What is the justification for subrogation to extinguished rights?

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Abstract

Subrogation to extinguished rights ('subrogation') describes a particular form of rights: C's new rights against D resemble X's extinguished rights against D. This thesis resolves four controversies surrounding subrogation: is subrogation redundant; what is the justification for subrogation; when should subrogation occur; and is subrogation a remedy for unjust enrichment? The thesis is divided into two parts. Part I considers what the law is and Part II considers what the law ought to be.

Part I asks whether, as the law stands, subrogation is redundant. Contrary to orthodoxy, it argues that subrogation is available in different circumstances and has a different effect compared to a 'direct unjust enrichment claim'. Consequently, subrogation does not duplicate a 'direct' claim and so subrogation is not redundant.

Part II asks what justifies subrogation and, in light of that, when should subrogation occur? Contrary to orthodoxy, it argues that there is not one justification for subrogation but two, each of which is sufficient on its own. Subrogation can be justified by a duty not to use a right for one's own benefit. Alternatively, subrogation can be justified by C bearing the burden of a debt which ought to be borne by D. Each justification mandates a different test for when subrogation should occur, explaining why different subrogation cases apply apparently contradictory rules.

The question of whether subrogation is a remedy for unjust enrichment is addressed in Parts I and II. Part I shows that subrogation does not duplicate a 'direct unjust enrichment claim'. Part II argues that, once the justifications for subrogation are understood, unjust enrichment is a distraction. It is therefore concluded that subrogation is not a remedy for unjust enrichment.

Declaration

This thesis incorporates the author's MPhil thesis, which was submitted to the Faculty of Law of the University of Oxford in 2018 and entitled 'Is non-contractual subrogation a remedy for unjust enrichment?'. This material has been revised and updated, and forms elements of Chapters 1, 2, 3, 4, and 6 of this DPhil thesis.

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1 Introduction

1.1 Introduction

This chapter[1] introduces the thesis by addressing four preliminary issues. Section 1.2 defines subrogation. Section 1.3 identifies four controversies surrounding subrogation which this thesis aims to resolve. Section 1.4 establishes the methodology of the thesis. Section 1.5 outlines the structure of the thesis.

1.2 What is subrogation?

1.2.1 Subrogation to subsisting and extinguished rights

Mitchell and Watterson's leading text on subrogation says that:

> 'Subrogation' literally means 'substitution' ... . In English law the term 'subrogation' denotes a process by which one party is deemed to have been substituted for another, so that he can acquire and enforce the other's rights against a third party for his own benefit.[2]

The authors distinguish two types of subrogation: to subsisting rights, and to extinguished rights.[3] The two types of subrogation take different forms.

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[1] Elements of Chapters 1, 2, 3, and 6 were adapted for publication as Rory Gregson, 'Is Subrogation a Remedy for Unjust Enrichment?' (2020) 136 LQR 481.

[2] Charles Mitchell and Stephen Watterson, *Subrogation: Law and Practice* (rev edn, OUP 2007) para 1.01 (footnotes omitted).

[3] Mitchell and Watterson (n 2) paras 1.04–1.10; Charles Mitchell, Paul Mitchell, and Stephen Watterson, *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) para 19-45. See also *Ibrahim v Barclays Bank Plc* [2011] EWHC 1897 (Ch), [2011] 2 CLC 589 [7] (Vos J); *Alliance Bank JSC v Aquanta Corp* [2011] EWHC 3281 (Comm),

Subrogation to subsisting rights allows C to exercise and obtain the benefit of X's rights against D.[4] These rights remain in X's name so C must sue D in X's name.[5] C is said to be subrogated to X's subsisting rights against D.

By contrast, subrogation to extinguished rights may occur when X has rights against D and these rights are extinguished.[6] Subrogation to extinguished rights means giving C new rights against D, which resemble X's extinguished rights against D.[7] C is said to be subrogated to X's extinguished rights against D. X's rights — and those C acquires by subrogation — may be personal or proprietary.[8]

[2012] 1 Lloyd's Rep 181 [21] (Burton J). Drawing the same distinction but using the language of 'simple' and 'reviving' subrogation: Charles Mitchell, 'The Law of Subrogation' [1992] LMCLQ 483, 485–92; Charles Mitchell, *The Law of Subrogation* (Clarendon Press 1994) 4–7; Charles Mitchell, *The Law of Contribution and Reimbursement* (OUP 2003) paras 1.12, 2.34–2.36, 14.13. For an explanation for this change in language, see Charles Mitchell, 'Subrogation: Persistent Misunderstandings' in Andrew Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 106–11.

4 For this notation of the parties, see eg Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) ('*Restitution*') 145.

5 *Esso Petroleum Co Ltd v Hall Russell & Co Ltd (The Esso Bernicia)* [1989] AC 643 (HL); *Lord Napier and Ettrick v Hunter* [1993] AC 713 (HL).

6 eg *Burston Finance Ltd v Speirway Ltd* [1974] 1 WLR 1648 (Ch) 1652B (Walton J); *Cheltenham & Gloucester Plc v Appleyard* [2004] EWCA Civ 291 [25] (Neuberger LJ); *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66, [2016] AC 176 ('*Menelaou* (SC)') [39] (Lord Clarke), [83] (Lord Neuberger), [111] (Lord Carnwath); *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29, [2018] AC 275 ('*ITC* (SC)') [49] (Lord Reed); *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2018] AC 313 [18] (Lord Sumption); Mitchell and Watterson (n 2) paras 1.05, 3.01; Mitchell, Mitchell, and Watterson (n 3) para 39-01. For this notation of the parties, see eg Burrows, *Restitution* (n 4) 145.

7 *Day v Tiuta International Ltd* [2014] EWCA Civ 1246 [43] (Gloster LJ); Mitchell and Watterson (n 2) paras 3.15–3.18, 8.05–8.31; Mitchell, Mitchell, and Watterson (n 3) paras 7-70, 39-11, 39-37 – 39-48. cf Johann Andreas Dieckmann, 'The Province of Subrogation Determined: Some Corrections — A Functional Analysis of the Guarantor's Right to Derivative Recourse, Comprising a Critique of the Restitutionary Thesis' (2012) 20 ERPL 989, 1000–01.

8 *Boscawen v Bajwa* [1996] 1 WLR 328 (CA) 338G–H (Millett LJ); *Banque Financière de la Cité SA v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) ('*BFC*') 228E–F (Lord Steyn),

This thesis is only concerned with subrogation to extinguished rights. Watterson observes that cases of subrogation to extinguished rights 'mostly' fall into three fact patterns: 'common liability' cases, 'misappropriation' cases, and 'lending' cases.[9] In common liability cases, C pays X, discharging C and D's common debt to X.[10] In misappropriation cases, money held on trust for C is paid to X without C's consent, discharging D's debt to X.[11] In lending cases, C's loan to D (or a fourth party) is paid to X, discharging D's debt to X.

The classic case of subrogation to extinguished rights is *Butler v Rice*, a lending case.[12] There, D owned a house subject to X's charge. Acting behind D's back, D's husband asked C for a loan to pay off X's charge. C thought that the husband owned the house, so agreed to the loan in exchange for a mortgage of the house. C therefore paid the loan monies to the husband, who paid X, discharging X's charge. When D discovered the arrangement, she refused to execute a mortgage in favour of C. On the face of it, then, C was unsecured.

However, Warrington J held that because C's loan had been used to pay off X's

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237G–38A (Lord Clyde); *Appleyard* (n 6) [36] (Neuberger LJ); *Filby v Mortgage Express (No 2) Ltd* [2004] EWCA Civ 759 [40], [64] (May LJ); *Menelaou* (SC) (n 6) [46], [50] (Lord Clarke); *Swynson* (n 6) [18] (Lord Sumption).

9 Stephen Watterson, 'Subrogation' in Graham Virgo and Sarah Worthington (eds), *Commercial Remedies: Resolving Controversies* (CUP 2017) 452–54. See also Mitchell, Mitchell, and Watterson (n 3) para 39-01.

10 eg *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 2)* [2004] EWCA Civ 487, [2004] 1 CLC 882 ('*Niru Battery* (CA)').

11 eg *Boscawen* (n 8).

12 *Butler v Rice* [1910] 2 Ch 277 (Ch).

charge, C was subrogated to X's extinguished charge. In other words, C acquired a new charge, which resembled that X used to have. Subrogation meant C was secured after all.

1.2.2 Contractual and non-contractual subrogation

So far, it has been shown that subrogation may take one of two forms: to subsisting or to extinguished rights. Another way of dividing the subject is by the reason for subrogation.[13] Sometimes, subrogation is contractual: subrogation occurs because the parties contracted for it. On other occasions, subrogation is non-contractual: subrogation occurs even though the parties did not contract for it; subrogation occurs 'by operation of law'.[14]

Most questions about contractual subrogation can be answered by the parties' contract and the law of contract.[15] Subrogation to subsisting rights is often[16] — though not always[17] — contractual.

By contrast, subrogation to extinguished rights is always non-contractual. If

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13 *BFC* (n 8) 231E–32B (Lord Hoffmann); Mitchell and Watterson (n 2) para 1.02.

14 *BFC* (n 8) 231E (Lord Hoffmann).

15 *BFC* (n 8) 231E–H (Lord Hoffmann).

16 *BFC* (n 8) 231E–H (Lord Hoffmann); Andrew Tettenborn, *The Law of Restitution in England and Ireland* (3rd edn, Cavendish 2002) paras 2-41 – 2-44; Mitchell and Watterson (n 2) para 1.08; Rob Merkin and Jenny Steele, *Insurance and the Law of Obligations* (OUP 2013) 106–15.

17 Mitchell and Watterson (n 2) paras 1.07–1.09; Burrows, *Restitution* (n 4) 165–66; Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) ('*Restatement*') 175–77; Mitchell, Mitchell, and Watterson (n 3) para 21-04.

the parties wanted C to acquire X's rights then they could choose to transfer X's rights by assignment. Subrogation to extinguished rights 'would be an unnecessary complication' which parties 'never contract' for.[18] As subrogation to extinguished rights is always non-contractual, questions about it cannot be resolved by the terms of a contract or the relatively settled law of contract. Subrogation to extinguished rights is therefore less understood than contractual subrogation and subrogation to subsisting rights.[19]

This thesis is only concerned with subrogation to extinguished rights and it excludes subrogation to subsisting rights. This allows the thesis to investigate the lesser understood form of subrogation in greater depth. The thesis refers to subrogation to extinguished rights as 'subrogation' for short. In addition, the thesis is only concerned with English law.

1.2.3 A remedy?

Subrogation is often described as a remedy.[20] By contrast, Burrows prefers to call subrogation a 'process or means of getting to particular rights or remedies'. This is because C does not seek subrogation against D, but subrogation 'to particular

[18] Mitchell and Watterson (n 2) para 3.01.

[19] *Challenger Managed Investments Ltd v Direct Money Corp Pty Ltd* [2003] NSWSC 1072 [50] (Bryson J); *Swynson Ltd v Lowick Rose LLP* [2015] EWCA Civ 629, [2016] 1 WLR 1045 [47] (Davis LJ).

[20] eg *BFC* (n 8); *Menelaou* (SC) (n 6); *Swynson* (n 6) [18] (Lord Sumption); Mitchell, Mitchell, and Watterson (n 3) para 39-01; Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2016) ('*Principles*') 636.

rights and remedies' against D.[21]

This thesis takes no view on this debate. 'Remedy' can be defined in many different ways;[22] some of those definitions embrace subrogation whereas others do not. The substance of subrogation is that it gives C rights against D which resemble X's extinguished rights against D. This substance does not change whether or not 'remedy' is defined in a way that captures subrogation. Thus, in *Menelaou* Lord Neuberger stated that it 'seems to me questionable whether a sharp distinction can satisfactorily be drawn between a process and a remedy, but the point has no effect on the outcome of this case'.[23] This thesis calls subrogation a 'remedy' because this is the language in common usage. However, every time the thesis uses the word 'remedy', the reader may substitute 'process', 'means', or 'doctrine' and nothing else would change.

1.3 Four controversies

This thesis addresses four controversies which surround subrogation:

(1) Is subrogation a remedy for unjust enrichment?

[21] Burrows, *Restitution* (n 4) 146. See also Mitchell and Watterson (n 2) para 1.01 'process'; Burrows, *Restatement* (n 17) 172 'process or means'; Jessica Palmer, 'Unjust Enrichment, Proprietary Subrogation and Unsatisfactory Explanations' (2016) 28 Singapore Academy of Law Journal 955, para 16 'mechanism'; Nathan Tamblyn, 'Separating Unjust Enrichment and Subrogation' (2017) 44 Exeter LR 1, 4.

[22] Peter Birks, 'Rights, Wrongs, and Remedies' (2000) 20 OJLS 1; Rafal Zakrzewski, *Remedies Reclassified* (OUP 2009); Stephen A Smith, *Rights, Wrongs, and Injustices* (OUP 2019).

[23] *Menelaou* (SC) (n 6) [96] (Lord Neuberger).

(2) Is subrogation redundant?

(3) What is the justification for subrogation?

(4) When should subrogation occur?

This section introduces each controversy in turn.

1.3.1 Is subrogation a remedy for unjust enrichment?

In English law, the modern orthodoxy is that subrogation is a remedy for unjust enrichment. The courts take this view,[24] as does Burrows,[25] McFarlane,[26] Mitchell, Watterson,[27] and others.[28] However, some commentators dissent from this view.[29] Moreover, five cases of the highest courts of England and Australia give cause to

[24] eg *Boscawen* (n 8) 335C–F (Millett LJ); *BFC* (n 8) 228C-F (Lord Steyn), 231H (Lord Hoffmann), 238H (Lord Clyde); *Menelaou* (SC) (n 6) [37], [49]–[50] (Lord Clarke), [78]–[99] (Lord Neuberger); *ITC* (SC) (n 6) [49] (Lord Reed); *Swynson* (n 6) [19], [22], [30] (Lord Sumption), [55]–[90] (Lord Mance).

[25] Burrows, *Restitution* (n 4) 144; Burrows, *Restatement* (n 17) 173; Andrew Burrows, '"At the Expense of the Claimant": A Fresh Look' [2017] RLR 167, 182.

[26] Ben McFarlane, *The Structure of Property Law* (Hart Publishing 2008) 303–04.

[27] Mitchell, *The Law of Subrogation* (n 3); Mitchell, *The Law of Contribution and Reimbursement* (n 3) paras 1.12, 14.02; Mitchell and Watterson (n 2) para 3.02; Mitchell, Mitchell, and Watterson (n 3) para 39-01.

[28] eg Peter Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) ('*Introduction*') 93–97, 191–92; Tettenborn, *The Law of Restitution in England and Ireland* (n 16) paras 2-22 – 2-39.

[29] eg Peter Jaffey, *The Nature and Scope of Restitution* (Hart Publishing 2000) 273; Steve Hedley, *A Critical Introduction to Restitution* (Butterworths 2001) 329; Steve Hedley, *Restitution: Its Division and Ordering* (Sweet & Maxwell 2001) 119–148; Craig Rotherham, *Proprietary Remedies in Context* (Hart Publishing 2002) 250–51; Craig Rotherham, 'Subrogation' in Steve Hedley and Margaret Halliwell (eds), *The Law of Restitution* (Butterworths 2002) para 8.10; SB Midwinter, 'Subrogation Finds Some "Well-Settled Principles"' [2003] LMCLQ 6; Virgo, *Principles* (n 20) 637; Tatiana RS Cutts, 'Modern Money Had and Received' (2018) 38 OJLS 1, 25; Tamblyn (n 21).

question the orthodoxy:

(1) *Banque Financière de la Cité SA v Parc (Battersea) Ltd* ('*BFC*');[30]

(2) *Bofinger v Kingsway Group Ltd*;[31]

(3) *Menelaou v Bank of Cyprus UK Ltd*;[32]

(4) *Swynson Ltd v Lowick Rose LLP*;[33] and

(5) *Prudential Assurance Co Ltd v Revenue and Customs Commissioners*.[34]

Each case will be considered in turn.

1.3.1.1 *BFC*

The idea that subrogation is a remedy for unjust enrichment was first endorsed by the House of Lords in *BFC*.[35] There, D owned property subject to X's first charge and OOL's second charge. C agreed to loan money to D, via Mr Herzig, to partially pay off X's charge, provided that OOL was bound by a 'postponement letter'. Under that letter, OOL would not demand repayment of its loan until C

[30] *BFC* (n 8).

[31] *Bofinger v Kingsway Group Ltd* [2009] HCA 44, (2009) 239 CLR 269.

[32] *Menelaou* (SC) (n 6).

[33] *Swynson* (n 6).

[34] *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39, [2018] 3 WLR 652.

[35] *BFC* (n 8).

had been repaid. C performed its side of the bargain before discovering that the postponement letter did not bind OOL.

A priority dispute then arose between C and OOL. As the postponement letter did not bind OOL, C could not rely on it to obtain priority. However, a unanimous House of Lords held that OOL had been enriched at C's expense: C's partial discharge of X's first charge had increased the value of OOL's second charge.[36] This enrichment was unjust because C acted in the mistaken belief that Mr Herzig had authority to bind OOL to the postponement letter.[37] To remedy OOL's unjust enrichment, C was subrogated to X's rights, insofar as they were discharged, as against OOL. Accordingly, C had priority over OOL.

BFC is the leading case for the proposition that subrogation is a remedy for unjust enrichment. Nevertheless, it is an unhappy authority in two ways.

First, the effect of subrogation was unusual. Usually, when C is subrogated to X's extinguished property right, C acquires priority over D's unsecured creditors.[38] However, the House held that this was inappropriate in *BFC* since C had not bargained for priority over D's unsecured creditors. C had only bargained for priority over OOL. As such, C was subrogated to X's rights *only as against OOL*

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[36] *BFC* (n 8) 227B–C (Lord Steyn), 234G (Lord Hoffmann), 238B–C (Lord Clyde), 239B–H (Lord Hutton).

[37] *BFC* (n 8) 227E (Lord Steyn), 234G–35A (Lord Hoffmann).

[38] Mitchell and Watterson (n 2) paras 8.54–8.55; Mitchell, Mitchell, and Watterson (n 3) para 39-54.

and not as against D's other creditors.[39] This means *BFC* is an outlier, rather than a paradigm example of subrogation.[40]

Second, the decision is much criticised. Some commentators say that there was no normative justification for OOL's liability.[41] Others claim that C's subsisting contract with D should have excluded C from claiming a remedy for unjust enrichment[42] or that C had not bargained for priority over OOL in the event of D's insolvency.[43]

1.3.1.2 *Bofinger*

BFC was considered by the High Court of Australia in *Bofinger*.[44] There, D owed a debt to X. C guaranteed that debt. D defaulted so C paid the debt. The Court held that C was subrogated to X's extinguished rights.

The Court rejected the view that subrogation is a remedy for unjust enrichment.

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39 *BFC* (n 8) 228B–F (Lord Steyn), 229B–D, 236H–37D (Lord Hoffmann), 237G–38A (Lord Clyde), 242F–H (Lord Hutton).

40 Mitchell and Watterson (n 2) paras 8.58–8.60; Mitchell, Mitchell, and Watterson (n 3) paras 39-57 – 39-59.

41 Peter Watts, 'Subrogation — A Step Too Far?' (1998) 114 LQR 341; Robert Stevens, 'The Unjust Enrichment Disaster' (2018) 134 LQR 574, 593.

42 Jaffey, *The Nature and Scope of Restitution* (n 29) 309; Gerard McMeel, *The Modern Law of Restitution* (Blackstone 2000) 300-01; Sarah Worthington, 'Subrogation Claims on Insolvency' in Francis Rose (ed), *Restitution and Insolvency* (Mansfield Press 2000) 71–73.

43 Michael G Bridge, 'Failed Contracts, Subrogation and Unjust Enrichment: *Banque Financière de la Cité v Parc (Battersea) Ltd*' [1998] JBL 323, 329–30.

44 *Bofinger* (n 31).

Instead, it treated subrogation as an 'equitable doctrine',[45] stating that the 'principles of equity which govern the outcome are well developed and have the vitality to permit further development in an orthodox fashion'.[46] This means that two leading Common Law jurisdictions treat subrogation differently, raising the question of which approach (if either) is preferable.

1.3.1.3 *Menelaou*

In England, *Menelaou* was the next case in which the highest domestic court considered subrogation.[47] There, D's parents had title to Rush Green Hall, which was subject to C's charge. D's parents decided to sell Rush Green Hall and use the proceeds to buy a new property, Great Oak Court, from X. C released its charge over Rush Green Hall in exchange for a new charge over Great Oak Court. However, D's parents registered Great Oak Court in D's name. D did not consent to C's new charge which was therefore invalid. On the face of it, then, C had no security. C therefore sought to be subrogated to X's discharged unpaid vendor's lien.

The Supreme Court unanimously agreed that C's claim succeeded. However, the members of the Court were divided by their reasoning. Lord Clarke, in line

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45 *Bofinger* (n 31) [90] (Gummow, Hayne, Heydon, Kiefel, and Bell JJ).

46 *Bofinger* (n 31) [89] (Gummow, Hayne, Heydon, Kiefel, and Bell JJ).

47 *Menelaou* (SC) (n 6).

with post-*BFC* orthodoxy, treated subrogation as a remedy to reverse D's unjust enrichment.[48] By contrast, Lord Carnwath was 'less convinced with respect of the case for "rationalising" the older cases "through the prism of unjust enrichment"'.[49] Instead, he treated subrogation as 'a claim to a property right'.[50] For Lord Clarke, the conclusion that C was entitled to subrogation to reverse D's unjust enrichment made it 'unnecessary' to consider Lord Carnwath's approach, although there was 'much to be said' for it.[51]

Lord Neuberger primarily followed Lord Clarke's unjust enrichment approach.[52] Nevertheless, he was 'attracted to the view that [subrogation] could be justified on the alternative basis of an orthodox proprietary claim rather than on unjust enrichment'[53] and to this extent agreed with Lord Carnwath.[54] Lord Kerr and Lord Wilson agreed with both Lord Clarke and Lord Neuberger.[55]

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48 *Menelaou* (SC) (n 6) [18], [37], [49]–[50].

49 *Menelaou* (SC) (n 6) [108].

50 *Menelaou* (SC) (n 6) [108].

51 *Menelaou* (SC) (n 6) [53]. See also [51], [54] (Lord Clarke).

52 *Menelaou* (SC) (n 6) [61]–[99].

53 *Menelaou* (SC) (n 6) [59].

54 *Menelaou* (SC) (n 6) [100]–[104].

55 *Menelaou* (SC) (n 6) [141].

1.3.1.4 *Swynson*

Less than thirteen months after giving judgment in *Menelaou*, the Supreme Court heard another subrogation case, *Swynson*.[56] The facts were as follows. D's negligence caused X to loan money to EMSL. EMSL defaulted. C made a new loan to EMSL, which EMSL used to repay X's loan. This meant X suffered no loss as a result of D's negligence so X could not recover damages from D.[57] EMSL then went into liquidation so could not repay C's loan. C therefore sought to be subrogated to X's discharged right to recover damages from D in the tort of negligence.

A unanimous Court denied C's claim. Lord Sumption, Lord Mance, and Lord Neuberger each gave a substantive judgment, and each treated subrogation as a remedy for unjust enrichment.[58] Lord Sumption, however, stated that 'it would be unwise to ... try to fit the subrogation cases into any broader category of unjust enrichment. It is in many ways sui generis.'[59]

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[56] *Swynson* (n 6).

[57] *Swynson* (n 6) [11]–[17] (Lord Sumption), [45]–[54] (Lord Mance), [92]–[108] (Lord Neuberger).

[58] *Swynson* (n 6) [19], [22], [30] (Lord Sumption), [55]–[90] (Lord Mance), [94], [109]–[120] (Lord Neuberger).

[59] *Swynson* (n 6) [30].

1.3.1.5 *Prudential*

The most recent case to consider is *Prudential*. *Prudential* did not concern subrogation, so its facts will not be recited here and the case will not figure prominently in the rest of the thesis. Nevertheless, the case is notable because Lord Mance, Lord Reed, and Lord Hodge — giving the joint judgment of the Supreme Court — stated obiter that:

> as a general rule, a cause of action based on unjust enrichment is only available in respect of a benefit which [C] has provided directly to [D] (the only true exception ... being subrogation following the discharge of a debt, which is *arguably based on a different principle*).[60]

1.3.1.6 Summary

In sum, there is good reason to revisit the orthodox view that subrogation is a remedy for unjust enrichment. The leading authority for that view, *BFC*, is an atypical and controversial case. The High Court of Australia rejected the unjust enrichment approach, and six Justices of the UK Supreme Court questioned it in less than three years.

In order to evaluate to evaluate the idea that subrogation is a remedy for unjust enrichment, it is important to be clear what this means. It is generally assumed that there are two consequences of subrogation being a remedy for unjust enrichment:

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[60] *Prudential* (n 34) [68] (emphasis added).

first, that a claim for subrogation raises the unjust enrichment questions; and second, that subrogation is redundant.[61] Each will be examined in turn.

First, it is uncontroversial that:

> a court must first ask itself four questions when faced with a claim for unjust enrichment as follows.
>
> (1) Has [D] been enriched?
> (2) Was the enrichment at [C]'s expense?
> (3) Was the enrichment unjust?
> (4) Are there any defences available to [D]?[62]

Those who say that subrogation is a remedy for unjust enrichment say that a court ought to ask these four questions when faced with a subrogation claim.[63] Indeed, Lord Steyn's speech in the subrogation case of *BFC* was the first judicial endorsement of the idea that unjust enrichment claims should be analysed by asking the four questions.[64]

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61 cf MJ Cleaver, 'Equitable Subrogation in Australia and England' (2018) 29 Journal of Banking and Finance Law and Practice 34, 46; Pablo Letelier, 'A Wrong Turn? Reconsidering the Unified Approach to Unjust Enrichment Claims' (2020) 136 LQR 121.

62 *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938 [10] (Lord Clarke). See also eg *BFC* (n 8) 227A–B (Lord Steyn); *Menelaou* (SC) (n 6) [18] (Lord Clarke); *ITC* (SC) (n 6) [24], [41] (Lord Reed); *Swynson* (n 6) [110] (Lord Neuberger); *Samsoondar v Capital Insurance Company Ltd* [2020] UKPC 33 [18] (Lord Burrows); Birks, *Introduction* (n 28) 7; Burrows, *Restitution* (n 4) 27; Burrows, *Restatement* (n 17) 25; Mitchell, Mitchell, and Watterson (n 3) paras 1-08 – 1-09. cf *Skandinaviska Enskilda Banken AB (Publ) v Conway* [2019] UKPC 36, [2019] 3 WLR 493 [80] (Lord Reed).

63 eg *BFC* (n 8) 234B–G (Lord Hoffmann); *Niru Battery* (CA) (n 10) [56] (Clarke LJ); *Menelaou v Bank of Cyprus Plc* [2013] EWCA Civ 1960, [2014] 1 WLR 854 ('*Menelaou* (CA)') [27] (Floyd LJ); *Sandher v Pearson* [2013] EWCA Civ 1822 [9] (Arden LJ); *Menelaou* (SC) (n 6) [18] (Lord Clarke); *Swynson* (n 6) [56] (Lord Mance), [110] (Lord Neuberger); Mitchell and Watterson (n 2) paras 3.02–3.03; Burrows, *Restitution* (n 4) 145; Mitchell, Mitchell, and Watterson (n 3) para 39-20; Stephen Watterson, 'Modelling Subrogation as an "Equitable Remedy"' (2016) 2 CJCCL 609, 618–19, 669–70.

64 *BFC* (n 8) 226G–28D (Lord Steyn).

1.3.2 Is subrogation redundant?

Second, the idea that subrogation is a remedy for unjust enrichment is often followed by the idea that subrogation 'duplicat[es]'[65] a 'direct unjust enrichment claim' on the same facts, and therefore subrogation is 'redundant'.[66] There are three variants of the argument. From broadest to narrowest, these are:

(1) Subrogation always duplicates a direct unjust enrichment claim.

(2) Subrogation to personal rights always duplicates a direct unjust enrichment claim.

(3) In common liability cases, subrogation to personal rights usually duplicates the rights created by recoupment or contribution.

Each will be evaluated in turn.

1.3.2.1 Subrogation always duplicates a direct claim

The broadest of the three claims is that subrogation always duplicates a 'direct' unjust enrichment claim. A 'direct' claim seems to be one decided without relying on subrogation. It is direct because it avoids the detour into the idea that C's new

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[65] *Menelaou* (CA) (n 63) [59] (Moses LJ); Burrows, *Restitution* (n 4) 147.

[66] Mitchell and Watterson (n 2) paras 3.08, 8.32; Charles Mitchell, 'Unjust Enrichment' in Andrew Burrows (ed), *English Private Law* (3rd edn, OUP 2013) para 18.280; Charles Mitchell, 'Unjust Enrichment' in Andrew Burrows (ed), *Principles of the English Law of Obligations* (OUP 2015) para 3.280; Mitchell, Mitchell, and Watterson (n 3) paras 39-02.

rights resemble X's extinguished rights.[67] Proponents of this view say that in all cases subrogation duplicates a direct claim, so subrogation is always redundant.

Birks took this view. He wrote that:

> within the law of restitution [subrogation] really adds nothing to the number of techniques already identified. It is in the nature of a metaphor which can be done without.[68]

In *Menelaou*, Lord Carnwath agreed.[69] This view can be represented as follows:

	Common liability cases	**Misappropriation and lending cases**
Subrogation to personal rights **Subrogation to proprietary rights**	Subrogation 'adds nothing' and 'can be done without'	

Table 1.1: Subrogation always duplicates a direct claim

Birks was right that there are 'metaphor[s]' associated with subrogation 'which can be done without'. The cases sometimes say that C 'step[s] into the shoes of' X,[70] or that X's rights are 'kept alive' for C,[71] or that C is treated 'as having had

[67] Birks, *Introduction* (n 28) 191–92; Hedley, *Restitution* (n 29) 142; Burrows, *Restitution* (n 4) 147.

[68] Birks, *Introduction* (n 28) 93.

[69] *Menelaou* (SC) (n 6) [117]. See also [109] (Lord Carnwath); Tettenborn, *The Law of Restitution in England and Ireland* (n 16) paras 2-37 – 2-38.

[70] eg *Patten v Bond* (1889) 60 LT 583 (Ch) 585–86 (Kay J); *Swynson* (n 6) [62] (Lord Mance).

[71] eg *Chetwynd v Allen* [1899] 1 Ch 353 (Ch) 357 (Romer J); *Butler* (n 12) 282–83 (Warrington

an assignment to him of [X]'s rights'.[72] These are all fictions and the law is only just beginning to recognise that C does not literally acquire X's rights, but rather C acquires new rights which merely resemble X's extinguished rights.[73]

Moreover, these fictions are harmful.[74] Some courts have denied subrogation because X's rights have been extinguished and so there are no rights for C to be subrogated to.[75] This makes sense if one takes the fictions literally: there are no shoes for C to step into. But the courts now recognise that, in response to the discharge of X's rights, subrogation gives C new rights.[76] As Millett LJ observed, 'discharge of [X's rights] is certainly not a bar to subrogation ... ; it is rather a precondition'.[77]

Thus, Birks was right that the metaphors associated with subrogation 'can be done without'.[78] Indeed, Palmer suggests that:

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72 eg *Burston* (n 6) 1652B (Walton J).

73 eg *BFC* (n 8) 236D–G (Lord Hoffmann); *Day* (n 7) [43] (Gloster LJ); Birks, *Introduction* (n 28) 95–98; Mitchell and Watterson (n 2) paras 3.07, 3.10–3.18, 8.05–8.31; Mitchell, 'Unjust Enrichment' (n 66) para 18.279; Mitchell, 'Unjust Enrichment' (n 66) para 3.279; Mitchell, Mitchell, and Watterson (n 3) paras 7-70, 39-11, 39-37 – 39-48.

74 *Niru Battery* (CA) (n 10) [63] (Clarke LJ); Birks, *Introduction* (n 28) 95–98; Rotherham, *Proprietary Remedies in Context* (n 29) 246; Rotherham, 'Subrogation' (n 29) para 8.4; Mitchell and Watterson (n 2) paras 3.07, 3.10–3.18; Mitchell, 'Unjust Enrichment' (n 66) para 18.280; Mitchell, 'Unjust Enrichment' (n 66) para 3.280; Mitchell, Mitchell, and Watterson (n 3) para 39-06.

75 eg *Re Diplock* [1948] 1 Ch 465 (CA) 548–549 (Lord Greene MR, Wrottesley and Evershed LJJ).

76 See n 73.

77 *Boscawen* (n 8) 340G.

78 Birks, *Introduction* (n 28) 93.

> It would be best to abandon the terminology of subrogation in order to place greater emphasis on the task of identifying the explanation for the particular rights that [C] is given in any of the cases that have traditionally been considered to fall within … subrogation.[79]

But even once the fictions are gone and the word 'subrogation' is expunged, there still remains a group of cases in which the law gives C new rights which resemble X's extinguished rights. Birks would still be unhappy. He was not just arguing that the fictions should be abolished or that subrogation should be renamed. He was arguing that the remedy itself was redundant; that giving C rights which resemble X's extinguished rights 'adds nothing' to the other remedies for unjust enrichment.[80]

Part I of the thesis will argue that this is not true. Subrogation is available in different circumstances and has a different effect compared to direct unjust enrichment claims. Accordingly, subrogation does not duplicate a direct claim, and so subrogation is not redundant.

This is not a novel argument; Hedley made it in 2001.[81] However, in the two decades since, the law on both subrogation and direct claims has developed[82] so

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79 Palmer (n 21) para 17 (footnotes omitted). See also para 60; *Re Wrexham Mold & Connah's Quay Railway Co* [1899] 1 Ch 440 (CA) 447 (Lindley MR); *BFC* (n 8) 238A (Lord Clyde); Hedley, *Restitution* (n 29) 142–43; Rotherham, *Proprietary Remedies in Context* (n 29) 246–48; Rotherham, 'Subrogation' (n 29) paras 8.5–8.7; Burrows, *Restitution* (n 4) 146; Burrows, *Restatement* (n 17) 172.

80 Birks, *Introduction* (n 28) 93. See also 7, 93-97, 191–92, 399; Jaffey, *The Nature and Scope of Restitution* (n 29) 271 fn 65.

81 Hedley, *Restitution* (n 29) 119–148.

82 eg *Menelaou* (SC) (n 6); *ITC* (SC) (n 6); *Swynson* (n 6); *Prudential* (n 34).

the detail of Hedley's argument differs significantly from that of Part I. More recently, other commentators have observed that subrogation and direct claims are governed by different rules.[83] Part I builds on their work, but is more extensive in its scope since it considers each of the four unjust enrichment questions.

1.3.2.2 Subrogation to personal rights always duplicates a direct claim

Compared to Birks, Mitchell and Watterson take a more nuanced position. They suggest that subrogation to personal rights duplicates 'a direct ... claim in unjust enrichment'[84] whereas subrogation to proprietary rights does not:

> In principle, [C]'s position should be improved by [subrogation to X]'s extinguished rights only in cases where [X]'s rights were proprietary. A claimant who is entitled to subrogation should always also have a direct personal claim of his own, making [subrogation to X]'s personal rights redundant. The courts have sometimes failed to recognize this, or have chosen to ignore it, and have permitted [C] to 'acquire' extinguished personal rights while simultaneously denying them direct claims. This is incoherent and self-contradictory. ... [D]iscrepancies of this kind cannot be justified once it is recognized that [C]'s direct personal claim to restitution and his claim to be subrogated to [X]'s personal rights rest on a common basis.[85]

For Mitchell and Watterson, then, 'the same limits' apply to 'subrogation to

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[83] eg Watterson, 'Subrogation' (n 9) 439–48; Cutts, 'Modern Money Had and Received' (n 29) 22–25.

[84] Mitchell and Watterson (n 2) para 8.32.

[85] Mitchell and Watterson (n 2) paras 3.08, 8.32. See also Mitchell, 'Subrogation' (n 3) 111–12; Mitchell and Watterson (n 2) paras 3.19–3.24; 8.32–8.38; Mitchell, 'Unjust Enrichment' (n 66) para 18.280; Mitchell, 'Unjust Enrichment' (n 66) para 3.280; Mitchell, Mitchell, and Watterson (n 3) paras 39-02 – 39-03; Virgo, *Principles* (n 20) 655.

[X]'s personal rights' as apply to 'a direct personal claim in unjust enrichment'.[86] Furthermore, subrogation to proprietary rights is different only because it gives C proprietary rights; in all other respects the authors present subrogation to proprietary rights as governed by the same rules as subrogation to personal rights and direct claims. Burrows takes the same position,[87] which can be represented as follows:

	Common liability cases	**Misappropriation and lending cases**
Subrogation to personal rights	Subrogation to personal rights always duplicates a direct unjust enrichment claim	
Subrogation to proprietary rights		

Table 1.2: Subrogation to personal rights always duplicates a direct claim

Thus, the authors present the rules which govern direct claims as also governing subrogation. For example, *Goff and Jones* states that:

> As an equitable remedy designed to reverse unjust enrichment, a [subrogation] claim ... may be defeated or limited by any defence or bar that will defeat or limit any cause of action in unjust enrichment. These include [the defence] of change of position ... .[88]

[86] Mitchell and Watterson (n 2) para 8.32.

[87] Burrows, *Restitution* (n 4) 148–167, 446. See also Tettenborn, *The Law of Restitution in England and Ireland* (n 16) para 2-37; Peter Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 297–98.

[88] Mitchell, Mitchell, and Watterson (n 3) para 39-28. See also Mitchell and Watterson (n 2)

Similarly, Mitchell and Watterson suggest that:

> In principle ... any recognized ground of restitution should be capable of justifying subrogation in appropriate circumstances. But, equally clearly, *only* a recognized ground of restitution should be capable of supporting the remedy of subrogation: in this respect it is no different from any other remedy for unjust enrichment.[89]

The 'recognized ground[s] of restitution ... capable of justifying subrogation' seem to be the same as those capable of justifying a direct claim: the authors write that 'secondary liability, ignorance, mistake and failure of consideration ... are the grounds which can most commonly support a subrogation claim in practice'[90] and they also suggest that these grounds can support a direct claim.[91]

They also reason in the opposite direction: because subrogation and direct claims are governed by the same rules, the rules which govern subrogation must also govern direct claims. For example, in some subrogation cases, the only sense in which an enrichment comes at C's expense is that it would not have accrued "'but for" [a] defective transfer from C's wealth'.[92] Birks, Mitchell, and Watterson

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paras 7.01, 7.68, 8.07; Watterson, 'Modelling Subrogation as an "Equitable Remedy"' (n 63) 619, 671.

89 Mitchell and Watterson (n 2) para 6.02 (original emphasis).

90 Mitchell and Watterson (n 2) para 6.02. See also Burrows, *Restitution* (n 4) 147, 148, 167; Burrows, *Restatement* (n 17) 173; Mitchell, Mitchell, and Watterson (n 3) paras 39-24 – 39-27; Watterson, 'Modelling Subrogation as an "Equitable Remedy"' (n 63) 619.

91 Burrows, *Restitution* (n 4) chs 9, 14–17; Mitchell and Watterson (n 2) paras 6.03–6.12, 6.38–6.40, 6.51–6.56, 6.73–6.79; Mitchell, Mitchell, and Watterson (n 3) chs 8, 9, 12–16, 19–20.

92 Mitchell, Mitchell, and Watterson (n 3) para 6-70.

therefore argue that this is the test for whether an enrichment comes at C's expense in direct claims.[93]

Consequently, the dominant view is that subrogation and direct claims are governed by the same rules except for the rules determining whether C acquires personal or proprietary rights. But even here, Mitchell and Watterson write that:

> As the law develops, it is to be hoped that the courts will look across from the [cases of] subrogation [to proprietary rights] to other cases where proprietary remedies have been awarded in response to unjust enrichment, with a view to developing a consistent view of the circumstances in which proprietary restitution should be awarded.[94]

Leading cases also support the idea that subrogation (to personal rights) duplicates a direct unjust enrichment claim. In *BFC*, Lord Steyn held that 'on an application of established principles of unjust enrichment [C is] 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'.[95]

In *Menelaou*, Moses LJ stated that there 'is, as Professor Burrows suggests, no need to duplicate the reasoning in relation to both unjust enrichment and

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93 Birks, *Unjust Enrichment* (n 87) 96–98 cited by Mitchell and Watterson (n 2) para 5.15 fn 22; Stephen Watterson, '"Direct Transfers" in the Law of Unjust Enrichment' (2011) 64 CLP 435, 458–59, 464–66; Mitchell, Mitchell, and Watterson (n 3) paras 6-53, 6-70.

94 Mitchell and Watterson (n 2) para 8.47. See also Mitchell, 'Unjust Enrichment' (n 66) para 18.282; Mitchell, 'Unjust Enrichment' (n 66) para 3.282; Mitchell, Mitchell, and Watterson (n 3) para 39-31.

95 *BFC* (n 8) 228C–D.

subrogation; the answer should be the same: see per Lord Steyn in [*BFC*]'.[96] Lord Clarke suggested that many of the rules governing subrogation are the same as those which govern direct claims. When deciding whether D was enriched at C's expense, he engaged with the debate over when D is enriched at C's expense for the purposes of a direct claim.[97] He stated that the unjust factor in subrogation cases is usually either mistake or failure of consideration[98] and these are unjust factors in direct claims too.[99] Obiter, he suggested that subrogation is susceptible to the change of position defence[100] which also applies to direct claims.[101]

In *Swynson*, Lord Neuberger recognised that C claimed to be 'subrogated to [X]'s [personal] claim against [D]',[102] but then did not mention subrogation again and dismissed C's claim because there was 'no good reason for upholding the present unjust enrichment claim given that it is not within the normal scope of such claims'.[103] Both Lord Mance and Lord Neuberger applied the rules for direct claims laid down by the Supreme Court in *ITC*.[104]

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96 *Menelaou* (CA) (n 63) [59] citing *BFC* (n 8) 228 (Lord Steyn); Burrows, *Restitution* (n 4) 147.

97 *Menelaou* (SC) (n 6) [27]–[32].

98 *Menelaou* (SC) (n 6) [21] (citations omitted).

99 See n 9 on page 94 and n 12 on page 94.

100 *Menelaou* (SC) (n 6) [36].

101 See pages 111–112.

102 *Swynson* (n 6) [94].

103 *Swynson* (n 6) [120].

104 *Swynson* (n 6) [56], [58], [67], [89] (Lord Mance), [114]–[115], [117], [120] (Lord Neuberger), citing *ITC* (SC) (n 6).

In short, the prevailing view is that subrogation is governed by the same rules as direct claims in unjust enrichment, except possibly for the rules determining whether C is entitled to personal or proprietary rights. Subrogation (to personal rights) therefore duplicates a direct claim in unjust enrichment and is redundant.

Again, Part I of the thesis will argue that this is not true. Subrogation and direct claims are governed by different rules. Subrogation is therefore available in different circumstances, and has a different effect, compared to direct claims. Accordingly, subrogation (to personal rights) does not duplicate a direct claim and so subrogation (to personal rights) is not redundant.

1.3.2.3 Subrogation duplicates recoupment and contribution

The broad claim that subrogation (to personal rights) *always* duplicates a direct unjust enrichment claim should not be confused with the narrow claim that subrogation to personal rights *in common liability cases* duplicates recoupment or contribution.

In common liability cases, C and D are both obliged to pay the same debt to X. If C pays X, then the debt of both C and D is discharged. D is then obliged to pay C to the extent that D ought to have borne the burden of paying the debt to X. If D ought to have borne the burden of paying the whole debt, then C has a right to 'reimbursement' or 'recoupment' against D.[105] If D ought to have borne the burden

[105] eg *Brook's Wharf & Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534 (CA).

of paying only some of the debt, then C has a right to 'contribution' against D.[106] In addition, C is subrogated to X's extinguished personal and proprietary rights against D to the extent that D ought to have borne the burden of paying the debt to X.[107]

It is sometimes argued that subrogation to personal rights in common liability cases is redundant because it duplicates the rights created by recoupment and contribution. For example, Burrows writes that 'often the resort to subrogation is unnecessary because the same reasoning on unjust enrichment that triggers subrogation ought also to trigger the direct remedy of recoupment or contribution'.[108] Similarly, Mitchell and Watterson suggest that in common liability cases:

> subrogation is essentially a *supplementary* remedy, available on the same basis, and awarded on the same facts, as an award of contribution or reimbursement. Hence if [X]'s rights against [D] were merely personal rights then subrogation is not generally needed because it cannot give [C] anything more than he already possesses, viz a personal claim against [D].[109]

This argument may be represented as follows:

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106 eg Civil Liability (Contribution) Act 1978, s 1(1); cf s 2(2).

107 eg Mercantile Law Amendment Act 1856, s 5; *Yonge v Reynell* (1852) 9 Hare 809, 817; 68 ER 744, 748 (Sir GJ Turner VC); *Drew v Lockett* (1863) 32 Beav 499, 55 ER 196; *Duncan Fox & Co v North & South Wales Bank* (1880) 6 App Cas 1 (HL).

108 Burrows, *Restitution* (n 4) 148. See also 149, 167, 446; Burrows, '"At the Expense of the Claimant"' (n 25) 182.

109 Mitchell and Watterson (n 2) para 6.15 (original emphasis).

	Common liability cases	Misappropriation and lending cases
Subrogation to personal rights	Subrogation often duplicates recoupment and contribution	
Subrogation to proprietary rights		

Table 1.3: Subrogation often duplicates recoupment and contribution

This argument is true as far as it goes but — as the writers acknowledge[110] — it does not follow that subrogation is redundant in all cases. There are three reasons for this.

First, recoupment and contribution only give C personal rights whereas subrogation can give C proprietary rights.[111] Accordingly, subrogation to proprietary rights does not duplicate recoupment and contribution. As a result, subrogation is not redundant in the bottom row of the table above.

Second, subrogation is so much more than a secured recoupment or contribution claim. Recoupment and contribution are only available in cases where C and D shared a common duty to X.[112] By contrast, subrogation is not limited to these

[110] Mitchell and Watterson (n 2) para 6.15; Burrows, *Restitution* (n 4) 149, 167.

[111] eg Rotherham, 'Subrogation' (n 29) para 8.2; Mitchell and Watterson (n 2) paras 3.08, 6.15; Mitchell, Mitchell, and Watterson (n 3) para 39-27.

[112] Mitchell, *The Law of Contribution and Reimbursement* (n 3) paras 1.11, 6.02, 6.18.

cases and is also awarded in misappropriation and lending cases.[113] As a result, the argument that subrogation duplicates recoupment and contribution does not prove subrogation redundant in misappropriation and lending cases. In other words, this argument does not show subrogation to be redundant in the right hand column of the table above.

Finally, even in common liability cases, subrogation to personal rights does not always duplicate recoupment and contribution. This is clearest in common liability cases where X had personal rights against D which would have priority in the event of D's insolvency. Subrogation gives C the preferential status that X would have had, whereas recoupment and contribution do not.[114] In these cases, subrogation is more advantageous than recoupment and contribution. As a result, even in the top left cell of the table above, subrogation is not always redundant.

Similarly, subrogation can give C interest at the same rate as X's extinguished rights against D.[115] Where this is greater than the rate of interest applicable to rights created by recoupment and contribution, subrogation is more advanta-

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[113] See page 4.

[114] *Hodgson v Shaw* (1834) 3 My & K 183, 40 ER 70; *Re M'Myn* (1886) 33 ChD 575 (Ch) 578 (Chitty J); *Re Lord Churchill* (1888) 39 ChD 174 (Ch); *Re Lamplugh Iron Ore Co Ltd* [1927] 1 Ch 308 (Ch). cf *Copis v Middleton* [1823] Turn & R 224, 37 ER 1083; *Re Bell Lines Ltd* [2006] IEHC 188, revd on a different point [2010] IESC 15; *Re Dalma No 1 Pty Ltd* [2013] NSWSC 1335; Mitchell and Watterson (n 2) paras 8.32–8.38.

[115] *Western Trust & Savings Ltd v Rock* (CA, 26 February 1993); *Castle Phillips Finance v Piddington* (1995) 70 P & CR 592 (CA) 602 (Peter Gibson LJ); *Filby* (n 8) [63]–[67] (May LJ); *Appleyard* (n 6) [76]–[77] (Lord Neuberger MR). cf Mitchell and Watterson (n 2) paras 9.112–9.121; Mitchell, Mitchell, and Watterson (n 3) paras 39-101 – 39-103.

geous than recoupment and contribution. Again, even in common liability cases, subrogation to personal rights is not always redundant.

In sum, subrogation to personal rights sometimes duplicates recoupment or contribution, and so subrogation is redundant in a limited number of cases. However, subrogation is available on a wider range of facts, and is often more advantageous, compared to recoupment or contribution. Consequently, even though subrogation sometimes duplicates recoupment or contribution, it does not follow that subrogation is redundant.

1.3.2.4 Summary

It is generally assumed that there are two consequences of subrogation being a remedy for unjust enrichment: first, that a court faced with a subrogation claim ought to ask the four unjust enrichment questions; and second, that subrogation is redundant.

When judges and scholars write that subrogation is 'redundant'[116] or 'duplicat[ive]',[117] they slip between different claims. Sometimes they make the broad claim that subrogation (to personal rights) always duplicates a 'direct' unjust enrichment claim, and so subrogation (to personal rights) is redundant. Part I will

[116] Mitchell and Watterson (n 2) paras 3.08, 8.32; Mitchell, 'Unjust Enrichment' (n 66) para 18.280; Mitchell, 'Unjust Enrichment' (n 66) para 3.280; Mitchell, Mitchell, and Watterson (n 3) paras 39-02.

[117] *Menelaou* (CA) (n 63) [59] (Moses LJ); Burrows, *Restitution* (n 4) 147.

show that this is not true. But on other occasions, judges and scholars make the narrow claim that subrogation to personal rights in common liability cases usually duplicates recoupment and contribution. This is correct, but it does not prove that subrogation is redundant.

1.3.3 What is the justification for subrogation?

A third controversy is the justification for subrogation.[118] The form of the rights created by subrogation are unusual in two ways. First, subrogation gives C rights against D which resemble X's extinguished rights against D.[119] This is a strange thing for the law to do. C might deserve rights against D but why should these rights resemble X's extinguished rights?[120] Second, the rights that subrogation gives to C are often proprietary.[121] A justification for subrogation must explain both of these aspects of the remedy's form.[122]

This has proven difficult. Many justifications for subrogation have been suggested; they will be evaluated in Chapter 7. Here, it suffices to consider two possibilities in order to illustrate the difficulties in justifying subrogation.

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118 Rotherham, 'Subrogation' (n 29) para 8.8.

119 See n 7 on page 3.

120 *Menelaou* (SC) (n 6) [109] (Lord Carnwath); Jaffey, *The Nature and Scope of Restitution* (n 29) 270; Rotherham, *Proprietary Remedies in Context* (n 29) 245, 248.

121 See n 8 on page 4.

122 Ben McFarlane, 'Form and Substance in Equity' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing 2019) 198.

First, subrogation used to rest on two fictions. The first fiction was that subrogation gives X's (proprietary) rights to C.[123] The second fiction was that the parties intended C to acquire X's (proprietary) rights.[124] Each fiction gave a role to X's (proprietary) rights, so the fictions could explain why subrogation gives C (proprietary) rights which resemble X's extinguished (proprietary) rights. However, the courts have now rejected both fictions: by operation of law, C acquires new rights which merely resemble X's extinguished rights.[125] Accordingly, these fictions cannot justify why C's rights resemble X's or why C's rights may be proprietary.

Second, for some, 'subrogation is a remedy for unjust enrichment' seems to be the answer to the question 'what is the justification for subrogation?'[126] However, it has already been shown that there is debate over whether subrogation is a remedy for unjust enrichment.[127]

Moreover, even those who argue that subrogation is a remedy for unjust enrichment concede that it is an incomplete justification for subrogation giving C proprietary rights.[128] Mitchell and Watterson explain that the advantages of

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123 See pages 18–20.

124 eg *Butler* (n 12) 282 (Warrington J).

125 *BFC* (n 8) 231D–32B, 236D–G (Lord Hoffmann), 241D (Lord Hutton); *Day* (n 7) [43] (Gloster LJ).

126 eg *Menelaou* (SC) (n 6) [59], [100] (Lord Neuberger); James Edelman and Elise Bant, *Unjust Enrichment* (2nd edn, Hart Publishing 2016) 44; Mitchell, Mitchell, and Watterson (n 3) paras 39-05 – 39-10, cf para 1-08; Watterson, 'Subrogation' (n 9) 437, 448.

127 See pages 8–16.

128 eg *Menelaou* (SC) (n 6) [130]–[132] (Lord Carnwath); Mitchell, Mitchell, and Watterson (n 3) para 39-31; Watterson, 'Subrogation' (n 9) 464; David Winterton, 'Unjust Enrichment

proprietary rights over personal rights mean that:

> further inquiry is required before the law affords [subrogation to proprietary rights]. It is not sufficient to conclude that [D] has been unjustly enriched at the expense of [C]. Proprietary remedies for unjust enrichment raise special considerations, which mean that their availability may need to be more tightly controlled than corresponding personal claims. This means in turn that it should always be necessary to address the following question, distinctly and directly, in cases where [C] seeks to acquire a security interest via subrogation: is it appropriate on these facts to reverse [D]'s unjust enrichment by awarding a proprietary restitutionary remedy rather than a personal restitutionary remedy?[129]

The authors suggest that the 'authorities reveal a surprising readiness to award proprietary subrogation',[130] since proprietary subrogation is more widely available than allowed for by the leading theories on when unjust enrichment should create proprietary rights.[131]

Similarly, Burrows writes that 'subrogation is of central importance to the continuing debate and controversy over the extent of, and justification for, proprietary restitution'.[132] He suggests that:

> Although subrogation to proprietary rights ... is commonplace, this is generally difficult to justify because [C] has taken the risk of [D]'s (or X's) insolvency and therefore does not appear to merit priority over unsecured creditors.[133]

and Rough Justice' [2016] RLR 164, 169.

[129] Mitchell and Watterson (n 2) para 8.39.

[130] Mitchell and Watterson (n 2) para 8.46.

[131] Mitchell and Watterson (n 2) paras 8.40–8.45.

[132] Burrows, *Restitution* (n 4) 147.

[133] Burrows, *Restitution* (n 4) 167. See also Burrows, *Restitution* (n 4) 149–50.

In short, it is difficult to explain why subrogation gives C rights which resemble X's extinguished rights, and why subrogation often gives C proprietary rights. In light of these difficulties, one judge said that:

> it is enough to see subrogation as an entitlement which equity accords to [C], firmly established by judicial decisions notwithstanding that a satisfactory doctrinal basis is difficult to identify ... .[134]

This is unsatisfactory: the justification for subrogation matters.[135] It should condition when subrogation is available and the content of the rights that subrogation creates. Accordingly, identifying the justification for subrogation can help decide novel cases, and there is an argument for reforming the positive law where it does not fit the justification. Furthermore, a legal system can operate without subrogation: South African law does so.[136] If there is no good justification for subrogation in English law, then it should be abolished.

1.3.4 When should subrogation occur?

In light of the previous three controversies, it is unsurprising that there is also controversy over when subrogation should occur.[137] Before the courts treated

[134] *Challenger* (n 19) [50] (Bryson J).

[135] cf Kit Barker, 'Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons' in Jason W Neyers, Mitchell McInnes, and Stephen GA Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing 2004) 95–96.

[136] *Absa Bank Ltd v Moore* [2016] ZACC 34 [43]–[44] (Cameron J).

[137] Rotherham, 'Subrogation' (n 29) para 8.8; Birks, *Unjust Enrichment* (n 87) 298; Cleaver (n 61) 55.

subrogation as a remedy for unjust enrichment, the 'the limits of [subrogation were] ill-defined and obscure'.[138] Subrogation occurred in certain 'established categories' of cases.[139] For example, if C stood surety for D's debt to X and C paid X, discharging D's debt to X, then C would be subrogated to X's extinguished rights against D.[140] However, beyond the established categories, the availability of subrogation was unclear.[141]

Thus, in *Orakpo*, Lord Diplock said that:

> 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 the civil law. There are some circumstances in which the remedy takes the form of 'subrogation,' but this expression embraces more than a single concept in English law. It ... takes place by operation of law in a whole variety of widely different circumstances ... and appear[s] to defeat classification except as an empirical remedy to prevent a particular kind of unjust enrichment.
>
> This makes particularly perilous any attempt to rely upon analogy to justify applying to 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.[142]

Similarly, Lord Salmon stated that:

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138 *Re TH Knitwear (Wholesale) Ltd* [1988] 1 Ch 275 (CA) 284F (Slade LJ).

139 *Re TH Knitwear* (n 138) 284D (Slade LJ).

140 *Duncan Fox* (n 107) 10–13 (Lord Selborne LC); *Re TH Knitwear* (n 138) 284D (Slade LJ).

141 cf *Duncan Fox* (n 107) 13–14 (Lord Selborne LC); *Re TH Knitwear* (n 138) 284D–H (Slade LJ).

142 *Orakpo v Manson Investments Ltd* [1978] AC 95 (HL) 104C–G.

> The test as to whether the courts will apply the doctrine of subrogation to the facts of any particular case 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.[143]

Lord Edmund-Davies said that '[a]part from ... certain well-established cases, it is conjectural how far the right of subrogation will be granted though in principle there is no reason why it should be confined to the hitherto recognised categories'.[144]

However, in *BFC* the House of Lords changed direction, holding that subrogation is a remedy for unjust enrichment.[145] Following *BFC*, subrogation is not limited to the established categories, but instead occurs whenever a party is unjustly enriched by the discharge of X's rights at C's expense.[146]

This is illustrated by *BFC* itself.[147] Unlike previous cases of subrogation to an extinguished charge, C had not bargained for priority over all D's creditors, but only for priority over OOL. Despite this novel element of the case, the House held

[143] *Orakpo* (n 142) 110D–E.

[144] *Orakpo* (n 142) 112D–E.

[145] *BFC* (n 8) 228C-F (Lord Steyn), 231H (Lord Hoffmann), 238H (Lord Clyde).

[146] *Menelaou v Bank of Cyprus Plc* [2012] EWHC 1991 (Ch) [20] (David Donaldson QC); Charles Mitchell, 'Subrogation, Unjust Enrichment and Remedial Flexibility' [1998] RLR 144, 144; Theresa Villiers, 'A Path Through the Subrogation Jungle: Whose Right is it Anyway?' [1999] LMCLQ 223, 225; Tettenborn, *The Law of Restitution in England and Ireland* (n 16) paras 2-26, 2-36; Burrows, *Restitution* (n 4) 145, 148, 166, 446; Burrows, *Restatement* (n 17) 173; Watterson, 'Modelling Subrogation as an "Equitable Remedy"' (n 63) 669–70. cf *Insol Funding Co Ltd v Cowlam* [2017] EWHC 1822 (Ch) [119]–[127] (Master Bowles).

[147] For the facts, see page 9. See also *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 2)* [2003] EWHC 1032 (Comm), [2003] 2 All ER (Comm) 365 ('*Niru Battery* (QB)') [30]–[31] (Moore Bick J); *Niru Battery* (CA) (n 10) [52]–[56] (Clarke LJ); *Menelaou* (SC) (n 6) [45]–[51] (Lord Clarke), [84]–[99] (Lord Neuberger).

that C was subrogated to X's extinguished charge (insofar as it was discharged, and only as against OOL)[148] since OOL had been unjustly enriched by the partial discharge of X's charge at C's expense.[149]

Orakpo's 'empirical' test was opaque and uncertain,[150] and the attempt to improve on it is welcome. Nevertheless, the answer to the question 'when should subrogation occur?' remains unsettled[151] for two reasons.

First, while the idea that subrogation is a remedy for unjust enrichment is the current orthodoxy,[152] it remains controversial.[153] If the doubts are justified and the idea that subrogation is a remedy for unjust enrichment falls away, then so too does the idea that subrogation occurs whenever a party is unjustly enriched by the discharge of X's rights at C's expense.[154]

Second, even if subrogation is a remedy for unjust enrichment, saying that subrogation occurs 'whenever a party is unjustly enriched by the discharge of X's rights at the expense of C' is not specific enough to determine when subrogation

148 *BFC* (n 8) 228B–F (Lord Steyn), 229B–D, 236H–37D (Lord Hoffmann), 237G–38A (Lord Clyde), 242F–H (Lord Hutton).

149 *BFC* (n 8) 227B–G (Lord Steyn), 234G–35A (Lord Hoffmann), 238B–C (Lord Clyde), 239B–H (Lord Hutton).

150 Birks, *Introduction* (n 28) 401; Graham Virgo, 'Restitution and Unjust Enrichment in the Supreme Court: Reflections on *Bank of Cyprus UK Ltd v Menelaou*' [2016] University of Cambridge Faculty of Law Research Paper No 10/2016 <https://ssrn.com/abstract=2724024> accessed 30 September 2017, 16.

151 See n 19 on page 6.

152 See page 8.

153 See pages 8–16.

154 Edelman and Bant (n 126) 44.

occurs. As Lord Reed explained in *ITC*, this formulation provides:

> no more than broad headings for ease of exposition[:] ... not ... legal tests, but ... signposts towards areas of inquiry involving a number of distinct legal requirements. In particular, the words 'at the expense of' do not express a legal test; and a test cannot be derived by exegesis of those words, as if they were the words of a statute.[155]

There is controversy over whether subrogation is governed by the same rules as a 'direct' unjust enrichment claim.[156] If subrogation is not governed by the same rules as direct claims, then it is unclear what rules do govern subrogation and so it is unclear when subrogation occurs.

In light of this, it is unsurprising that there was confusion in *Menelaou* over what C must prove for subrogation.[157] The Supreme Court was split over whether subrogation required C to trace into the discharge of X's rights. Lord Carnwath stated that subrogation required C 'to establish that the money used to pay off [X's rights] was their money. "Tracing" [is] the process by which this [is] done.'[158]

By contrast, Lord Clarke said that subrogation is a remedy for unjust enrichment[159] and 'a claim in unjust enrichment does not need to show a property right'.[160] Accordingly, subrogation did not require C to 'retain a property interest

[155] *ITC* (SC) (n 6) [41].

[156] See pages 17–31.

[157] *Menelaou* (SC) (n 6).

[158] *Menelaou* (SC) (n 6) [128]. See generally [118]–[132] (Lord Carnwath).

[159] *Menelaou* (SC) (n 6) [37], [49]–[50].

[160] *Menelaou* (SC) (n 6) [38].

in the proceeds of sale of Rush Green Hall ... that were used to buy Great Oak Court'.[161] Subrogation only required 'a sufficient causal connection ... between the loss to [C] and the benefit received by [D]'.[162]

Lord Neuberger agreed with Lord Clarke that subrogation did not require C to trace.[163] However, he also stated that:

> I am also attracted to the view that [C]'s case ... could be justified on the alternative basis of an orthodox proprietary claim rather than on unjust enrichment[.] ... I am very sympathetic to the notion that [C] had a proprietary interest in the [money] which was used to purchase Great Oak Court, and if that is right, its subrogation claim becomes relatively uncontroversial.[164]

Lord Kerr and Lord Wilson agreed with both Lord Clarke and Lord Neuberger.[165] *Goff and Jones* criticises the majority approach and argues that subrogation to proprietary rights requires C to trace, while subrogation to personal rights does not.[166]

In addition to this controversy over when subrogation should occur, there is also controversy over what rights subrogation should create. Specifically, where X

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161 *Menelaou* (SC) (n 6) [50], [53].

162 *Menelaou* (SC) (n 6) [27].

163 *Menelaou* (SC) (n 6) [85], [92], [96]–[98].

164 *Menelaou* (SC) (n 6) [59], [100].

165 *Menelaou* (SC) (n 6) [141].

166 Mitchell, Mitchell, and Watterson (n 3) paras 7-03 – 7-11. For further criticism, see Virgo, 'Restitution and Unjust Enrichment in the Supreme Court' (n 150) 20; Stephen Watterson, 'Subrogation as a Remedy for Unjust Enrichment in the Supreme Court' (2016) 75 CLJ 209, 211–12.

had legal security, there is debate over whether subrogation gives C legal rights or only equitable rights. To take an example, say D owes a debt to X secured by a legal mortgage. C pays X, discharging D's debt. C is subrogated to X's extinguished mortgage, but the question is whether this gives C a legal mortgage or an equitable mortgage.

On the one hand, subrogation emerged in the Courts of Equity and is 'an equitable remedy'.[167] Mitchell and Watterson suggest that subrogation only ever gives C equitable rights, even if X's rights were legal.[168] In the example above, subrogation would only give C an equitable mortgage. Some cases endorse that position.[169]

On the other hand, some authorities suggest that if X's rights were legal, then subrogation can give C legal rights. Section 5 of the Mercantile Law Amendment Act 1856 provides that if a surety pays a debt, they 'shall be entitled to stand in the place of the creditor, and to use all the remedies ... at law or in equity'. Beyond sureties, there are appellate cases which held that subrogation entitled C to be registered as a legal chargee of land.[170] For instance, in *Appleyard* Neuberger

[167] *BFC* (n 8) 231G–H (Lord Hoffmann).

[168] Mitchell and Watterson (n 2) paras 8.14–8.15, 8.113–8.121; Mitchell, Mitchell, and Watterson (n 3) paras 39-38, 39-48, 39-73, 39-83, 39-88; Stephen Watterson, 'Subrogation, Priority Disputes and Rectification: Mapping a Route Through the Thicket' [2016] RLR 1, 10, 12–14.

[169] *Boscawen* (n 8) 341A–B, 342D (Millett LJ); *Day* (n 7) [41]–[43] (Gloster LJ).

[170] *Castle Phillips* (n 115) 602 (Peter Gibson LJ); *Appleyard* (n 6) [23], [69]–[74] (Neuberger LJ); *Primlake Ltd v Matthews Associates (No 2)* [2009] EWHC 2774 (Ch) [17(c)], [27] (Jeremy Cousins QC); *Anfield (UK) Ltd v Bank of Scotland Plc* [2010] EWHC 2374 (Ch), [2011] 1 WLR 2414 [6], [40] (Proudman J).

LJ explained that 'although [C] would be relying on an equitable principle, namely subrogation, the right they are seeking to obtain by subrogation is a legal right, namely the right of a first legal chargee'.[171] If subrogation is a remedy for unjust enrichment and D has been unjustly enriched by the release of X's legal mortgage at C's expense, then McFarlane argues that in principle subrogation ought to give C a legal mortgage.[172]

All in all, even though the courts have accepted that subrogation is a remedy for unjust enrichment, controversy persists over when subrogation should occur and what rights it should create. In particular, is is unclear whether subrogation requires C to trace into the discharge of X's rights, and whether subrogation can give C legal security.

1.3.5 Summary

At least four controversies surround subrogation:

(1) Is subrogation a remedy for unjust enrichment?

(2) Is subrogation redundant?

(3) What is the justification for subrogation?

(4) When should subrogation occur?

This thesis seeks to resolve these four controversies.

[171] *Appleyard* (n 6) [74].

[172] McFarlane, *The Structure of Property Law* (n 26) 303–05.

1.4 Methodology

This section explains the methodologies which the thesis will use. No one methodology is always best. Instead, the most appropriate methodology depends on the purpose for which it is sought.[173] The purpose of this thesis is to resolve four controversies surrounding subrogation. To do so, Part I considers what the law is as a matter of authority, while Part II considers what the law ought to be as a matter of principle.[174]

Part I assesses whether subrogation is redundant according to the law as it stands in the decided cases. Part II then addresses the controversies over what justifies subrogation, when subrogation should occur, and whether subrogation claims should be analysed by asking the four unjust enrichment questions. To this end, Part II asks what good reasons the law has for subrogation. On the one hand, if no justification for subrogation can be found, then Part II will conclude that subrogation should be abolished. On the other hand, if a justification for subrogation can be found, then Part II will consider, in light of that justification,

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[173] David Feldman, 'The Nature of Legal Scholarship' (1989) 52 MLR 498, 503; Stephen A Smith, *Contract Theory* (OUP 2004) 5–6; Steve Hedley, 'The Shock of the Old: Interpretivism in Obligations' in Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing 2008); Steve Hedley, 'Looking Outward or Looking Inward? Obligations Scholarship in the Early 21st Century' in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing 2009).

[174] Charlie Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (OUP 2016) chs 1–2.

when subrogation should occur and whether subrogation claims should be analysed by asking the four unjust enrichment questions.

As Part II is concerned with what the law ought to be, it is not required to agree with the results and reasoning of the existing cases. Nevertheless, this does not mean that the cases are irrelevant. The 'wisdom of our predecessors is a valuable resource'.[175] Many judges and scholars have asked what justifies subrogation and when it should occur. Rather than starting from a blank page, it makes sense to evaluate their views, even if it ultimately concluded that some or all are mistaken.

Cases are also useful in a process of 'reflective equilibrium'.[176] A potential justification for subrogation can be compared to the reasoning and result of a subrogation case. Where the two diverge, there are two possible responses. On the one hand, the reasoning or result of the case may suggest that, on reflection, the justification should be refined or rejected. On the other hand, it may be concluded that the case is wrongly reasoned and/or wrongly decided. The cases are therefore a testing ground for potential justifications.

Having set out the methodology of the thesis, it is instructive to compare the seminal account of private law methodology in Smith's book, *Contract Theory*.[177]

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[175] *ITC* (SC) (n 6) [40] (Lord Reed).

[176] Feldman (n 173) 503; John Rawls, *A Theory of Justice* (rev edn, Belknap Press of Harvard UP 1999) 17–18, 42–43; Allan Beever and Charles Rickett, 'Interpretive Legal Theory and the Academic Lawyer' [2005] 68 MLR 320, 324–25.

[177] Smith, *Contract Theory* (n 173).

Smith pursued interpretive theory, which aims:

> to enhance understanding of the law by highlighting its significance or meaning. ... [T]his is achieved by explaining why certain features of the law are important or unimportant and by identifying connections between those features — in other words, by revealing an intelligible order in the law, so far as such an order exists.[178]

Interpretivism is a popular methodology amongst private law scholars[179] and there are similarities in this thesis' approach. For instance, Part I highlights certain features of the rules which govern subrogation and the rules which govern direct unjust enrichment claims. It argues that there is a connection (more accurately, a disconnect) between these features: the rules which govern subrogation differ from the rules which govern direct claims. It argues that this is important because it shows that subrogation is available in different circumstances and has a different effect compared to a direct claim, and so subrogation is not redundant.

Furthermore, Smith notes that:

> law is a human practice [which therefore possesses] a self-understanding. ... One aspect of law's self-understanding is ... that law regards itself as ... providing good reasons for acting in a certain way. ... [D]octrinal work[s] ... advance the sorts of arguments that, roughly speaking, a court might be willing to listen to, even if [a] court has not previously

[178] Smith, *Contract Theory* (n 173) 5.

[179] Beever and Rickett (n 176); Hedley, 'The Shock of the Old' (n 173); Hedley, 'Looking Outward or Looking Inward? Obligations Scholarship in the Early 21st Century' (n 173) 197 fn 19; Frederick Wilmot-Smith, 'Reasons? For *Restitution*?' (2016) 79 MLR 1116, 1122; Smith, *Rights, Wrongs, and Injustices* (n 22) 25 fn 49; Andrew Burrows, 'Unjust Enrichment and Restitution' in Andrew S Gold and others (eds), *The Oxford Handbook of the New Private Law* (OUP 2020) 300.

> agreed with such an argument. They are written in a language that respects law's self-understanding.[180]

The thesis is consistent with this. For example, Part II advances justifications for subrogation which the courts have recognised in some cases. However, Part II argues that these justifications explain more than previously has been supposed. Part II therefore respects the law's self-understanding by advancing arguments that courts are willing to listen to.

Nevertheless, this thesis does not endorse all aspects of Smith's approach. Smith wrote that:

> four criteria are of particular relevance in assessing [interpretive] theories: (1) fit, (2) coherence, (3) morality, and (4) transparency.
>
> ... A theory 'fits' if it is consistent with, and supported by, ... legal rules and ... decisions. ...
>
> A second criterion by which contract theories may be assessed is coherence. ... According to the less-demanding version, a theory satisfies the coherence criterion to the extent that it presents [an area of] law as consistent or non-contradictory. According to the more demanding version, ... a good theory must show that most of the core elements of [an area of] law can be traced to, or are closely related to, a single principle. ...
>
> ... Law is transparent to the extent that the reasons legal actors give for doing what they do are their real reasons.[181]

These criteria have been criticised. Bell argues that Smith wrongly equates

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[180] Stephen A Smith, 'Taking Law Seriously' (2000) 50 University of Toronto LJ 241, 249, 255–56.

[181] Smith, *Contract Theory* (n 173) 7–24 (emphasis omitted).

intelligibility, coherence, and unity:[182] it 'is surely possible that an account of the law might reveal the law to be incoherent, in the sense that it accepts that there are aspects of the law which do not neatly fit together, but at the same time render it intelligible'.[183] Similarly, Bell suggests that an intelligible, coherent theory may reveal multiple justifications for an area of law.[184]

Furthermore, Webb observes that the four criteria are incommensurable 'so, save where one account comes out on top on [all] measures, there will be no basis on which we can adjudge any one as, all things considered, best'.[185] This leads to arbitrary conclusions. For instance, interpretive theories allow only a limited number of cases to be rejected as wrongly decided.[186] Webb observes that 'why and how [the theory] can at times trump, while at other times be trumped by, fit [with the cases] is unexplained'.[187]

To avoid these problems, this thesis eschews Smith's four criteria. The thesis therefore does not commit to finding a unitary justification for subrogation and

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182 Joanna Bell, *The Anatomy of Administrative Law* (Hart Publishing 2020) 230–37. See also Robert Reed, 'Theory and Practice' in Andrew Dyson, James Goudkamp, and Frederick Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart Publishing 2016) 315; Nicholas J McBride, *The Humanity of Private Law: Part I: Explanation* (Hart Publishing 2019) 39.

183 Bell (n 182) 234.

184 Bell (n 182) 236. See also Hedley, 'The Shock of the Old' (n 173).

185 Webb, *Reason and Restitution* (n 174) 18.

186 Ronald Dworkin, 'Hard Cases' (1975) 88 Harvard LR 1057, 1099; Smith, *Contract Theory* (n 173) 10; Beever and Rickett (n 176) 325.

187 Charlie Webb, 'Property, Unjust Enrichment, and Defective Transfers' in Robert Chambers, Charles Mitchell, and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 340.

avoids balancing incommensurable criteria. Instead, the thesis separates what the law is (Part I) from what the law ought to be (Part II).

1.5 Structure

This section elaborates on the structure of the rest of the thesis.

Part I comprises Chapters 2–6 and asks whether subrogation is redundant as the law stands. It is conceded that subrogation to personal rights in common liability cases usually duplicates recoupment and contribution. However, it does not follow that subrogation is redundant.[188] Part I can therefore set common liability cases to one side.

Instead, Part I shows that the rules which govern direct unjust enrichment claims do not govern subrogation in misappropriation and lending cases. In particular:

- Chapter 2 shows that subrogation is not governed by the rules which determine whether there was an enrichment at C's expense in a direct claim.
- Chapter 3 shows that subrogation is not governed by the rules which determine whether an enrichment was unjust in a direct claim.

[188] See pages 26–30.

- Chapter 4 shows that while the change of position defence applies to most direct claims, there is no authority for it applying to subrogation.
- Chapter 5 shows that subrogation and direct claims have different effects.
- Chapter 6 therefore concludes that, in misappropriation and lending cases, subrogation and direct claims are governed by different rules. As a result, subrogation is available in different circumstances and has a different effect compared to direct claims. Accordingly, subrogation does not duplicate a direct claim and subrogation is not redundant. In other words, the correct position is that in Table 1.3.[189] Chapter 6 then considers the implications of this.

Part II comprises Chapters 7–9 and considers what the law should be. Chapter 7 argues that many previous attempts to justify subrogation are unsuccessful. Chapters 8 and 9 argue that there are two good reasons for subrogation, each of which is sufficient on its own. Chapter 8 argues that one reason for subrogation is a duty not to use a right for one's own benefit. It then explains the circumstances in which this justifies subrogation. Chapter 9 argues that a second reason for subrogation is properly distributing the burden of a debt. It then explores the

[189] See page 28.

circumstances in which this justifies subrogation.

The controversy over whether subrogation is a remedy for unjust enrichment straddles the division between what the law is and what the law ought to be. It is therefore addressed in both Parts I and II. It is usually assumed that there are two consequences of subrogation being a remedy for unjust enrichment. One consequence is that subrogation is redundant because it duplicates a direct unjust enrichment claim.[190] This is a claim about what the law is as a matter of authority, so it will be addressed in Part I. Part I argues that subrogation is not a remedy for unjust enrichment in this sense.

The other consequence is that subrogation claims ought to be analysed by asking the four unjust enrichment questions.[191] This can be understood as a claim about what the courts should do as a matter of principle, and so this will be addressed in Part II. Part II argues that, once the justifications for subrogation are understood, the four unjust enrichment questions are a distraction. Accordingly, subrogation is not a remedy for unjust enrichment in either of the two senses that are usually assumed.

Chapter 10 summarises the conclusions of the thesis and explores their implications.

[190] See pages 17-31.

[191] See n 63 on 16.

Part I

Is subrogation redundant?

2 Enrichment at the expense of

2.1 Introduction

The previous chapter identified four controversies surrounding subrogation. Part I of the thesis addresses one of those controversies: the question of whether subrogation is redundant. Part I argues that subrogation in misappropriation and lending cases is governed by different rules compared to a 'direct' unjust enrichment claim. Accordingly, subrogation does not duplicate a direct claim and so subrogation is not redundant.

This chapter begins by briefly rehearsing Watterson's argument that subrogation is not governed by the rules which determine whether there was an enrichment in direct claims. It then focuses on showing that subrogation is not governed by the rules which determine whether an enrichment came at C's expense in direct claims.

2.2 Enrichment

In an unjust enrichment case, the first question is whether D was enriched.[1] In direct claims, there are detailed rules for determining whether, and to what extent, D was enriched. Nevertheless, 'the starting point in valuing the enrichment is the

[1] See n 62 on page 16.

objective market value, or market price'.[2] In other words, enrichment in direct claims is 'the receipt of value'.[3]

Meanwhile, in subrogation cases, a payment to X discharges D's debt to X. One might think that X's receipt of the payment is a receipt of value, just like the enrichment in direct claims. However, there are two problems with this. First, X's receipt of the payment discharges X's right against D. Thus, X's receipt of value is the extent to which (if at all[4]) the law recognises receiving payment of a debt as worth more than the right to payment of a debt. Second, X's receipt of value might justify the law giving C rights against X. But this would not justify subrogation giving C rights against D, still less rights which resembled X's extinguished rights against D.

Instead, *Goff and Jones* identifies two enrichments in subrogation cases:

> The primary enrichment accrues to [D], who is released from liability to [X], and whose asset is released from [X]'s security interest. However, there are also secondary enrichments that may immediately accrue to other parties, whose position is materially improved when [X]'s rights are extinguished. Such secondary enrichments may accrue to a

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2 *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938 [15] (Lord Clarke).

3 AVM Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Hart Publishing 2012); Stephen Watterson, 'Modelling Subrogation as an "Equitable Remedy"' (2016) 2 CJCCL 609, 615; Stephen Watterson, 'Subrogation' in Graham Virgo and Sarah Worthington (eds), *Commercial Remedies: Resolving Controversies* (CUP 2017) 440. See also Robert Chambers, 'Two Kinds of Enrichment' in Robert Chambers, Charles Mitchell, and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009).

4 cf *Foakes v Beer* (1884) 9 App Cas 605 (HL); *Re Selectmove Ltd* [1995] 1 WLR 474 (CA); *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] QB 604; *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24, [2019] AC 119 [18] (Lord Sumption).

> junior secured creditor, who held a security interest over the same asset which was subordinate to [X]'s security interest, and whose subordinate security interest was strengthened to the extent that the debt secured by the prior-ranking security interest is discharged.[5]

BFC illustrates this.[6] D's title to a property was subject to X's first charge and OOL's second charge. C's loan to D was paid to X, partially discharging D's secured debt to X. D was therefore primarily enriched: D was partially released from liability to X, and D's property was partially released from X's charge. In addition, OOL was secondarily enriched: the partial discharge of X's first charge increased the value of OOL's second charge.[7] This thesis will describe parties (like OOL) who receive secondary enrichments as 'secondary enrichees'.

Secondary enrichees are enriched by the increase in value of their pre-existing rights. Thus, like enrichments in direct claims, secondary enrichments are in the form of value.[8]

However, Watterson observes that this is not true of the primary enrichment

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5 Charles Mitchell, Paul Mitchell, and Stephen Watterson, *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) para 39-22 (footnotes omitted). See also, eg, *National Westminster Bank Plc v Mayfair Estates Property Investments Ltd* [2007] EWHC 287 (Ch) [24] (Sir Donald Rattee); *Anfield (UK) Ltd v Bank of Scotland Plc* [2010] EWHC 2374 (Ch), [2011] 1 WLR 2414 [11] (Proudman J); *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2018] AC 313 [57] (Lord Mance); Charles Mitchell and Stephen Watterson, *Subrogation: Law and Practice* (rev edn, OUP 2007) ch 4 esp para 4.08; Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) ('*Restatement*') 174–75.

6 *Banque Financière de la Cité SA v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) ('*BFC*').

7 *BFC* (n 6) 227B–C (Lord Steyn), 234G (Lord Hoffmann), 238B–C (Lord Clyde), 239B–H (Lord Hutton).

8 Chambers, 'Two Kinds of Enrichment' (n 3) 269–71.

in subrogation cases.[9] He explains that the 'natural restitutionary response'[10] to enrichments in the form of value is 'an order to pay a money sum reflecting the monetary value of [D]'s enrichment'.[11] Accordingly, a focus on enrichment by value cannot explain why subrogation gives C rights resembling X's extinguished rights. Watterson argues that this can only be explained by recognising that subrogation 'operates as a specific restitutionary mechanism, addressed to the release of D's liabilities, conceived as a "legal" enrichment'.[12]

Thus, the enrichment in direct claims is a receipt of value, whereas the primary enrichment in subrogation cases is the discharge of a legal liability. Direct claims and subrogation therefore respond to different enrichments. As a result, subrogation may be available where a direct claim is not, so subrogation is not 'needlessly duplicative' or 'invariably redundant for C'.[13]

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9 Watterson, 'Subrogation' (n 3) 439–48; Watterson, 'Modelling Subrogation as an "Equitable Remedy"' (n 3) 615–17. See also Johann Andreas Dieckmann, 'The Province of Subrogation Determined: Some Corrections — A Functional Analysis of the Guarantor's Right to Derivative Recourse, Comprising a Critique of the Restitutionary Thesis' (2012) 20 ERPL 989, 1026; Lodder (n 3) 141–47.

10 Watterson, 'Subrogation' (n 3) 440.

11 Watterson, 'Subrogation' (n 3) 438.

12 Watterson, 'Subrogation' (n 3) 441 (emphasis omitted).

13 Watterson, 'Subrogation' (n 3) 446–48.

2.3 At the expense of

The second question in an unjust enrichment case is whether the enrichment came at C's expense.[14] Section 2.4 identifies the rules which govern the answer to that question for direct claims. Section 2.5 then shows that these rules do not govern subrogation.

2.4 Direct claims

The first task, then, is to identify the rules which determine whether an enrichment came at C's expense in a direct unjust enrichment claim.

2.4.1 Sufficient causal connection

Until recently, there was an emerging consensus that the test was one of 'economic reality'[15] or whether there was a 'sufficient causal connection' between C's loss and

[14] See n 62 on page 16.

[15] *Investment Trust Companies v Revenue and Customs Commissioners* [2012] EWHC 458 (Ch) ('*ITC* (Ch)') [72] (Henderson J); *Menelaou v Bank of Cyprus Plc* [2013] EWCA Civ 1960, [2014] 1 WLR 854 ('*Menelaou* (CA)') [48] (Floyd LJ), cf [62] (Moses LJ); *Relfo Ltd v Varsani* [2014] EWCA Civ 360 [92], [96]–[97] (Arden LJ), [103] (Gloster LJ), [115] (Floyd LJ); *Investment Trust Companies v Revenue and Customs Commissioners* [2015] EWCA Civ 82 ('*ITC* (CA)') [67], [69] (Patten LJ); *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66, [2016] AC 176 ('*Menelaou* (SC)') [31] (Lord Clarke), [73] (Lord Neuberger); Mitchell, Mitchell, and Watterson (n 5) para 6-38; Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2016) ('*Principles*') 107–11.

D's gain.[16] It was easy to say that subrogation was governed by these tests. For example, Mitchell and Watterson treated both primary and secondary enrichments as accruing at C's expense because C could 'establish a causal connection between his loss and the[se] gains'.[17] In *BFC*, the House of Lords held that, as a matter of 'reality', OOL was secondarily enriched at C's expense.[18] In *Menelaou*, a majority of the Supreme Court used both tests to show that D's enrichment came at C's expense.[19]

2.4.2 The *ITC* rules

However, these expansive tests were rejected in *ITC*.[20] There, the customer bought services from the managers. As part of the price, the customer paid Value Added Tax ('VAT') to the managers. The managers accounted to the Revenue for the

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16 *ITC* (Ch) (n 15) [68] (Henderson J); *Menelaou* (CA) (n 15) [42] (Floyd LJ); *TFL Management Ltd v Lloyds TSB Bank Plc* [2013] EWCA Civ 1415, [2014] 1 WLR 2006 [57] (Floyd LJ), [61] (Moses LJ); *Relfo* (n 15) [83], [95]–[96] (Arden LJ), [103]–[104] (Gloster LJ), [115], [122] (Floyd LJ); *ITC* (CA) (n 15) [67], [69] (Patten LJ); *Menelaou* (SC) (n 15) [27] (Lord Clarke); Mitchell and Watterson (n 5) para 5.15; Mitchell, Mitchell, and Watterson (n 5) para 6-37.

17 Mitchell and Watterson (n 5) paras 5.15–5.20, 5.48–5.50. See also Peter Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 96–98; Stephen Watterson, '"Direct Transfers" in the Law of Unjust Enrichment' (2011) 64 CLP 435, 458–59, 464–66; Mitchell, Mitchell, and Watterson (n 5) paras 6-53, 6-70.

18 *BFC* (n 6) 227C (Lord Steyn), 238B (Lord Clyde), 239G (Lord Hutton). See also *Filby v Mortgage Express (No 2) Ltd* [2004] EWCA Civ 759 [50], [62] (May LJ); cf Ben McFarlane, 'Unjust Enrichment, Property Rights and Indirect Recipients' [2009] RLR 37, 50.

19 *Menelaou* (SC) (n 15) [24]–[35] (Lord Clarke), [66], [77] (Lord Neuberger), [141] (Lord Kerr and Lord Wilson).

20 *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29, [2018] AC 275 ('*ITC* (SC)') [37]–[38], [52], [56]–[57], [59]–[60], [72] (Lord Reed).

VAT. It then transpired that the services ought to have been exempt from VAT. The customer sought to recover the VAT from the Revenue.

The Supreme Court denied the customer's claim. Giving the only judgment, Lord Reed held that an enrichment is only at C's expense if 'there has been a transfer of value'.[21] He continued:

> The expression 'transfer of value' is, however, also too general to serve as a legal test. More precisely, it means ... that [D] has received a benefit from [C] ... [and C] suffered a loss through his provision of the benefit.[22]

This test is 'usually'[23] — or possibly only[24] — satisfied 'where the parties have dealt directly with one another, or with one another's property', such as where C pays D.[25] There are 'a number of situations' in which there is no 'direct transfer', but 'which, for the purposes of the rule, the law treats as equivalent to a direct transfer'.[26] These include:

- 'where the agent of one of the parties is interposed between them';[27]
- 'cases ... in which a set of co-ordinated transactions has been treated as forming a single scheme or transaction for the purpose

[21] *ITC* (SC) (n 20) [42]–[43].

[22] *ITC* (SC) (n 20) [43].

[23] *ITC* (SC) (n 20) [46].

[24] *ITC* (SC) (n 20) [50].

[25] *ITC* (SC) (n 20) [46].

[26] *ITC* (SC) (n 20) [50].

[27] *ITC* (SC) (n 20) [48].

of the "at the expense of" inquiry, on the basis that to consider each individual transaction separately would be unrealistic';[28]

- 'situations where [D] receives property from a third party into which [C] can trace an interest';[29] and
- cases 'where [C] discharges a debt owed by [D] to a third party'.[30]

Furthermore, the requirement that C 'must ... incur a loss through the provision of the benefit ... will not normally be satisfied where the provision of the benefit was merely an incidental or collateral result of his expenditure'.[31] This will be referred to as the 'rule against incidental benefits'.[32] Collectively, these rules will be referred to as the '*ITC* rules'.

On the facts of *ITC*, Lord Reed held that there was a transfer of value from the customer to the managers, and from the managers to the Revenue. However, '[t]hese two transfers [could not] be collapsed into a single transfer of value' from the customer to the Revenue.[33] The customer could not rely on any of the equivalents to a direct transfer:

since the payments made by [the customer] formed part of the managers'

[28] *ITC* (SC) (n 20) [48].

[29] *ITC* (SC) (n 20) [48].

[30] *ITC* (SC) (n 20) [49].

[31] *ITC* (SC) (n 20) [52].

[32] Andrew Trotter, 'The Double Ceiling on Unjust Enrichment: Old Solutions for Old Problems' (2017) 76 CLJ 168, 188, 190.

[33] *ITC* (SC) (n 20) [71].

> general assets, to do with as they pleased, it is impossible to trace those payments into the payments subsequently made by the managers to the [Revenue. In addition,] there is no question of the transactions ... comprising a single scheme.[34]

Therefore, the Revenue's enrichment was not at the customer's expense, so the customer had no claim against the Revenue.[35]

The rules laid down in *ITC* were affirmed in *Swynson* and *Prudential*.[36] As a result, there are three unanimous Supreme Court decisions rejecting the generous 'economic reality' and causal tests in favour of *ITC*'s narrower rules.

2.5 Subrogation

However, subrogation is not governed by the *ITC* rules. To demonstrate this, the following sections are organised as follows. As a preliminary, Section 2.5.1 distinguishes four types of subrogation case. Section 2.5.2 then shows that subrogation cases do not fit *ITC*'s requirement of a transfer of value. Section 2.5.3 shows that subrogation cases do not fit *ITC*'s directness rule. Next, Sections 2.5.4 and 2.5.5 show that Lord Reed's equivalents to a direct transfer cannot reconcile

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[34] *ITC* (SC) (n 20) [72].

[35] *ITC* (SC) (n 20) [73]–[74].

[36] *Swynson* (n 5) [56], [58], [67], [89] (Lord Mance), [114]–[115], [117], [120] (Lord Neuberger); *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39, [2018] 3 WLR 652 [68], [102] (Lord Mance, Lord Reed, and Lord Hodge). For criticism, see Charles Mitchell, 'End of the Road for the Overpaid Tax Litigation?' (2017–18) 9 UKSCYB 225, 236–42.

subrogation cases with these rules. Finally, Section 2.5.6 shows that *ITC*'s rule against incidental benefits does not apply to subrogation.

2.5.1 Four types of subrogation case

In Chapter 1, a division was introduced between common liability cases, misappropriation cases, and lending cases.[37] A different way of dividing the cases is according to how C is connected to the enrichments. This reveals four different types of case:[38]

- In **Type 1** cases, C pays X, discharging D's debt to X.[39] All common liability cases follow this pattern.[40]
- In **Type 2** cases, C pays D, then D pays X, discharging D's debt to X. Burrows describes this as 'the standard subrogation situation',[41] and indeed these cases seem most common.[42]

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37 See page 4.

38 Types 1–3 were distinguished in Peter Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) ('*Introduction*') 94; Charles Mitchell, 'The Law of Subrogation' [1992] LMCLQ 483, 493–94; Charles Mitchell, *The Law of Subrogation* (Clarendon Press 1994) 113–14; Mitchell and Watterson (n 5) paras 5.18, 5.20, 5.23.

39 eg *Ghana Commercial Bank v Chandiram* [1960] AC 732 (PC) 737.

40 Mitchell and Watterson (n 5) para 5.19.

41 Andrew Burrows, '"At the Expense of the Claimant": A Fresh Look' [2017] RLR 167, 182.

42 eg *Baroness Wenlock v River Dee Co (No 2)* (1887) 19 QBD 155 (CA) 166 (Fry LJ); *Chetwynd v Allen* [1899] 1 Ch 353 (Ch) 354; *Halifax Plc v Omar* [2002] EWCA Civ 121, [2002] 2 P&CR 26 [4]–[5] (Jonathan Parker LJ); *Anfield* (n 5) [3]–[4] (Proudman J); *Day v Tiuta International Ltd* [2014] EWCA Civ 1246 [4] (Gloster LJ).

- In **Type 3** cases, C pays a fourth party, F, who then pays X, discharging D's debt to X.[43]
- In **Type 4** cases, C releases F's property from a charge. The property is sold and X is paid from the proceeds, discharging D's debt to X. *Menelaou* seems to be the only example.[44]

2.5.2 Transfer of value

In *ITC*, the Supreme Court held that there were 'two separate transactions — first, between [the customer] and the managers, and secondly between the managers and'[45] the Revenue — which 'cannot be collapsed into a single transfer of value' from the customer to the Revenue.[46] This reasoning suggests that there is no transfer of value in some subrogation cases.[47] To demonstrate this, each of the four types of subrogation case will be considered in turn.

In **Type 1** cases, C pays X, discharging D's debt to X. Is this one transaction (a payment which discharges) or two (a payment, then a discharge)? It is difficult

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[43] eg *Lehman Commercial Mortgage Conduit Ltd v Gatedale Ltd* [2012] EWHC 848 (Ch), The Times, 6 July 2012 [7] (Vos J). Note that payment by an agent is 'legally equivalent' to payment by the agent's principal, and payment to an agent is 'legally equivalent' to payment to the agent's principal: *ITC* (SC) (n 20) [48] (Lord Reed). Consequently, if F is acting as an agent of C, D, or X, then the case is of Type 1 or 2.

[44] *Menelaou* (SC) (n 15). For the facts, see page 12.

[45] *ITC* (SC) (n 20) [72] (Lord Reed).

[46] *ITC* (SC) (n 20) [71] (Lord Reed).

[47] Frederick Wilmot-Smith, 'A Prudent Decision' (2019) 135 LQR 195, 198.

to find authority which directly addresses this technical point. The closest seems to be *Hirachand Punamchand v Temple*.[48] There, Sir Richard Temple paid X 650 Rupees in order to settle the 1,953 Rupee debt of his son, Lieutenant Temple. X then sued Lieutenant Temple for the balance of 1,303 Rupees.

The Court of Appeal held that Lieutenant Temple was not liable as Sir Richard had discharged his debt. X knew that Sir Richard paid in order to discharge the whole debt, so X could not treat the payment as only a partial discharge: X 'could only accept [Sir Richard's] money on the terms upon which it was offered'.[49]

This suggests that, once X accepts C's payment, X cannot choose whether or not it discharges D's debt. As Birks and Beatson put it: 'a payment in discharge is a self-executing transaction leaving the recipient creditor with nothing more to do'.[50] As a result, it would be artificial to treat the payment and the discharge as separate transactions. There is only one transaction: a payment which discharges.

Thus, while in *ITC* there was no transfer of value because there was two separate transactions, this problem does not affect **Type 1** subrogation cases.

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48 *Hirachand Punamchand v Temple* [1911] 2 KB 330 (CA).

49 *Hirachand* (n 48) 342 (Farwell LJ). See also 338–39 (Fletcher Moulton LJ), cf 336 (Vaughan Williams LJ).

50 Peter Birks and Jack Beatson, 'Unrequested Payment of Another's Debt' (1976) 92 LQR 188, 197. See also 194; Daniel Friedmann, 'Payment of Another's Debt' (1983) 99 LQR 534, 539, 542. Also implicit in *Strong v Bird* (1874) LR 18 Eq 315; *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (QB) 699D–H (Robert Goff J); Mitchell and Watterson (n 5) ch 2; Mitchell, Mitchell, and Watterson (n 5) paras 5-54 – 5-73. cf *Absa Bank Ltd v Moore* [2016] ZACC 34 [32] (Cameron J); Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) ('*Restitution*') 463.

This accords with Lord Reed's treatment of 'the case where [C] discharges a debt owed by [D] to [X]' as a 'transfer of value' from C and D.[51]

In **Type 2** cases, C pays D, then D pays X, discharging D's debt to X. When C pays D, there is a transfer of value from C to D.[52] For subrogation, however, the relevant enrichment is not D's receipt of the money. Rather, it the discharge of D's debt to X.[53] C is only linked to this discharge via two transactions: the transaction between C and D (when C pays D), and the transaction between D and X (when D pays X, discharging D's debt). Thus, analogously to *ITC*, there are two transactions interposed between C and D's enrichment. Consequently, applying *ITC*, there appears to be no transfer of value from C to D in respect of the discharge of D's debt. Subrogation does not share *ITC*'s requirement of a transfer of value.

In **Type 3** cases, C pays F, who then pays X, discharging D's debt to X. Again, like *ITC*, there are two separate transactions: first, between C and F; and second, between F and X. Applying *ITC*, there is no transfer of value from C to X. C is only connected to D's enrichment via the payment to X. Thus, if there is no transfer of value from C to X, then it follows a fortiori that there is no transfer of value from C to D.

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[51] *ITC* (SC) (n 20) [49].

[52] *ITC* (SC) (n 20) [46] (Lord Reed).

[53] See n 5 on page 54.

In **Type 4** cases, C releases F's property from a charge, the property is sold, and X is paid from the proceeds, discharging D's debt to X. There are three transactions interposed between C and D's enrichment: first, the release of C's charge; second, the sale of F's property; and third, the payment to X which discharges D's debt to X. Again, the result in *ITC* suggests there is no transfer of value from C to D here, as Cutts observes.[54]

On the face of it, then, there is no transfer of value in **Type 2**, **3**, and **4** subrogation cases in respect of the primary enrichment. Consequently, it seems that direct claims require a transfer of value whereas subrogation does not. Subrogation seems to be governed by different rules to direct claims. This conclusion might be rebutted if subrogation cases fitted into one of Lord Reed's 'equivalents' to a transfer of value, such as 'co-ordinated transactions' or tracing.[55] However, this possibility will be rejected in Sections 2.5.4 and 2.5.5.

Furthermore, in all four types of case, there is no transfer of value in respect of secondary enrichments. In *BFC*, for example, C's loan to D was used to partially discharge X's first charge, which increased the value of OOL's second charge.[56]

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54 Tatiana RS Cutts, 'Modern Money Had and Received' (2018) 38 OJLS 1, 23. See also Eli Ball, 'At the Claimant's Expense' (2014) 130 LQR 13, 16; Claudia Wilmot-Smith, 'Unjust Enrichment and the Direct Transfer Rule: *Investment Trust Companies v Revenue and Customs Commissioners*' (2017) 14 International Corporate Rescue 373, 373.

55 *ITC* (SC) (n 20) [48], [50].

56 *BFC* (n 6).

Cutts observes that 'OOL was [not] a party to the impugned loan' from C to D.[57] Accordingly, there was no 'transactional nexus between [C] and [OOL]' and so no transfer of value from C to the secondary enrichee.[58] As *Goff and Jones* says: it 'is difficult to explain why such secondary enrichments are "at the expense of" [C], except by means of a causal test',[59] which *ITC* rejected.[60]

2.5.3 Directness

In addition to requiring a transfer of value, the Supreme Court in *ITC* held that the transfer 'usually' — perhaps always — must be 'direct'.[61] Lord Reed gave examples, but did not define 'direct'.[62] *Goff and Jones* observes that "'[d]irect transfer" has no natural or agreed meaning',[63] and suggests that the rule is unhelpful.[64] Nevertheless, the authors say that 'direct transfer' is '[b]roadly' understood to mean that 'claims should not be allowed against ... parties who have been enriched through the action of a third party who has himself dealt with

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57 Cutts, 'Modern Money Had and Received' (n 54) 23.

58 Cutts, 'Modern Money Had and Received' (n 54) 22.

59 Mitchell, Mitchell, and Watterson (n 5) para 6-53. See also Watterson, 'Direct Transfers' (n 17) 459.

60 *ITC* (SC) (n 20) [37]–[38], [52], [56]–[57], [72] (Lord Reed).

61 *ITC* (SC) (n 20) [46], [50] (Lord Reed). cf *Swynson* (n 5) [114]–[116] (Lord Neuberger).

62 *ITC* (SC) (n 20) [46]–[51].

63 Mitchell, Mitchell, and Watterson (n 5) para 6-22, repeating verbatim Watterson, 'Direct Transfers' (n 17) 442.

64 Mitchell, Mitchell, and Watterson (n 5) paras 6-21 – 6-25. See also Watterson, 'Direct Transfers' (n 17) 439–48.

[C]'.[65] In the same vein, Burrows requires that 'the benefit obtained by [D] is directly from [C] rather than from a third party'.[66] Similar definitions of directness are offered by other writers.[67]

In this context, the word 'direct' has a different meaning compared to when 'direct unjust enrichment claims' are contrasted with subrogation. In the latter context, 'direct' means without a detour into the idea that C's new rights resemble X's extinguished rights.[68] By contrast, the need for a 'direct' transfer of value means that D must be enriched by C and not by a third party.

In all four types of subrogation case, a payment to X discharges D's debt to X. This requires X to accept the payment.[69] Does this offend *ITC*'s directness rule? Applying the definition of directness in *Goff and Jones*, is D enriched 'through the action [ie, accepting payment] of a third party [ie, X]'?[70] Applying Burrows'

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65 Mitchell, Mitchell, and Watterson (n 5) para 6-17. See also Watterson, 'Direct Transfers' (n 17) 439; Mitchell, 'End of the Road for the Overpaid Tax Litigation?' (n 36) 239.

66 Burrows, *Restatement* (n 5) 48. See also Burrows, *Restitution* (n 50) 69–70; Burrows, '"At the Expense of the Claimant"' (n 41) 168, 174.

67 Andrew Tettenborn, 'Lawful Receipt — A Jusifying Factor?' [1997] RLR 1, 1; Lionel Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Texas LR 2115, 2155; McFarlane, 'Unjust Enrichment, Property Rights and Indirect Recipients' (n 18) 38; Virgo, *Principles* (n 15) 105–06.

68 Birks, *Introduction* (n 38) 191–92; Steve Hedley, *Restitution: Its Division and Ordering* (Sweet & Maxwell 2001) 142; Burrows, *Restitution* (n 50) 147.

69 *Hirachand* (n 48) 336 (Vaughan Williams LJ), 338–39 (Fletcher Moulton LJ), 342 (Farwell LJ); *Simms* (n 50) 695G (Robert Goff J); Friedmann (n 50) 536; J Beatson, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (Clarendon Press 1991) 204; Burrows, *Restitution* (n 50) 460, 463, 464; Watterson, 'Direct Transfers' (n 17) 444, 451; Burrows, *Restatement* (n 5) 100.

70 Mitchell, Mitchell, and Watterson (n 5) para 6-17.

definition, does D's discharge come from X's acceptance, rather than from C?[71]

One view answers these questions affirmatively. For example, in *Prudential*, the Supreme Court stated that:

> Lord Reed ... explained [in *ITC*] that, as a general rule, a cause of action based on unjust enrichment is only available in respect of a benefit which [C] has provided directly to [D] (the only true exception identified being subrogation following the discharge of a debt, which is arguably based on a different principle).[72]

On this strict view, no subrogation case complies with *ITC*'s directness rule.

However, there is a more generous view which was endorsed by Lord Reed in *ITC*:

> Although it is [X] who receives the payment from [C], [D] is directly enriched, since the payment discharges his debt: the enrichment is not the payment which [X] receives, but the discharge which [D] receives.[73]

McFarlane and Virgo both make the same argument.[74] Similarly, Burrows says that 'the benefit of the discharge is obtained by D directly from both C and X.

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[71] Burrows, *Restatement* (n 5) 48.

[72] *Prudential* (n 36) [68] (Lord Mance, Lord Reed, and Lord Hodge). See also *Menelaou* (CA) (n 15) [60] (Moses LJ); Rajiv Shah, 'Indirect Enrichment in the Supreme Court' (2017) 76 CLJ 490, 490, 492; William Day, 'Further Narrowing the Scope of Unjust Enrichment' (2019) 78 CLJ 24, 26–27; Lionel Smith, 'Restitution: A New Start?' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing 2019) 99.

[73] *ITC* (SC) (n 20) [49]. See also McFarlane, 'Unjust Enrichment, Property Rights and Indirect Recipients' (n 18) 49; Burrows, *Restatement* (n 5) 49; Virgo, *Principles* (n 15) 106. Criticised by Mitchell, Mitchell, and Watterson (n 5) para 6-18.

[74] McFarlane, 'Unjust Enrichment, Property Rights and Indirect Recipients' (n 18) 49; Virgo, *Principles* (n 15) 106.

C's payment is analogous to rendering services to D'.[75] On this more generous view, C directly enriches D despite X's involvement. Accordingly, **Type 1** — and presumably **Type 2** — subrogation cases fit *ITC*'s directness rule.[76]

Goff and Jones implies that the more generous view strains the meaning of 'direct' since 'one might have thought that [D] had received a benefit from a third party, or that [C] had conferred a benefit on a third party'.[77] But even if this thesis concedes that the more generous view is correct, **Type 3** and **4** cases still do not fit the directness rule. In those cases, F pays X, discharging D's debt to X. The more generous view allows X to drop out. But even then F, 'not C, is the direct provider of D's enrichment', as Burrows observes.[78] Burrows further suggests that, in all types of subrogation case, secondary enrichees are 'directly benefited by D not C'.[79] He therefore accepts that 'some examples of subrogation are exceptions to the "direct providers" rule'.[80]

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75 Burrows, *Restatement* (n 5) 49.

76 cf Mitchell and Watterson (n 5) paras 5.15, 5.18–5.20 treating Type 1 cases as direct and Types 2 and 3 as indirect.

77 Mitchell, Mitchell, and Watterson (n 5) para 6-18. See also Watterson, 'Direct Transfers' (n 17) 439; William Day, '"At the Expense of" in Unjust Enrichment: Causal, Direct or Intentional Transfers of Value?' [2017] LMCLQ 588, 605.

78 Burrows, *Restatement* (n 5) 51. See also *Menelaou* (CA) (n 15) [60] (Moses LJ); McFarlane, 'Unjust Enrichment, Property Rights and Indirect Recipients' (n 18) 49; Burrows, *Restitution* (n 50) 78–79.

79 Burrows, *Restitution* (n 50) 79. See also Nathan Tamblyn, 'Separating Unjust Enrichment and Subrogation' (2017) 44 Exeter LR 1, 7; Timothy Liau and Rachel Leow, 'Proprietary Restitution' in Elise Bant, Kit Barker, and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar Publishing 2020) 497.

80 Burrows, *Restatement* (n 5) 51. See also Burrows, *Restitution* (n 50) 78.

In sum, on either the strict view or the generous view, subrogation does not seem to be governed by *ITC*'s directness rule. Again, subrogation and direct unjust enrichment claims seem to be governed by different rules.

2.5.4 Co-ordinated transactions

On the face of it, then, subrogation is not governed by *ITC*'s requirement of a direct transfer of value. In *ITC*, however, Lord Reed explained *BFC* and *Menelaou* as exemplifying facts 'equivalent to a direct transfer':[81]

> These are cases in which, for the purpose of answering the 'at the expense of' question, the court has treated a set of related transactions, operating in a co-ordinated way, as forming a single scheme or transaction, on the basis that to answer the question by considering each of the individual transactions separately would be unrealistic.[82]

Accordingly, Lord Clarke was correct in *Menelaou* to say that 'the two arrangements, namely the sale of Rush Green Hall and the purchase of Great Oak Court, were not separate but part of one scheme', and so there was a transfer of value from C to D.[83]

This 'co-ordinated transactions' rule is, however, problematic for at least four reasons: it is under-inclusive in one area; over-inclusive in another; uncertain; and

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[81] *ITC* (SC) (n 20) [50].

[82] *ITC* (SC) (n 20) [61].

[83] *Menelaou* (SC) (n 15) [25] approved in *ITC* (SC) (n 20) [65]–[66] (Lord Reed); criticised Day, '"At the Expense of" in Unjust Enrichment' (n 77) 600. For the facts of *Menelaou*, see page 12.

only applied to subrogation cases.[84] Each problem will be explained in turn.

2.5.4.1 Problem 1: under-inclusive

First, the co-ordinated transactions rule is under-inclusive because it fails to establish a transfer of value in respect of secondary enrichments. *BFC* illustrates this.[85] The payments from C to Mr Herzig and from Mr Herzig to D were indeed 'co-ordinated transactions forming a single scheme' given that Mr Herzig was only interposed to avoid liability under Swiss federal banking regulations.[86] Thus, there was a transfer of value from C to D in respect of D's primary enrichment.

However, this is a separate issue from whether there was a transfer of value from C to OOL in respect of OOL's secondary enrichment. In *ITC*, Lord Reed conflated these two issues,[87] whereas Day rightly separates them.[88] OOL's second charge increased in value when C partially paid off X's first charge. But OOL was not party to any transaction. As Cutts observes, that was the very reason why the dispute arose: had OOL been bound by the postponement letter, it would have been indisputable that C had priority over OOL.[89] Thus, OOL was not party

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84 For further criticism, see Day, '"At the Expense of" in Unjust Enrichment' (n 77) 599–600.

85 *BFC* (n 6). For the facts, see page 9.

86 *BFC* (n 6) 225D (Lord Steyn), 229G (Lord Hoffmann), 238B (Lord Clyde); Day, '"At the Expense of" in Unjust Enrichment' (n 77) 599.

87 *ITC* (SC) (n 20) [62] (Lord Reed).

88 Day, '"At the Expense of" in Unjust Enrichment' (n 77) 599–600.

89 Cutts, 'Modern Money Had and Received' (n 54) 23.

to any 'co-ordinated transactions forming a single scheme'. Consequently, Lord Reed's co-ordinated transactions rule cannot establish a transfer of value from C to OOL. Despite this, the House of Lords awarded subrogation in order to reverse OOL's secondary enrichment.[90] In the leading case, therefore, subrogation succeeded even though *ITC*'s requirement of a transfer of value was not satisfied.

2.5.4.2 Problem 2: over-inclusive

There is a second problem with the co-ordinated transactions rule. If the transactions could be collapsed into a single scheme in *Menelaou*, then the same could be said of the transactions from C to the managers and from the managers to D in *ITC*.[91] The Supreme Court, however, expressly rejected this.[92] The co-ordinated transactions rule therefore appears over-inclusive, catching *ITC* when it should not.

There are at least four potential solutions to this problem. Each will be rejected in turn. First, Burrows suggests *Menelaou*

> can perhaps be justified as turning on the close family relationship involved (parents and daughter) so that [C] regarded there as being a single scheme involving the conferral of a benefit by them in return for real security. It was, arguably, a pure matter of form not substance that

90 *BFC* (n 6) 228B–F (Lord Steyn), 229B–D, 236H–37D (Lord Hoffmann), 237G–38A (Lord Clyde), 242F–H (Lord Hutton).

91 Wilmot-Smith (n 54) 376.

92 *ITC* (SC) (n 20) [71]–[72] (Lord Reed). For criticism, see Mitchell, 'End of the Road for the Overpaid Tax Litigation?' (n 36) 238.

> the conferral of the benefit and the provision of the security were in two transactions involving different parties rather than one transaction involving the same parties.[93]

This reasoning could be used to distinguish *ITC* — where there was no 'family relationship' — explaining why the transactions were co-ordinated in *Menelaou* and not *ITC*.

Burrows' argument, however, seems to contradict *Swynson*.[94] A key pillar of the Supreme Court's reasoning was that Mr Hunt and his company were distinct legal persons[95] so loss to the former could not be treated as loss to the latter.[96] By analogy, in *Menelaou*, D and her parents were — however 'close' their relationship — distinct legal persons so the conferral of a benefit on the former cannot — without more — be treated as the conferral of a benefit on the latter.

Indeed, in *Swynson*, Mr Hunt owned and controlled his company[97] but his loss could not be regarded as his company's loss. In contrast, parents do not own and control their (adult) children so, a fortiori, the conferral of a benefit on an (adult) child cannot — without more — be treated as the conferral of a benefit on the parents.

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93 Burrows, '"At the Expense of the Claimant"' (n 41) 174.

94 *Swynson* (n 5). For the facts, see page 14.

95 *Swynson* (n 5) [1] (Lord Sumption).

96 *Swynson* (n 5) [12]–[13], [17] (Lord Sumption), [46]–[50], [54] (Lord Mance), [99], [107]–[108] (Lord Neuberger).

97 *Swynson* (n 5) [2] (Lord Sumption), [38] (Lord Mance).

A 'close family relationship' is therefore not enough to explain why the transactions were co-ordinated in *Menelaou* but not *ITC*. The distinction between must be something else.

Second, in *Swynson*, Lord Neuberger stated that:

> I consider that in this case, as in [*BFC*] and in *Menelaou*, the fact that the money passed from [C] to EMSL and then from EMSL to [X] does not present a problem for an unjust enrichment claim. The new loan was advanced not merely on the basis that it was expected to be used to pay off the original loan: it was required to be used for that purpose.[98]

This suggests that two payments are co-ordinated when the first must be used to make the second. In these circumstances, however, the first payment is subject to a *Quistclose* trust, enabling C to trace through the second payment and thereby establish D's enrichment at C's expense.[99] This collapses the co-ordinated transactions rule into a tracing exercise. Given that Lord Reed listed tracing and the co-ordinated transactions rule as two different equivalents to a direct transfer, this is unlikely to be what the Supreme Court in *ITC* intended.[100]

Third, Leung and Wong suggest that two transactions are co-ordinated when the second would not have occurred but for the first.[101] For instance, in *Menelaou*,

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98 *Swynson* (n 5) [114] (citations omitted).

99 See pages 78–81.

100 *ITC* (SC) (n 20) [48], [72].

101 John Leung and Siu Yin Wong, 'Subrogation and Unjust Enrichment in the Supreme Court' [2016] LMCLQ 337, 340. cf Mitchell, Mitchell, and Watterson (n 5) para 6-28.

D would not have acquired Great Oak Court but for C releasing its charge over Rush Green Hall, so the two transactions were co-ordinated.[102] By contrast, in *ITC*, Lord Reed held that 'there is no question of the transactions ... comprising a single scheme. The first transfer did not even bring about the second transfer as a matter of causation:'[103] the managers were liable to D even before C paid the managers.[104] Causation therefore seems to explain why the transactions were co-ordinated in *Menelaou*, but not *ITC*.

Shah, however, observes that the co-ordinated transactions rule must demand something more than causation.[105] Otherwise, the rule would introduce a causal test for whether D was enriched at C's expense, which Lord Reed explicitly rejected.[106] Consequently, the reason why the transactions were co-ordinated in *Menelaou* but not in *ITC* must be something else.

Finally, *Goff and Jones* suggests that:

> the intentions of the relevant participants, and commonly, the party or parties initiating the sequence of transactions, seem to be fundamentally important ... [I]f [D]'s enrichment was the intended result of that sequence, the courts may be prepared to overlook the intermediate steps, and find a transfer of value between [C] and [D]. ...
>
> [For instance,] in *Menelaou*, the mutual understanding, of [C and

[102] *Menelaou* (SC) (n 15) [24], [27] (Lord Clarke), [66] (Lord Neuberger); Leung and Wong (n 101) 340.

[103] *ITC* (SC) (n 20) [72].

[104] *ITC* (SC) (n 20) [33] (Lord Reed).

[105] Shah, 'Indirect Enrichment in the Supreme Court' (n 72) 491–92.

[106] *ITC* (SC) (n 20) [37]–[38], [52], [56]–[57], [72].

> D's] parents, was that [C] would release its charge, to enable the sale of [Rush Green Hall] and the purchase of [Great Oak Court] for [D], over which [C] would obtain a new charge ... .[107]

This, however, does not seem to distinguish *ITC*. When the customer paid tax on the managers' services, the customer intended this tax to ultimately reach the Revenue.[108]

Perhaps, then, causation and intention are cumulative requirements for transactions to be co-ordinated. Nevertheless, this is not obvious. On its face, the co-ordinated transactions rule catches *ITC* and so proves too much.

2.5.4.3 Problem 3: uncertain

This also reveals a third problem with the co-ordinated transactions rule. Lord Reed gave little guidance as to when the rule applies[109] and, as this discussion has shown, the rule can be interpreted in different ways. The rule's uncertainty has been criticised by Leung and Wong: 'the "single composite transaction" language seems at times more conclusionary than it is explanatory and does not provide much insight as to what it is that makes these events belong to such a ... scheme'.[110]

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[107] Mitchell, Mitchell, and Watterson (n 5) paras 6-39, 6-91. See also *Boscawen v Bajwa* [1996] 1 WLR 328 (CA) 338B–39H (Millett LJ); *Relfo* (n 15) [121] (Floyd LJ); *Brazil v Durant International Corp* [2015] UKPC 35, [2016] AC 297 [38] (Lord Toulson); *CMOC Sales and Marketing Ltd v Persons Unknown* [2018] EWHC 2230 (Comm) [148] (Judge Waksman QC); Day, '"At the Expense of" in Unjust Enrichment' (n 77) 598.

[108] *ITC* (Ch) (n 15) [70] (Henderson J); Frederick Wilmot-Smith, 'Taxing Questions' (2015) 131 LQR 531, 535.

[109] Wilmot-Smith (n 54) 376.

[110] Leung and Wong (n 101) 340.

2.5.4.4 Problem 4: subrogation provides the only examples

A final problem is that the subrogation cases of *BFC* and *Menelaou* were Lord Reed's only examples of the co-ordinated transactions rule.[111] The rule only seems to apply to subrogation and has not been applied to direct claims.[112] Accordingly, even if the co-ordinated transactions rule can explain subrogation cases, this does not show that subrogation and direct claims are governed by the same rules.

2.5.4.5 Summary

To sum up, co-ordinated transactions reasoning is under-inclusive, over-inclusive, and uncertain. It is therefore an ineffective and unsatisfactory way of reconciling the subrogation cases with *ITC*'s requirement of a direct transfer of value. Yet co-ordinated transactions reasoning exists solely for this purpose, as it is only used to explain subrogation cases. As a result, it still seems that subrogation cases are not governed by the *ITC* rules and so subrogation is governed by different rules to direct claims.

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111 *ITC* (SC) (n 20) [61]–[66].

112 *CMOC* (n 107) [155(3)] (Judge Waksman QC); *Begum v Maran (UK) Ltd* [2020] EWHC 1846 (QB) [66]–[74] (Jay J).

2.5.5 Tracing

Co-ordinated transactions reasoning cannot establish a direct transfer of value in subrogation cases, but perhaps tracing can. Tracing is:

> the process by which [C] demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property.[113]

In *ITC*, Lord Reed stated that 'situations where [D] receives property from a third party into which [C] can trace an interest' are 'equivalent' to direct transfers of value.[114] By symmetry,[115] situations where D's debt is discharged using property into which C can trace an interest could be considered 'equivalent' to direct transfers of value. Accordingly, tracing can establish the equivalent of a direct transfer of value in subrogation cases, satisfying the *ITC* rules.

This fits the reasoning in *Boscawen*.[116] There, D owned property subject to X's charge. D agreed to sell the property to the Buyers. C agreed to loan to the Buyers funds for the purchase, in exchange for a charge over the property. C paid the loan to the Buyers' solicitors, who paid it to D's solicitors. D's solicitors

[113] *Foskett v McKeown* [2001] 1 AC 102 (HL) 128D (Lord Millett).

[114] *ITC* (SC) (n 20) [48], [50]. See also *BFC* (n 6) 235C–D (Lord Hoffmann); *Swynson* (n 5) [60] (Lord Mance). cf Mitchell, Mitchell, and Watterson (n 5) para 7-02 suggesting that a transfer of value and tracing are cumulative requirements for a proprietary remedy for unjust enrichment.

[115] See n 3 on page 182. See generally Chapter 8.

[116] *Boscawen* (n 107).

were authorised to pay the monies to X on completion of the sale of the property. However, D's solicitors acted too soon, and paid the monies to X before completion, partially discharging X's charge. The sale then fell through and completion never took place.

In the Court of Appeal, Millett LJ gave the only judgment. He held that the Buyers' solicitors had held the loan monies on trust for C.[117] C could then trace the monies from the Buyers' solicitors, through D's solicitors, and into the discharge of X's rights against D.[118] This enabled C to show that X's rights had been discharged at his expense and so '[D]'s unjust enrichment was at his expense'.[119] As a result, C was subrogated to X's extinguished rights against D.[120]

Consequently, tracing seems to explain how subrogation cases satisfy the *ITC* rules. On closer inspection, however, it fails to do so for three reasons. First, tracing is not possible in some subrogation cases. Second, C can never trace into a secondary enrichment. Finally, even where tracing is possible, it cannot establish a transfer of vaue. Each problem will be explained in turn.

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117 *Boscawen* (n 107) 332F.

118 *Boscawen* (n 107) 335F–338A.

119 *Boscawen* (n 107) 334E–F.

120 *Boscawen* (n 107) 334B–35F.

2.5.5.1 Problem 1: tracing not possible

To begin with, Hedley and Watterson each observe that tracing is not possible in some cases in which subrogation was awarded.[121] *Anfield* is a good example.[122] D owned property subject to X's charge. C made a loan to D, who used it to redeem X's charge. In return, C acquired a new charge ('the 2006 charge') but failed to register it. Subsequently, Anfield obtained a charging order over the property and registered it, thus obtaining priority over C's 2006 charge. However, the court held that C was subrogated to X's extinguished charge, giving it priority over Anfield.

Goff and Jones criticises the court's assumption that C's subrogated rights had priority over Anfield's registered charge.[123] However, the authors do not question that C was entitled to subrogation.

Anfield was a **Type 2** case and so on the face of it subrogation succeeded even though there was no transfer of value from C to D.[124] Nevertheless, C could try to use tracing to establish the equivalent of a direct transfer of value. C could try to trace the money it loaned to D, through D's payment to X, into the discharge of X's charge.

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[121] Hedley, *Restitution* (n 68) 144–146; Watterson, 'Subrogation' (n 3) 454–61. See also Daniel Donnelly, 'The Law of Subrogation' (PhD thesis, Trinity College Dublin 2000) <www.tara.tcd.ie/handle/2262/78350> accessed 6 January 2019, 32, 36, 307.

[122] *Anfield* (n 5). Other possible examples include *Wenlock* (n 42); *Lehman* (n 43).

[123] Mitchell, Mitchell, and Watterson (n 5) paras 39-87 – 39-94.

[124] See pages 62–70.

However, when C paid the loan monies to D, D acquired full legal and beneficial ownership of them and C lost any entitlement to them.[125] This prevents C from tracing the money any further.[126] C cannot trace through D's payment to X, so cannot trace into the discharge of X's charge. As a result, C cannot use tracing to establish the equivalent of a direct transfer of value.

To avoid this conclusion, C could argue that D held the loan monies on trust for C until they were paid to X. This '*Quistclose*' trust[127] would enable C to trace into the discharge of X's charge.[128] However, it is not clear whether a *Quistclose* trust existed in *Anfield*, especially as the court did not specify whether the loan monies were segregated from D's other assets. While segregation is not necessary for a *Quistclose* trust,[129] it is good evidence of one.[130]

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[125] *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC) 100D–01E, 102H (Lord Mustill); *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 689G–90A (Lord Browne-Wilkinson); *Re Beppler & Jacobson Ltd* [2016] EWHC 20 (Ch) ('*Re Beppler* (Ch)') [115], [117], cf [120]–[121] (Hildyard J); *ITC* (SC) (n 20) [70], [72] (Lord Reed); *Re Beppler & Jacobson Ltd* [2018] EWCA Civ 763 [60] (Gloster LJ); Hedley, *Restitution* (n 68) 144–45; Watterson, 'Subrogation' (n 3) 456.

[126] *Re Goldcorp* (n 125) 104G–H (Lord Mustill); *Boscawen* (n 107) 334E (Millett LJ); *Filby* (n 18) [16]–[19], [28]–[30] (May LJ); *ITC* (SC) (n 20) [70], [72] (Lord Reed).

[127] *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL).

[128] *Orakpo v Manson Investments Ltd* [1978] AC 95 (HL) 119C–D (Lord Keith); *Menelaou* (SC) (n 15) [100]–[103] (Lord Neuberger), [133]–[140] (Lord Carnwath); *Re Beppler* (Ch) (n 125) [118] (Hildyard J); Birks, *Introduction* (n 38) 390–91; McFarlane, 'Unjust Enrichment, Property Rights and Indirect Recipients' (n 18) 49–50; Watterson, 'Subrogation' (n 3) 456; Nicholas J McBride, *The Humanity of Private Law: Part I: Explanation* (Hart Publishing 2019) 218–19.

[129] *Re Kayford Ltd* [1975] 1 WLR 279 (Ch) 282 (Megarry J); *Re Farepak Food and Gifts Ltd* [2006] EWHC 3272 (Ch), [2008] BCC 22 [34] (Mann J).

[130] *Quistclose* (n 127) 579E (Lord Wilberforce); *Re Kayford* (n 129) 282 (Megarry J); *Re Farepak* (n 129) [34] (Mann J); *Patel v Mirza* [2014] EWCA Civ 1047, [2015] Ch 271 [18] (Rimer LJ), [91] (Gloster LJ); *ITC* (SC) (n 20) [70] (Lord Reed).

In *Anfield*, then, tracing may not be possible. If tracing is not possible, then it cannot establish a direct transfer of value. Yet subrogation succeeded despite this. Subrogation, therefore, may not be governed by *ITC*'s requirement of a direct transfer of value, and may be governed by different rules to direct claims.

Goff and Jones acknowledges this:

> There are undoubtedly [unjust enrichment] cases which proceed on the assumption that C's claim against D ... rests on C's having title to the asset received by D, and that this proprietary link is a necessary component of C's claim. There are other cases that have afforded [C] a [subrogation] remedy where transactional links exist, but without undertaking an inquiry into the existence of any 'proprietary link'. It may be that such a link could be constructed, in many of these cases, if this were thought necessary. However, the fact remains that in the relevant cases, this inquiry was not undertaken ... .[131]

The authors use this as evidence for their view that direct claims require 'that D would not have been abstractly enriched "but for" the defective transfer from C's wealth'.[132] But that was before *ITC*. Now, the Supreme Court has rejected a causal 'at the expense of' test.[133] Cases like *Anfield* may no longer fit the rules applicable to direct claims.

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131 Mitchell, Mitchell, and Watterson (n 5) para 6-70 (footnotes omitted) citing, inter alia, *Wenlock* (n 42); *Chetwynd* (n 42); *Butler v Rice* [1910] 2 Ch 277 (Ch); *Filby* (n 18) [46], [52], [62] (May LJ). See also *Menelaou* (SC) (n 15) [85] (Lord Neuberger); Watterson, 'Direct Transfers' (n 17) 464; Watterson, 'Subrogation' (n 3) 459–61.

132 Mitchell, Mitchell, and Watterson (n 5) para 6-70. See also Watterson, 'Direct Transfers' (n 17) 465.

133 *ITC* (SC) (n 20) [37]–[38], [52], [56]–[57], [72] (Lord Reed).

2.5.5.2 Problem 2: secondary enrichments

Furthermore, tracing cannot explain why secondary enrichments come at C's expense. A secondary enrichee never receives any property, nor is one of its debts discharged.[134] As a result, the secondary enrichee has nothing which C can claim is its property, or the substitute of its property. Instead, the discharge of D's debt to X causes the secondary enrichee's pre-existing rights to increase in value. But this causal link is insufficient for tracing; tracing requires transactional links.[135] It has already been shown that there are no transactional links between C and any secondary enrichments.[136] Consequently, tracing cannot explain why secondary enrichments come at C's expense.

2.5.5.3 Problem 3: no transfer of value

Finally, even in cases like *Boscawen* where C can trace into the discharge of X's rights against D,[137] this cannot establish a transfer of value from C to D,[138] so

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134 *Swynson* (n 5) [62] (Lord Mance); Robert Stevens, 'The Unjust Enrichment Disaster' (2018) 134 LQR 574, 593; Liau and Leow (n 79) 497.

135 eg *Foskett* (n 113) 128 (Lord Millett); *Menelaou* (SC) (n 15) [128] (Lord Carnwath); Andrew Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 LQR 412, 417; Burrows, *Restitution* (n 50) 120; James Edelman and Elise Bant, *Unjust Enrichment* (2nd edn, Hart Publishing 2016) 115. cf Tatiana Cutts, 'Tracing, Value and Transactions' (2016) 79 MLR 381, 397–403; Mitchell, Mitchell, and Watterson (n 5) paras 7-31 – 7-46.

136 See page 71.

137 See page 78. For another example, see *Filby* (n 18) [28]–[31] (May LJ).

138 Lionel Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (2000) 116 LQR 412, 420; Burrows, 'Proprietary Restitution' (n 135) 417 (text to fn 29); Burrows, *Restitution* (n 50) 76; Burrows, *Restatement* (n 5) 7–9 (separating transfers of value from tracing);

cannot satisfy the *ITC* rules.

In *ITC*, Lord Reed stated that tracing could establish the 'equivalent' of a direct transfer of value.[139] His reasoning was that since 'the property [traced into] is, in law, the equivalent of [C]'s property, [D] is therefore treated as if he had received [C]'s property'.[140] However, even if D received C's property, this does not establish a transfer of value from C to D or its 'equivalent'. As Smith explains:

> if you possess something I own (call it A), and you transfer it away in exchange for something else (call it B), then I can claim ownership of B. ... Although there was a transfer of wealth from [me] to [you] when [you] acquired asset A, there is not another transfer when the substitution is made. [You do] not get asset B as a transfer from [me], the owner of A; rather, [you get] B from (at the expense of) some third party.[141]

In other words, there are two separate transactions which, analogously to *ITC*,[142] cannot be collapsed into single transfer of value.[143]

There are further differences between tracing and a transfer of value. A transfer of value measures value abstracted from any particular asset, whereas tracing

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Burrows, '"At the Expense of the Claimant"' (n 41) 168 fn 10, 170–71, 174 fn 41; Day, '"At the Expense of" in Unjust Enrichment' (n 77) 601.

139 *ITC* (SC) (n 20) [48], [50].

140 *ITC* (SC) (n 20) [48].

141 Smith, 'Restitution' (n 67) 2157–58. See also Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (n 138) 424–25.

142 *ITC* (SC) (n 20) [71] (Lord Reed).

143 Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (n 138) 420.

identifies (a) specific asset(s).[144] As such, tracing operates independently of whether an asset was valuable, or whether D was enriched, in direct contrast to a transfer of value.[145] As Burrows observes, this means that tracing 'may give [C] a higher value claim against [D]' than a transfer of value.[146]

Thus, transfers of value and tracing are different, not 'equivalent' as Lord Reed suggested in *ITC*.[147] Invoking tracing, therefore, cannot disturb the conclusion that direct claims require a transfer of value whereas subrogation does not.

To sum up, Section 2.5.2 showed that subrogation is not governed by *ITC*'s requirement of a transfer of value, and Section 2.5.3 showed that subrogation is not governed by *ITC*'s directness rule. Sections 2.5.4 and 2.5.5 then showed that these conclusions cannot be escaped using co-ordinated transactions reasoning or tracing. In short, subrogation is not governed by *ITC*'s requirement of a direct

144 *Foskett* (n 113) 128D, 129E–G (Lord Millett); Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (n 138) 419–20; Smith, 'Restitution' (n 67) 2159; Lionel Smith, 'Tracing' in Andrew Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 126–29, 135–37; Chambers, 'Two Kinds of Enrichment' (n 3) 246–47, 260; Lionel Smith, 'Philosophical Foundations of Proprietary Remedies' in Robert Chambers, Charles Mitchell, and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 298–99, 303–04; Richard Nolan, 'Civil Recovery After Fraud' (2015) 131 LQR 8, 12; Cutts, 'Tracing, Value and Transactions' (n 135) 394–95; Mitchell, Mitchell, and Watterson (n 5) paras 6-68, 7-28 – 7-30, 7-63 – 7-66; Day, '"At the Expense of" in Unjust Enrichment' (n 77) 601; Day, 'Further Narrowing the Scope of Unjust Enrichment' (n 72) 27.

145 *Foskett* (n 113) 129E–G (Lord Millett); Smith, 'Tracing' (n 144) 126–29, 135–37; Chambers, 'Two Kinds of Enrichment' (n 3) 259–60; Watterson, 'Direct Transfers' (n 17) 465; Cutts, 'Tracing, Value and Transactions' (n 135) 392–96; Mitchell, Mitchell, and Watterson (n 5) paras 6-68, 7-28 – 7-29; Sir Philip Sales, 'The Future of Tracing: Practical and Conceptual Issues' [2017] RLR 183, 186. See also Leung and Wong (n 101) 344.

146 Burrows, *Restatement* (n 5) 58.

147 *ITC* (SC) (n 20) [48], [50].

transfer of value, and therefore subrogation is governed by different rules to direct unjust enrichment claims.

2.5.6 Incidental benefits

Furthermore, subrogation is not governed by *ITC*'s rule against incidental benefits. Lord Reed formulated this rule as follows:

> [C] must ... incur a loss through the provision of the benefit. ... That requirement will not normally be satisfied where the provision of the benefit was merely an incidental or collateral result of ... the reason why the expenditure was incurred.[148]

This rule does not apply to subrogation in common liability cases, in misappropriation cases, and in respect of secondary enrichments. Each problem will be explained in turn.

First, in common liability cases, C and D owe a common debt to X. If C pays X, discharging the common debt, it is generally because C is legally obliged to.[149] It is seldom because C wants to benefit D. For example, a commercial guarantor honours its guarantee because it has to, not because it wants to improve the

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[148] *ITC* (SC) (n 20) [52]. cf Mitchell and Watterson (n 5) para 4.13.

[149] Jonathan Hilliard, 'A Case for the Abolition of Legal Compulsion as a Ground of Restitution' (2002) 61 CLJ 551, 551; Burrows, *Restatement* (n 5) 55; Day, '"At the Expense of" in Unjust Enrichment' (n 77) 594; Shah, 'Indirect Enrichment in the Supreme Court' (n 72) 492; Rajiv Shah, 'Reasons for Unjust Enrichment' (PhD thesis, University of Cambridge 2018) <www.repository.cam.ac.uk/handle/1810/290112> accessed 29 March 2020, 38–39; Smith, 'Restitution' (n 72) 99.

position of the principal debtor.[150] Indeed, by bringing subrogation proceedings against D, C shows that it has no intention of benefiting D. Accordingly, D's benefit is 'incidental or collateral to the reason why the expenditure was incurred'. As such, many common liability cases fall foul of the rule against incidental benefits.[151] Burrows and Mitchell acknowledge this by treating common liability cases as justified exceptions to the rule against incidental benefits.[152]

Second, in misappropriation cases, money held on trust for C is paid to X without C's consent, discharging D's debt to X. In these cases, D's benefit is 'incidental or collateral to the reason why the expenditure was incurred' as C had no reason to incur the expenditure. Misappropriation cases, then, also fall foul of the rule against incidental benefits.

Finally, practically all secondary enrichments are ruled out, as C seldom discharges D's debt in order to benefit secondary enrichees.[153] In *BFC*, C did not partially pay off X's first charge in order to increase the value of OOL's second charge.[154] In fact, the ineffective postponement letter showed that C did not

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150 Day, '"At the Expense of" in Unjust Enrichment' (n 77) 594.

151 Day, '"At the Expense of" in Unjust Enrichment' (n 77) 594; Shah, 'Indirect Enrichment in the Supreme Court' (n 72) 492; Burrows, '"At the Expense of the Claimant"' (n 41) 176–77; Stevens, 'The Unjust Enrichment Disaster' (n 134) 579 fn 24; Smith, 'Restitution' (n 72) 98–99. cf Burrows, *Restatement* (n 5) 55.

152 Charles Mitchell, *The Law of Contribution and Reimbursement* (OUP 2003) para 3.31; Burrows, '"At the Expense of the Claimant"' (n 41) 177; Andrew Burrows, 'In Defence of Unjust Enrichment' (2019) 78 CLJ 521, 542.

153 Mitchell and Watterson (n 5) para 4.11 cf para 4.13.

154 *BFC* (n 6). For the facts, see page 9.

intend to improve OOL's position at all. Thus, the benefit received by OOL was 'incidental or collateral to the reason why the expenditure was incurred'. Therefore, as Day observes, C's subrogation claim against OOL fell foul the rule against incidental benefits.[155] But C's claim succeeded, showing that the rule against incidental benefits does not apply to subrogation.

ITC's rule against incidental benefits is therefore another rule which applies to direct claims but not subrogation.

2.6 Summary

This chapter showed that subrogation is not governed by the rules which determine whether there was an enrichment at C's expense in a direct claim. It began by rehearsing Watterson's argument that direct claims reverse 'factual' enrichments whereas the primary enrichment reversed by subrogation is 'legal'.

The remainder of the chapter considered the rules for determining whether an enrichment came at C's expense. Before *ITC*, subrogation shared the same broad 'at the expense of' rules as direct unjust enrichment claims. However, in *ITC*, the Supreme Court rejected these expansive rules and laid down narrower rules for direct claims. This chapter asked whether subrogation is governed by the *ITC*

[155] Day, '"At the Expense of" in Unjust Enrichment' (n 77) 600. See also Sonja Meier, 'Enrichment "At the Expense of Another" and Incidental Benefits in German Law' [2019] Acta Juridica 453, 462.

rules.

Table 2.1 summarises the results. It shows that, at best,[156] only **Type 1** lending cases can be reconciled with the *ITC* rules. Even in these cases, it is only the primary enrichment which comes at C's expense according to the *ITC* rules. Secondary enrichments, common liability cases, misappropriation cases, and **Type 2**, **3** and **4** lending cases are not governed by the *ITC* rules. In *Anfield*, *BFC*, *Butler*, *Niru Battery*, and *Menelaou* subrogation succeeded, whereas the *ITC* rules would now bar a direct claim.

It follows that subrogation is not governed by these rules. Subrogation does not share *ITC*'s requirement of a transfer of value from C to D. Subrogation is not governed by *ITC*'s directness rule, or its rule against incidental benefits. Co-ordinated transactions reasoning and tracing fail to overcome these difficulties. In short, the *ITC* rules apply to direct unjust enrichment claims but not subrogation; direct claims are governed by different rules to subrogation.

[156] See pages 66–69.

<table>
<tr><th></th><th colspan="4">Primary enrichment</th><th>Secondary enrichments</th></tr>
<tr><th></th><th>Type 1
C pays X</th><th>Type 2
C pays D, who pays X</th><th>Type 3
C pays F, who pays X</th><th>Type 4
Menelaou</th><th></th></tr>
<tr><td>Prima facie, is there a transfer of value from C to D?</td><td>Yes
(pages 62–64)</td><td>No
(page 64)</td><td>No
(page 64)</td><td>No
(page 65)</td><td>No
(page 65)</td></tr>
<tr><td>Prima facie, is the directness rule complied with?</td><td colspan="2">Yes?
(pages 66–69)</td><td colspan="2">No
(page 69)</td><td>No
(page 69)</td></tr>
<tr><td>Can the co-ordinated transactions rule nevertheless establish a direct transfer?</td><td>N/A</td><td colspan="3">No
(pages 72–77)</td><td>No
(pages 71–77)</td></tr>
<tr><td>Can tracing nevertheless establish a direct transfer?</td><td>N/A</td><td colspan="2">No
(pages 80–85)</td><td>No
(pages 83–85)</td><td>No
(pages 83–85)</td></tr>
<tr><td>Is the incidental benefits rule complied with?</td><td colspan="4">Not in misappropriation and common liability cases
(pages 86–87)</td><td>No
(page 87)</td></tr>
<tr><td>Overall, are the ITC rules satisfied?</td><td>Yes? but only in lending cases</td><td>No</td><td>No</td><td>No</td><td>No</td></tr>
</table>

Table 2.1: Summary of Chapter 2

3 Unjust

3.1 Introduction

In an unjust enrichment claim, the third question is whether D's enrichment was unjust.[1] In direct claims, this requires C to prove one of a list of 'unjust factors' or 'grounds for restitution'.[2] Mitchell and Watterson write that:

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[1] See n 62 on page 16.

[2] *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558 ('*DMG*') [21] (Lord Hoffmann); *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19, [2012] 2 AC 337 [162] (Lord Sumption); *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2018] AC 313 [22] (Lord Sumption); Charles Mitchell and Stephen Watterson, *Subrogation: Law and Practice* (rev edn, OUP 2007) para 6.02; Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011)

> In principle ... any recognized ground of restitution should be capable of justifying subrogation in appropriate circumstances. But, equally clearly, *only* a recognized ground of restitution should be capable of supporting the remedy of subrogation: in this respect it is no different from any other remedy for unjust enrichment.[3]

The authors add that 'secondary liability, ignorance, mistake and failure of consideration ... are the grounds which can most commonly support a subrogation claim in practice'.[4]

Secondary liability is said to be the unjust factor in common liability cases.[5] Part I is not concerned with common liability cases[6] and so secondary liability will not be discussed here. It will, however, be examined in Chapter 9.

Furthermore, this part of the thesis is concerned with the question of whether subrogation is governed by the same rules as direct unjust enrichment claims. It is unclear whether ignorance is an unjust factor in direct unjust enrichment claims so

('*Restitution*') 95–116; Charles Mitchell, Paul Mitchell, and Stephen Watterson, *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) paras 1-22 – 1-24. cf *DMG* (n 2) [22] (Lord Hoffmann), [158] (Lord Walker).

3 Mitchell and Watterson (n 2) para 6.02 (original emphasis). See also Burrows, *Restitution* (n 2) 147, 148, 167; Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) ('*Restatement*') 173; Mitchell, Mitchell, and Watterson (n 2) paras 39-24 – 39-27; Stephen Watterson, 'Modelling Subrogation as an "Equitable Remedy"' (2016) 2 CJCCL 609, 619.

4 Mitchell and Watterson (n 2) para 6.02. See also Burrows, *Restitution* (n 2) 147, 148, 167; Burrows, *Restatement* (n 3) 173; Mitchell, Mitchell, and Watterson (n 2) paras 39-24 – 39-27; Watterson, 'Modelling Subrogation as an "Equitable Remedy"' (n 3) 619.

5 Mitchell and Watterson (n 2) para 6.04; Mitchell, Mitchell, and Watterson (n 2) para 39-27. Burrows calls this factor 'legal compulsion': Burrows, *Restitution* (n 2) 148; Burrows, *Restatement* (n 3) 173. In substance, however, little turns on this difference: Burrows, *Restitution* (n 2) 437; Burrows, *Restatement* (n 3) 99.

6 See page 47.

ignorance will not be discussed here. This controversy will, however, be examined in Chapter 8.

Instead, this chapter examines the unjust factors of mistake and failure of basis (also known as failure of consideration). It is uncontroversial that these unjust factors can support a direct claim.[7] Section 3.2 shows that some subrogation cases rely on, and are consistent with, these unjust factors. However, Section 3.3 shows that subrogation is not governed by the restrictions on these unjust factors. A defeated unilateral expectation about the future cannot ground the unjust factor of mistake or failure of basis in direct claims. By contrast, in subrogation cases a defeated unilateral expectation about the future can render D's enrichment unjust. This was confirmed by the Supreme Court in *Swynson*,[8] as Section 3.4 explains. Section 3.5 therefore concludes that a defeated unilateral expectation about the future can render D's enrichment unjust in subrogation cases, whereas this is not so in direct claims. Again, subrogation and direct claims are governed by different rules; subrogation succeeds where a direct claims fails and so subrogation is not redundant.

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[7] See n 9 on page 94 and n 12 on page 94.

[8] *Swynson* (n 2).

3.2 Mistake and failure of basis

In brief, the unjust factor of mistake requires that D would not have been enriched but for C's mistaken conscious belief, or mistaken tacit assumption, about the past or present.[9] *BFC* is an example of a subrogation case where the court relied on this unjust factor.[10] But for its mistaken belief that Mr Herzig had authority to bind OOL to the postponement letter, C would not have loaned money to D to partially pay off X's charge.[11]

Failure of basis requires that C's enrichment of D was subject to a condition which failed.[12] *Lehman* is an example of a subrogation case which relies on this unjust factor.[13] There, one company, Brookdane, owned another, D. C loaned money to Brookdane. Brookdane used the loan to discharge X's charge over D's property. C had contracted with Brookdane for a charge over D's property, and D

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9 eg *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (QB) 695C (Robert Goff J); *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50, [2002] 1 All ER (Comm) 193 [28] (Lord Bingham and Lord Goff); *DMG* (n 2) [59]–[60] (Lord Hope), [84] (Lord Scott), [143] (Lord Walker); *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 [108] (Lord Walker).

10 *Banque Financière de la Cité SA v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) ('*BFC*'). For the facts, see page 9.

11 *BFC* (n 10) 227E (Lord Steyn), 234G–35A (Lord Hoffmann); Mitchell and Watterson (n 2) para 6.60.

12 eg *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (HL) 48 (Viscount Simon LC); *Barnes v Eastenders Cash & Carry plc* [2014] UKSC 26, [2015] AC 1 [103]–[116] (Lord Toulson).

13 *Lehman Commercial Mortgage Conduit Ltd v Gatedale Ltd* [2012] EWHC 848 (Ch), The Times, 6 July 2012.

executed a third party charge in favour of C. But legislation rendered this charge void. Prima facie, then, C was unsecured.

However, Vos J held that D was unjustly enriched at C's expense, and so C was subrogated to X's extinguished charge over D's property. Vos J held that the unjust factor was that C 'bargained for the charge over the property but did not get it ... [and] had made [the charge] a condition of the transaction'.[14] In other words, the basis upon which C enriched D had failed.

Many other subrogation cases are consistent with the unjust factors of mistake and failure of basis.[15]

3.3 Defeated unilateral expectations

However, the rules which restrict the unjust factors of mistake and failure of basis in direct claims do not apply to subrogation. Giving the leading judgment in *Menelaou*, Lord Clarke stated that:

> the unjust factor ... in subrogation cases [is usually], either (1) that the lender was acting pursuant to the mistaken assumption that it would obtain security which it failed to obtain or (2) failure of consideration.

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[14] *Lehman* (n 13) [28].

[15] eg *Chetwynd v Allen* [1899] 1 Ch 353 (Ch); *Butler v Rice* [1910] 2 Ch 277 (Ch); *Halifax Plc v Omar* [2002] EWCA Civ 121, [2002] 2 P&CR 26; *Cheltenham & Gloucester Plc v Appleyard* [2004] EWCA Civ 291; Mitchell and Watterson (n 2) paras 6.51–6.97; Burrows, *Restitution* (n 2) 151; Burrows, *Restatement* (n 3) 173; Mitchell, Mitchell, and Watterson (n 2) para 39-26.

> On the facts here [C] expected to have a first legal charge over Great Oak Court securing the debts of [D's] parents ... but, as events turned out, it did not ... .[16]

Swadling[17] and Virgo[18] have each observed that this reasoning is inconsistent with the rules which restrict the unjust factors of mistake and failure of basis in direct claims. A lender's 'mistaken assumption that it would obtain security':[19] 'does not involve a mistake as to existing facts, but rather a misprediction as to what might occur in the future. And ... a misprediction is not a ground of restitution'.[20] Meanwhile, failure of basis:

> depends on the purpose or motive of [C] in transferring an enrichment to [D], only if such a purpose or motive had been communicated to [D] before the enrichment was transferred, so that [D] had an opportunity to object to it. Consequently it is necessary to establish that the basis can be considered to be shared. This could not be established on the facts of [*Menelaou*], since [D] was unaware of [the] arrangement [for C to obtain a charge over Great Oak Court].[21]

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16 *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66, [2016] AC 176 ('*Menelaou* (SC)') [21]–[22] (citations omitted). For the facts, see page 12.

17 William Swadling, 'In Defence of Formalism' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing 2019) 116–17.

18 Graham Virgo, 'Restitution and Unjust Enrichment in the Supreme Court: Reflections on *Bank of Cyprus UK Ltd v Menelaou*' [2016] University of Cambridge Faculty of Law Research Paper No 10/2016 <https://ssrn.com/abstract=2724024> accessed 30 September 2017, 11–12.

19 *Menelaou* (SC) (n 16) [21] (Lord Clarke).

20 Virgo, 'Restitution and Unjust Enrichment in the Supreme Court' (n 18) 11, citing *Pitt* (n 9) [104] (Lord Walker). See also *Dextra Bank* (n 9) [29] (Lord Bingham and Lord Goff); Mitchell and Watterson (n 2) paras 6.52, 6.63. cf Jessica Palmer, 'Unjust Enrichment, Proprietary Subrogation and Unsatisfactory Explanations' (2016) 28 Singapore Academy of Law Journal 955, para 8 fn 15.

21 Virgo, 'Restitution and Unjust Enrichment in the Supreme Court' (n 18) 12, citing *Burgess*

In short, Lord Clarke's unjust factor reasoning does not fit with rules which apply to direct claims.

However, Mitchell identifies a mistake about the present which could have satisfied the rules which apply to direct claims. Mitchell writes that C 'mistakenly believed at the time when it released the charges on [Rush Green Hall] that D was aware of her parents' arrangements, and was willing to grant [C] a new charge over [Great Oak Court]'.[22] Thus, the result of *Menelaou* is consistent with the rules which apply to direct claims, even though Lord Clarke's unjust factor reasoning is not.

The same can be said of *Filby v Mortgage Express (No 2) Ltd.*[23] Mr and Mrs Filby owned a house, subject to X's mortgage. Mr Filby remortgaged the property with C, forging Mrs Filby's signature. This forgery meant that Mrs Filby was not bound by C's mortgage. However, May LJ, giving the judgment of the Court of Appeal, held that C was subrogated to X's extinguished personal rights against Mrs Filby.

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v Rawnsley [1975] Ch 429 (CA) 442C (Browne LJ); *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB) [286] (Stadlen J); *Lissack v Manhattan Loft Corp Ltd* [2013] EWHC 128 (Ch) [88] (Roth J). See also *Barnes* (n 12) [106], [115] (Lord Toulson); *Spaul v Spaul* [2014] EWCA Civ 679 [46]–[47] (Rimer LJ); *Swynson* (n 2) [30] (Lord Sumption); Mitchell and Watterson (n 2) para 6.74; Burrows, *Restitution* (n 2) 220; Burrows, *Restatement* (n 3) 88; Mitchell, Mitchell, and Watterson (n 2) paras 13-02 – 13-05.

22 Charles Mitchell, 'Current Issues in Unjust Enrichment: The "Time Value" of Money and Proprietary Remedies for Failure of Basis' [2017] <https://ssrn.com/abstract=3055715> accessed 21 October 2017, 10.

23 *Filby v Mortgage Express (No 2) Ltd* [2004] EWCA Civ 759.

May LJ said that the unjust factor was that C 'mistakenly believed that their advance was to be secured by a first legal charge'.[24] Just as in *Menelaou*, this is a misprediction of the future, not a mistake about the past or present. The Court therefore ignored the rule in direct claims that mispredictions are not actionable.

Once again, however, Mitchell and Watterson identify a mistake about the past which could have served as the unjust factor: 'unknown to [C], the consent of [Mrs Filby] ... was forged'.[25] Like *Menelaou*, the Court's conclusion that there was an unjust factor fits the rules which apply to direct claims, even if the Court's reasoning does not.

It seems that there are only three lending cases in which subrogation was awarded even though there was no mistake or failure of basis which could serve as the unjust factor. These cases were *Reversion Fund*,[26] *Mayfair*,[27] and *Anfield*.[28]

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[24] *Filby* (n 23) [48].

[25] Mitchell and Watterson (n 2) para 6.59. The authors also suggest failure of basis: para 6.82. However, like D in *Menelaou*, Mrs Filby was unaware of transaction so did not share C's basis: *Filby* (n 23) [10] (May LJ).

[26] *Reversion Fund and Insurance Co Ltd v Maison Cosway Ltd* [1913] 1 KB 364 (CA); Steve Hedley, *Restitution: Its Division and Ordering* (Sweet & Maxwell 2001) 138, 140. For discussion, see pages 258–261.

[27] *National Westminster Bank Plc v Mayfair Estates Property Investments Ltd* [2007] EWHC 287 (Ch). There was no mistake about the past or present: *Mayfair* [13] (Sir Donald Rattee). C's basis was not shared with the secondary enrichee: *Mayfair* [18] (Sir Donald Rattee). Therefore, failure of basis could not render the secondary enrichment unjust: see n 21 on page 97. Consequently, there was no unjust factor rendering the secondary enrichment unjust. Despite this, C was entitled to subrogation to reverse the secondary enrichment: *Mayfair* [24] (Sir Donald Rattee).

[28] *Anfield (UK) Ltd v Bank of Scotland Plc* [2010] EWHC 2374 (Ch), [2011] 1 WLR 2414. The analysis of *Mayfair* (n 27) applies equally here.

Nevertheless, these cases will not be discussed here, for two reasons. To begin with, they are marginal authorities. Only *Reversion Fund* is an appellate decision. The cases are sometimes dismissed as wrongly decided.[29] Moreover, the significance of these three cases is now eclipsed by the Supreme Court decision in *Swynson*.[30]

3.4 *Swynson*

In *Swynson*, Lord Sumption, Lord Mance, and Lord Neuberger each gave a substantive judgment. Their judgments will be considered in turn.

3.4.1 Lord Sumption

Giving the leading judgment, Lord Sumption accepted that subrogation is a remedy for unjust enrichment[31] and so requires an unjust factor.[32] However, he suggested that unjust factors are governed by different rules in subrogation cases. He stated that 'failure of basis ... ordinarily requires' the basis to be 'mutual' between C

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[29] Charles Mitchell, *The Law of Subrogation* (Clarendon Press 1994) 134–35, arguing *Reversion Fund* (n 26) was wrongly decided.

Mayfair (n 27) [32] (Sir Donald Rattee): subrogation not ordered as the case was res judicata.

Mitchell, Mitchell, and Watterson (n 2) paras 39-87 – 39-94, criticising *Anfield* (n 28).

[30] *Swynson* (n 2). For the facts, see page 14.

[31] *Swynson* (n 2) [19], [22], [30].

[32] *Swynson* (n 2) [20], [22].

and D[33] but 'this is not a requirement for equitable subrogation'.[34] Furthermore:

> it would be unwise to draw too close an analogy with the role of mistake in other legal contexts or to try to fit the subrogation cases into any broader category of unjust enrichment. It is in many ways sui generis. ... [T]he real basis of [subrogation] is the defeat of an expectation of benefit which was the basis of [C]'s consent to the payment of the money for the relevant purpose. Mistake is not the critical element. It is only one, admittedly common, explanation of how that expectation came to be disappointed.[35]

As such, subrogation does not seem to be governed by the unjust factors of mistake and failure of basis.[36] Instead, C must prove an unjust factor which is unique to subrogation:

> [C made] an error, but it does not follow that its consequences constitute an injustice which falls to be corrected by the law of equitable subrogation. Unless [C] has been defeated in his expectation of some feature of the transaction for which he may be said to have bargained, he does not suffer an injustice recognised by law ... .[37]

On the facts, C was not entitled to subrogation because he 'did not in any sense bargain for a right to recover substantial damages from [D]'.[38]

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33 *Swynson* (n 2) [30]. See also n 21 on page 97.

34 *Swynson* (n 2) [30]. See also [24], [28]–[29] (Lord Sumption); *Appleyard* (n 15) [40] (Neuberger LJ).

35 *Swynson* (n 2) [30].

36 MJ Cleaver, 'Equitable Subrogation in Australia and England' (2018) 29 Journal of Banking and Finance Law and Practice 34, 51.

37 *Swynson* (n 2) [34].

38 *Swynson* (n 2) [33].

Lord Sumption's approach fits the reasoning of lending cases better than the unjust factors of mistake and failure of basis.[39] In *Menelaou*, Lord Clarke stated that D's enrichment was unjust because C 'expected to have a first legal charge over Great Oak Court securing the debts of [D]'s parents ... but, as events turned out, it did not'.[40] In *Filby*, May LJ said that the unjust factor was that C 'mistakenly believed that their advance was to be secured by a first legal charge'.[41] These statements are inconsistent with the unjust factors of mistake and failure of basis.[42] By contrast, Lord Sumption's unjust factor draws out the common thread: that C 'has been defeated in his expectation of some feature of the transaction for which he ... bargained'.[43]

Defeated expectations also feature in the House of Lords' reasoning in *BFC*.[44] Some passages suggest that the unjust factor was a mistake about present facts: C mistakenly believed that Mr Herzig had authority to bind OOL to the postponement letter.[45] But other passages suggest that the unjust factor was a defeated

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39 Stephen Watterson, 'Subrogation' in Graham Virgo and Sarah Worthington (eds), *Commercial Remedies: Resolving Controversies* (CUP 2017) 460–61.

40 *Menelaou* (SC) (n 16) [22]. See also *Menelaou v Bank of Cyprus Plc* [2013] EWCA Civ 1960, [2014] 1 WLR 854 ('*Menelaou* (CA)') [44] (Floyd LJ); *Swynson* (n 2) [29] (Lord Sumption). For the facts, see page 12.

41 *Filby* (n 23) [48].

42 See pages 95–98.

43 *Swynson* (n 2) [34]. See also *Mayfair* (n 27) [24], [26] (Sir Donald Rattee); *Anfield* (n 28) [34], [36] (Proudman J).

44 *BFC* (n 10). For the facts, see page 9.

45 *BFC* (n 10) 227E (Lord Steyn), 234G–35A (Lord Hoffmann); Mitchell and Watterson (n 2) para 6.60.

expectation about the future: C expected that OOL would become bound by the postponement letter. For instance, Lord Steyn said that:

> [C] expected that they would obtain a form of security sufficient to postpone repayment of loans by [OOL] until repayment of [C]'s loan. ... Restitutionary liability is triggered by a range of unjust factors or grounds of restitution. Defeated bilateral expectations are a prime source of such liability. But sometimes unilateral defeated expectations may be sufficient.[46]

Similarly, Lord Hoffmann explained that the unjust factor was that C 'advanced the [loan] upon the mistaken assumption that it was obtaining a postponement letter'.[47] Lord Clyde stated that 'unjust enrichment ... requires ... that [C] should have sustained a loss through the provision of [a] benefit ... . The loss may be an expenditure which has not met with the *expected* return'.[48] Lord Hutton said that C was entitled to subrogation because it '*expected* to receive the form of security constituted by the postponement of the demands of OOL'.[49]

Walton J's classic statement in *Burston Finance* also refers to defeated expectations: 'subrogation ... finds one of its chief uses in the situation where [C] advances money on the understanding that he is to have certain security for the money he has advanced, and, for one reason or another, he does not receive the

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[46] *BFC* (n 10) 227D–F.

[47] *BFC* (n 10) 234G.

[48] *BFC* (n 10) 237D–G (emphasis added).

[49] *BFC* (n 10) 245H (emphasis added).

promised security'.[50]

Consequently, there is support in the cases for Lord Sumption's suggestion that defeated unilateral expectations about the future can serve as the unjust factor for subrogation. On this view, direct claims and subrogation have different unjust factors. Mistake or failure of basis can trigger a direct claim whereas subrogation is triggered by a defeated expectation. Direct claims and subrogation are available in different circumstances and so subrogation is not redundant.

3.4.2 Lord Mance

Lord Mance applied the rules which govern the unjust factor of mistake in direct claims. He found that C had 'a mistaken conscious belief or mistaken tacit assumption', that he 'did not intend to run' the 'risk of being wrong', and that his mistake was 'causative'.[51] Ordinarily, this would be enough for the unjust factor of mistake to render D's enrichment unjust.[52] However, Lord Mance explained that:

> [C's] mistake [was not] one in respect of which equity should grant relief, by way of subrogation[.] [S]ubrogation cannot improve a lender's position, by giving him more than he expected to get. ... [Here, C]'s

[50] *Burston Finance Ltd v Speirway Ltd* [1974] 1 WLR 1648 (Ch) 1652C approved *BFC* (n 10) 245C–D (Lord Hutton; *Appleyard* (n 15) [25] (Neuberger LJ); *Halifax v Omar* (n 15) [79]–[80] (Jonathan Parker LJ); *Filby* (n 23) [11] (May LJ); *Menelaou* (CA) (n 40) [16] (Floyd LJ); *Menelaou* (SC) (n 16) [111] (Lord Carnwath). See also *Eagle Star Insurance Co Ltd v Karasiewicz* [2002] EWCA Civ 940 [19] (Arden LJ).

[51] *Swynson* (n 2) [78]–[82].

[52] Nathan Tamblyn, 'Separating Unjust Enrichment and Subrogation' (2017) 44 Exeter LR 1, 22. See n 9 on page 94.

> loan to EMSL and EMSL's consequent discharge of [X]'s loan were exactly as [C] specified and intended. ... [Thus, C] was not mistaken in any way which ... could give him any arguable claim to be subrogated to a claim by [X] against [D]. ... This conclusion can be explained ... either on the basis that there was no sufficiently direct transfer of value from [C] to [D], or on the basis that there is no relevant unjust factor, or both.[53]

In short, Lord Mance found that the requirements of the unjust factor of mistake were satisfied but denied C's claim because of a rule specific to subrogation. On this view, subrogation to personal rights is redundant because it is available in a narrower range of cases than direct claims.

3.4.3 Lord Neuberger

Lord Neuberger also found that C 'made a mistake' but that it was 'not the sort of mistake which renders [D's enrichment] "unjust"'.[54] This was because:

> in the context of an unjust enrichment claim arising out of a transaction, there must, in my view, at least normally (and quite possibly always), be some defect in the transaction itself for the doctrine of unjust enrichment to come into play. In other words, for some reason, including but not limited to a mistake on his part, [C] must be able to show that he did not get all that he expected or thought that he had bargained for. ...
>
> In this case, [C] got precisely what he thought he was getting from the transaction in question, namely repayment [by ESML] to [X] of the original loan, and a right to recover the new loan from EMSL.[55]

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[53] *Swynson* (n 2) [83], [86]–[89].

[54] *Swynson* (n 2) [117].

[55] *Swynson* (n 2) [118]–[119].

At first glance, this supports the orthodoxy that subrogation and direct claims are governed by the same rules. Lord Neuberger states a rule which applies 'in the context of an unjust enrichment claim arising out of a transaction' and applies that rule to subrogation.

Nevertheless, Lord Neuberger is unorthodox in stating this particular rule. In lending cases like *Swynson*, it is well established that subrogation cannot give C more than it bargained for.[56] But it is novel to apply this rule beyond lending cases, beyond subrogation, to all or most 'unjust enrichment claim[s] arising out of a transaction'.[57]

This radical expansion of the rule deserves to be met with caution. It does not seem to apply to *Allcard v Skinner*, the seminal undue influence case.[58] C became a nun, and gave all her property to her lady superior. C later left the sisterhood, and sought to recover the property. The Court of Appeal held that C made the gift under the undue influence of her confessor and spiritual advisor, as well as the lady superior. In principle, therefore, C was entitled to rescind the gift. However, her claim was barred by her laches and acquiescence.

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[56] eg *Paul v Speirway* [1976] Ch 220 (Ch) 233B (Oliver J); *BFC* (n 10) 235D (Lord Hoffmann), 237H (Lord Clyde), 242F–G (Lord Hutton); *Appleyard* (n 15) [38], [41] (Neuberger LJ); *Swynson* (n 2) [31]–[34] (Lord Sumption), [86] (Lord Mance); Mitchell and Watterson (n 2) para 7.26.

[57] *Swynson* (n 2) [118] (Lord Neuberger).

[58] *Allcard v Skinner* (1887) 36 ChD 145 (CA). The same applies legal compulsion or secondary liability cases: eg *Duncan Fox & Co v North & South Wales Bank* (1880) 6 App Cas 1 (HL).

C's claim was 'an unjust enrichment claim arising out of a transaction'[59] — the transaction was C's gift — thus engaging Lord Neuberger's rule. C made the gift under undue influence, so there was a 'defect in the transaction', apparently satisfying the first sentence of Lord Neuberger's rule.[60] But Lord Neuberger added a second sentence: C 'must be able to show that he did not get all that he expected or thought that he had bargained for'.[61] Yet in *Allcard*, C had a claim in principle, even though she could not show this: she did not expect or think that she had bargained for anything. Consequently, the second sentence of Lord Neuberger's rule does not seem to be satisfied.

There are at least two possible solutions. First, Lord Neuberger stated that his rule applies 'at least normally (and quite possibly always)' to 'unjust enrichment claim[s] arising out of a transaction'.[62] If the rule only applies 'normally' and not 'always', then undue influence claims can be exceptions to the rule. But this requires an explanation of why these claims are exceptional.

Second, Lord Neuberger might be wrong. There may be no rule that in 'unjust enrichment claim[s] arising out of a transaction ... [C] must be able to show that

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59 eg *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938 [175] (Lord Neuberger); *Hart v Burbidge* [2014] EWCA Civ 992 [43] (Vos LJ); Burrows, *Restitution* (n 2) ch 11; Burrows, *Restatement* (n 3) 165; Mitchell, Mitchell, and Watterson (n 2) para 33-08 fn 24; Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2016) ('*Principles*') ch 11.

60 *Swynson* (n 2) [118].

61 *Swynson* (n 2) [118].

62 *Swynson* (n 2) [118].

he did not get all that he expected or thought that he had bargained for'.[63] Instead, the rule is unique to subrogation, as Lord Sumption and Lord Mance suggest. In fact, the rule is unique to subrogation in lending cases, as it does not apply in common liability[64] and misappropriation cases.[65]

3.4.4 Summary

In *Swynson*, the Supreme Court unanimously held that C's subrogation claim failed for want of an unjust factor because subrogation would give C more than he expected to get. Nevertheless, each judge framed this conclusion slightly differently and this has implications for whether subrogation is redundant.

For Lord Neuberger, subrogation is governed by the same rules as direct claims, one of which barred C's claim. On this view, subrogation is redundant as it duplicates a direct claim. This approach is not to be preferred since Lord Neuberger's purported rule raises more questions than it answers.

For Lord Mance, subrogation is governed by the same rules as direct claims and is also governed by an additional rule — unique to subrogation — which barred C's claim. On this view, subrogation is redundant because it is available in

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63 *Swynson* (n 2) [118] (Lord Neuberger).

64 *Mayhew v Crickett* (1818) 2 Swans 185, 191; 36 ER 585, 587 (Lord Eldon LC); *Duncan Fox* (n 58); *Insol Funding Co Ltd v Cowlam* [2017] EWHC 1822 (Ch) [120] (Master Bowles).

65 *Patten v Bond* (1889) 60 LT 583 (Ch); *Boscawen v Bajwa* [1996] 1 WLR 328 (CA) 338B–340A (Millett LJ).

a narrower range of cases than direct claims.

Finally, for Lord Sumption, subrogation and direct claims are governed by different rules. Subrogation has its own unique unjust factor — 'defeat of an expectation of benefit'[66] — which was not made out on the facts. On this view, subrogation and direct claims are available in different circumstances and so subrogation is not redundant.

Lord Neuberger said that he did 'not see any significant variation in the reasoning of Lord Sumption and Lord Mance ... . However, given the ability of ingenious lawyers to identify possible differences between concurring judgments,' he agreed only with Lord Sumption.[67]

Perhaps, then, this discussion is splitting hairs. Ultimately, the leading judgment was given by Lord Sumption, with whom Lord Neuberger, Lord Clarke, and Lord Hodge agreed. As such, a majority of the Supreme Court endorsed the view that subrogation and direct claims are governed by different rules for determining whether there is an unjust factor and that subrogation has an idiosyncratic unjust factor: 'defeat of an expectation of benefit'.[68] This approach fits the reasoning and results of previous cases better than mistake and failure of basis[69] and has been

66 *Swynson* (n 2) [30] (Lord Sumption).

67 *Swynson* (n 2) [121].

68 *Swynson* (n 2) [30] (Lord Sumption).

69 See pages 95–98.

subsequently applied at first instance.[70] Lord Sumption's approach is therefore to be preferred: subrogation and direct claims are governed by different unjust factors.

3.5 Summary

In subrogation cases, C's defeated unilateral expectation about the future can render an enrichment unjust. In a direct claim, this is not so. Consequently, subrogation is available when a direct claim is not; subrogation does not duplicate a direct claim and subrogation is not redundant.

[70] *Re CC Automotive Group Ltd* [2019] EWHC 2771 (Ch) [59]–[82] (HH Judge Klein).

4 Defences

4.1 Introduction

The fourth question in an unjust enrichment case is whether D has any defences.[1] Section 4.2 shows that many direct unjust enrichment claims are susceptible to the change of position defence. Sections 4.3 and 4.4 then show that there is no clear authority for the defence applying to subrogation. Accordingly, Section 4.5 concludes that it is unclear whether subrogation and direct claims are susceptible

[1] See n 62 on page 16.

to different defences.

Importantly, this part of the thesis is concerned with what the law is and not what the law ought to be. As a result, this chapter makes no argument about whether or not the change of position defence should apply to subrogation; it only argues that there is no clear authority for the proposition that it does.

4.2 Direct claims

The change of position defence is available 'where an innocent [D]'s position is so changed that ... the injustice of requiring him ... to repay outweighs the injustice of denying [C] restitution'.[2] The change of position must be 'causally linked (at least on a "but for" test)' to D's enrichment.[3] Furthermore, 'the defence is not open to one who has changed his position in bad faith, as where [D] has paid away the money with knowledge of the facts entitling [C] to restitution'.[4] It is a pro tanto defence.[5]

It is sometimes said that all direct unjust enrichment claims are susceptible to the change of position defence.[6] For example, in *Haugesund Kommune*, Aikens LJ

2 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL) 579F (Lord Goff).

3 *Scottish Equitable Plc v Derby* [2001] EWCA Civ 369, [2001] 3 All ER 818 [31] (Robert Walker LJ).

4 *Lipkin Gorman* (n 2) 580C (Lord Goff).

5 *Lipkin Gorman* (n 2) 579G (Lord Goff).

6 Peter Birks, 'Misnomer' in WR Cornish and others (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Hart Publishing 1998) 24; Lionel Smith,

said that 'the defence of change of position is a general defence to all restitution claims (for money or other property) based on unjust enrichment'.[7] Burrows endorses this.[8] In the same vein, *Goff and Jones* states that change of position may 'defeat or limit any cause of action in unjust enrichment'.[9]

However, there is now authority that the defence does not apply to *Woolwich* claims.[10] Despite their statements in the previous paragraph, Burrows and *Goff and Jones* suggest that the defence does not apply to some other direct claims either.[11] At best, most direct claims are susceptible to the change of position defence. Thus, even if there is no authority for change of position applying to subrogation, this only proves that subrogation and most direct claims are susceptible to different defences.

'Defences and the Disunity of Unjust Enrichment' in Andrew Dyson, James Goudkamp, and Frederick Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart Publishing 2016) 45–46.

7 *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2012] QB 549 [122].

8 Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) ('*Restitution*') 544–45 cf 550.

9 Charles Mitchell, Paul Mitchell, and Stephen Watterson, *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) para 39-28. See also Charles Mitchell and Stephen Watterson, *Subrogation: Law and Practice* (rev edn, OUP 2007) para 7.68; Stephen Watterson, 'Modelling Subrogation as an "Equitable Remedy"' (2016) 2 CJCCL 609, 619, 671.

10 *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2014] EWHC 4302 (Ch) [309]–[315] (Henderson J).

11 Burrows, *Restitution* (n 8) 550; Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) ('*Restatement*') 122; Mitchell, Mitchell, and Watterson (n 9) paras 27-55 – 27-66. See also Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2016) ('*Principles*') 695.

4.3 Primary enrichee

Mitchell and Watterson write that 'change of position can be invoked by a defendant against whom subrogation rights are asserted'.[12] Similarly, *Goff and Jones* states that:

> As an equitable remedy designed to reverse unjust enrichment, a [subrogation] claim ... may be defeated or limited by any defence or bar that will defeat or limit any cause of action in unjust enrichment. These include [the defence] of change of position ... .[13]

Both books suggest that change of position may operate as a defence for the primary enrichee (D) or for secondary enrichees.[14]

This chapter shows that there is no clear authority for the application of the change of position defence to subrogation. This section considers the primary enrichee, while the following section considers secondary enrichees. These sections address each authority — English or otherwise — cited by Mitchell and Watterson.[15] In addition, the author has checked every English case on LexisNexis and Westlaw which includes the search terms 'subrogation' and 'change of position'.[16]

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[12] Mitchell and Watterson (n 9) para 7.69.

[13] Mitchell, Mitchell, and Watterson (n 9) para 39-28. See also Watterson, 'Modelling Subrogation as an "Equitable Remedy"' (n 9) 619, 671.

[14] Mitchell and Watterson (n 9) para 7.69; Mitchell, Mitchell, and Watterson (n 9) para 39-29.

[15] Mitchell and Watterson (n 9) paras 7.68–7.85; Mitchell, Mitchell, and Watterson (n 9) paras 39-28 – 39-30.

[16] Searches conducted on 5 June 2021.

There are some explicit statements in English cases that the primary enrichee can raise change of position as a defence to subrogation.[17] However, these are exclusively obiter and so not authoritative. In fact, Mitchell and Watterson offer only two subrogation cases which, as part of their ratio, allow the primary enrichee the defence:[18] *Re Diplock*,[19] an English case, and *Gertsch v Atsas*,[20] a case from New South Wales. These two cases will be considered in turn.

4.3.1 *Re Diplock*

In *Re Diplock*, a payment was made to D under a will. D used some of the money to pay off a charge over its property.[21] The will was then found to be invalid. C, the judicial trustee of the deceased's estate, sought to recover the money paid to D.

The Court of Appeal held that C was not entitled to be subrogated to the extinguished charge.[22] The Court's reasoning is difficult to follow.[23] In *Boscawen*,

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17 *Boscawen v Bajwa* [1996] 1 WLR 328 (CA) 341C–E (Millett LJ); *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 2)* [2004] EWCA Civ 487, [2004] 1 CLC 882 ('*Niru Battery* (CA)') [37], [60] (Clarke LJ); *Barons Finance Ltd v Kensington Mortgage Co Ltd* [2011] EWCA Civ 1592 [28] (Tomlinson LJ); *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66, [2016] AC 176 ('*Menelaou* (SC)') [36] (Lord Clarke).

18 Mitchell and Watterson (n 9) paras 7.68–7.85; Mitchell, Mitchell, and Watterson (n 9) paras 39-28 – 39-30.

19 *Re Diplock* [1948] 1 Ch 465 (CA).

20 *Gertsch v Atsas* [1999] NSWSC 898.

21 *Re Diplock* (n 19) 548 (Lord Greene MR, Wrottesley and Evershed LJJ).

22 *Re Diplock* (n 19) 549–50 (Lord Greene MR, Wrottesley and Evershed LJJ).

23 *Boscawen* (n 17) 340G–41B (Millett LJ). For criticism, see Peter Birks, *An Introduction to*

Millett LJ explained the result on the basis that D had changed its position. D 'had in all innocence used the money to redeem a mortgage held by its bank, which, no doubt, was willing to allow its advance to remain outstanding indefinitely', whereas C would enforce the subrogated charge and force the property to be sold.[24] Accordingly, Mitchell and Watterson use *Re Diplock* as authority for their claim that change of position is a defence to subrogation.[25]

However, there are two reasons why *Re Diplock* is not a clear authority for this proposition.[26] First, the judgment in *Re Diplock* did not use the language of change of position. Instead, this is an ex-post rationalisation of the result.

Second, in *Boscawen* Millett LJ conceded that change of position was not an entirely satisfactory explanation of *Re Diplock*. The defence 'did not require the withholding of any remedy [the result in *Re Diplock*], but only that the charge by subrogation should not be enforceable until [D] had had a reasonable opportunity to obtain a fresh advance on suitable terms from a willing lender'.[27]

As a result, *Re Diplock* is not compelling authority for the proposition that change of position is a defence to subrogation for the primary enrichee.

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the Law of Restitution (rev edn, Clarendon Press 1989) ('*Introduction*') 374–75.

[24] *Boscawen* (n 17) 341C–D. See also Andrew Tettenborn, *The Law of Restitution in England and Ireland* (3rd edn, Cavendish 2002) para 2-27.

[25] Mitchell and Watterson (n 9) paras 7.74–7.75; Mitchell, Mitchell, and Watterson (n 9) para 39-28 fn 58.

[26] See also Virgo, *Principles* (n 11) 639.

[27] *Boscawen* (n 17) 341D (Millett LJ).

4.3.2 *Gertsch*

Mitchell and Watterson's second authority for this proposition is *Gertsch*.[28] There, D received a legacy of AU$100,000 under a will. The will was then shown to be a forgery. C, the executor and sole beneficiary of the deceased's intestate estate, sought to recover the legacy from D. Giving the judgment of the Supreme Court of New South Wales, Foster AJ held that D was liable to make restitution of her unjust enrichment.

But D had been unaware that the will was a forgery and had spent the legacy. D had used AU$69,000 of the legacy to pay off her mortgage.[29] Prima facie, therefore, C was subrogated to the extinguished AU$69,000 charge.

Foster AJ, however, held 'that it is reasonable to regard [C's subrogation claim] ... as being comprehended within claims relating to "unjust enrichment" and as being susceptible to defences appropriate to such claims'.[30] As a result, the defence of change of position was available to D.[31]

C argued that using the legacy to pay off the mortgage did not afford D a change of position defence, since D benefited from not having to repay the mortgage

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[28] *Gertsch* (n 20), cited by Mitchell and Watterson (n 9) para 7.77; Mitchell, Mitchell, and Watterson (n 9) para 39-28 fn 58; Watterson, 'Modelling Subrogation as an "Equitable Remedy"' (n 9) 671 fn 148.

[29] *Gertsch* (n 20) [16].

[30] *Gertsch* (n 20) [22].

[31] *Gertsch* (n 20) [22]–[23].

using her own funds.[32] Foster AJ rejected that argument. D had no funds with which to repay the legacy. To repay, she would have to sell her home, leaving her in financial hardship and with little money to find alternative accommodation. In these circumstances, paying off the mortgage amounted to a change of position.[33]

Had D not received the legacy, she would have only have paid off AU$10,000 of the mortgage. Thus, by paying off the whole AU$69,000 mortgage, she had changed her position to the extent of AU$59,000.[34] Consequently, AU$10,000 'represent[ed] the amount of her unjust enrichment'[35] and she was obliged to repay this sum.[36] Furthermore, Foster AJ held that C could be subrogated to the discharged mortgage and so he could make an order charging AU$10,000 (plus interest) upon D's home. As such, Mitchell and Watterson cite *Gertsch* for the proposition that change of position is a defence to subrogation.[37]

However, there are three reasons why *Gertsch* is not compelling authority for this proposition. First, this decision of the Supreme Court of New South Wales is not authoritative in English law.

Second, it may no longer be authoritative in New South Wales. Foster AJ's

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32 *Gertsch* (n 20) [95].

33 *Gertsch* (n 20) [90]–[92], [94]–[99].

34 *Gertsch* (n 20) [98].

35 *Gertsch* (n 20) [98].

36 *Gertsch* (n 20) [99].

37 See n 28 on page 116.

conclusion that change of position was a defence to subrogation relied on the premiss that 'it is reasonable to regard [C's subrogation claim] ... as being comprehended within claims relating to "unjust enrichment"'.[38] But ten years after *Gertsch* was decided, the High Court of Australia rejected this premiss.[39]

Finally, the order made in *Gertsch* was for monetary restitution.[40] Foster AJ considered that subrogation allowed him to make a charging order and that change of position modified the quantum of that order. However, he did not actually make the charging order, instead granting C 'liberty to apply on 7 days' notice to seek [such] an order'.[41] Arguably, then, the application of change of position to subrogation was obiter.[42]

To summarise, Mitchell and Watterson state that change of position is available as a defence to subrogation for the primary enrichee, but it is difficult to find convincing authority for this.

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38 *Gertsch* (n 20) [22]–[23].

39 *Bofinger v Kingsway Group Ltd* [2009] HCA 44, (2009) 239 CLR 269 [90]–[98] (Gummow, Hayne, Heydon, Kiefel, and Bell JJ).

40 *Gertsch* (n 20) [99], [144].

41 *Gertsch* (n 20) [100], [144].

42 cf Mitchell and Watterson (n 9) para 7.77 esp fn 119.

4.4 Secondary enrichees

Mitchell and Watterson also say that secondary enrichees can raise the change of position defence:

> An example is where a junior secured creditor can make out the defence, on the basis that he made further advances in the belief that [X's] senior charge to which [C] seeks to be subrogated has been extinguished. In such cases, the most proportionate response in practice might be for the court to hold that [C]'s [subrogated] charge has priority to the junior chargee's claims only to the extent of the junior creditor's original advance. The further advance, made on the faith of the apparent discharge of [X's] senior charge, would have priority over [C]'s [subrogated] charge.[43]

There is, however, no clear authority allowing secondary enrichees the defence.

4.4.1 *Redman*

Mitchell and Watterson cite *Redman v Rymer* as an 'early English case which shows that the courts are sensitive to changes of position by' secondary enrichees.[44] There, a father's property was subject to X's £2000 mortgage. The father died and his will charged his estate with a legacy for his daughters. The father's sons and heirs, D, borrowed money from C and used it to discharge X's mortgage. To

[43] Mitchell and Watterson (n 9) para 7.85. See also paras 7.69, 7.78; Mitchell, Mitchell, and Watterson (n 9) para 39-29.

[44] Mitchell and Watterson (n 9) para 7.71 citing *Redman v Rymer* (1889) 60 LT 385 (Ch). The facts given here are simplified but nothing turns on this for the points being made.

secure the loan, D purported to mortgage the property to C, with priority over the daughters' charge. A priority dispute then arose between C and the daughters.

Kekewich J held that D lacked the authority to give C priority over the daughters' charge. Prima facie, then, the daughters had priority over C. However, C's loan had been used to discharge X's £2000 mortgage so C was subrogated to this discharged mortgage. C therefore had priority over the daughters to the extent of £2000.

Kekewich J suggested that had the daughters 'made an advance or made a purchase on the faith of [X's £2000 mortgage] being paid off', C would not have been subrogated to X's mortgage.[45] Mitchell and Watterson interpret this as a recognition of the change of position defence for secondary enrichees (here, the daughters).[46] However, this was obiter: on the facts the daughters had not changed their position so had no defence.[47]

4.4.2 *Anfield*

The only other English recognition of change of position for secondary enrichees came in *Anfield*.[48] There, D owned property, subject to X's first legal charge. C lent money to D, who used it to redeem X's charge. In return, C acquired a new

[45] *Redman* (n 44) 388.

[46] Mitchell and Watterson (n 9) paras 7.71–7.72.

[47] *Redman* (n 44) 388 (Kekewich J).

[48] *Anfield (UK) Ltd v Bank of Scotland Plc* [2010] EWHC 2374 (Ch), [2011] 1 WLR 2414.

charge ('the 2006 charge') but failed to register it. Subsequently, Anfield obtained a charging order over the property and registered it, gaining priority over C's 2006 charge. However, Proudman J held that C was entitled to be subrogated to X's discharged charge, giving it priority over Anfield.

Proudman J recognised that 'there may potentially be harm to third party lenders who can demonstrate reliance on the register' and that this might activate the 'change of position defence'.[49] She later affirmed that 'any unfair consequences of subrogation can be dealt with by way of a defence founded on change of position'.[50]

Again, however, this was obiter: the possibility of Anfield having a change of position defence was not raised. Indeed, Mitchell and Watterson say that the defence can be raised by a party who was D's creditor *before* the discharge of D's debt to X. But they say that the defence cannot be raised by a party who becomes D's creditor *after* the discharge of D's debt to X.[51] Anfield was in the latter position so — for Mitchell and Watterson — there was no possibility of it raising the defence.[52]

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49 *Anfield* (n 48) [31].

50 *Anfield* (n 48) [38].

51 Mitchell and Watterson (n 9) paras 7.69–7.70.

52 Mitchell, Mitchell, and Watterson (n 9) para 39-29 fn 65. The same applies to *Home Savings Bank of Chicago v Bierstadt* 48 NE 161 (Illinois SC 1897) 162 (Phillips CJ); *McCullough v Elliott* (1921) 62 DLR 257 (Alberta CA) 262–63 (Beck J); both cited by Mitchell and Watterson (n 9) para 7.71 fn 104.

In short, there is no clear authority for Mitchell and Watterson's claim that subrogation is a defence to subrogation for secondary enrichees.[53]

4.5 Summary

This chapter showed that it is unclear whether direct claims and subrogation are subject to the same defences. Some direct claims are susceptible to a change of position defence. However, there is no clear authority for the defence applying to subrogation. It is therefore unclear whether change of position is a defence to subrogation as the law stands.

[53] See also Mitchell and Watterson (n 9) para 7.81, suggesting that *Armatage Motors Ltd v Royal Trust Corp of Canada* (1997) 34 OR (3d) 599 (Ontario CA) — decided without reference to change of position — might be ex-post rationalised in terms of the defence. Ultimately, however, the authors reject this view.

5 Effect

5.1 Introduction

This chapter argues that subrogation has a different effect compared to direct unjust enrichment claims. Section 5.2 shows that direct claims reverse a transaction whereas subrogation does not. Section 5.3 rebuts five objections to this argument. Accordingly, subrogation has a different effect compared to direct claims; subrogation does not duplicate a direct claim and so subrogation is not redundant.

5.2 Reversing a transaction

In *Swynson*, Lord Sumption stated that:

> the law of unjust enrichment is generally concerned to restore the parties to a normatively defective transfer to their pre-transfer position. Subrogation, however, does not restore the parties to their pre-transfer position.[1]

This is correct. Direct claims reverse the transaction which led to D's enrichment at C's expense[2] whereas subrogation does not. This can be shown by contrasting the cases of *Simms*[3] and *Liggett*.[4]

In *Simms*, the Royal British Legion Housing Association Ltd had an account with Barclays Bank.[5] Barclays mistakenly thought that it had authority to pay the company's debt to a creditor. In fact, Barclays paid the creditor without authority.

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1 *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2018] AC 313 [30]. See also *Challenger Managed Investments Ltd v Direct Money Corp Pty Ltd* [2003] NSWSC 1072 [50] (Bryson J); *Bofinger v Kingsway Group Ltd* [2009] HCA 44, (2009) 239 CLR 269 [97] (Gummow, Hayne, Heydon, Kiefel, and Bell JJ); *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29, [2018] AC 275 ('*ITC* (SC)') [42], [49] (Lord Reed); Lionel Smith, 'Defences and the Disunity of Unjust Enrichment' in Andrew Dyson, James Goudkamp, and Frederick Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart Publishing 2016) 51; Tatiana RS Cutts, 'Modern Money Had and Received' (2018) 38 OJLS 1, 23; Rajiv Shah, 'Reasons for Unjust Enrichment' (PhD thesis, University of Cambridge 2018) <www.repository.cam.ac.uk/handle/1810/290112> accessed 29 March 2020, 4, 6, 196; Lionel Smith, 'Restitution: A New Start?' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing 2019) 107–08.

2 *ITC* (SC) (n 1); *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39, [2018] 3 WLR 652; Cutts, 'Modern Money Had and Received' (n 1).

3 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (QB).

4 *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48 (KB).

5 *Simms* (n 3).

Robert Goff J reversed the transaction. He held that Barclays' payment had not discharged the company's debt to the creditor[6] and that Barclays had a direct claim against the creditor to recover its payment.

Compare the earlier case of *Liggett*, where B Liggett (Liverpool) Ltd had an account with Barclays Bank.[7] Barclays mistakenly thought that it had authority to pay the company's debts to creditors. In fact, Barclays paid the creditors without authority.

The facts of *Simms* and *Liggett* were therefore virtually indistinguishable; even the bank was the same. The law could have responded to the facts of *Liggett* in the same way as the facts of *Simms*. The court could have reversed the transaction by holding that the debts were not discharged and that Barclays had direct claims against the creditors to recover its payments.[8]

However, that was not how *Liggett* was decided. Wright J held that Barclays' payments discharged the company's debts and that Barclays was subrogated to the creditors' extinguished rights against the company.[9]

Simms and *Liggett* therefore represent two different ways in which the law can respond to the same facts. In *Simms*, the direct claim reversed the transaction

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6 See also *Crantrave Ltd v Lloyds Bank Plc* [2000] QB 917 (CA) criticised by Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) ('*Restitution*') 159.

7 *Liggett* (n 4).

8 *Challenger* (n 1) [50] (Bryson J); *Bofinger* (n 1) [97] (Gummow, Hayne, Heydon, Kiefel, and Bell JJ); Shah, 'Reasons for Unjust Enrichment' (n 1) 4; Smith, 'Restitution' (n 1) 107.

9 *Liggett* (n 4) 64.

by having the creditor repay Barclays. By contrast, in *Liggett*, the court upheld the transactions by holding that they were effective in discharging the company's debts, and instead subrogation gave Barclays rights against the company. While direct claims reverse transactions, subrogation does not. Subrogation therefore has a different effect to direct claims; subrogation does not duplicate direct claims and so subrogation is not redundant. This is recognised by Friedmann, who argues that in some circumstances C should be able to elect between these two different responses.[10]

5.3 Objections

One might object to this argument in five ways.

(1) *Simms* and *Liggett* can be distinguished.

(2) Subrogation in *Liggett* duplicated a direct claim against the company, so subrogation was redundant.

(3) *Simms* and *Liggett* are inconsistent.

(4) Direct claims and subrogation both reverse an enrichment so subrogation is redundant.

(5) Direct claims and subrogation are both restitutionary so subrogation is redundant.

[10] Daniel Friedmann, 'Payment of Another's Debt' (1983) 99 LQR 534, 554–56.

Each objection will be rejected in turn.

First, the cases are often distinguished on the basis that the payments in *Liggett* discharged the company's debts whereas in *Simms* the payment did not.[11] One might argue that this distinction, and not the difference between subrogation and direct claims, explains why the cases had different results.

However, whether or not a debt is discharged is not an immutable fact. Rather, the law must make a choice about if and when a mistaken payment of another's debt discharges that debt.[12] It is true that the debt was discharged in *Liggett* and not in *Simms*. But this is part of the way in which the law has a different effect in direct claim cases compared to subrogation cases, and so is part of the reason why subrogation is not redundant.

Second, Burrows writes that 'the subrogation reasoning in *Liggett* is an unnecessary complication; the bank should have been entitled to ... a direct restitutionary remedy against [the company]'.[13] If this is correct, subrogation in *Liggett* would have been redundant.

However, Burrows does not cite any authority for this direct claim. The court in *Liggett* could have reversed the transactions by treating the debts as not

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[11] *Crantrave* (n 6); Charles Mitchell and Stephen Watterson, *Subrogation: Law and Practice* (rev edn, OUP 2007) para 2.06; Burrows, *Restitution* (n 6) 159; Charles Mitchell, Paul Mitchell, and Stephen Watterson, *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) para 5-61.

[12] See pages 229–231.

[13] Burrows, *Restitution* (n 6) 159.

discharged and giving Barclays a direct claim *against the creditors*. But a direct claim *against the company* would be unlike other direct claims as it would not undo the transactions. Instead, it would uphold the transactions by treating the debts as discharged and give Barclays new rights against the company. This claim would indeed duplicate subrogation, rendering subrogation redundant. But there is no authority for such a claim. As the law stands, direct claims for mistake reverse transactions whereas subrogation does not. Accordingly, subrogation is not redundant.

Third, it is said that *Liggett* and *Simms* are 'inconsistent': in *Liggett* Barclays' unauthorised and mistaken payment discharged its customer's debts whereas in *Simms* it did not.[14] Accordingly, one of these cases is wrongly decided.

Even if this is true, subrogation and direct claims still have different effects. *Liggett* and *Simms* have substantially the same facts so comparing these cases makes the different effect of subrogation and direct claims obvious. But other cases could be chosen to show that subrogation and direct claims have different effects.[15]

Fourth, it is often said that both direct claims and subrogation reverse an

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[14] Mitchell and Watterson (n 11) para 2.06; Mitchell, Mitchell, and Watterson (n 11) para 5-61.

[15] eg *Cunliffe Brooks & Co v Blackburn and District Benefit Building Society* (1884) 9 App Cas 857 (HL) ('*Blackburn* (HL)'); *ITC* (SC) (n 1); *Prudential* (n 2).

enrichment.[16] Even if this is true, it does not follow that subrogation is redundant. Direct claims and subrogation reverse different enrichments of different parties in different ways.

In *Simms*, the court held that the debt was not discharged. As a result, the creditor was left factually enriched by Barclays' payment. The direct claim reversed the creditor's factual enrichment by imposing a duty on the creditor to repay Barclays.

By contrast, in *Liggett* the court held that the debts were discharged. In effect, the creditors exchanged their rights against the company for Barclays' payments and so the creditors were not unjustly enriched.[17] Instead, it was the company that was enriched: it was released from its duties to pay the creditors. Subrogation reversed that legal enrichment by imposing a duty on the company, owed to Barclays, resembling the duties that the company used to owe to the creditors.[18]

As a result, it is true that both direct claims and subrogation have the effect of reversing an enrichment. But while a direct claim reverses X's factual enrichment, subrogation reverses D's legal enrichment. Thus, direct claims and subrogation

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16 *Boscawen v Bajwa* [1996] 1 WLR 328 (CA) 335C–D (Millett LJ); *Banque Financière de la Cité SA v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) ('*BFC*') 231G–H (Lord Hoffmann); Mitchell and Watterson (n 11) chs 4, 8; Burrows, *Restitution* (n 6) 144–67; Mitchell, Mitchell, and Watterson (n 11) ch 39; Stephen Watterson, 'Modelling Subrogation as an "Equitable Remedy"' (2016) 2 CJCCL 609; Stephen Watterson, 'Subrogation' in Graham Virgo and Sarah Worthington (eds), *Commercial Remedies: Resolving Controversies* (CUP 2017) 437–49.

17 *Simms* (n 3) 695C–E (Robert Goff J).

18 See n 16 on page 129.

reverse different enrichments of different parties in different ways. Subrogation does not have the same effect as a direct claim so subrogation is not redundant.

Finally, some say that direct claims and subrogation are both restitutionary.[19] Others object that subrogation is not restitutionary.[20] This is a barren semantic debate. Different meanings can be given to the word 'restitution'; some of those meanings include subrogation whereas others do not. Nothing turns on this and it does not alter the point that direct claims reverse transactions whereas subrogation does not.

5.4 Summary

A direct claim reverses a transaction whereas subrogation does not. Subrogation and direct claims therefore have different effects. Subrogation does not duplicate a direct claim and subrogation is not redundant.

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[19] *BFC* (n 16) 232A–C, 234C (Lord Hoffmann); Peter Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) ('*Introduction*') 96–97; Burrows, *Restitution* (n 6) 14–15, 439–40; AVM Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Hart Publishing 2012) 141–47; Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2016) ('*Principles*') 234; Watterson, 'Modelling Subrogation as an "Equitable Remedy"' (n 16) 617–18.

[20] *Challenger* (n 1) [50] (Bryson J); *Bofinger* (n 1) [97] (Gummow, Hayne, Heydon, Kiefel, and Bell JJ); *ITC* (SC) (n 1) [49] (Lord Reed); James Edelman and Elise Bant, *Unjust Enrichment* (2nd edn, Hart Publishing 2016) 45, 50; Smith, 'Defences and the Disunity of Unjust Enrichment' (n 1) 51; Smith, 'Restitution' (n 1) 107–08.

6 Implications

6.1 Introduction

This chapter concludes Part I of the thesis, which sought to resolve the controversy over whether subrogation is redundant. Orthodoxy says that subrogation is governed by the same rules as a direct unjust enrichment claim, that subrogation duplicates a direct claim, and that therefore subrogation is redundant.[1] Part I argued that this is not true. Section 6.2 summarises the previous four chapters. They showed that subrogation is available in different circumstances and has a different effect compared to direct unjust enrichment claims. Section 6.3 explores the implications of this. Most importantly, it shows that subrogation does not

[1] See pages 17–31.

duplicate a direct claim and so subrogation is not redundant.

6.2 Summary

Part I asks whether subrogation is redundant as the law stands. The question of what the law ought to be is postponed until Part II.

Chapter 1 distinguished three different versions of the claim that subrogation is redundant:[2]

(1) Subrogation always duplicates a direct claim.

(2) Subrogation to personal rights always duplicates a direct claim.

(3) Subrogation to personal rights in common liability cases usually duplicates recoupment and contribution.

It is conceded that claim (3) is correct but it does not follow that subrogation is redundant.[3] Part I therefore set common liability cases aside, focussed on misappropriation and lending cases, and took issue with claims (1) and (2).

Some subrogation cases apply, or are at least consistent with, some of the rules which govern direct claims. For example, some subrogation cases invoke the unjust

[2] See pages 17–31.

[3] See pages 26–30.

factor of mistake[4] and this is also an unjust factor in direct claims.[5] However, other cases show that the rules which govern direct claims do not limit subrogation. The previous four chapters identified many differences between the rules governing direct claims and the rules governing subrogation.

[4] eg *Banque Financière de la Cité SA v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) ('*BFC*') 227E (Lord Steyn), 234G–35A (Lord Hoffmann).

[5] See n 91 on page 23.

Chapter 2. Enrichment at the expense of

- Direct claims reverse factual enrichments whereas subrogation reverses a legal enrichment.[6]
- Direct claims require a (direct) transfer of value from C to D whereas subrogation does not.[7]
- Direct claims are subject to a rule against incidental benefits whereas subrogation is not.[8]

Chapter 3. Unjust

- A defeated unilateral expectation about the future can render an enrichment unjust in subrogation cases, whereas this is not so in direct claims.

Chapter 4. Defences

- Many direct claims are susceptible to a change of position defence, whereas there is no convincing authority for the application of the defence to subrogation.

Chapter 5. Effect

- Direct claims reverse a transaction whereas subrogation does not.

[6] See pages 52–56.

[7] See pages 62–85.

[8] See pages 86–88.

In sum, as the law stands in misappropriation and lending cases, subrogation is available in different circumstances and has a different effect compared to direct claims. Accordingly, subrogation is not redundant.

6.3 Implications

This has seven important implications:

(1) Just because a rule applies to direct claims does not mean that it applies to subrogation.

(2) Just because a rule applies to subrogation does not mean that it applies to direct claims.

(3) The law can dispense with unsatisfactory reasoning which exists only to prop up the fallacy that subrogation is governed by the same rules as direct claims.

(4) Subrogation may succeed where a direct claim fails.

(5) Subrogation is not redundant.

(6) Subrogation is not a remedy for unjust enrichment in the sense that it duplicates a direct unjust enrichment claim and is redundant. Nevertheless, it may be a remedy for unjust enrichment in another sense.

(7) The question of when subrogation should occur deserves renewed

attention.

Each implication will be considered in turn.

First, just because a rule applies to direct claims does not mean that it applies to subrogation. For example, Chapter 2 showed that although the *ITC* rules govern direct claims, they do not govern subrogation. Accordingly, Lord Mance and Lord Neuberger were wrong to apply the *ITC* rules to the subrogation claim in *Swynson*.[9]

In particular, C's loan to EMSL caused D's liability in negligence to be 'reduced to nil'.[10] However, C did not intend this, so Lord Mance's view was that it was an incidental benefit for D and therefore *ITC*'s rule against incidental benefits barred C's subrogation claim.[11] Lord Sumption and Lord Neuberger were sympathetic to this idea, though they did not decide the point.[12] However, Chapter 2 showed that subrogation is not governed by the incidental benefits rule. As such, the Supreme Court was wrong to apply the incidental benefits rule to subrogation in *Swynson*.[13]

Second, just because a rule applies to subrogation does not mean that it applies to direct claims. So, Birks, Mitchell, and Watterson are wrong to rely on

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9 *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2018] AC 313 [56], [58], [67], [89] (Lord Mance), [114]–[115], [117], [120] (Lord Neuberger).

10 *Swynson* (n 9) [89] (Lord Mance). For the facts, see page 14.

11 *Swynson* (n 9) [67], [88]–[89] (Lord Mance).

12 *Swynson* (n 9) [20] (Lord Sumption), [115] (Lord Neuberger).

13 See pages 86–88.

subrogation cases as authority for a broad causal test for whether an enrichment came at C's expense in direct claims.[14]

Third, the law can dispense with unsatisfactory reasoning which is used only to prop up the fallacy that subrogation is governed by the same rules as direct claims.[15] For instance, co-ordinated transactions reasoning is over-inclusive, under-inclusive, and uncertain.[16] Yet it has been applied only in subrogation cases: co-ordinated transactions reasoning exists only to ensure that subrogation cases satisfy *ITC*'s requirement of a direct transfer of value.[17] Once it is recognised that direct claims and subrogation are governed by different rules, and that *ITC* governs direct claims but not subrogation, then there is no need to squeeze the subrogation cases into the *ITC* rules. The unsatisfactory co-ordinated transactions reasoning can be forgotten.

Fourth, as direct claims and subrogation are governed by different rules, a

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[14] Peter Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 96–98 cited by Charles Mitchell and Stephen Watterson, *Subrogation: Law and Practice* (rev edn, OUP 2007) para 5.15 fn 22; Stephen Watterson, '"Direct Transfers" in the Law of Unjust Enrichment' (2011) 64 CLP 435, 458–59, 464–66; Charles Mitchell, Paul Mitchell, and Stephen Watterson, *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) paras 6-53, 6-70.

[15] cf Sonja Meier, 'Enrichment "At the Expense of Another" and Incidental Benefits in German Law' [2019] Acta Juridica 453, 461; Rajiv Shah, 'Reasons for Unjust Enrichment' (PhD thesis, University of Cambridge 2018) <www.repository.cam.ac.uk/handle/1810/290112> accessed 29 March 2020, 39, 43; Lionel Smith, 'Restitution: A New Start?' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing 2019) 99; Pablo Letelier, 'A Wrong Turn? Reconsidering the Unified Approach to Unjust Enrichment Claims' (2020) 136 LQR 121, 136.

[16] See pages 70–77.

[17] See page 77.

direct claim may succeed where subrogation fails and subrogation may succeed where a direct claim fails. In *Anfield*, *BFC*, *Butler*, *Niru Battery*, and *Menelaou* subrogation succeeded, whereas the *ITC* rules would now bar a direct claim.[18] In *Reversion Fund*, *Mayfair*, and *Anfield*, subrogation succeeded, whereas a direct claim would fail for want of an unjust factor.[19] As a result, Moses LJ was wrong in *Menelaou* when he stated that there is 'no need to duplicate the reasoning in relation to both unjust enrichment and subrogation; the answer should be the same'.[20]

Fifth, this resolves the controversy over whether subrogation is redundant. Subrogation is available when a direct claim is not. Consequently, subrogation does not always duplicate a direct claim and so subrogation is not redundant. Even where direct claims and subrogation are both available, the two have different effects as the cases of *Liggett* and *Simms* show.[21] Consequently, subrogation is never redundant. Birks was wrong to suggest that subrogation 'adds nothing' and 'can be done without'.[22] Subrogation is available in different circumstances and has a different effect compared to direct unjust enrichment claims.

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18 See Chapter 2.

19 See page 98.

20 *Menelaou v Bank of Cyprus Plc* [2013] EWCA Civ 1960, [2014] 1 WLR 854 ('*Menelaou* (CA)') [59].

21 See Chapter 5.

22 Peter Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) ('*Introduction*') 93.

This has implications for the suggestion that subrogation duplicates a direct claim. When writers make this suggestion, they slide between two different ideas. Sometimes they endorse the narrow idea that subrogation to personal rights in common liability cases (usually) duplicates recoupment or contribution.[23] This may be correct but it does not follow that subrogation is redundant.[24] In other places, writers endorse the broader idea that subrogation (to personal rights) duplicates a direct unjust enrichment claim in all cases, so subrogation (to personal rights) is redundant in all cases.[25] Part I of the thesis has shown that this is not true.

Sixth, this leads to the debate over whether subrogation is a remedy for unjust enrichment. It is usually assumed that there are two consequences of subrogation being a remedy for unjust enrichment. One consequence is that subrogation is governed by the same rules as a direct unjust enrichment claim, that subrogation duplicates a direct claim, and so subrogation is redundant.[26] Part I has shown that subrogation is not a remedy for unjust enrichment in this sense.

However, subrogation may still be a remedy for unjust enrichment in another sense: that subrogation claims ought to be analysed by asking the four unjust

[23] See pages 26–30.

[24] See pages 26–30.

[25] See pages 21–26.

[26] See pages 17–31.

enrichment questions.[27] In *ITC*, Lord Reed stated that 'the questions are not themselves legal tests, but are signposts towards areas of inquiry involving a number of distinct legal requirements'.[28] Consequently, even if all unjust enrichment claims raise the same four questions, the rules which govern the answers to the questions need not be the same for all claims.[29]

In short, subrogation is not a remedy for unjust enrichment in the sense that it duplicates a direct unjust enrichment claim, and so is redundant. Nevertheless, subrogation may be a remedy for unjust enrichment in the sense that courts faced with a subrogation claim ought to ask the four unjust enrichment questions. Part II will evaluate whether subrogation is indeed a remedy for unjust enrichment in the latter sense.

Finally, there are implications for the controversy over when subrogation

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27 See n 63 on page 16.

28 *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29, [2018] AC 275 ('*ITC* (SC)') [41]. See also Smith, 'Restitution' (n 15) 104; Letelier (n 15); Andrew Burrows, 'In Defence of Unjust Enrichment' (2019) 78 CLJ 521, 526–30; Kit Barker, 'Unjust Enrichment in Australia: What is(n't) it? Implications for Legal Reasoning and Practice' (2019) 43 Melbourne University LR 903, 927. cf Rohan Havelock, 'Rivalry over Liability for Defective Transfers' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing 2019) 143.

29 *ITC* (SC) (n 28) [38], [50] (Lord Reed); *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39, [2018] 3 WLR 652 [68] (Lord Mance, Lord Reed, and Lord Hodge); Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) ('*Restitution*') 51, 70, 75–85, 153 fn 48; Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) ('*Restatement*') 48–52; Andrew Burrows, '"At the Expense of the Claimant": A Fresh Look' [2017] RLR 167; Burrows, 'In Defence of Unjust Enrichment' (n 28) 542; Charles Mitchell, 'Other Reasons for Restitution' in Elise Bant, Kit Barker, and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar Publishing 2020) 382–83; Stephen Watterson, 'At the Claimant's Expense' in Elise Bant, Kit Barker, and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar Publishing 2020).

should occur. This question has been neglected for a generation because it has been assumed that subrogation should be available whenever a direct claim is. Consequently, the question of when subrogation should occur deserves fresh attention. Subrogation should occur only when it is justified. Part II therefore asks what, if anything, justifies subrogation and, in light of the answer, when should subrogation occur?

Part II

What is the justification for subrogation?

7 Previous attempts to justify subrogation

7.1 Introduction

Part I addressed the question of whether subrogation is redundant as a matter of authority. Part II now turns to what the law should be as a matter of principle. Part II therefore adopts a different methodology compared to Part I. Part II is concerned with what the law ought to be, so it is not bound by the cases and may reject cases as wrongly decided. Nevertheless, the cases are not irrelevant. They are a source of potential justifications for subrogation, and they can be used in a process of reflective equilibrium to test the persuasiveness of potential justifications for subrogation.[1]

In order to determine what the law should be, Part II asks what, if anything, justifies subrogation. An important part of justifying subrogation is justifying its form. Subrogation gives C new rights which (i) resemble X's extinguished rights and (ii) are often proprietary. A justification for subrogation must explain both of these features.

If subrogation cannot be justified, then it should be abolished. However, Part II argues that subrogation can be justified. It then asks, in light of subrogation's justification, when should subrogation occur and whether courts should analyse subrogation claims by asking the four unjust enrichment questions. To this end,

[1] See pages 42–47.

Chapter 7 rejects a number of previous attempts to justify subrogation. Chapters 8 and 9 then argue that there are two different justifications for subrogation.

The role of this chapter, therefore, is to review previous attempts to justify subrogation. It begins by considering six leading theories:

(1) Unjust enrichment (Section 7.2);

(2) Mistake and failure of basis (Section 7.3);

(3) Defeated expectations (Section 7.4);

(4) Intention (Section 7.5);

(5) Unconscionability (Section 7.6); and

(6) Equity (Section 7.7).

The chapter argues that each of these justifications is unsatisfactory, and that instead subrogation has different justifications in different cases. Section 7.8 reviews the cases and academic writing which support this idea. Section 7.9 summarises.

7.2 Unjust enrichment

Orthodoxy says that subrogation is a remedy for unjust enrichment[2] and some people treat this as the justification for subrogation.[3] However, this justification is incomplete in two ways.

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[2] See page 8.

[3] See n 126 on page 32.

First, even those who support the idea that subrogation is a remedy for unjust enrichment recognise that something more is needed to justify subrogation's creation of proprietary rights.[4]

Second, there is a more fundamental problem with treating unjust enrichment as a justification. As Webb explains:

> Birks had initially employed 'unjust enrichment' as the generic conception of the event which triggered rights to restitution. ... To say that there has been an unjust enrichment is simply to say that the facts support a restitutionary claim. ... Unjust enrichment ... , without further elaboration [does not] provide a reason for requiring [D] to give up such enrichments.[5]

This seems to be acknowledged by *Goff and Jones*:

> Whatever may be the underlying moral justifications for the award of restitution in these cases, the 'unjust' element in 'unjust enrichment' is simply a 'generalisation of all the factors which the law recognises as calling for restitution'. In other words, unjust enrichment is not an abstract moral principle to which the courts refer when deciding cases; it is an organising concept that groups decided cases on the basis that they share a set of common features, namely that in all of them [D] has been enriched by the receipt of a benefit gained at [C]'s expense in circumstances that the law deems to be unjust. The reasons why the courts have held [D]'s enrichment to be unjust vary from one set of cases to another, and for this reason the law of unjust enrichment more closely resembles the law of torts (recognising a variety of reasons why

[4] See page 32.

[5] Charlie Webb, 'Property, Unjust Enrichment, and Defective Transfers' in Robert Chambers, Charles Mitchell, and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 342–43 (footnotes omitted). See also Robert Stevens, 'Is there a Law of Unjust Enrichment?' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Lawbook Co 2008) 15; Charlie Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (OUP 2016) chs 1–2.

> [D] must compensate [C] for harm) than it does the law of contract (embodying a single principle that expectations engendered by binding promises must be fulfilled). In this respect, 'English law does not have a unified theory of restitution'.[6]

This was approved by the Supreme Court in *Barnes v Eastenders Cash & Carry plc*.[7]

Thus, unjust enrichment is not itself a justification for subrogation. However, the various unjust factors may justify subrogation. Mitchell and Watterson write that 'secondary liability, ignorance, mistake and failure of consideration ... are the grounds which can most commonly support a subrogation claim in practice'.[8] The justificatory force of secondary liability and ignorance will be evaluated elsewhere.[9] The following section will evaluate whether subrogation can be justified by mistake or failure of basis.

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6 Charles Mitchell, Paul Mitchell, and Stephen Watterson, *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) para 1-08 (footnotes omitted). See also Charles Mitchell, 'Other Reasons for Restitution' in Elise Bant, Kit Barker, and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar Publishing 2020) 382; cf Peter Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 16–17, 107–08.

7 [2014] UKSC 26, [2015] AC 1 [102] (Lord Toulson) .

8 Charles Mitchell and Stephen Watterson, *Subrogation: Law and Practice* (rev edn, OUP 2007) para 6.02. See also Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) ('*Restitution*') 147, 148, 167; Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) ('*Restatement*') 173; Mitchell, Mitchell, and Watterson (n 6) paras 39-24 – 39-27; Stephen Watterson, 'Modelling Subrogation as an "Equitable Remedy"' (2016) 2 CJCCL 609, 619.

9 See pages 186–193 and Chapter 9.

7.3 Mistake and failure of basis

Many lending cases rely on the unjust factors of mistake or failure of basis.[10] A mistake or failure of basis is a fact, not a justification. There are, however, many theories about why these facts render D's enrichment unjust, justifying giving C rights against D. This section will consider the two leading contenders: vitiated or qualified intention, and absence of basis. The merits of each theory have been debated extensively[11] and there is no room for this thesis to fully evaluate each. Instead, this section will assume that each theory successfully justifies a direct unjust enrichment claim for mistake or failure of basis, and ask whether the theory can also justify subrogation.

Any justification for direct mistake or failure of basis claims cannot explain all lending cases of subrogation. Subrogation succeeded in at least three cases even though neither the unjust factor of mistake nor the unjust factor of failure of basis could be established.[12] In these cases, subrogation seems to go beyond the justification for direct mistake or failure of basis claims. Conversely, in *Swynson*

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[10] See pages 94–95.

[11] eg Birks, *Unjust Enrichment* (n 6) chs 5–6; Andrew Burrows, 'Absence of Basis: The New Birksian Scheme' in Andrew Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006); Sonja Meier, 'No Basis: A Comparative View' in Andrew Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006); Stevens, 'Is there a Law of Unjust Enrichment?' (n 5); Helen Scott, *Unjust Enrichment in South African Law: Rethinking Enrichment by Transfer* (Hart Publishing 2013). See also n 2 on page 92.

[12] See page 98.

the unjust factor of mistake was established but the Supreme Court held that this was not enough to render D's enrichment unjust.[13] Here, the justification for a direct mistake claim seems to go beyond the availability of subrogation. However, none of this is fatal since Part II of the thesis asks what the law ought to be and therefore is not bound by the cases. If the justification for direct mistake and failure of basis claims is a good justification for subrogation, then the cases which do not fit this justification can be rejected as wrongly decided.

There is, however, a more fundamental problem with subrogation sharing the justification for direct mistake and failure of basis claims. Chapter 5 used the cases of *Simms*[14] and *Liggett*[15] to show that direct claims and subrogation take different forms. Direct claims reverse the transaction in which C unjustly enriched D. Subrogation does not. An important part of justifying subrogation is justifying its form.[16] Accordingly, a good justification for subrogation must explain why subrogation gives C rights which resemble X's extinguished rights, rather than reversing the transaction in which C unjustly enriched D.[17]

The two most popular justifications for direct mistake and failure of basis claims are vitiated or qualified intention, and absence of basis. Each theory fails

[13] See pages 99–109.

[14] *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (QB).

[15] *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48 (KB).

[16] See page 31.

[17] Nathan Tamblyn, 'Separating Unjust Enrichment and Subrogation' (2017) 44 Exeter LR 1, 3.

to explain why direct claims reverse the transaction whereas subrogation does not. Accordingly, each theory fails to justify subrogation's form. This will now be demonstrated for each theory in turn.

7.3.1 Vitiated or qualified intention

The dominant view is that mistake justifies a direct unjust enrichment claim because it vitiates C's intention to enrich D, while failure of basis justifies a direct unjust enrichment claim because it qualifies C's intention to enrich D. For example, Birks wrote that:

> Where there is 'a non-voluntary transfer' so that the circumstance calling for restitution is 'a factor negativing voluntariness', the explanation of the response is always reducible in the simplest terms to the statement that [C] did not mean [D] to have the ... enrichment ... In [mistake cases, C's] judgement in forming the intent to transfer was vitiated ... . In [failure of basis cases, C] ... qualified his intention by specifying the event in which, or basis on which, he wanted [D] to have the benefit. Here the reason why we ultimately say the transfer was non-voluntary is that the specified event or basis failed to materialise: in the events which have occurred he did not want [D] to have the benefit.[18]

The form of the remedy (reversing the transaction) flows from its justification (impaired intention). As Scott explains:

> property passes by virtue of the transferor's intention to confer ownership on the recipient of the transfer and the recipient's corresponding

[18] Peter Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) ('*Introduction*') 100–01. See also Burrows, *Restitution* (n 8) 86; Burrows, *Restatement* (n 8) 5, 30; Mitchell, Mitchell, and Watterson (n 6) para 1-25.

> intention to become owner; transfer is thus itself an exercise of the parties' autonomy . . . . But where the intention of [C] in conferring the benefit is impaired, for example, because he is mistaken about his liability, that autonomy is only imperfectly expressed . . . . It is this — the impairment of [C]'s autonomy in deciding to make the transfer — that provides the ethical justification for restitution . . . .[19]

Thus, impaired intention explains why direct claims reverse the transaction which C mistakenly entered. However, subrogation does not reverse the transaction which C mistakenly entered. Instead, it grants C new rights which resemble X's extinguished rights against D.[20] It is difficult to see why C's impaired intention justifies reversing a transaction in *Simms*, whereas C's impaired intention justifies creating new rights which resemble X's extinguished rights in subrogation cases like *Liggett*.

Moreover, it is difficult to see how the justification (impaired intention) explains the form of subrogation (giving C new rights which resemble X's extinguished rights). Subrogation does not undo the transaction to which C's consent was impaired. Nor does subrogation cure the defect in C's consent, making the world as if C were correct and not mistaken. For instance, in *Butler*, subrogation did not undo the transaction by reinstating X's mortgage and giving C its money back.[21]

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[19] Scott, *Unjust Enrichment in South African Law* (n 11) 210 (footnotes omitted). See also Birks, *Introduction* (n 18) 100–01, 140; Frederick Wilmot-Smith, 'Failure of Condition' (DPhil thesis, University of Oxford 2013) <https://ora.ox.ac.uk/objects/uuid:93ab182a-be71-489a-88e8-1479d9b8efb3> accessed 15 October 2019, 163–65; Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2016) ('*Principles*') 121.

[20] See n 7 on page 3.

[21] *Butler v Rice* [1910] 2 Ch 277 (Ch). For the facts, see page 4.

Nor did subrogation cure C's mistaken belief that Mr Rice owned the property by making Mr Rice the owner. Instead, subrogation left Mrs Rice as the owner and gave C a charge over her property. In short, even if impaired intention justifies a direct mistake claim, it is difficult to see how this can justify subrogation.

The same point applies to qualified intention and failure of basis. Wilmot-Smith explains that when C 'performs some action with a conditional intention and the condition fails, the problem she faces ... might be conceived of in one of two ways. First, one might regard the problem as being ... [that] her action is not a reflection of her true intentions' and so the law should reverse that action. Alternatively, one might say that 'the problem is that the condition attached to her action has failed' and so the law should satisfy the condition.[22] There is also a third option: the law could do nothing. In direct claims the law takes the first approach whereas subrogation takes the second. Qualified intention cannot explain this difference, so cannot justify subrogation's form. Three cases illustrate this.

First, in *Cobbe v Yeoman's Row*, D orally agreed to sell a block of flats to C.[23] C therefore obtained planning permission to redevelop the flats. D then withdrew from the agreement. As the agreement to sell the flats was not in writing, it was unenforceable.[24]

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22 Wilmot-Smith, 'Failure of Condition' (n 19) 167. See also 121–26.

23 *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752.

24 Law Reform (Miscellaneous Provisions) Act 1989, s 2(1).

The House of Lords held that D had been unjustly enriched by the planning permission.[25] The unjust factor was failure of basis: C obtained the planning permission on the condition that D would sell the flats to him.[26]

The law could respond to this in one of three ways. First, the law could reverse the service to which the failed condition attached. Second, the law could fulfil the failed condition by enforcing the agreement to sell the flats to C. Third, the law could do nothing. The House chose the first response: C was entitled to recover the value of his services in obtaining the planning permission.[27]

Similarly, in *Guinness Mahon*, the Bank entered an interest rate swap with the Council.[28] At the end of the swap, the Bank had paid more to the Council than the Council had paid to the Bank. It then transpired that the swap was ultra vires for the Council and so void. The Court of Appeal held that the Bank paid the Council on condition that it had a contractual right to the Council's counter-performance and that condition had failed.

Again, the law could respond to this in one of three ways. First, the law could reverse the payments to which the failed condition attached. Second, the law could fulfil the failed condition by imposing an obligation on the Council to pay.

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25 *Cobbe* (n 23) [40] (Lord Scott).

26 *Cobbe* (n 23) [43] (Lord Scott).

27 *Cobbe* (n 23) [41]–[44] (Lord Scott).

28 *Guinness Mahon & Co Ltd v Kensington and Chelsea RLBC* [1999] QB 215 (CA). The same analysis applies to *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 WLR 912 (CA) (Cannon's Claim); *Goss v Chilcott* [1996] AC 788 (PC).

Third, the law could do nothing. Again, the Court chose the first response: the Bank could recover its payments to the Council, less the Council's payments to the Bank.

Contrast these cases with *Lehman*, a subrogation case which relies on failure of basis.[29] There, one company, Brookdane, owned another, D. C loaned money to Brookdane. Brookdane used the loan to discharge X's charge over D's property. C had contracted with Brookdane for a charge over D's property, and D executed a third party charge in favour of C. But legislation rendered this charge void. Prima facie, then, C was unsecured. However, Vos J held that D was unjustly enriched at C's expense because C 'bargained for the charge over the property but did not get it ... [and] had made [the charge] a condition of the transaction'.[30]

Once again, the law could respond to this in one of three ways. First, the law could reverse the action to which the failed condition attached by undoing C's loan and reinstating X's charge. Second, the law could fulfil the failed condition by giving C its charge. Third, the law could do nothing. Vos J took the second route by holding that C was subrogated to X's extinguished charge.

Cobbe, *Guinness Mahon*, and *Lehman* are therefore all said to be failure of basis cases, but the law responds to this in opposite ways. In *Cobbe* and

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29 *Lehman Commercial Mortgage Conduit Ltd v Gatedale Ltd* [2012] EWHC 848 (Ch), The Times, 6 July 2012.

30 *Lehman* (n 29) [28] (Vos J).

Guinness Mahon the law gave C a direct claim to reverse the action to which C's condition attached, whereas in *Lehman* the law used subrogation to satisfy the failed condition. Qualified intention cannot explain this difference, so cannot justify subrogation's form.

7.3.2 Absence of basis

Later, Birks changed his mind and thought that the justification for mistake and failure of basis claims was that: 'every enrichment at another's expense either has an explanation known to the law or has not. ... An enrichment which turns out to have no such explanation is inexplicable and cannot be retained.'[31] Mistake and failure of basis were each ways of showing that there was no basis for D's enrichment.[32]

However, this comes no closer to solving the problem posed in the previous section. In direct claims, if an enrichment has no basis, then the transaction which enriched D is reversed. By contrast, in subrogation cases, if an enrichment has no basis, then C is given new rights which resemble X's extinguished rights. It is difficult to see why the same justification (absence of basis) should lead to different outcomes in different cases. Accordingly, even if absence of basis justifies direct mistake and failure of basis claims, it does not justify subrogation.

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[31] Birks, *Unjust Enrichment* (n 6) 102–03.

[32] Birks, *Unjust Enrichment* (n 6) chs 5–6.

7.3.3 Different enrichments

Watterson offers a potential solution to these difficulties. He suggests that direct claims and subrogation take different forms because they reverse different enrichments.[33] Direct claims reverse '"factual" enrichments: the receipt of value' by ordering D to pay 'a money sum reflecting the monetary value of [D]'s enrichment'.[34] By contrast, subrogation reverses a '"legal" enrichment ... the release of [X's] rights ... by substantially recreating the released liabilities/rights in favour of C'.[35]

However, in both direct claims and subrogation, the law reverses both types of enrichment, so the distinction between different enrichments cannot explain why direct claims and subrogation take different forms. In the direct claim in *Simms*, Robert Goff J held that D's debt was not discharged by C's payment.[36] As a result, the law prevented D from being factually or legally enriched. In the subrogation case of *Liggett*, Wright J held that D's debts were discharged by C's payments.[37] D was factually and legally enriched by this, but both enrichments were reversed by

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[33] Stephen Watterson, 'Subrogation' in Graham Virgo and Sarah Worthington (eds), *Commercial Remedies: Resolving Controversies* (CUP 2017) 439–48; Watterson, 'Modelling Subrogation as an "Equitable Remedy"' (n 8) 615–17. See also AVM Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Hart Publishing 2012) 141–47

[34] Watterson, 'Subrogation' (n 33) 440 (emphasis omitted), 438.

[35] Watterson, 'Subrogation' (n 33) 440–41 (emphasis omitted).

[36] *Simms* (n 14).

[37] *Liggett* (n 15).

subrogation recreating the debts in C's favour. Thus, direct claims and subrogation take different forms, but in both the law ensures that D is not factually or legally enriched. The distinction between factual and legal enrichment does not explain why direct claims and subrogation take different forms.

7.3.4 Summary

In sum, whatever the justification is for direct mistake and failure of basis claims, it cannot justify subrogation too. There is no explanation for why the same justification supports reversing C's actions in direct claims but giving C rights which resemble X's extinguished rights in subrogation cases.

7.4 Defeated expectations

Giving the leading judgment in *Swynson*, Lord Sumption said that:

> The cases on the use of equitable subrogation to prevent or reverse unjust enrichment are all cases of defective transactions. They were defective in the sense that [C] paid money on the basis of an expectation which failed. ... [T]he real basis of [subrogation] is the defeat of an expectation of benefit which was the basis of [C]'s consent to the payment of the money for the relevant purpose.
>
> ... [T]he role of the law of unjust enrichment in such cases is to characterise the resultant enrichment of [D] as unjust, because the absence of the stipulated benefit disrupted a relevant expectation about the transaction under which the money was paid.[38]

[38] *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2018] AC 313 [30]–[31].

Lord Sumption cannot be right that C's defeated expectation is the justification for 'all cases' of subrogation.[39] As Cleaver notes, in many misappropriation cases C had no expectation of anything.[40] Furthermore, in common liability cases subrogation can give C more than it expected. C may be subrogated to X's extinguished security, even if C was unaware of that security.[41]

The idea that subrogation *in lending cases* may be justified by C's defeated expectation is more plausible. However, it still faces two problems: immorality and inconsistency. Each will be explained in turn.

7.4.1 Problem 1: immoral

First, Lord Sumption's defeated expectations justification is arguably immoral. Lord Sumption observed that D need not share C's expectation[42] and 'the intentions of [D] were beside the point'.[43] Thus, subrogation can give C rights against D even though D does not feature in the justification for those rights. Stevens writes that it 'is not the case, and cannot be, that the justification for recovery is wholly "claimant sided". Such an approach would be immoral. We would be using [D] as a means to an end, requiring them to correct an injustice that was not of

[39] *Swynson* (n 38) [30].

[40] MJ Cleaver, 'Equitable Subrogation in Australia and England' (2018) 29 Journal of Banking and Finance Law and Practice 34, 54. eg *Patten v Bond* (1889) 60 LT 583 (Ch).

[41] eg *Mayhew v Crickett* (1818) 2 Swans 185, 191; 36 ER 585, 587 (Lord Eldon LC).

[42] *Swynson* (n 38) [25], [30].

[43] *Swynson* (n 38) [28].

their doing'.[44] As a result, Stevens writes that Lord Sumption's justification for subrogation 'cannot be correct'.[45]

There are three possible responses to Stevens but none is completely convincing. First, Lord Sumption suggested that C must have bargained for the rights that it expected, yet failed, to acquire.[46] Nevertheless, this bargain need not have been struck with D and in many cases is not.[47] As such, the requirement that C bargain for its rights *with someone* does not necessarily implicate D in C's defeated expectation, and therefore does not implicate D in the justification for subrogation.

A second response to Stevens is that subrogation is unobjectionable because it

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[44] Robert Stevens, 'The Unjust Enrichment Disaster' (2018) 134 LQR 574, 581–82. See also Steve Hedley, *Restitution: Its Division and Ordering* (Sweet & Maxwell 2001) 27; Mitchell and Watterson (n 8) para 3.27; Ernest J Weinrib, 'The Normative Structure of Unjust Enrichment' in Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing 2008); Ernest J Weinrib, 'Correctively Unjust Enrichment' in Robert Chambers, Charles Mitchell, and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009); Ernest J Weinrib, *Corrective Justice* (OUP 2012) ch 6; Ernest J Weinrib, *The Idea of Private Law* (rev edn, OUP 2012) 120–22; Jessica Palmer, 'Unjust Enrichment, Proprietary Subrogation and Unsatisfactory Explanations' (2016) 28 Singapore Academy of Law Journal 955, paras 44–54; J E Penner, 'We All Make Mistakes: A "Duty of Virtue" Theory of Restitutionary Liability for Mistaken Payments' (2018) 81 MLR 222, 224–25; Steve Hedley, 'Justice and Discretion in the Law of Unjust Enrichment' (2019) 43 Common Law World Review 94, 98–104; Lionel Smith, 'Restitution: A New Start?' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing 2019) 102, 110–14; Robert Stevens, 'Private Law and the Form of Reasons' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing 2019); Ernest J Weinrib, 'The Corrective Justice of Liability for Unjust Enrichment' in Elise Bant, Kit Barker, and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar Publishing 2020).

[45] Stevens, 'The Unjust Enrichment Disaster' (n 44) 599. See also 593.

[46] *Swynson* (n 38) [28], [34].

[47] *Swynson* (n 38) [28]–[30] (Lord Sumption). eg *Butler* (n 21); *Banque Financière de la Cité SA v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) ('*BFC*'); *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66, [2016] AC 176 ('*Menelaou* (SC)').

does not leave D worse off: the 'only alteration in her position is that instead of owing the money to [X] she will in future owe it to [C]'.[48] The fact that D is left no worse off removes an objection to granting C rights against D, but it still does not positively justify why the law should do so.[49] To put it another way, subrogation does not leave D worse off, compared to before C discharged X's rights against D. But subrogation does leave D worse off, compared to if subrogation did not take place. As Wilmot-Smith explains, without more, it is not clear why the relevant comparison is the first and not the second.[50]

A final response to Stevens is that his argument presupposes the Kantian view that using people as a means to an end is immoral.[51] Not everyone shares this view[52] and a consequentialist may disagree. There is no space in this thesis on subrogation to engage with the relative merits of these competing theories of

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48 *Butler* (n 21) 282–83 (Warrington J). See also *Re M'Myn* (1886) 33 ChD 575 (Ch) 578 (Chitty J); *Chetwynd v Allen* [1899] 1 Ch 353 (Ch) 357 (Romer J); *Swynson* (n 38) [28] (Lord Sumption); Palmer (n 44) para 49; Peter G Watts, '"Unjust Enrichment" — the Potion that Induces Well-meaning Sloppiness of Thought' (2016) 69 CLP 289, 307; Tamblyn (n 17) 21.

49 cf Joseph Raz, 'Book Review' (1982) 95 Harvard LR 916, 929; Andrew Tettenborn, *The Law of Restitution in England and Ireland* (3rd edn, Cavendish 2002) para 2-30; Tamblyn (n 17) 20–21; Stevens, 'The Unjust Enrichment Disaster' (n 44) 578; Dennis Klimchuk, 'Unjust Enrichment and the Forms of Justice' in Elise Bant, Kit Barker, and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar Publishing 2020) 195.

50 Frederick Wilmot-Smith, 'Should the Payee Pay?' (2017) 37 OJLS 844, 846–851.

51 Immanuel Kant, *Groundwork of the Metaphysics of Morals* (first published 1785, CUP 2012) 4:428–4:429.

52 Liam Murphy, 'The Formality of Contractual Obligation' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing 2019) 156–57; Rachel Leow and Timothy Liau, 'Birksian Themes and Their Impact in England and Singapore: Three Points of Divergence' [2021] LMCLQ 350, 378.

morality. At the least, Lord Sumption's 'defeated expectations' justification for subrogation faces a serious challenge from Stevens' allegation that it is immoral.

7.4.2 Problem 2: inconsistent

A second problem with Lord Sumption's defeated expectations rationale is that it is inconsistent with how the law treats non-subrogation cases. To illustrate this, consider the following variations on the facts of *Butler v Rice*.[53]

> *Valet v Chips*
> Mrs Chips owns a property, subject to X's £100,000 mortgage. Mr Chips asks C for a £100,000 loan to pay off the mortgage. C knows that Mr Chips does not own the property and C knows that Mrs Chips is ignorant of her husband's actions. However, C agrees to the loan as C and Mr Chips agree that Mrs Chips will subsequently execute a mortgage in C's favour. C therefore pays the loan monies to Mr Chips, who pays X. Mrs Chips ratifies her husband's payment, discharging X's mortgage, but she refuses to execute a mortgage in C's favour.

The difference between *Butler* and this case is that in *Butler* C mistakenly thought Mr Rice owned the property whereas here C knows Mr Chips does not. Despite this, Lord Sumption's justification for subrogation still seems to operate. Lord Sumption stated that 'the real basis of [subrogation] is the defeat of an expectation of benefit which was the basis of [C]'s consent to the payment of the money for the relevant purpose'.[54] Here, C paid money to Mr Chips to discharge

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[53] *Butler* (n 21). For the facts, see page 4.

[54] *Swynson* (n 38) [30].

X's mortgage on the basis of its expectation that it would obtain a mortgage over the property and that expected was defeated.

Lord Sumption stated that C must be 'defeated in his expectation of some feature of the transaction for which he may be said to have bargained'.[55] Here, C bargained for a mortgage with Mr Chips. Lord Sumption did not require the bargain to be struck with the owner of the property;[56] indeed, it was not in *Butler v Rice*.[57]

Thus, according to Lord Sumption's justification for subrogation, C ought to be subrogated to X's extinguished mortgage over Mrs Chips' property.

Now compare:

> *Footman v Pasta*
> Mrs Pasta owns a property. Mr Pasta asks C for a £100,000 loan so that he make an extravagant gift to his wife. C knows that Mr Pasta does not own the property and C knows Mrs Pasta is ignorant of her husband's actions. However, C agrees to the loan as C and Mr Pasta agree that Mrs Pasta will subsequently execute a mortgage in C's favour. C therefore pays the loan monies to Mr Pasta, who pays them to Mrs Pasta. Mrs Pasta accepts the gift, but refuses to execute a mortgage in C's favour.

The only difference between *Valet v Chips* and this case is that Mr Chips used C's loan to pay off a mortgage over his wife's property, whereas Mr Pasta used C's loan to make a gift to his wife. Again, C is defeated in its expectation of

[55] *Swynson* (n 38) [34].

[56] *Swynson* (n 38) [28]–[30] (Lord Sumption).

[57] *Butler* (n 21).

obtaining a mortgage from the borrower's wife. According to Lord Sumption, this defeated expectation seems to justify a subrogation claim in *Valet v Chips*, but not C recovering the loan monies from Mrs Pasta in *Footman v Pasta*. Lord Sumption seemed to treat defeated expectations as only triggering subrogation. He suggested that the unjust factors of failure of basis and mistake are governed by different rules, which continue to govern direct unjust enrichment claims.

Thus, he observed that 'failure of basis ... ordinarily requires that the expectation should be mutual [between C and D], whereas this is not a requirement for equitable subrogation'.[58] Here, C made the loan on the basis that it would obtain a mortgage over Mrs Pasta's property. But this basis was not shared with Mrs Pasta, so C cannot establish the unjust factor of failure of basis.

Furthermore, Lord Sumption said that '[m]istake is not the critical element' in subrogation claims and that 'it would be unwise to draw too close an analogy with the role of mistake in other legal contexts'.[59] While Lord Sumption stated that a defeated expectation about the future can justify subrogation, in direct claims a defeated expectation about the future is an inert misprediction rather than an actionable mistake.[60] Here, C made a misprediction that Mrs Pasta would grant a mortgage in the future. But C made no mistake about the past or present, so

[58] *Swynson* (n 38) [30]. See also n 21 on page 97.

[59] *Swynson* (n 38) [30].

[60] See n 20 on page 96.

cannot establish the unjust factor of mistake. Accordingly, C's claim to recover the loan monies from Mrs Pasta fails for want of an unjust factor.

C's claim would also fail because Mrs Pasta's receipt of the £100,000 did not come at C's expense. *ITC* establishes that a direct claim requires a transfer of value from C to D.[61] Here, there was a transfer of value from C to Mr Pasta (when C made the loan to Mr Pasta) and another transfer of value from Mr Pasta to his wife (when he made a gift to her). But just like in *ITC*, these two separate transactions 'cannot be collapsed into a single transfer of value' from C to Mrs Pasta, so C's claim fails because Mrs Pasta's enrichment did not come at C's expense.[62]

Thus, Lord Sumption would seem to allow C's subrogation claim in *Valet v Chips* but deny C's direct unjust enrichment claim in *Footman v Pasta*. Yet the only difference in the facts is that Mr Chips used C's loan to pay off a mortgage over his wife's property, whereas Mr Pasta used C's loan to make a gift to his wife. It is difficult to see why this should change the result.

Generalising, if C's defeated unilateral expectation about the future leads to the discharge of D's obligation to X, then C is subrogated to X's extinguished rights against D (as in *Butler v Rice* and *Valet v Chips*). But if C's defeated

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61 *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29, [2018] AC 275 ('*ITC* (SC)') [43] (Lord Reed).

62 *ITC* (SC) (n 61) [71] (Lord Reed).

unilateral expectation about the future leads to D being enriched in some other way, then C has no claim against D (as in *Footman v Pasta*). Lord Sumption does not justify this difference, so his justification for subrogation appears to treat like cases inconsistently.[63]

7.4.3 Summary

As a result of the problems of immorality and inconsistency, Lord Sumption's defeated expectations justification for subrogation should be rejected.[64]

7.5 Intention

Older cases justified subrogation on the basis of actual[65] or presumed[66] intention for C to acquire X's extinguished rights. However, Palmer observes that 'whose intention was relevant was not always consistently identified'.[67] Sometimes, the courts looked to C's intentions[68] whereas on other occasions they considered C

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63 cf pages 311–312.

64 The same applies to Tamblyn (n 17) 19–22.

65 eg *Patten* (n 40) 586 (Kay J).

66 eg *Butler* (n 21) 282–83 (Warrington J); *Ghana Commercial Bank v Chandiram* [1960] AC 732 (PC) 745 (Lord Jenkins); *Orakpo v Manson Investments Ltd* [1978] AC 95 (HL) 104G–05C (Lord Diplock).

67 Palmer (n 44) para 45.

68 eg *Butler* (n 21) 282–83 (Warrington J); *Ghana Commercial Bank* (n 66) 745 (Lord Jenkins).

and D's 'mutual intentions'.[69]

In *BFC*, the House of Lords rightly rejected intention as the justification for subrogation.[70] Lord Hoffmann said 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.[71]

Lord Hoffmann cited cases including *Butler v Rice* and *Boscawen* where subrogation succeeded even though D had no intention of C acquiring rights against D.[72]

Lord Hoffmann was also right to reject the theory that subrogation is justified by C's unilateral intention. In *Butler*, C's actual intention was to acquire rights under a new legal mortgage.[73] It was fictional to say that C intended to acquire rights resembling those X had under its extinguished equitable charge.[74] Furthermore, C has no intention of acquiring any rights in misappropriation cases.[75]

As Mitchell and Watterson explain, if the parties want C to acquire X's rights

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69 eg *Orakpo* (n 66) 104G–05C (Lord Diplock).

70 *BFC* (n 47) 231D–34D (Lord Hoffmann); 241D (Lord Hutton).

71 *BFC* (n 47) 234B–C.

72 *BFC* (n 47) 231D–34D (Lord Hoffmann) citing *Butler* (n 21); *Boscawen v Bajwa* [1996] 1 WLR 328 (CA). For the facts of *Butler*, see page 4. For the facts of *Boscawen*, see page 78.

73 *Butler* (n 21). For the facts, see page 4.

74 *Halifax Mortgage Services Ltd v Muirhead* (1998) 76 P&CR 418 (CA) 425 (Evans LJ); Mitchell, Mitchell, and Watterson (n 6) paras 39-07.

75 eg *Patten* (n 40).

then they can choose to transfer X's rights by assignment; in practice parties never intend subrogation.[76]

Palmer offers a different intention-based theory. She argues that subrogation to proprietary rights is justified by D's intention to grant C a security interest.[77]

At the outset, it should be noted that Palmer's theory does not fit the results or reasoning of the cases. She writes that the leading cases of *Chetwynd v Allen*, *Butler v Rice*, and *Menelaou* are wrongly decided, because in each case D had no intention of giving C rights.[78] Although some cases justify subrogation by reference to C and D's mutual intention,[79] *Boscawen* seems to be the only case which treated D's intention alone as decisive.[80]

This Part of the thesis is concerned with what the law ought to be, so lack of fit with the cases is not fatal to an otherwise convincing theory. However, Palmer's theory becomes fictitious:

> equity will not be limited only to [D's] actual or express intention. Equity requires of all parties that they act in good conscience. It may therefore deem [D] to have a certain intention. ... Proprietary subrogation will also be available where equity deems [D] to have an intention to grant an interest to [C] in the particular circumstances

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76 Mitchell and Watterson (n 8) para 3.01.

77 Palmer (n 44) paras 44–54.

78 Palmer (n 44) para 53 referring to *Chetwynd* (n 48); *Butler* (n 21); *Menelaou* (SC) (n 47). See also Tamblyn (n 17) 19. For the facts of *Butler*, see page 4. For the facts of *Menelaou*, see page 12.

79 See n 69 on page 166.

80 *Boscawen* (n 72) 337F–39H (Millett LJ); Palmer (n 44) para 46.

> despite [D]'s protestations. *Boscawen* is an example of this. Although [D] never intended that [C] would have a charge on his property had the transaction as planned been implemented, in the circumstances that did occur, [D] must in good conscience be taken to have intended to grant a security to [C]. [D] could not intend both to have the property unencumbered and the debt discharged. Again, the extinguished security interest of [X] serves as a useful evidential proxy for what [D] should have agreed to give [C].[81]

As Palmer herself acknowledges, '[s]ome may object that this ... deemed intention' is 'fiction[al]'.[82] In *Boscawen* D had no intention of giving C rights. If subrogation is justified by D's deemed intention to give C rights, then the reason for so deeming is the justification for subrogation and clothing it in the language of D's intention is dishonest and unnecessary. So, in *Boscawen*, the reason why D 'could not' in 'good conscience ... intend both to have the property unencumbered and the debt discharged' is the real reason for subrogation. This reason must be sought out, rather than clothed in a fictional intention.

One might therefore amend Palmer's theory by saying that subrogation is justified only by D's actual intention to give C security. However, this still faces two problems. First, it is unclear why the parties should be allowed to evade any formalities which would otherwise be required for D to give C security.[83]

Second, even if D had an actual intention to give C security, this does not

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[81] Palmer (n 44) paras 47, 52 referring to *Boscawen* (n 72). For the facts of that case, see page 78.

[82] Palmer (n 44) para 48.

[83] eg Law of Property Act 1925, ss 52, 53.

explain why the security should resemble X's extinguished security. Palmer's response is that 'the extinguished security interest of [X] serves as a proxy for what [D] would have agreed to give' to C.[84] This suggests that if D intended to give C greater rights than X, then C should acquire these greater rights. But this proves too much. The definition of subrogation is giving C rights which resemble X's extinguished rights.[85] Consequently, even if D intended to give C greater rights than X, X's rights limit what subrogation gives to C.[86] Palmer's theory cannot explain this, and so it is not a justification for subrogation.

All in all, intention cannot justify subrogation.

7.6 Unconscionability

In *Boscawen*, Millett LJ said that subrogation occurs when it is 'unconscionable for [D] to deny the proprietary interest claimed by [C]'.[87] Unconscionability, then, may be the justification for subrogation.

Virgo suggests that unconscionability can be interpreted in four different ways:

> [There is] a fundamental distinction between [D]'s conscience and the conscience of the court. ... When [D]'s conscience is assessed, a

[84] Palmer (n 44) para 51.

[85] See n 7 on page 3.

[86] *Re Manchester, Middleton, and District Tramways Company* [1893] 2 Ch 638 (Ch) 655 (Kekewich J); *Nottingham Permanent Benefit Building Society v Thurstan* [1902] 1 Ch 1 (CA) affd [1903] AC 6 (HL); *Ghana Commercial Bank* (n 66); *Muirhead* (n 74).

[87] *Boscawen* (n 72) 335D (Millett LJ).

> further distinction needs to be drawn between conscience as a state of [D]'s mind and conscience as an assessment of [D]'s behaviour, which essentially reflects subjective and objective interpretations of conscience. ... Conscience alternatively refers to the conscience of the court. This can be interpreted as the exercise either of principled or unprincipled discretion.[88]

On any of Virgo's interpretations, unconscionability is not a sufficient justification for subrogation. As for the first interpretation — 'conscience as a state of [D]'s mind' — it has already been shown that subrogation cannot be justified by D's intention to grant C rights.[89] For the second interpretation — 'conscience as an assessment of [D]'s behaviour' — the standard by which D's behaviour is to be assessed needs to be articulated and justified.

Moving ahead to the fourth interpretation — conscience as an exercise of unprincipled discretion — Virgo rightly argues that this is indefensible: 'if the resort to justice is to be defensible and predictable, there needs to be identifiable principles or recognised factors to guide that discretion and to ensure that like cases are treated alike'.[90]

The third interpretation — conscience as an exercise of principled discretion —

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[88] Graham Virgo, 'Whose Conscience? Unconscionability in the Common Law of Obligations' in Andrew Robertson and Michael Tilbury (eds), *Divergences in Private Law* (Hart Publishing 2016) 309–10. See also 299, 311, 319.

[89] See pages 167–169.

[90] Virgo, 'Whose Conscience?' (n 88) 310. See also Peter Birks, 'Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment' (1999) 23 Melbourne University LR 1, 20–22; Virgo, 'Whose Conscience?' (n 88) 315, 320; Robert Stevens, 'Set-Off and the Nature of Equity' in Paul S Davies, Simon Douglas, and James Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 43.

fits with Millett LJ's suggestion that:

> subrogation ... is not a remedy which the court has a general discretion to impose whenever it thinks it just to do so. The equity arises from the conduct of the parties on well settled principles and in defined circumstances which make it unconscionable for [D] to deny the proprietary interest claimed by [C].[91]

This also fits the position of the High Court of Australia. In *Bofinger*, the Court quoted Millett LJ's dictum with approval[92] and stated that:

> whether a particular case [justifies subrogation] is determined by reference to well developed principles, both specific and flexible in character. It is to those principles that the court has first regard rather than entering into the case at that higher level of abstraction involved in notions of unconscientious conduct in some loose sense where all principles are at large.[93]

However, as Virgo suggests, where an area of law is said to represent an exercise of principled discretion, the principles which govern the exercise of this discretion need to be articulated.[94] These principles may be enough to justify the law, leaving 'unconscionability' doing no justificatory work.[95]

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91 *Boscawen* (n 72) 335C–E.

92 *Bofinger v Kingsway Group Ltd* [2009] HCA 44, (2009) 239 CLR 269 [94] (Gummow, Hayne, Heydon, Kiefel, and Bell JJ). See also [8] (Gummow, Hayne, Heydon, Kiefel, and Bell JJ).

93 *Bofinger* (n 92) [81] (Gummow, Hayne, Heydon, Kiefel, and Bell JJ) quoting *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57, (2003) 217 CLR 315 [20] (Gleeson CJ, McHugh, Gummow, Hayne, and Heydon JJ). See generally *Bofinger* (n 92) [78]–[82] (Gummow, Hayne, Heydon, Kiefel, and Bell JJ).

94 Virgo, 'Whose Conscience?' (n 88) 314–15, 319. See also Rohan Havelock, 'Rivalry over Liability for Defective Transfers' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing 2019) 133–38.

95 Graham Virgo, 'Conscience or Unjust Enrichment?' (*Opinions on High*, 19 May 2014)

This is the case for subrogation. For example, in *Bofinger* D owed a debt to X. C guaranteed that debt. D defaulted, so C paid the debt. The Court held that C was subrogated to X's extinguished rights. It explained that 'a foundation for' subrogation was that D had 'ultimate liability' for the debt, whereas C had only 'secondary liability'.[96] Chapter 9 agrees that this is a good justification for subrogation. However, it leaves unconscionability as a conclusory label, rather than a justification for subrogation.[97]

7.7 Equity

In *Bofinger*, the High Court of Australia stated that subrogation is governed by 'principles of equity'.[98] Just as with conscience, these principles need to be articulated and these principles may complete the task of justifying subrogation, leaving 'equity' with no justificatory work to do. 'Equity' can be defined in different ways; three leading definitions will be considered here. It will be shown that none of the definitions is a sufficient justification for subrogation.

The classic definition is that 'Equity now is that body of rules administered by

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<https://blogs.unimelb.edu.au/opinionsonhigh/2014/05/19/virgo-hills-industries> accessed 9 January 2019; James Edelman and Elise Bant, *Unjust Enrichment* (2nd edn, Hart Publishing 2016) 27; Virgo, 'Whose Conscience?' (n 88) 314–16, 319–20.

96 *Bofinger* (n 92) [7]–[8] (Gummow, Hayne, Heydon, Kiefel, and Bell JJ).

97 cf Virgo, 'Whose Conscience?' (n 88) 320.

98 *Bofinger* (n 92) [89] (Gummow, Hayne, Heydon, Kiefel, and Bell JJ).

our English courts of justice which, were it not for the operation of the Judicature Acts, would be administered only by those courts which would be known as Courts of Equity'.[99] Subrogation certainly fits that definition. However, this is a historical description rather than a justification for subrogation.[100]

A second view is that 'Equity ... takes the form of a kind of discretionary power in the judges to do justice in particular cases where the application of the strict rules of law would be harsh in an individual case'.[101] However, this is no longer true: equity is now 'a system of rules and principles'.[102] In *Boscawen*, Millett LJ stated that 'subrogation ... is not a remedy which the court has a general discretion to impose whenever it thinks it just to do so. The equity arises from the

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99 FW Maitland, *Equity: Also the Forms of Action at Common Law* (CUP 1909) 1. See also eg Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 University of Western Australia LR 1, 9; Andrew Burrows, 'We Do This at Common Law But That in Equity' (2002) 22 OJLS 1, 2; Ben McFarlane, *The Structure of Property Law* (Hart Publishing 2008) 66; John McGee, *Snell's Equity* (1st supp, 34th edn, Sweet & Maxwell 2020) para 1-003; Andrew Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th edn, OUP 2019) 10–11, 544.

100 Maitland (n 99) 1–2; McFarlane, *The Structure of Property Law* (n 99) 68; Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4 J Eq 1, 9; McGee (n 99) para 1-031.

101 Stevens, 'Set-Off and the Nature of Equity' (n 90) 42. See also Burrows, 'We Do This at Common Law But That in Equity' (n 99) 2; Henry E Smith, 'Equitable Defences as Meta-Law' in Paul S Davies, Simon Douglas, and James Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 17.

102 Burrows, 'We Do This at Common Law But That in Equity' (n 99) 2. See also eg SFC Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981) 95; McGee (n 99) para 1-013; Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (n 99) 11; Jennifer Nadler, 'What is Distinctive about the Law of Equity?' [2021] OJLS Advance Article <https://doi.org/10.1093/ojls/gqaa065> accessed 17 March 2021, 3–4.

conduct of the parties on well settled principles and in defined circumstances'.[103]

Even if it were true that equity means discretion, the principles which govern this discretion would need to be articulated. Again, these principles would completely justify subrogation, leaving 'equity' no role in justifying subrogation.[104]

A third view is that:

> a distinctive feature of equity ... [is] its secondary or supplementary nature. Equitable intervention presupposes the existence of primary rules of positive law. The effect of equity is to qualify the enforcement of the positive law to ensure a more complete standard of justice than the law itself would attain.[105]

McFarlane and Stevens argue that equity has 'a specific second-order role to play'.[106] 'Equitable rights concern rights in relation to other rights'.[107] Equity gives C a right 'to control the [D]'s acquisition or enforcement of a particular right'.[108]

Subrogation may fit this definition. A charge created by subrogation 'is entirely dependent upon the common law's prior recognition of' the right which is

[103] *Boscawen* (n 72) 335C–D (Millett LJ). See also *BFC* (n 47) 237D–E (Lord Clyde); *Filby v Mortgage Express (No 2) Ltd* [2004] EWCA Civ 759 [67] (May LJ).

[104] See page 171.

[105] McGee (n 99) para 1-002. See also Steve Hedley, 'Rival Taxonomies Within Obligations: Is There a Problem?' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005) 77, 85; Smith (n 101) 18–27. cf Nadler (n 102) 2.

[106] Ben McFarlane and Robert Stevens, 'What's Special about Equity?: Rights about Rights' in Dennis Klimchuk, Irit Samet, and Henry E Smith (eds), *Philosophical Foundations of the Law of Equity* (OUP 2020) 193.

[107] McFarlane and Stevens, 'What's Special about Equity?' (n 106) 192.

[108] McFarlane and Stevens, 'What's Special about Equity?' (n 106) 192–93. See also n 93 on page 206; Ben McFarlane, 'Form and Substance in Equity' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing 2019); Klimchuk (n 49) 196–98.

charged.[109] The charge restricts the chargor's ability to exercise the right which is charged.[110]

It is more difficult to see subrogation to personal rights as dependent upon common law rights. However, '[n]ot all of the rules that were applied in the Court of Chancery in 1875 ... fall into this pattern of being rules about rules' or rights against rights.[111]

More importantly, viewing equitable rights as 'parasitic' on common law rights[112] does not in itself justify equitable rights. On this view, equitable rights are united by their form.[113] This form means that only certain types of justification can possibly justify equitable rights but '[s]uch rights are not given their unity from the multiplicity of reasons underlying their existence'.[114] Accordingly, even is subrogation is equitable in this third sense, the question of the justification for subrogation remains unanswered.

Consequently, on each of these three interpretations, equity is an insufficient

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109 Stevens, 'Set-Off and the Nature of Equity' (n 90) 43–44.

110 McFarlane and Stevens, 'The Nature of Equitable Property' (n 100) 22–26; Stevens, 'Set-Off and the Nature of Equity' (n 90) 44.

111 Stevens, 'Set-Off and the Nature of Equity' (n 90) 45. See also McFarlane and Stevens, 'The Nature of Equitable Property' (n 100) 28; Smith (n 101); McFarlane, 'Form and Substance in Equity' (n 108) 199; McFarlane and Stevens, 'What's Special about Equity?' (n 106) 191, 193.

112 Stevens, 'Set-Off and the Nature of Equity' (n 90) 44.

113 Stevens, 'Set-Off and the Nature of Equity' (n 90) 42; McFarlane and Stevens, 'What's Special about Equity?' (n 106) 191.

114 Stevens, 'Set-Off and the Nature of Equity' (n 90) 42. See also McFarlane and Stevens, 'What's Special about Equity?' (n 106) 192–94; Klimchuk (n 49) 197.

justification for subrogation.

7.8 Multiple justifications

This section reviews previous attempts to argue that subrogation has different justifications in different cases. Section 7.8.1 shows that this idea is implicit in three theories considered earlier in this chapter. Section 7.8.2 shows that there is some limited support for the idea in the cases. Section 7.8.3 shows that other writers have suggested that subrogation has multiple justifications. It is concluded that, while there is some support for the idea, it requires further elaboration.

7.8.1 Implicit in other theories

The idea that subrogation has multiple justifications is recognised by three theories considered earlier in this chapter. First, those who say that subrogation is a remedy for unjust enrichment also say that subrogation 'is triggered by a range of unjust factors'.[115] Birks described the various unjust factors as representing various 'reasons for restitution'.[116] Consistently, *Goff and Jones* suggests that:

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[115] Burrows, *Restitution* (n 8) 147. See also Mitchell and Watterson (n 8) para 6.02; Burrows, *Restitution* (n 8) 148, 150–51, 167; Burrows, *Restatement* (n 8) 173; Mitchell, Mitchell, and Watterson (n 6) paras 39-24 – 39-27.

[116] Birks, *Unjust Enrichment* (n 6) 16, 41, 105, 107. See also Birks, 'Annual Miegunyah Lecture' (n 90) 1, 16–17. cf Birks, *Unjust Enrichment* (n 6) 108; Webb, 'Property, Unjust Enrichment, and Defective Transfers' (n 5) 343 fn 11, 344–45 fn 15; Webb, *Reason and Restitution* (n 5) 155–58.

> the 'unjust' element in 'unjust enrichment' is simply a 'generalisation of all the factors which the law recognises as calling for restitution'. ... The reasons why the courts have held [D]'s enrichment to be unjust vary from one set of cases to another ... .[117]

Second, in *Boscawen* Millett LJ said that subrogation 'arises ... on well settled principles' — rather than on one well settled principle — 'which make it unconscionable for [D] to deny the proprietary interest claimed by [C]'.[118] Similarly, third, in *Bofinger* the High Court of Australia stated that subrogation is governed by 'principles of equity', rather than one principle of equity.[119]

7.8.2 Cases

There is some limited support in the cases for the idea that subrogation has different justifications in different cases. In *Orakpo*, Lord Diplock said that:

> 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 the civil law. There are some circumstances in which the remedy takes the form of 'subrogation,' but this expression embraces more than a single concept in English law. It ... takes place by operation of law in a whole variety of widely different circumstances.

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[117] Mitchell, Mitchell, and Watterson (n 6) para 1-08 (footnotes omitted, emphasis added). See also Mitchell, 'Other Reasons for Restitution' (n 6) 382. cf Birks, *Unjust Enrichment* (n 6) 107–08.

[118] *Boscawen* (n 72) 335D (Millett LJ, emphasis added).

[119] *Bofinger* (n 92) [89] (Gummow, Hayne, Heydon, Kiefel, and Bell JJ). See also *Re Dalma No 1 Pty Ltd* [2013] NSWSC 1335 [24] (Brereton J); JD Heydon, MJ Leeming, and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th edn, Butterworths 2015) para 9-020.

> Some rights by subrogation are contractual in their origin . . . . Others . . . are in no way based on contract and appear to defeat classification except as an empirical remedy to prevent a particular kind of unjust enrichment.
>
> This makes particularly perilous any attempt to rely upon analogy to justify applying to 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.[120]

7.8.3 Academic support

Academic writers have also suggested that subrogation has multiple justifications.[121] Yet it seems that only one writer has developed the idea at any length: Donnelly, in a PhD thesis submitted to Trinity College Dublin in 2000.[122] This thesis agrees that there are multiple justifications for subrogation. However, this thesis disagrees with Donnelly about what those justifications are. For instance, Donnelly suggests

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[120] *Orakpo* (n 66) 104C–G. See also *Orakpo v Manson Investments Ltd* [1977] 1 WLR 347 (CA) 357H (Buckley LJ) approved *Bofinger* (n 92) [6] (Gummow, Hayne, Heydon, Kiefel, and Bell JJ).

[121] Birks, *Introduction* (n 18) 389–93; Lionel Smith, 'Book Review' (1995) 9 TLI 133, 134; Peter Jaffey, *The Nature and Scope of Restitution* (Hart Publishing 2000) 270–73; Craig Rotherham, *Proprietary Remedies in Context* (Hart Publishing 2002) ch 11; Craig Rotherham, 'Subrogation' in Steve Hedley and Margaret Halliwell (eds), *The Law of Restitution* (Butterworths 2002) para 8.15; Eoin O'Dell, 'Shipping and Subrogation' (*Cearta.ie — the Irish for Rights*, 13 October 2010) <www.cearta.ie/2010/10/shipping-and-subrogation> accessed 6 January 2019; Eoin O'Dell, 'Subrogation, Shipping, and Unjust Enrichment' (*Cearta.ie — the Irish for Rights*, 18 October 2010) <www.cearta.ie/2010/10/subrogation-shipping-and-unjust-enrichment> accessed 6 January 2019; Johann Andreas Dieckmann, 'The Normative Basis of Subrogation and Comparative Law: Select Explanations in the Common Law, Civil Law and in Mixed Legal Systems of the Guarantor's Right to Derivative Recourse' (2012) 27 Tulane European & Civil Law Forum 49, 92, 95; Eoin O'Dell, 'The Varieties of Subrogation' (*Cearta.ie — the Irish for Rights*, 17 August 2012) <www.cearta.ie/2012/08/the-varieties-of-subrogation> accessed 6 January 2019; Cleaver (n 40) 54.

[122] Daniel Donnelly, 'The Law of Subrogation' (PhD thesis, Trinity College Dublin 2000) <www.tara.tcd.ie/handle/2262/78350> accessed 6 January 2019.

that subrogation can be justified by intention, property, or vitiated intention[123] whereas this thesis does not agree.[124]

7.9 Summary

This chapter argued that a number of previous attempts to justify subrogation are unsatisfactory. Some cases and writers suggest that subrogation has multiple justifications. This thesis agrees. Chapter 8 argues that one justification for subrogation is a duty not to use a right for one's own benefit. Chapter 9 argues that a second independent justification for subrogation is properly distributing the burden of a debt.

[123] Donnelly (n 122) 312–13.

[124] See pages 148–169, 193–197.

8 Subrogation and tracing

8.1 Introduction

This chapter argues that one justification for subrogation is a duty not to use a right for one's own benefit. Section 8.2 outlines the popular view that trusts

over traceably acquired rights and subrogation to traceably discharged debts are justified by the same reason. Section 8.3 identifies two objections to this view. The chapter then examines possible justifications for trusts over traceably acquired rights and subrogation to traceably discharged debts. Section 8.4 rejects the view that they are remedies for unjust enrichment. Section 8.5 rejects the view that they vindicate C's property rights. Section 8.6 instead argues that they are both justified by a duty not to use a right for one's own benefit. Section 8.7 identifies the limitations of this account, before Section 8.8 summarises.

For ease of expression the chapter will refer to trusts with beneficiaries, but the argument applies equally to trusts without beneficiaries, such as charitable purpose trusts.

8.2 A factual analogy

Say a trustee holds title to cash on trust and without authorisation spends the cash. If tracing shows that the trustee exchanged title to the cash for title to a car, then the trustee holds title to the car on trust.[1] Alternatively, if tracing shows that the trustee exchanged title to the cash for the discharge of her mortgage, then the beneficiaries are subrogated to the extinguished mortgage.[2]

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1 *Foskett v McKeown* [2001] 1 AC 102 (HL).

2 *Boscawen v Bajwa* [1996] 1 WLR 328 (CA).

The only difference in the facts of these two scenarios is that in the first the trustee acquires a right, whereas in the second the trustee discharges its debt. The overwhelmingly dominant view is that this factual difference is normatively insignificant: subrogation to traceably discharged debts is subject to the same conditions, and is justified by the same reason, as trusts over traceably acquired rights.[3] For example, Mitchell writes that:

> only [the] obscure language [of subrogation] conceals the fact that, if a successful tracing exercise identifies, not shares or a yacht, but an extinguished security interest, the conditions which dictate the transfer of the shares or the yacht will be the same conditions as will justify giving [C] a new security interest that mirrors the extinguished charge.[4]

(A note on terminology: when this thesis refers to tracing into the discharge of a debt, it means that a right was exchanged for the discharge of a debt. This is how the cases use the phrase.[5] However, Smith objects to tracing 'into' the

[3] eg *Boscawen* (n 2) 334B–35F (Millett LJ); *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2018] AC 313 [58]–[61] (Lord Mance); Peter Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) ('*Introduction*') 84, 96, 390; Andrew Tettenborn, *The Law of Restitution in England and Ireland* (3rd edn, Cavendish 2002) para 2-27; Peter Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 298–99; Charles Mitchell, Paul Mitchell, and Stephen Watterson, *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) para 6-63; Nicholas J McBride, *The Humanity of Private Law: Part I: Explanation* (Hart Publishing 2019) 218.

[4] Charles Mitchell, 'Unjust Enrichment' in Andrew Burrows (ed), *English Private Law* (3rd edn, OUP 2013) para 18.282; Charles Mitchell, 'Unjust Enrichment' in Andrew Burrows (ed), *Principles of the English Law of Obligations* (OUP 2015) para 3.282.

[5] eg *Baroness Wenlock v River Dee Co (No 2)* (1887) 19 QBD 155 (CA) 166 (Lord Esher MR, Fry and Lopes LJJ); *Banque Financière de la Cité SA v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) ('*BFC*') 235C–D (Lord Hoffmann); *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66, [2016] AC 176 ('*Menelaou* (SC)') [129] (Lord Carnwath); *Swynson* (n 3) [60] (Lord Mance). See also Birks, *Introduction* (n 3) 390; Birks, *Unjust Enrichment* (n 3) 298; Mitchell, Mitchell, and Watterson (n 3) paras 7-69 – 7-70; Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2016) ('*Principles*') 623.

discharge of a debt: '[l]ooking just at the payment of the debt, we can see that there is no asset acquired by that payment alone, and so nothing into which we could trace'.[6] This is true. Smith instead speaks of tracing 'to the payment of a debt'.[7] This is just a linguistic difference; on this point there is no difference in substance between Smith's position and that of this thesis. This thesis refers to tracing 'into' the discharge of a debt, as this is the language in common usage, rather than tracing 'to' the discharge of a debt. But nothing turns on this.)

8.3 Two objections

There are at least two objections to the idea that subrogation shares the justification of trusts over traceably acquired rights. The first objection is that there is no justification for these trusts, and so there is nothing which can justify subrogation too. Swadling writes that the English courts have offered 'no satisfactory explanation' for these trusts.[8]

Second, even if trusts over traceably acquired rights are justifiable, not everyone shares the instinct that traceably discharged debts should be treated in the

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6 Lionel D Smith, 'Tracing into the Payment of a Debt' (1995) 54 CLJ 290, 298; Lionel D Smith, *The Law of Tracing* (Clarendon Press 1997) 150. See also *Russell Gould Pty Ltd v Ramangkura* [2014] NSWCA 310, (2014) 87 NSWLR 552 [36] (Barrett JA).

7 Smith, 'Tracing into the Payment of a Debt' (n 6) 297; Smith, *The Law of Tracing* (n 6) 149.

8 William Swadling, 'Ignorance and Unjust Enrichment: The Problem of Title' (2008) 28 OJLS 627, 629. See also William Swadling, 'Policy Arguments for Proprietary Restitution' (2008) 28 LS 506, 530.

same way. In *Boscawen*, Millett LJ treated subrogation as a remedy for unjust enrichment[9] but then, as Lord Millett in *Foskett*, stated that trusts over traceably acquired rights are not remedies for unjust enrichment.[10]

To take another example, in *Re Diplock*, payments were made to various charities under a will.[11] The will was then found to be invalid. C, the judicial trustee of the deceased's estate, sought to recover the payments.

One charity used its payment to purchase a bond and the Court of Appeal held that C had a charge over the bond.[12] Another charity used its payment to purchase 'War Stock' and the Court held that C had a charge over the stock.[13]

A third charity used its payment to pay off X's charge over its property.[14] However, the Court held that C was not subrogated to X's extinguished charge.[15] The Court therefore allowed the claim to the traceably acquired right and denied the claim to be subrogated to the traceably discharged debt. In *Boscawen*, Millett LJ suggested that subrogation failed because of the change of position defence[16]

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9 *Boscawen* (n 2) 335C–F.

10 *Foskett* (n 1) 127E–F, 129D–H, 132A–B (Lord Millett).

11 *Re Diplock* [1948] 1 Ch 465 (CA).

12 *Re Diplock* (n 11) 552–54, 557 (Lord Greene MR, Wrottesley and Evershed LJJ).

13 *Re Diplock* (n 11) 554–57 (Lord Greene MR, Wrottesley and Evershed LJJ).

14 *Re Diplock* (n 11) 548 (Lord Greene MR, Wrottesley and Evershed LJJ).

15 *Re Diplock* (n 11) 549–50 (Lord Greene MR, Wrottesley and Evershed LJJ).

16 *Boscawen* (n 2) 341B–F.

but there are difficulties with this explanation.[17]

Furthermore, Smith explains that tracing plays a different role in relation to subrogation, compared to trusts over traceably acquired rights. He writes that unlike trusts over traceably acquired rights,

> subrogation ... is not a claim to specifically surviving enrichment; it is a claim which depends on showing that value was used in a certain way in the past. ... In [a subrogation] claim, tracing is used to show that at a particular point, [C]'s value went to pay a debt; once that is shown, [C] is not concerned with what is actually the traceable proceeds of the value. ... It follows that claims based upon ... subrogation require a theoretical foundation which is independent from that which underlies claims to the traceable proceeds of value.[18]

Consequently, subrogation to a traceably discharged debt is not a claim to a traceable substitute, and there is disagreement about whether the two share the same justification. This chapter investigates that question. Section 4 rejects the view that trusts over traceably acquired rights and subrogation to traceably discharged debts are remedies for unjust enrichment. Section 5 rejects the view that they vindicate C's property rights. Section 6 instead argues that they are both justified by a duty not to use a right for one's own benefit.

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[17] See page 115.

[18] Smith, 'Tracing into the Payment of a Debt' (n 6) 301–04. See also Smith, *The Law of Tracing* (n 6) 152–54; Ben McFarlane, 'Unjust Enrichment, Rights and Value' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing 2012) 587, 590–91; Stephen Watterson, 'Subrogation' in Graham Virgo and Sarah Worthington (eds), *Commercial Remedies: Resolving Controversies* (CUP 2017) 452.

8.4 Unjust enrichment

8.4.1 The argument

The view of Birks, Burrows, and (in some circumstances) *Goff and Jones* is that trusts over traceably acquired rights are remedies for unjust enrichment:

(1) D is enriched by the traceably acquired right.

(2) This is at C's expense because C can trace into it.

(3) The unjust factor is variously identified as C's 'ignorance' of the transaction in which D acquired the right, C's 'powerlessness' to prevent the transaction, C's 'lack of consent' to the transaction, or a fiduciary's 'want of authority' to enter the transaction.[19]

Burrows, Mitchell, and Watterson suggest that the same unjust factor can trigger subrogation as a remedy for unjust enrichment:

(1) D is enriched by the discharge of its debt to X.

(2) This is at C's expense because C can trace into the discharge.

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[19] eg Birks, *Introduction* (n 3) 140–146; Andrew Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 LQR 412; Robert Chambers and James Penner, 'Ignorance' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Thomson Reuters 2008); Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) ('*Restitution*') 169, ch 6, ch 16; Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) ('*Restatement*') 92–98; Mitchell, Mitchell, and Watterson (n 3) paras 8-152 – 8-165. cf Lionel Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (2000) 116 LQR 412, 415–28.

(3) Again, the unjust factor is variously identified as C's 'ignorance' of the transaction in which D's debt was discharged, C's 'lack of consent' to the transaction, or a fiduciary's 'want of authority' to enter the transaction.[20]

The dominant view in the cases is that subrogation is indeed a remedy for unjust enrichment.[21] However, no subrogation case has explicitly relied upon this unjust factor[22] and, even beyond the subrogation cases, it seems that only first instance decisions have relied on this unjust factor.[23]

8.4.2 Evaluation

Furthermore, commentators have offered many objections to the view that unjust enrichment justifies trusts over traceably acquired rights and subrogation to

[20] Charles Mitchell and Stephen Watterson, *Subrogation: Law and Practice* (rev edn, OUP 2007) paras 6.42–6.50; Burrows, *Restitution* (n 19) 167; Mitchell, Mitchell, and Watterson (n 3) paras 8-144 – 8-148, 39-19, 39-25.

[21] See page 8.

[22] cf Mitchell and Watterson (n 20) para 6.43 citing *Primlake Ltd v Matthews Associates (No 1)* [2006] EWHC 1227 (Ch), [2007] 1 BCLC 666 [340] (Lawrence Collins J).

[23] *Relfo Ltd v Varsani* [2012] EWHC 2168 (Ch) [88] (Sales J); *Scott v Bridge* [2020] EWHC 3116 (Ch) [139]–[140] (HHJ Paul Matthews). On the lack of other authority, see *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 230 CLR 89 [156] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); Sarah Worthington, 'Justifying Claims to Secondary Profits' in EJH Schrage (ed), *Unjust Enrichment and the Law of Contract* (Kluwer Law International 2001) 459–60; Mitchell and Watterson (n 20) paras 6.44, 6.48; Chambers and Penner (n 19) 253; Swadling, 'Ignorance and Unjust Enrichment' (n 8) 630; Lionel Smith, 'Philosophical Foundations of Proprietary Remedies' in Robert Chambers, Charles Mitchell, and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 298–99; Burrows, *Restitution* (n 19) 403; Burrows, *Restatement* (n 19) 93; Mitchell, Mitchell, and Watterson (n 3) paras 8-05 – 8-06; Virgo, *Principles* (n 5) 152, 565.

traceably discharged debts.[24] This thesis will not canvas all their objections. Instead, one common criticism will be rehearsed.

That criticism is that D is not enriched at C's expense.[25] Say that D holds title to a book on trust for C. In breach of trust, D transfers title to the book to a third party in exchange for title to £100 in cash. The third party knows that the transaction is a breach of trust. In this situation, C can elect between a trust over the third party's title to the book and a trust over D's traceably acquired title to the £100.[26]

Thus, D has been enriched by the title to the £100. But this enrichment has not come at C's expense as C is still entitled to have title to the book held on trust. Accordingly, it is difficult to see the trust over the traceably acquired right to the £100 as a remedy for D's unjust enrichment at C's expense.

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[24] eg Worthington, 'Justifying Claims to Secondary Profits' (n 23) 455–60; RB Grantham and CEF Rickett, 'Property Rights as a Legally Significant Event' (2003) 62 CLJ 717; Chambers and Penner (n 19); Swadling, 'Ignorance and Unjust Enrichment' (n 8); Swadling, 'Policy Arguments for Proprietary Restitution' (n 8); Ben McFarlane, 'Unjust Enrichment, Property Rights and Indirect Recipients' [2009] RLR 37; Smith, 'Philosophical Foundations of Proprietary Remedies' (n 23) 298–304; McFarlane, 'Unjust Enrichment, Rights and Value' (n 18); Tatiana RS Cutts, 'The Role of Tracing in Claiming' (DPhil thesis, University of Oxford 2015) <https://ora.ox.ac.uk/objects/ora:12239> accessed 6 January 2019, 129–42; Tatiana RS Cutts, 'Modern Money Had and Received' (2018) 38 OJLS 1; Jordan English and Mohammud Jaamae Hafeez-Baig, *The Law of Tracing* (Federation Press, forthcoming) paras 2.25–2.43.

[25] Lionel Smith, 'Tracing' in Andrew Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 120–124; Swadling, 'Ignorance and Unjust Enrichment' (n 8); McFarlane, 'Unjust Enrichment, Property Rights and Indirect Recipients' (n 24); Smith, 'Philosophical Foundations of Proprietary Remedies' (n 23); McFarlane, 'Unjust Enrichment, Rights and Value' (n 18) 587; Cutts, 'The Role of Tracing in Claiming' (n 24) 129–42; Cutts, 'Modern Money Had and Received' (n 24); English and Hafeez-Baig (n 24) paras 2.29–2.33.

[26] *Foskett* (n 1).

One might object that C must elect between the two trusts.[27] In order to have a trust over D's title to the £100, C must relinquish any entitlement to a trust over the third party's title to the book. Consequently, D's title to the £100 does come at C's expense, and the trust over this traceably acquired right is a remedy for D's unjust enrichment at C's expense.

However, this makes the argument circular.[28] It is premised on C having an election between a trust over the third party's title to the book and a trust over D's title to the £100. But these trusts are exactly what unjust enrichment is trying to explain. As a result, the objection is not compelling and it remains difficult to see a trust over a traceably acquired right as a remedy for unjust enrichment.

The example can be modified to make the same point for subrogation. Say that D holds title to a book on trust for C. In breach of trust, D transfers title to the book to a third party in exchange for the discharge of D's £100 debt to the third party. The third party knows that the transaction is a breach of trust. In this situation, C can elect between a trust over the third party's title to the book[29] and subrogation to the third party's traceably discharged right to £100 from D.[30]

Thus, D has been enriched by the discharge of its debt. But this enrichment

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[27] cf Peter Birks, 'Receipt' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 232; Birks, *Unjust Enrichment* (n 3) 66, 68–69.

[28] See also Swadling, 'Ignorance and Unjust Enrichment' (n 8) 651–53.

[29] *Re Diplock* (n 11); *Foskett* (n 1).

[30] *Boscawen* (n 2).

has not come at C's expense as C is still entitled to have title to the book held on trust. Accordingly, it is difficult to see subrogation as a remedy for D's unjust enrichment at C's expense.

Burrows' response is that whether D is enriched at C's expense 'is assessed factually and not in terms of legal entitlement'.[31] Applied to the examples above, the argument is that as a matter of fact C lost the book because it is no longer held by D, even though C can still elect to have the third party hold title to the book on trust.

English and Hafeez-Baig doubt that this works where C only ever had an equitable proprietary right:

> [C] never had a right to or against the [book], or a right to immediate possession of the [book], in the first place. It cannot be said ... that [C] has been deprived of possession of the [book]. To say that 'at [C]'s expense' is assessed factually in this example simply does not work.[32]

Moreover, a factual assessment creates problems elsewhere.[33] For example, Watterson explains that the 'natural restitutionary response to [factual] enrich-

[31] Andrew Burrows, 'The Relationship between Unjust Enrichment and Property: Some Unresolved Issues' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Thomson Reuters 2008) 335; Burrows, *Restitution* (n 19) 195. See also Burrows, 'Proprietary Restitution' (n 19) 419; Burrows, *Restitution* (n 19) 194–98, 408; Mitchell, Mitchell, and Watterson (n 3) paras 8-16 – 8-19.

[32] English and Hafeez-Baig (n 24) para 2.33. See also McFarlane, 'Unjust Enrichment, Property Rights and Indirect Recipients' (n 24) 56; McFarlane, 'Unjust Enrichment, Rights and Value' (n 18) 587.

[33] cf eg *Foskett* (n 1) 112H (Lord Steyn); Burrows, 'Proprietary Restitution' (n 19) 422–28; Swadling, 'Ignorance and Unjust Enrichment' (n 8) 644–46; Swadling, 'Policy Arguments for Proprietary Restitution' (n 8); English and Hafeez-Baig (n 24) para 2.32.

ments'[34] is 'an order to pay a money sum reflecting the monetary value of [D]'s enrichment'.[35] So if enrichment is assessed factually, it is difficult to explain why subrogation can give C proprietary rights.[36]

One might respond by saying that subrogation can give C proprietary rights to 'reinforc[e] C's monetary claim against D, by imposing a new equitable lien/charge as security for its satisfaction'.[37] However, subrogation gives C new security which resembles X's extinguished security.[38] As Watterson explains, if the purpose of C's new security is simply to reinforce a monetary claim, there is no reason why it should resemble X's extinguished security.[39] Accordingly, if enrichment is assessed factually, then it is difficult to explain why subrogation gives C rights which resemble X's extinguished rights. As such, the view that subrogation is a remedy for unjust enrichment does not justify subrogation's form.[40]

Unjust enrichment theorists are therefore on the horns of a dilemma. On the one hand, if whether D is enriched at C's expense is assessed legally, then any

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34 Watterson, 'Subrogation' (n 18) 440.

35 Watterson, 'Subrogation' (n 18) 438.

36 cf English and Hafeez-Baig (n 24) paras 2.39–2.42.

37 Watterson, 'Subrogation' (n 18) 439 (emphasis omitted).

38 See n 7 on page 3.

39 Watterson, 'Subrogation' (n 18) 439–40.

40 See also Johann Andreas Dieckmann, 'The Province of Subrogation Determined: Some Corrections — A Functional Analysis of the Guarantor's Right to Derivative Recourse, Comprising a Critique of the Restitutionary Thesis' (2012) 20 ERPL 989, 1026; William Swadling, 'In Defence of Formalism' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing 2019) 114–15.

enrichment does not come at C's expense. On the other hand, if whether D is enriched at C's expense is assessed factually, then it is difficult to explain why subrogation gives C rights which resemble X's extinguished rights.

Unjust enrichment theorists might respond by saying that whether D is enriched is assessed legally, and whether that came at C's expense is assessed factually. This is implicitly the position taken by Watterson in a chapter in an edited collection. In the first half of the chapter, Watterson argues that subrogation is 'addressed to the release of D's liabilities, conceived as a "legal" enrichment'.[41] Then, in the second half of the chapter, Watterson shows that subrogation does not depend upon C tracing into the discharge of D's debt.[42] In Watterson's account, therefore, enrichment is assessed legally and 'at the expense of' is assessed factually. The test for enrichment is divorced from the test for 'at the expense of'.[43]

The problem is that it then becomes difficult to explain why subrogation gives C rights against D. The fact that D is unjustly legally enriched by the release from its duty to X may explain why a duty should be imposed on D which resembles its extinguished duty to X. But this does not explain why D's duty should be owed to C. Conversely, the fact that C is unjustly factually worse off may explain

41 Watterson, 'Subrogation' (n 18) 441. See generally 437–49.

42 Watterson, 'Subrogation' (n 18) 448–64. See also Mitchell and Watterson (n 20) paras 5.48–5.50; Stephen Watterson, '"Direct Transfers" in the Law of Unjust Enrichment' (2011) 64 CLP 435, 464–65; Mitchell, Mitchell, and Watterson (n 3) para 6-70.

43 cf Stephen Watterson, 'At the Claimant's Expense' in Elise Bant, Kit Barker, and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar Publishing 2020) 264.

why C should be given a right to a sum of money. But this does not explain why C's right should be against D. The argument that D is legally enriched, and that C is factually worse off, does not explain why the law should respond to this by subrogation, rather than giving C rights against the state and the state rights against D.[44]

In sum, the idea that subrogation is a remedy for unjust enrichment does not explain why subrogation gives C (and not anyone else) rights against D (and not anyone else) which resemble X's extinguished rights.

8.5 Property

8.5.1 The argument

In *Foskett*, the House of Lords declared that the 'transmission of a claimant's property rights from one asset to its traceable proceeds is part of our law of property'.[45] Lord Millett affirmed this view extra-judicially.[46] Similarly, Virgo writes that:

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[44] See n 44 on page 159. cf William M Landes and Richard A Posner, 'The Private Enforcement of Law' (1975) 4 Journal of Legal Studies 1; McBride (n 3) 256–60; Alexander Waghorn, 'Book Review' (2021) 80 CLJ 187, 190.

[45] *Foskett* (n 1) 127E–F (Lord Millett). See also 108F–G (Lord Browne-Wilkinson), 112H (Lord Steyn), 115G (Lord Hoffmann), 126C–F (Lord Hope), 129D–H, 132A–B (Lord Millett).

[46] Peter Millett, 'Proprietary Restitution' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005); Peter Millett, '*Jones v Jones*: Property or Unjust Enrichment?' in Andrew Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006).

> Once [C] has established that he or she has a legal or equitable proprietary interest which can be followed or traced into property which had been received by [D], [C] can establish a restitutionary claim to vindicate his or her proprietary rights.[47]

Virgo argues that subrogation too 'operates to vindicate [C]'s equitable property rights'.[48] He suggests that this position 'has been endorsed by the High Court of Australia' in *Bofinger*[49] but this is not explicit in the Court's judgment. Nevertheless, three English cases suggest that the justification for subrogation is linked to property.

Most notably, in *Menelaou* Lord Carnwath stated that 'there is a clear distinction of principle between a claim to enforce property rights and a claim for unjust enrichment' and '[s]ubrogation to a vendor's lien is a claim to a property right'.[50] By contrast, the rest of the Supreme Court treated subrogation as a remedy for unjust enrichment.[51] Lord Clarke said that this made it 'unnecessary' to consider Lord Carnwath's approach, although there was 'much to be said' for

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47 Virgo, *Principles* (n 5) 631. See generally 11–17, 152–53, 557–65. See also Grantham and Rickett (n 24).

48 Virgo, *Principles* (n 5) 637. See also 637–40; Graham Virgo, 'Restitution and Unjust Enrichment in the Supreme Court: Reflections on *Bank of Cyprus UK Ltd v Menelaou*' [2016] University of Cambridge Faculty of Law Research Paper No 10/2016 <https://ssrn.com/abstract=2724024> accessed 30 September 2017; Graham Virgo, 'Unjust Enrichment' in William Day and Sarah Worthington (eds), *Challenging Private Law: Lord Sumption on the Supreme Court* (Hart Publishing 2020) 179.

49 Virgo, *Principles* (n 5) 637; Virgo, 'Unjust Enrichment' (n 48) 179; citing *Bofinger v Kingsway Group Ltd* [2009] HCA 44, (2009) 239 CLR 269.

50 *Menelaou* (SC) (n 5) [108].

51 *Menelaou* (SC) (n 5) [18], [37], [49]–[50] (Lord Clarke), [61]–[99] (Lord Neuberger), [141] (Lord Kerr and Lord Wilson).

it.[52] Meanwhile, Lord Neuberger was 'attracted to the view that [subrogation] could be justified on the alternative basis of an orthodox proprietary claim rather than on unjust enrichment'[53] and to this extent agreed with Lord Carnwath.[54]

Second, in *Halifax Plc v Omar*, Jonathan Parker LJ gave the unanimous decision of the Court of Appeal. He said that:

> In the *BFC Case*, the House of Lords fashioned the restitutionary remedy of subrogation to meet a situation in which (on the case presented by BFC in the House of Lords) property rights were not in issue. It did so by the application of the wider doctrine of unjust enrichment, so as to confer personal rights (as opposed to property rights) on [C] ... . The instant case, on the other hand, does not require the remedy of subrogation to be fashioned in that special way. In my judgment, the instant case is a straightforward case involving property rights, calling into play well-settled principles.[55]

Subsequently, in *Eagle Star Insurance Co Ltd v Karasiewicz*, Arden LJ — giving another unanimous decision of the Court of Appeal — said that:

> the *Halifax* decision ... explains that what might be described as the more usual case of subrogation is where money is lent to pay off a secured claim. The effect of the *Halifax* decision is that in that situation [C] is given the remedy by way of satisfaction of a pre-existing equitable proprietary right which is vindicated by the order for subrogation.[56]

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52 *Menelaou* (SC) (n 5) [53]–[54].

53 *Menelaou* (SC) (n 5) [59].

54 *Menelaou* (SC) (n 5) [100]–[104].

55 *Halifax Plc v Omar* [2002] EWCA Civ 121, [2002] 2 P&CR 26 [71] referring to *BFC* (n 5).

56 *Eagle Star Insurance Co Ltd v Karasiewicz* [2002] EWCA Civ 940 [19].

8.5.2 Evaluation

Birks made two criticisms of the view that property justifies trusts over traceably acquired rights and subrogation to traceably discharged debts.[57] First, the view makes a '[c]ategorical error': property is one of the law's responses to an event, not an event to which the law responds.[58] Those who treat property as a justification therefore mistake the thing that needs to be explained for its explanation. Second, this error is concealed by the 'fiction of persistence' in which C's 'original right in the original asset simply persisted in, or was transmitted to, the substitute'.[59] This is fiction because the 'right in the substitute is not the same right, and ... [its existence] has to be fully explained'.[60]

Grantham, Rickett, and Virgo respond to these criticisms by explaining that a trust over a traceably acquired right is not the persistence of C's original right. Instead, it is a new right justified by, and created in response to the event of, D's interference with the original right.[61]

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57 Birks, 'Receipt' (n 27) 215–22; Birks, *Unjust Enrichment* (n 3) 21–38; Millett, '*Jones v Jones*' (n 46) 270–72. See also Burrows, 'Proprietary Restitution' (n 19); Robert Chambers, 'Tracing and Unjust Enrichment' in Jason W Neyers, Mitchell McInnes, and Stephen GA Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing 2004) 264–65, 272–78; Mitchell and Watterson (n 20) para 6.50; Burrows, *Restitution* (n 19) 183–91; Mitchell, Mitchell, and Watterson (n 3) paras 8-155 – 8-158, 39-19.

58 Birks, *Unjust Enrichment* (n 3) 32–33.

59 Birks, *Unjust Enrichment* (n 3) 35.

60 Birks, 'Receipt' (n 27) 216.

61 Grantham and Rickett (n 24); Virgo, *Principles* (n 5) 15, 563.

However, this still does not justify why the law responds to this interference by imposing a trust over the traceably acquired right, rather than responding in another way such as giving C a right to compensation from D.[62] As *Goff and Jones* puts it:

> there is nothing inherent in the concept of ownership which dictates that the owner of an asset must also own its unauthorised substitute. If an owner is afforded such rights, it is a contingent choice which our system has made, which must itself be justified.[63]

The same applies to subrogation. An important part of justifying subrogation is justifying its form: why does subrogation give C rights which resemble X's extinguished rights? This question is not answered by saying that subrogation vindicates C's property rights which can be traced into the discharge of X's rights. The law could vindicate C's property rights in another way, such as by giving C a right to compensation.[64] As a result, the argument that subrogation vindicates C's property rights is incomplete as it does not explain subrogation's form.

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62 English and Hafeez-Baig (n 24) para 2.20.

63 Mitchell, Mitchell, and Watterson (n 3) para 8-156. See also Worthington, 'Justifying Claims to Secondary Profits' (n 23) 458–66; Birks, 'Receipt' (n 27) 219; Ben McFarlane, *The Structure of Property Law* (Hart Publishing 2008) 328; Burrows, *Restitution* (n 19) 183, 186; Cutts, 'The Role of Tracing in Claiming' (n 24) 121–26; Watterson, 'Subrogation' (n 18) 463; English and Hafeez-Baig (n 24) paras 2.12–2.20.

64 cf English and Hafeez-Baig (n 24) para 2.20.

8.6 Duty not to use a right for one's own benefit

A number of writers offer a third explanation for trusts over traceable substitutes. These accounts are varied and it would be impossible to do justice to all of them here. Nonetheless, a common theme sees a trust over a traceably acquired right as justified by a duty not to use a right for one's own benefit.[65] This section broadly endorses these accounts, although it departs from some of their details. It then argues that this may also justify subrogation to traceably discharged debts. To substantiate this argument, the section addresses three different fact patterns in turn:

(1) A trustee traceably acquires a right.

(2) A trustee traceably discharges its debt.

(3) A third party traceably acquires a right or traceably discharges its

[65] eg Worthington, 'Justifying Claims to Secondary Profits' (n 23); Lionel Smith, 'Transfers' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 130–31; Lionel Smith, 'Unravelling Proprietary Restitution' (2004) 40 Canadian Business LJ 317; Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4 J Eq 1, 18; Cutts, 'The Role of Tracing in Claiming' (n 24) 154–55; Mitchell, Mitchell, and Watterson (n 3) para 8-162; Aruna Nair, *Claims to Traceable Proceeds: Law, Equity and the Control of Assets* (OUP 2018); Magda Raczynska, *The Law of Tracing in Commercial Transactions* (OUP 2018); Sinéad Agnew and Ben McFarlane, 'The Paradox of the Equitable Proprietary Claim' in Sinéad Agnew and Ben McFarlane (eds), *Modern Studies in Property Law: Volume 10* (Hart Publishing 2019); William Day and Sarah Worthington, 'Proprietary Restitution' in William Day and Sarah Worthington (eds), *Challenging Private Law: Lord Sumption on the Supreme Court* (Hart Publishing 2020) 198; Ben McFarlane and Robert Stevens, 'What's Special about Equity?: Rights about Rights' in Dennis Klimchuk, Irit Samet, and Henry E Smith (eds), *Philosophical Foundations of the Law of Equity* (OUP 2020) 204; Lionel Smith, 'Equity is Not a Single Thing' in Dennis Klimchuk, Irit Samet, and Henry E Smith (eds), *Philosophical Foundations of the Law of Equity* (OUP 2020) 163; English and Hafeez-Baig (n 24) ch 2.

debt.

8.6.1 Trustee traceably acquires a right

The defining feature of a trust is that the trustee has a duty not to use a right for her own benefit.[66] If the trustee, T, exchanges the right held on trust for a substitute right, then T no longer has the original right, and so T can no longer perform her original duty to hold original right on trust. However, McFarlane and Stevens argue that:

> the reason for the original duty does not disappear when perfect compliance with it is no longer possible. ... the original reason now entails that T must do the next best thing to perfect compliance. ... Whatever the original reason for the duty to hold a right on trust, this reason is sufficient to require that the trustee holds unauthorized substitutions on the same basis. The crucial point is that the new right was acquired by T's exercise of powers of title to the original right, and T was under a duty to B in relation to those powers. No fresh reason needs to be provided: it is the original reason for the original duty that requires the recognition of the new duty in relation to the substitute. Just as T was under a duty to B in relation to the original right, T can now be under the same duty to B in relation to the substitute right.[67]

The difficulty with this account is explaining why the duty to hold the substitute

[66] *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072 (PC) 1073H–74A (Lord Templeman); *Armitage v Nurse* [1998] Ch 241 (CA) 253G–54A (Millett LJ); Smith, 'Unravelling Proprietary Restitution' (n 65) 322–23, 337; McFarlane, *The Structure of Property Law* (n 63) 215–16, 551–53; Smith, 'Philosophical Foundations of Proprietary Remedies' (n 23) 293; John McGee, *Snell's Equity* (1st supp, 34th edn, Sweet & Maxwell 2020) paras 21-001, 21-008.

[67] McFarlane and Stevens, 'What's Special about Equity?' (n 65) 204 (footnote omitted). See also Agnew and McFarlane (n 65) 304–07; English and Hafeez-Baig (n 24) paras 2.5, 2.44–2.65.

right on trust is the next best thing to the original duty to hold the original right on trust. One response is to point to the combination of two reasons. First, the duty to hold the substitute right on trust takes the same form as the original duty: both require the trustee to hold a right on trust. Second, the subject matter of this duty is the substitute right, which tracing shows the trustee acquired in exchange for the original right.[68] One might therefore say that the duty to hold the substitute right on trust is the closest the law can come to imposing a duty identical in form to the original duty to hold the original right on trust.

However, consider the case where a trustee holds the right to £1m on trust, and exchanges that right for title to a worthless vase.[69] A duty to hold title to the vase on trust replicates the form of the original duty to hold a right on trust. But it is not the next best thing for the beneficiaries financially. Furthermore, the law could more perfectly replicate the form of original duty to hold a right to £1m on trust, by requiring the trustee to hold the right to £1m of her own money on trust.

Indeed, the law allows the beneficiaries an election between (i) 'adopting' the transaction and requiring the trustee to hold title to the worthless vase on trust, or (ii) 'falsifying' the transaction and requiring the trustee to account for the value of the right which should be held on trust.[70] Under the latter option, the trustee

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[68] Smith, 'Philosophical Foundations of Proprietary Remedies' (n 23) 304; English and Hafeez-Baig (n 24) paras 2.48, 2.65.

[69] I am grateful to Professor Swadling for this example.

[70] *Space Investments* (n 66) 1074B–C (Lord Templeman); *Ultraframe (UK) Ltd v Fielding*

has a duty to pay £1m into the trust.

McFarlane and Stevens' account may therefore be modified. Where performance of the original duty to hold the original right on trust is impossible, the next best thing is to give the beneficiaries an election between a trust over (i) the traceably acquired right, or (ii) the value of the original right.

Birks objected to this kind of account:

> The element of fiction is evident. It is odd to say that a right in a car about which at the time nobody knew anything arose from a declaration of trust of money. It is even more odd when the right itself mutates. [C] has a choice in relation to the substitute whether to take a beneficial interest proportionate to his involuntary contribution or a security interest for the amount of that contribution.[71]

Birks made two objections here, but neither is convincing. First, McFarlane and Stevens' account does not require the parties to know of a specific right to a specific car at the time the trust is made.

Second, the apparent mutation of the beneficiary's right is explicable.[72] As explained above, the trustee's duty to hold the original right on trust gives the beneficiaries an election between (i) a trust over the traceably acquired right; and (ii) requiring the trustee to account for the value of the original right. The latter

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[2005] EWHC 1638 (Ch) [1513] (Lewison J); *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503; McFarlane, *The Structure of Property Law* (n 63) 551–52.

71 Birks, *Unjust Enrichment* (n 3) 35.

72 Grantham and Rickett (n 24) 747–48.

is secured by a lien over traceably acquired rights. This was explained by Lord Millett in *Foskett*:

> the beneficiary is entitled at his option either to assert his beneficial ownership of the proceeds or to bring a personal claim against the trustee for breach of trust and enforce an equitable lien or charge on the proceeds to secure restoration of the trust fund.[73]

Birks' objections are therefore not compelling; a duty not to use a right for one's own benefit can justify trusts over traceably acquired rights.

8.6.2 Trustee traceably discharges its debt

Subrogation to a traceably discharged debt is not the same as a claim to a traceable substitute.[74] Nevertheless, a duty not to use a right for one's own benefit may also justify subrogation. It seems that no author has expressly argued this.[75]

Patten v Bond is a good example.[76] James Patten was a trustee of two trusts: the Bond trust and the Dixon trust. X had a mortgage of title to a house, securing a £1000 debt. As trustee of the Bond trust, Patten held the equity of redemption. As trustee of the Dixon trust, Patten held £600. In breach of the Dixon trust, Patten paid the £600 to X, partially discharging X's mortgage.

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[73] *Foskett* (n 1) 130A.

[74] Smith, 'Tracing into the Payment of a Debt' (n 6) 301–04; Smith, *The Law of Tracing* (n 6) 152–54; Watterson, 'Subrogation' (n 18) 452.

[75] cf Mitchell, Mitchell, and Watterson (n 3) para 8-144 – 8-148; Nair (n 65) para 4.30.

[76] *Patten v Bond* (1889) 60 LT 583 (Ch).

Nine years later, the beneficiaries of the Bond trust paid X £400 and obtained a transfer of X's mortgage. They refused to repay £600 to the Dixon trustees. The Dixon trustees therefore claimed that they were subrogated to X's mortgage, insofar as Patten's payment of £600 extinguished it.

Kay J allowed the claim. His reasoning drew a parallel between trusts over traceably acquired rights and subrogation to traceably discharged debts. He cited *Taylor v Plumer*,[77] a case of a trust over a traceably acquired right,[78] and then held that the 'money, to the knowledge of all concerned, was trust money, and persons have a right to follow it where it has gone'.[79] He explained that, if the Bond trustees had made the payment of £600 to X, then they would be subrogated to X's mortgage insofar as their payment had extinguished it.[80] Instead, Patten made the payment in his capacity as trustee of the Dixon trust. So, by analogy, the Dixon trustees were subrogated to X's extinguished mortgage, which they held under the Dixon trust.[81]

Just like trusts over traceably acquired rights, subrogation to this traceably discharged debt can be understood through the notion of the next best thing.

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77 *Patten* (n 76) 585 citing *Taylor v Plumer* (1815) 3 M&S 562, 105 ER 721.

78 *Trustee of the Property of FC Jones & Sons (A Firm) v Jones* [1997] Ch 159 (CA) 169E–F (Millett LJ) citing Lionel D Smith, 'Tracing in *Taylor v Plumer*: Equity in the Court of King's Bench' [1995] LMCLQ 240.

79 *Patten* (n 76) 586.

80 *Patten* (n 76) 585.

81 *Patten* (n 76) 585–86.

Where a trustee traceably acquires a substitute right, the next best thing was to give the beneficiaries an election between a trust over (i) the traceably acquired right or (ii) the value of the original right. Where a trustee traceably discharges a debt, subrogation can be added to this menu.

Once again, the problem is explaining why subrogation is part of the next best thing. In the previous section, it was argued that the trust over the traceably acquired right is part of the next best thing because:

(i) it takes the same form as the original duty: a duty to hold a right on trust; and

(ii) the subject matter of this duty is the substitute right, which tracing shows the trustee acquired in exchange for the original right.[82]

As explained above,[83] subrogation to a traceably discharged debt and a trust over a traceably acquired right take different forms, so (i) does not apply here. Nevertheless, tracing shows that the debt was discharged in exchange for the original right, so (ii) still holds true. It is therefore plausible that subrogation is part of the next best thing, but it must be conceded that this account is a more persuasive justification of trusts over traceably acquired rights than subrogation to traceably discharged debts.

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[82] Smith, 'Philosophical Foundations of Proprietary Remedies' (n 23) 304; English and Hafeez-Baig (n 24) paras 2.48, 2.65.

[83] See n 18 on page 185.

This justified subrogation creating legal rights, not just equitable rights. Tracing showed that Patten's original right to the £600 was exchanged for the partial discharge X's legal mortgage, not an equitable mortgage. Thus, the next best thing was to give the Pattens a legal mortgage which resembled X's extinguished legal mortgage, rather than an equitable mortgage. Indeed, Kay J seemed to hold that subrogation gave the Dixon trustees a legal mortgage.[84] This shows that where X's rights were legal, a duty not to use a right for one's own benefit can justify subrogation giving C legal rights.

8.6.3 Third parties

Similar reasoning may be able to explain the position of third parties. A trustee has a duty not to use a right for her own benefit.[85] Unlike the trustee's other duties, that duty persists against third parties who, as a result of a breach of trust, acquire a right which is the traceable product of the right held on trust.[86] This

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84 *Patten* (n 76) 586.

85 See n 66 on page 199.

86 eg *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 703E–G, 705F–G, 707B–E (Lord Browne-Wilkinson); *Foskett* (n 1) 127F–G, 130D–E, 131C (Lord Millett); *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424 [51] (Lord Mance), [82]–[83], [88] (Lord Sumption); *Byers v Samba Financial Group* [2021] EWHC 60 (Ch); FW Maitland, *Equity: Also the Forms of Action at Common Law* (CUP 1909) 117–120; Smith, 'Transfers' (n 65) 136–38; Smith, 'Unravelling Proprietary Restitution' (n 65) 320–21; McFarlane, *The Structure of Property Law* (n 63) 23–32; Charles Mitchell and Stephen Watterson, 'Remedies for Knowing Receipt' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing 2010) 115–20; McFarlane and Stevens, 'The Nature of Equitable Property' (n 65) 1.

duty only arises once the third party acquires knowledge of the breach of trust.[87] However, the duty does not persist if the third party is a bona fide purchaser for value without notice.[88]

There is vigorous debate over how to describe the beneficiary's rights in a way that accommodates this feature. The beneficiary's rights are variously labelled as personal rights,[89] proprietary rights,[90] modified proprietary rights,[91] a mixture of personal and proprietary rights,[92] rights against the trustee's rights,[93] and persistent rights.[94]

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87 *Re Montagu* [1987] Ch 264 (Ch); *Westdeutsche* (n 86) 705C–07F (Lord Browne-Wilkinson); *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91 [75]–[84] (Lloyd LJ); *Akers* (n 86) [89] (Lord Sumption); Mitchell and Watterson (n 86) 115–20; Agnew and McFarlane (n 65).

88 *Westdeutsche* (n 86) 703E–G, 705F–G (Lord Browne-Wilkinson); *Foskett* (n 1) 127F–G, 130D–E (Lord Millett); *Akers* (n 86) [51] (Lord Mance), [82]–[83], [88]–[89] (Lord Sumption).

89 Maitland (n 86) Lecture IX.

90 *Westdeutsche* (n 86) 703E–05F (Lord Browne-Wilkinson); *Foskett* (n 1); *Akers* (n 86) [16], [54] (Lord Mance); Millett, 'Proprietary Restitution' (n 46) 315; McGee (n 66) paras 2-002 – 2-003, 21-003.

91 Graham Virgo, *The Principles of Equity & Trusts* (3rd edn, OUP 2018) 47–52.

92 *Akers* (n 86) [82] (Lord Sumption); RC Nolan, 'Equitable Property' (2006) 122 LQR 232; Peter Jaffey, 'Explaining the Trust' (2015) 131 LQR 377.

93 McFarlane, 'Unjust Enrichment, Property Rights and Indirect Recipients' (n 24) 42, 55; McFarlane, *The Structure of Property Law* (n 63); Lionel D Smith, 'Trust and Patrimony' (2008) 38 Revue Générale de Droit 379; McFarlane and Stevens, 'The Nature of Equitable Property' (n 65); Burrows, *Restitution* (n 19) 191–93; Robert Stevens, 'When and Why does Unjustified Enrichment Justify the Recognition of Proprietary Rights?' (2012) 92 BULR 919; James Edelman, 'Two Fundamental Questions for the Law of Trusts' (2013) 129 LQR 66; Robert Stevens, 'Floating Trusts' in Paul S Davies and James Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing 2017) 114–17; McBride (n 3) 77; McFarlane and Stevens, 'What's Special about Equity?' (n 65) 194–206.

94 McFarlane, *The Structure of Property Law* (n 63); McFarlane and Stevens, 'The Nature of Equitable Property' (n 65) 1.

It is unclear why the beneficiary's rights persist against third parties.[95] Agnew and McFarlane suggest that this prevents a third party 'seeking an opportunistic advantage from a transfer made by [a trustee] in breach of [the trustee]'s duty to [the beneficiary]'.[96] Similarly, McBride argues that if the beneficiary's rights did not persist against third parties, then fraudulent trustees would exploit this by transferring trust rights to third parties, putting them beyond the reach of the beneficiaries. To avoid this result, McBride argues that 'the legitimacy of the law would be best preserved by allowing' the beneficiary's rights to persist against third parties.[97] Alternatively, McFarlane and Televantos argue that 'the law has separate rules governing the third party effects of legal property rights ... ; equitable interests ... ; [and] personal rights' because this 'plurality of legal forms valuably enhances party autonomy' by providing different ways to structure transactions.[98]

These are merely possible arguments; this chapter does not offer a complete justification for why the beneficiary's rights persist against third parties. This persistence may or may not be justified. If it is not justified, then this chapter cannot justify subrogation against third parties. However, if it is justified, then

95 See also Smith, 'Philosophical Foundations of Proprietary Remedies' (n 23).

96 Agnew and McFarlane (n 65) 318.

97 McBride (n 3) 217.

98 Ben McFarlane and Andreas Televantos, 'Third Party Effects in Private Law: Form and Function' in Paul B Miller and John Oberdiek (eds), *Oxford Studies in Private Law Theory: Volume 1* (OUP 2020) 133.

trusts over traceably acquired rights and subrogation to traceably discharged debts follow.

Gertsch provides a good example.[99] D received a legacy of AU$100,000 under a will. D spent the money on (amongst other things):

(1) title to Nike shoes;

(2) the discharge of her mortgage; and

(3) takeaway food.[100]

It then transpired that the will was a forgery. C, the executor and sole beneficiary of the deceased's intestate estate, sought to recover the money. The New South Wales Supreme Court implied that D held her title to the Nike shoes on trust for the estate,[101] held that C was entitled to be subrogated to the extinguished mortgage,[102] and held that D was not obliged to repay the money that she had spent on takeaway food.[103]

All three results are explained by the persistence of duty not to use a right for one's own benefit. C paid D the AU$100,000, so D's right to AU$100,000 was the traceable product of C's right to AU$100,000, which C held as part of the estate. C's duty to hold his right to AU$100,000 for the estate would therefore persist

99 *Gertsch v Atsas* [1999] NSWSC 898.

100 *Gertsch* (n 99) [16]–[17] (Foster AJ).

101 *Gertsch* (n 99) [59] (Foster AJ).

102 *Gertsch* (n 99) [100] (Foster AJ).

103 *Gertsch* (n 99) [93] (Foster AJ).

against D as soon as she acquired knowledge that the will was invalid. Until she acquired this knowledge, D was merely under a liability to hold her right to the AU$100,000 for the estate.[104]

D spent the AU$100,000 before she learned that the will was invalid. As a result, D no longer had a right to the AU$100,000. Thus, D could not perform a duty to hold her right to the AU$100,000 for the estate, and so could not be under a liability to hold her right to the AU$100,000 for the estate.

Nevertheless, the reason for this liability did not disappear. Instead, the reason for D's original liability to hold her right to AU$100,000 for the estate now justified the next best thing.[105] Where a trustee had a duty to hold a right on trust, and performance of this duty became impossible, the next best thing was a trust over the traceably acquired right or subrogation to the traceably discharged debt. Similarly, where a third party has a liability to hold a right on trust, and crystallisation of this liability into a duty becomes impossible, the next best thing is a liability to hold a traceably acquired right on trust, or a liability to be subject to subrogation to the traceably discharged debt.

Consequently, when D spent the AU$100,000, she could no longer be under a liability to hold her right to the AU$100,000 for the estate. However, the reason which justified this liability now justified the next best thing: a liability to hold

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[104] See n 87 on page 206.

[105] cf Agnew and McFarlane (n 65) 305; English and Hafeez-Baig (n 24) para 2.53.

her traceably acquired title to the Nike shoes for the benefit of the estate, and a liability that C would be subrogated to the traceably discharged mortgage. When D learned that the will was a forgery, these liabilities crystallised into duties. Thus, the Court was correct that D held her title to the Nike shoes for the estate, and that C was subrogated to the extinguished mortgage. For the same reasons, the Court of Appeal in *Re Diplock* was wrong to deny subrogation.[106]

In *Gertsch*, D also spent some of the AU$100,000 on takeaway food. When she bought the takeaways, D did not know that the will was invalid and so at this point D was only under a liability to hold the AU$100,000 for the estate and not a duty.[107] Thus, by spending the money on takeaways, D breached no duty.

Furthermore, D no longer had her right to the money, and so she could not be under a liability to hold her right to the money for the estate. Nor could the law do the next best thing and impose a liability to hold a substitute right for the estate, for there was no substitute right: D had eaten the takeaways. Nor did the law require D to personally account for the money that she had spent on takeaways, as that would leave an innocent party worse off.[108] The Court was therefore correct to hold that D was not liable to repay the money that she had spent on takeaways.[109]

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[106] *Re Diplock* (n 11) 549–50 (Lord Greene MR, Wrottesley and Evershed LJJ).

[107] See n 87 on page 206.

[108] English and Hafeez-Baig (n 24) para 2.60.

[109] See also *Re Montagu* (n 87); *Independent Trustee Services* (n 87) [65] (Patten LJ), [129]

8.6.4 Summary

This section argued that a duty or liability not to use a right for one's own benefit may justify both trusts over traceably acquired rights and subrogation to traceably discharged debts.

8.7 Limitations

A duty or liability not to use a right for one's own benefit cannot justify subrogation where D is under no such duty or liability. This is so in two situations. In some cases, D acquires a right but is never under a duty or liability not to use the right for her own benefit. In other cases, D never acquires a right so never comes under any such duty or liability. Each set of cases will now be considered in turn.

8.7.1 *Anfield*

In some cases, D acquires a right but is never under a duty or liability not to use the right for her own benefit. *Anfield* is an example.[110] D owned property subject to X's charge. C made a loan to D, who used it to redeem X's charge. In return, C acquired a new charge ('the 2006 charge') but failed to register it.

(Lloyd LJ); Nair (n 65) para 7.26.

[110] *Anfield (UK) Ltd v Bank of Scotland Plc* [2010] EWHC 2374 (Ch), [2011] 1 WLR 2414. Other possible examples include *Wenlock* (n 5); *Lehman Commercial Mortgage Conduit Ltd v Gatedale Ltd* [2012] EWHC 848 (Ch), The Times, 6 July 2012.

Subsequently, Anfield obtained a charging order over the property and registered it, thus obtaining priority over C's 2006 charge. However, the court held that C was subrogated to X's extinguished charge, giving it priority over Anfield.

Goff and Jones criticises the court's assumption that C's subrogated rights had priority over Anfield's registered charge.[111] Putting that to one side, the point here is that, unlike *Patten*, D was never under a duty to hold its right to the monies for C's benefit. Unlike *Gertsch*, D was never under a liability to hold its right to the monies for C's benefit. As a result, a duty or liability not to use a right for one's own benefit could not justify subrogation.

It would be different if D held its right to the loan monies subject to a *Quistclose* trust.[112] Then, D would be under a duty to hold its right to the loan monies for C's benefit, unless and until it was used for a designated purpose such as redeeming X's charge.[113] This duty would justify subrogation. However, there are difficulties with establishing a *Quistclose* trust in *Anfield*.[114]

Consequently, a duty or liability not to use a right for one's own benefit cannot justify subrogation in *Anfield*. Nevertheless, the following chapter suggests that there may be a different justification for subrogation in that case.

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111 Mitchell, Mitchell, and Watterson (n 3) paras 39-87 – 39-94.

112 *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL).

113 *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [77]–[100] (Lord Millett). Lord Millett dissented on a different point but his analysis of *Quistclose* trusts is authoritative: *Challinor v Juliet Bellis & Co* [2015] EWCA Civ 59 [55] (Briggs LJ).

114 See pages 80–83.

8.7.2 *Boscawen*

In *Anfield*, D acquired a right but never had a duty or liability not to use the right for his own benefit. In other cases, D never acquires a right. This is so where a trustee or third party traceably discharges another's debt, such as in *Boscawen*.[115] D's property was subject to X's charge. D agreed to sell the property to the Buyers. C agreed to loan funds to the Buyers for the purchase, in exchange for a charge over the property. C paid the loan to the Buyers' solicitors, who paid it to D's solicitors. D's solicitors were authorised to pay the monies to X on completion of the sale of the property. However, D's solicitors acted too soon and paid the monies to X before completion, partially discharging X's charge. The sale then fell through, completion never took place, the Buyers never acquired the property, and never executed C's charge. On the face of it, then, C's loan was unsecured.

Giving the judgment of the Court of Appeal, Millett LJ held that the Buyers' solicitors had held their right to the loan monies on trust for C.[116] C could trace from the Buyers' solicitors, through D's solicitors, and into the discharge of X's charge.[117] The solicitors were authorised to pay the monies to X, but only on completion. The payment of the monies to X before completion was therefore a

[115] *Boscawen* (n 2).

[116] *Boscawen* (n 2) 331D, 332F.

[117] *Boscawen* (n 2) 335F–338A (Millett LJ).

breach of trust.[118] Accordingly, C was subrogated to X's extinguished charge.[119]

Millett LJ emphasised the parallel between trusts over traceably acquired rights and subrogation to traceably discharged debts:

> If [C] succeeds in tracing his property ... into the hands of [D], and overcomes any defences which are put forward on [D]'s behalf, he is entitled to a remedy. ... [C] will generally be entitled to a personal remedy; if he seeks a proprietary remedy he must usually prove that the property to which he lays claim is still in the ownership of [D]. If he succeeds in doing this the court will treat [D] as holding the property on a constructive trust for [C] and will order [D] to transfer it in specie to [C]. ... If ... [C]'s money has been used to discharge a mortgage on [D]'s land, then the court may achieve a similar result by treating the land as subject to a charge by way of subrogation in favour of [C].[120]

So far, this chapter has supported this analogy. It has argued that trusts over traceably acquired rights and subrogation to traceably discharged debts are both justified by a duty not to use a right for one's own benefit.

However, in cases like *Boscawen* where a trustee or third party traceably discharges another's debt, this analogy breaks down. In *Boscawen*, tracing showed that the discharge of D's secured debt derived from the right held on trust. But D never derived any right from the right held on trust.[121] Accordingly, D never acquired a right, so never came under any duty or liability not to use a right for

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[118] *Boscawen* (n 2) 332F–G (Millett LJ).

[119] *Boscawen* (n 2) 333A–B, 343A–B (Millett LJ).

[120] *Boscawen* (n 2) 334H–35C. See also 341F–42C (Millett LJ).

[121] *Russell Gould* (n 6) [36] (Barrett JA); Smith, 'Tracing into the Payment of a Debt' (n 6) 298; Smith, *The Law of Tracing* (n 6) 150.

his own benefit. It was a duty not to use a right for one's own benefit which justified subrogation in *Patten*, so the same reasoning cannot be used here. It was a liability not to use a right for one's own benefit which justified subrogation in *Gertsch*, so the same reasoning cannot be used here.

One might appeal to substance over form. If the solicitors paid D, who then paid X, discharging X's charge, then a liability not to use a right for one's own benefit would justify subrogation, as in *Gertsch*. In effect, in *Boscawen* a step was skipped, as it was the solicitors who paid X, discharging X's charge. One might argue that the different form of the transaction should not obscure that the substance is the same (a right held on trust was traceably used to discharge D's secured debt) and so the result (subrogation) should be the same. Reasoning like this is sometimes used in cases.[122]

However, the law does not always take this approach.[123] In *ITC*, for example, the payment from the customer to the managers and from the managers to the Revenue could not 'be collapsed into a single transfer of value' from the customer to the Revenue.[124] This raises the question of why the law should look to substance over form in *Boscawen* but not *ITC*. As Swadling argues, appealing to substance

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[122] *BFC* (n 5) 227C (Lord Steyn); *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180, [2011] QB 86 [143] (Waller LJ); *Relfo Ltd v Varsani* [2014] EWCA Civ 360 [95], [97] (Arden LJ), [115] (Floyd LJ); *Menelaou* (SC) (n 5) [26] (Lord Clarke), [99] (Lord Neuberger).

[123] Swadling, 'In Defence of Formalism' (n 40) 115.

[124] *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29, [2018] AC 275 ('*ITC* (SC)') [71] (Lord Reed).

over form in this way is:

> nothing more than a rhetorical device allowing judges to summarily dismiss settled rules of substantive law, whilst at the same time substituting new and generally vaguer rules without the need to articulate reasons why the old rules are unsatisfactory or the new ones better.[125]

In short, a duty or liability not to use a right for one's own benefit can justify subrogation where a trustee or third party traceably discharges its own debt.[126] However, this duty or liability cannot justify subrogation in cases like *Boscawen* where a trustee or third party traceably discharges another's debt. Here, the debtor never acquires a right, so is never under a duty or liability not to use a right for her own benefit.[127] Nevertheless, the following chapter suggests that there may be a different justification for subrogation in *Boscawen*.

8.8 Summary

This chapter argued that one justification for subrogation is a duty or liability not to use a right for one's own benefit. This justifies subrogation where, following a breach of trust, D traceably discharges its own debt to X (*Patten*, *Gertsch*, *Re Diplock*). However, a duty or liability not to use a right for one's own benefit

[125] Swadling, 'In Defence of Formalism' (n 40) 118. See also PS Atiyah, *Essays on Contract* (Clarendon Press 1986) ch 5.

[126] Page 61 referred to these as Type 2 cases.

[127] Page 61 referred to these as Type 1, 3, and 4 cases.

cannot justify subrogation where D never comes under such a duty or liability. Examples include where there is never a trust (*Anfield*) and where a trustee or third party traceably discharges a charge over D's property (*Boscawen*).

9 Properly distributing the burden of a debt

9.1 Introduction

This chapter identifies a second, alternative justification for subrogation: properly distributing the burden of a debt. If C bore the burden of a debt which should have been borne by D, then subrogation imposes an obligation on D to pay C. Subrogation thus reinstates the burden of the debt on D and relieves the burden from C. In this way, subrogation ensures the burden of the debt is distributed as it should be.

To substantiate this argument, this chapter will be structured as follows. Section 9.2 introduces this justification by using an uncontroversial core case. Section 9.3 clears up some terminology. Section 9.4 argues that this justification operates in a wider range of cases than is commonly assumed. Section 9.5 explores the implications of this before Section 9.6 summarises.

9.2 The core case

C and D are both obliged to pay the same debt to X. If C pays X discharging both C and D, then D is obliged to pay C to the extent that D ought to have borne the burden of paying the debt to X. If D ought to have borne the burden of paying

the whole debt, then C has a right to 'reimbursement' or 'recoupment' against D.[1] If D ought to have borne the burden of paying only some of the debt, then C has a right to 'contribution' against D.[2]

In addition, C is subrogated to X's extinguished personal and proprietary rights against D to the extent that D ought to have borne the burden of paying the debt to X.[3] For example, in *Forbes v Jackson*, D borrowed £200 from X, secured by a mortgage over D's property.[4] C stood surety for the debt. D defaulted so C paid £200 to X, discharging D's debt to X and the mortgage. Hall VC held that D owed £200 to C and that C was 'entitled to have all [X's] securities preserved for him' including the mortgage.[5]

In this core case, it is uncontroversial that recoupment, contribution, and subrogation share a single justification: that C bore the burden of C and D's common debt and this burden ought to have been borne by D.[6] For example, in

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1 eg *Brook's Wharf & Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534 (CA).

2 eg Civil Liability (Contribution) Act 1978, s 1(1); cf s 2(2).

3 See n 107 on page 27.

4 *Forbes v Jackson* (1882) 19 ChD 615 (Ch).

5 *Forbes* (n 4) 621.

6 eg *Yonge v Reynell* (1852) 9 Hare 809, 818–19; 68 ER 744, 748–49 (Sir GJ Turner VC); *Re Downer Enterprises* [1974] 1 WLR 1460 (Ch) 1468C–69A (Pennycuick VC); *Bofinger v Kingsway Group Ltd* [2009] HCA 44, (2009) 239 CLR 269 [7]–[8] (Gummow, Hayne, Heydon, Kiefel, and Bell JJ); Lionel Smith, 'Book Review' (1995) 9 TLI 133, 134; Charles Mitchell, *The Law of Contribution and Reimbursement* (OUP 2003) paras 1.01, 1.09, 1.11, 3.28–3.29; Johann Andreas Dieckmann, 'Scots Influence on English Law: the Guarantor's Right to Derivative Recourse (Subrogation)' (2004) 8 Edinburgh LR 329, 343–45, 349–54; Johann Andreas Dieckmann, 'The Normative Basis of Subrogation and Comparative Law: Select Explanations in the Common Law, Civil Law and in Mixed Legal Systems of the Guarantor's Right to Derivative Recourse' (2012) 27 Tulane European & Civil Law Forum

Duncan Fox, Lord Selborne LC recognised that subrogation is available when:

> there is a primary and a secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid.[7]

9.2.1 Why should D bear the burden?

The reason why, and extent to which, D ought to bear the burden of the common debt varies from case to case.[8] In some cases, C and D's common debt arose under an agreement, which makes clear where the burden should fall. In *Forbes*, for example, the parties agreed that C stood surety for D's debt, making it clear that the burden of C and D's common debt should fall on D.[9] Smith explains that:

> The surety has guaranteed the risk of non-payment by the debtor to the creditor. He has not guaranteed any larger risk. If the creditor

49, 76–83; Johann Andreas Dieckmann, 'The Province of Subrogation Determined: Some Corrections — A Functional Analysis of the Guarantor's Right to Derivative Recourse, Comprising a Critique of the Restitutionary Thesis' (2012) 20 ERPL 989, 1041; Robert Stevens, 'The Unjust Enrichment Disaster' (2018) 134 LQR 574, 588; Nicholas J McBride, *The Humanity of Private Law: Part I: Explanation* (Hart Publishing 2019) 212–13; Lionel Smith, 'Restitution: A New Start?' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing 2019) 106–08.

7 *Duncan Fox & Co v North & South Wales Bank* (1880) 6 App Cas 1 (HL) 11. See also 13 (Lord Selborne LC).

8 Mitchell, *The Law of Contribution and Reimbursement* (n 6) ch 10; Charles Mitchell, Paul Mitchell, and Stephen Watterson, *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) paras 20-82 – 20-104; Smith, 'Restitution' (n 6) 107; Charles Mitchell, 'Other Reasons for Restitution' in Elise Bant, Kit Barker, and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar Publishing 2020) 391.

9 *Forbes* (n 4) 621 (Hall VC).

> has real security for the debt, then the creditor's risk is reduced; so then should be the surety's. The only way to ensure that the surety's risk is no greater than the risk taken by the creditor is to provide that the surety shall have the benefit of any security, once he has paid the creditor.[10]

In other cases, the common debt was assumed involuntarily.[11] In *Niru Battery*, X was a victim of a fraud which occurred because of C's negligence, and which left D unjustly enriched at X's expense.[12] X obtained judgment against C and D. C had a duty to compensate X for the losses caused by its negligence, while D had a duty to make restitution of its unjust enrichment at X's expense. C and D were therefore jointly and severally indebted to X under a court judgment. C paid the whole of the judgment, discharging both parties' debt to X. C then sought to be subrogated to X's extinguished rights against D.

Here, no agreement decided who should bear the burden of the common debt. Instead, the Court of Appeal explained that if C bore the burden of the common debt to X, then X's losses would be compensated but D would remain unjustly enriched at X's expense. By contrast, if D bore the burden of the common debt to X, then D would no longer be unjustly enriched at X's expense and X's losses would be compensated. The Court of Appeal therefore held that D ought to

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10 Smith, 'Book Review' (n 6) 134. See also Lionel Smith, 'Security' in Andrew Burrows (ed), *English Private Law* (3rd edn, OUP 2013) para 5.178.

11 See also *Brook's Wharf* (n 1).

12 *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 2)* [2004] EWCA Civ 487, [2004] 1 CLC 882 ('*Niru Battery* (CA)').

bear the burden of the common debt as this remedied both injustices: D's unjust enrichment and the losses caused by C's negligence. C was therefore subrogated to X's extinguished rights against D.

To sum up, subrogation is justified where C bore the burden of C and D's common debt and this burden ought to have been borne by D. The reason why, and extent to which, D ought to bear the burden of the debt varies from case to case.

9.3 Terminology

Before going further, it is important to clear up three pieces of terminology: 'legal compulsion', 'secondary liability', and 'common liability'.

9.3.1 Legal compulsion

Birks argued that these were cases of unjust enrichment where the unjust factor was 'legal compulsion'.[13] D was enriched at C's expense because C paid X, discharging D's debt to X. This was unjust because C was under a duty to pay X, so the legal system compelled C to pay X, vitiating C's intention to enrich D.

However, this legal compulsion is not unjust. As Hilliard explained, a 'threat

[13] Peter Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) ('*Introduction*') 185–93. See also *Samsoondar v Capital Insurance Company Ltd* [2020] UKPC 33 [21] (Lord Burrows); Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2016) ('*Principles*') 233–53.

to have recourse to legal process is not objectionable, quite the reverse in fact'.[14] Mitchell gives a telling example:

> People routinely bind themselves by contract to perform obligations, and no question arises of their recovering the value of their performance via an action in unjust enrichment on the ground that their performance was compelled by the law of contract.[15]

As a result, Burrows writes that 'legal compulsion is better viewed as a policy-motivated unjust factor designed to ensure that liability is ultimately borne by the appropriate party in the appropriate amount'.[16] Burrows therefore endorses the idea that one justification for subrogation is that C bore the burden of a debt which ought to have been borne by D.[17] However, labelling this idea 'legal compulsion' is misleading given that this legal compulsion is not unjust and it plays no role in justifying subrogation.

9.3.2 Secondary liability

Goff and Jones calls the unjust factor 'secondary liability':

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[14] Jonathan Hilliard, 'A Case for the Abolition of Legal Compulsion as a Ground of Restitution' (2002) 61 CLJ 551, 553. See also Dieckmann, 'The Province of Subrogation Determined' (n 6) 1031–33.

[15] Mitchell, *The Law of Contribution and Reimbursement* (n 6) para 3.27.

[16] Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) ('*Restitution*') 437. See also Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) ('*Restatement*') 99.

[17] Burrows, *Restitution* (n 16) 148; Burrows, *Restatement* (n 16) 173.

> C may ... be entitled to recover some or all of his payment from [D] on the ground that [D] is the person who should ultimately bear some or all of the burden of paying [X]: in the language of the cases, because [D] is 'primarily' and [C] only 'secondarily' liable for [D]'s share of their common obligation.[18]

Goff and Jones therefore also endorses the idea that subrogation can be justified by C bearing the burden of a debt which ought to have been borne by D.[19]

Calling this idea 'secondary liability' works well in cases like *Forbes* and *Duncan Fox* where C and D share a common debt which arose under an agreement.[20] D agreed to take primary responsibility for paying X and C agreed to take secondary responsibility by agreeing to pay X if D failed to do so. The reason for subrogation was enforcing this agreement about who had 'primary' and 'secondary liability' for the burden of a common debt.

However, the language of 'secondary liability' is less apt in cases like *Niru Battery* where no agreement decided who had 'primary' and 'secondary liability' for the common debt.[21] Instead, the reason that D ought to bear the burden of the common debt to X, and thus the reason for subrogation, was to ensure that both injustices (D's unjust enrichment at X's expense, and X's loss caused by C's

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[18] Mitchell, Mitchell, and Watterson (n 8) para 19-01. See also *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 2)* [2003] EWHC 1032 (Comm), [2003] 2 All ER (Comm) 365 ('*Niru Battery* (QB)') [31] (Moore-Bick J).

[19] Mitchell, Mitchell, and Watterson (n 8) para 39-27. See also Charles Mitchell and Stephen Watterson, *Subrogation: Law and Practice* (rev edn, OUP 2007) para 6.04.

[20] *Duncan Fox* (n 7); *Forbes* (n 4).

[21] *Niru Battery* (CA) (n 12). See also Burrows, *Restatement* (n 16) 99.

negligence) were remedied. This led the Court to describe D as primarily and C as secondarily liable for the debt. But this was merely a conclusory label which did no justificatory work.[22]

In sum, this thesis agrees with the substance of Burrows and *Goff and Jones*' position: recoupment, contribution, and subrogation are justified by C bearing the burden of a debt that ought to be borne by D. However, labelling this justification 'legal compulsion' or 'secondary liability' is inaccurate and unnecessary.

9.3.3 Common liability

It is sometimes said that in these cases C and D shared a 'common liability'.[23] Both words deserve attention.

Mitchell explains that the word 'common' indicates that C and D must be obliged 'to the same creditor in respect of the same debt'.[24] Subrogation can operate whether C and D's obligations to pay X are joint, joint and several, or

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22 *Niru Battery* (CA) (n 12) [69] (Clarke LJ), [85] (Sedley LJ).

23 eg *Bonner v Tottenham and Edmonton Permanent Investment Building Society* [1899] 1 QB 161 (CA) 174–75 (Vaughan Williams LJ); *Stimpson v Smith* [1999] Ch 340 (CA) 348F (Peter Gibson LJ); *Niru Battery* (QB) (n 18) [61] (Moore-Bick J); Mitchell and Watterson (n 19) paras 6.10–6.12; Burrows, *Restitution* (n 16) 455; Burrows, *Restatement* (n 16) 14, 98; Mitchell, Mitchell, and Watterson (n 8) chs 19, 20, 39; Virgo, *Principles* (n 13) ch 10; Stephen Watterson, 'Subrogation' in Graham Virgo and Sarah Worthington (eds), *Commercial Remedies: Resolving Controversies* (CUP 2017) 453.

24 Mitchell, *The Law of Contribution and Reimbursement* (n 6) para 6.18. See also *Ruabon Steamship Co Ltd v London Assurance* [1900] AC 6 (HL) 11–12 (Earl of Halsbury LC); Charles Mitchell, 'Claims in Unjustified Enrichment to Recover Money Paid Pursuant to a Common Liability' (2001) 5 Edinburgh LR 186, 190–91.

several.[25]

As for the word 'liability', one might dispute whether subrogation distributes the burden of obligations or liabilities.[26] The argument of this chapter is consistent with either view.

Furthermore, the word 'liability' implies that subrogation may extend beyond cases where D was obliged to pay a debt. In *Gebhardt v Saunders* a landlord and a tenant were both obliged to abate a nuisance.[27] The tenant abated the nuisance. The Court of Appeal held that he could recoup his expenses from the landlord because the nuisance was caused by a structural defect rather than improper use by the tenant, so the landlord ought to have borne the burden of abating the nuisance. *Gebhardt* therefore shows that recoupment extends beyond cases where D was obliged to pay a debt, to cases where D was obliged (or liable) to do something else. In principle, the same might apply to subrogation. In practice, it seems that in all reported subrogation cases D owed a debt to X.[28] Accordingly, this chapter will speak of subrogation distributing the burden of 'debts', but the same principle may extend to other 'obligations' or 'liabilities'.

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[25] Mitchell and Watterson (n 19) paras 6.09, 6.14; Mitchell, Mitchell, and Watterson (n 8) paras 20-10, 20-65 – 20-76, 39-27.

[26] cf eg Wesley Newcomb Hohfeld, 'Some Fundamental Legal Concepts as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16; Stephen A Smith, 'A Duty to Make Restitution' (2013) 26 Canadian Journal of Law and Jurisprudence 157; Sandy Steel and Robert Stevens, 'The Secondary Legal Duty to Pay Damages' (2020) 136 LQR 283.

[27] *Gebhardt v Saunders* [1892] 2 QB 452 (QB).

[28] Mitchell and Watterson (n 19) paras 4.01–4.04 therefore slip between the words 'debt', 'liability', and 'obligation'.

9.4 Scope

This chapter argues that subrogation is justified where C bears the burden of a debt which ought to be borne by D. The chapter began by identifying one fact pattern in which this occurs: C pays X, discharging C and D's common debt to X.[29] This section argues that subrogation may have the same justification even if C and D do not have a common debt to X.[30] Section 9.4.1 controversially argues that the justification extends to some cases where C pays D's debt, even though C was not obliged to do so. More controversially still, Section 9.4.2 tentatively suggests that this justification also operates in some cases where C does not pay D's debt but merely causes it to be paid. Section 9.4.3 summarises what C must do to bear the burden of a debt.

9.4.1 C paid X, discharging D's debt

If C pays X, intending to discharge D's debt to X, then D's debt can sometimes be discharged even if the debt was not C and D's common debt:

- C's payment discharges D's debt if D authorises or subsequently ratifies it.[31]

[29] eg *Duncan Fox* (n 7) 11, 13 (Lord Selborne LC); Birks, *Introduction* (n 13) 185–93; Mitchell and Watterson (n 19) para 6.07; Mitchell, Mitchell, and Watterson (n 8) para 19-01.

[30] eg Burrows, *Restitution* (n 16) 441–44; Burrows, *Restatement* (n 16) 101.

[31] *Belshaw v Bush* (1851) 11 CB 191, 206–07; 138 ER 444, 450–51 (Maule J); *Simpson v*

- In *Exall v Partridge*, D owed rent to X.[32] C's carriage was on D's land and X distrained it for D's arrears. To recover the carriage, C paid D's rent to X. The Court of King's Bench held that C could recover this payment from D. This seems to assume that C's payment extinguished D's debt to X.[33]
- While some cases hold that C's mistaken payment to X cannot discharge D's debt to X,[34] subrogation cases tend to proceed on the basis that it does.[35]
- Many writers argue that, as a matter of principle, D's debt should be discharged whenever C pays X with the intention of discharging D's debt.[36] This is controversial.[37]

This thesis prescinds from the debate over when an unauthorised intervenor

Eggington (1855) 10 Ex 845, 847–48; 156 ER 683, 684 (Parke B).

32 *Exall v Partridge* (1799) 8 TR 308, 101 ER 1405.

33 Birks, *Introduction* (n 13) 186–87; Burrows, *Restitution* (n 16) 440–41; Mitchell and Watterson (n 19) para 2.10 fn 15; Mitchell, Mitchell, and Watterson (n 8) para 5-65 fn 144.

34 *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (QB); *Crantrave Ltd v Lloyds Bank Plc* [2000] QB 917 (CA) 923G–H (Pill LJ).

35 eg *Butler v Rice* [1910] 2 Ch 277 (Ch) 282 (Warrington J); *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48 (KB); Peter G Watts, '"Unjust Enrichment" — the Potion that Induces Well-meaning Sloppiness of Thought' (2016) 69 CLP 289, 307.

36 Birks, *Introduction* (n 13) 189–191; Mitchell and Watterson (n 19) para 2.05; Burrows, *Restitution* (n 16) 460–68; Burrows, *Restatement* (n 16) 100; Mitchell, Mitchell, and Watterson (n 8) para 5-55. cf Daniel Friedmann, 'Payment of Another's Debt' (1983) 99 LQR 534.

37 Peter Birks and Jack Beatson, 'Unrequested Payment of Another's Debt' (1976) 92 LQR 188, 188–202; J Beatson, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (Clarendon Press 1991) 200–05.

can pay another's debt. There are a myriad of relevant factors.

On the one hand, a rule that says 'D's debt is discharged whenever C pays X with the intention of discharging D's debt' has the merit of simplicity,[38] giving parties certainty about their legal rights and obligations. It also protects X's security of receipt.[39]

On the other hand, one might take the view that X and D should not be able to change C's legal duties without C's consent.[40] Furthermore, Beatson argues that 'as the law provides for assignment and imposes certain requirements before a valid assignment, to allow a payment to have the same effect as an assignment constitutes a subversion of the policy of the law'.[41]

Another concern is malicious intervenors, the classic example being *Norton v Haggett*.[42] There, Norton and Haggett had two arguments and Norton was 'desirous of harming' Haggett. Norton paid off a bank's mortgage over Haggett's home, then sought to be subrogated to the bank's mortgage. The Supreme Court of Vermont held that the bank's mortgage was extinguished but denied Norton's claim to be subrogated to it. The Court explained that Norton 'was an intermeddler, and officiousness is not to be encouraged' and that Norton's 'good

[38] Birks, *Introduction* (n 13) 189–91; Mitchell and Watterson (n 19) para 2.05; Mitchell, Mitchell, and Watterson (n 8) para 5-55.

[39] Friedmann (n 36) 547–54.

[40] *Norton v Haggett* 85 A 2d 571 (Vermont SC 1952) 547 (Blackmer J).

[41] Beatson (n 37) 203.

[42] *Norton* (n 40).

faith was apparently questionable'.[43] Alternatively, a legal system could respond to a malicious intervenor like Norton by preventing his payment from discharging the debt in the first place.[44]

In sum, when deciding when an unauthorised intervenor can pay another's debt, there are many relevant factors in play. As a result, a legal system may reasonably choose one of a range of options on this matter.[45] It is therefore prudent for this thesis to take no position on the issue. Instead, the argument is that subrogation can in principle be justified whenever C bore the burden of a debt which ought to have been borne by D, even if the debt was D's alone and C was not obliged to pay it. The availability of subrogation may then be cut back by other considerations, such as a rule against malicious intervenors.

This is illustrated by *Cunliffe Brooks & Co v Blackburn and District Benefit Building Society*.[46] There, the Blackburn Building Society had an overdrawn account at its bank. The Society instructed the bank to pay the Society's creditors and the bank did so, making the Society's account further overdrawn. It then transpired that the Society had acted ultra vires in borrowing from the bank, so

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43 *Norton* (n 40) 547 (Blackmer J). See also *Exall v Partridge* (1799) 8 TR 308, 310; 101 ER 1405, 1406 (Lord Kenyon CJ); *Owen v Tate* [1976] 1 QB 402 (CA).

44 Beatson (n 37) 200–05.

45 cf Steve Hedley, *Restitution: Its Division and Ordering* (Sweet & Maxwell 2001) 140–44.

46 *Cunliffe Brooks & Co v Blackburn and District Benefit Building Society* (1884) 9 App Cas 857 (HL) ('*Blackburn* (HL)'). See also *Re Wrexham Mold & Connah's Quay Railway Co* [1899] 1 Ch 440 (CA); *Brocklesby v Temperance Permanent Building Society* [1895] AC 173 (HL); *Re Beavan (No 1)* [1912] 1 Ch 196 (Ch).

was not contractually obliged to repay the bank. Nevertheless, the House of Lords held that the Society was obliged to repay the bank 'as far as it can be made out that the moneys which were advanced by the bankers simply went to pay the legitimate debts and liabilities of the society'.[47]

Importantly, the bank was not indebted to the Society's creditors. The Society and the bank did not share a common debt to the creditors. Nevertheless, the House assumed without discussion that the bank's payments had extinguished the Society's debts, and held that the Society was obliged to repay the bank. Lord Blackburn said that '[a]ny person, whether the bankers or any one else, might pay off the creditors and stand in the shoes of the creditor who is paid off'.[48]

Similarly, in the Court of Appeal Lord Selborne LC said that:

> The test is: has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remains in substance unchanged, but there is, 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.[49]

Lord Selborne LC's last sentence echoes his judgment two years earlier in *Duncan*

[47] *Blackburn Building Society v Cunliffe Brooks & Co* (1882) 22 ChD 61 (CA) ('*Blackburn* (CA)') 71 (Lord Selborne LC) affd *Blackburn* (HL) (n 46).

[48] *Blackburn* (HL) (n 46) 866.

[49] *Blackburn* (CA) (n 47) 71 (Lord Selborne LC).

Fox. In *Duncan Fox*, C paid C and D's common debt to X. Lord Selborne LC justified subrogation on the basis that C was 'entitled to reimbursement from the person by whom ... [the debt] ought to have been paid'.[50] In *Blackburn*, the bank paid the Society's debt, even though the bank was not indebted to the creditor. Lord Selborne LC justified subrogation on much the same basis: the Society 'shall not ... make those other people pay their debts'.[51] Thus, Lord Blackburn and Lord Selborne LC recognised that subrogation is justified whenever C pays a debt which D ought to bear the burden of, and that this justification is not limited to cases where the debt is C and D's common debt.

Lord Selborne LC's judgment in *Blackburn* was applied in many subsequent cases.[52] However, the judgment is now largely forgotten and an error has crept in, saying that C bearing the burden of D's debt can only justify subrogation where C was obliged to pay D's debt.[53] This is for two reasons.

First, the dispute in *Blackburn*, and almost all the cases which applied Lord Selborne LC's reasoning, arose because a company borrowed money ultra vires. Legislation now provides that the 'validity of an act done by a company shall not

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50 *Duncan Fox* (n 7) 11.

51 *Blackburn* (CA) (n 47) 71.

52 *Baroness Wenlock v River Dee Co (No 2)* (1887) 19 QBD 155 (CA) 165 (Lord Esher MR, Fry and Lopes LJJ); *Re Wrexham* (n 46) 451 (Rigby LJ), 461 (Vaughan Williams LJ); *Bannatyne v D&C MacIver* [1906] 1 KB 103 (CA) 108 (Collins MR); *Reversion Fund and Insurance Co Ltd v Maison Cosway Ltd* [1913] 1 KB 364 (CA) 376–77 (Buckley LJ); *Liggett* (n 35) 60–61 (Wright J).

53 EP Ellinger and CY Lee, 'The "Liggett" Defence: A Banker's Last Resort' [1984] LMCLQ 459, 473; Mitchell and Watterson (n 19) para 6.07.

be called into question on the ground of lack of capacity'[54] so these cases no longer arise. Understandably, the treatises tend to relegate these cases to footnotes and omit their reasoning.[55]

Second, there was confusion over whether *Blackburn* was a subrogation case. The judgments in *Blackburn* do not explicitly refer to 'subrogation', though Lord Blackburn said that the bank 'might ... stand in the shoes of the creditor who is paid off' and 'claim as assignee of the creditor whom he had paid off'.[56] Other cases on similar facts were decided without mentioning 'subrogation'.[57] In *Baroness Wenlock v The River Dee Company*, the Court of Appeal applied Lord Selbourne LC's reasoning and held that C was 'entitled to be subrogated to the rights of [the] creditors'.[58] But subsequent decisions criticised this:

> So far as the money has been applied in discharging debts or liabilities which could be enforced against the company, the prohibition against borrowing does not apply to it, and the Courts have so decided. The subrogation theory has been had recourse to in order to account for the decisions ultimately arrived at; but that theory was really not wanted in order to justify them. It was, however, adequate for the purposes for which it was used, and as applied to the cases before the Courts it led to just results. But, if logically followed out in other cases, it leads

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54 Companies Act 2006, s 39(1).

55 eg Mitchell and Watterson (n 19) para 5.76, para 6.59 fn 99, para 6.59 fn 100, para 6.63 fn 124, para 6.82 fn 169, para 6.82 fn 170; Burrows, *Restitution* (n 16) 155 fn 57, 157 fn 65; Mitchell, Mitchell, and Watterson (n 8) para 39-35 fn 74. cf Burrows, *Restitution* (n 16) 156–57.

56 *Blackburn* (HL) (n 46) 866.

57 *Re Cork and Youghal Railway Co* (1868–69) LR 4 Ch App 748; *Bannatyne* (n 52).

58 *Wenlock* (n 52) 166 (Lord Esher MR, Fry and Lopes LJJ).

> to consequences not only not foreseen by those who had recourse to it, but to results so startling that I cannot accept the theory as sound. There is no decision yet in which it has been applied so as to defeat any innocent person, nor so as to place the lender in a better position than that in which he would have been if his loan had not been prohibited. But that would be the result in the present case, if we adopted that theory and pushed it to its logical consequences ... .[59]

These fears were unfounded. It is now recognised that subrogation is not a transfer of X's rights to C. Instead, subrogation gives C new rights which resemble X's extinguished rights.[60] As a result, C's new rights need not be identical to X's extinguished rights.[61] C's new rights may be less than X's extinguished rights to avoid giving C more than it bargained for.[62] In fact, *Blackburn* and the cases which applied it were subrogation cases, because the law gave C new rights against D which resembled X's extinguished rights against D.[63]

Nevertheless, the ultimate result is that Lord Selbourne LC's judgment — which was once a leading authority — has now faded into obscurity. In turn, this has obscured the important point that subrogation is justified whenever C bears the burden of a debt which ought to be borne by D, even if C was not obliged to

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59 *Re Wrexham* (n 46) 447. See also 455 (Rigby LJ), 464 (Vaughan Williams LJ); *Reversion Fund* (n 52) 377–82 (Buckley LJ); *Liggett* (n 35) 61 (Wright J). *Re Wrexham* is discussed on page 251.

60 See n 73 on page 19.

61 *Banque Financière de la Cité SA v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) ('*BFC*') 236D–37D (Lord Hoffmann); *Day v Tiuta International Ltd* [2014] EWCA Civ 1246 [43] (Gloster LJ).

62 See n 56 on page 105.

63 See n 7 on page 3.

do so.

Once again, the reason why D ought to bear the burden of the debt is the same reason why D was originally indebted to X. In *Blackburn*, 'the application of the sums advanced by the [bank] were in some instances made for the payment of members who had given notice of withdrawal, and the balance in payment of salaries of officers or legal expenses', amongst other things.[64] The Society's debts to its members and staff had been assumed voluntarily so the Society had consented to bearing the burden of these debts. The same might be true of the 'legal expenses' if they were debts to the Society's lawyers. Alternatively, the 'legal expenses' may have arisen under a court order to pay costs, in which case the court order would be the reason why D ought to bear the burden of this debt.

Blackburn provides further evidence against using the labels 'legal compulsion' or 'secondary liability' to describe the idea that C bore the burden of a debt which ought to be borne by D. The bank had no duty or liability to pay the Society's creditors; it is inaccurate to say that the bank was 'legally compelled' or had 'secondary liability' to pay. Nevertheless, subrogation was justified because the bank bore the burden of debts which ought to have been borne by the Society. The labels 'legal compulsion' and 'secondary liability' are therefore under-inclusive: they do not capture all the cases in which subrogation is justified because C bore the burden of a debt which ought to have been borne by D.

64 *Blackburn* (CA) (n 47) 64.

In sum, there is a justification for subrogation whenever C discharges a debt that D ought to bear the burden of, even the debt was not C and D's common debt.

9.4.2 C caused the discharge of D's debt

In fact, this justification may be pushed even further. It may justify subrogation where C does not pay X, and C merely causes the discharge of D's debt.

Consider *Wenlock*.[65] There, Lord Wenlock made a loan to the River Dee Company in two ways. First, the River Dee Company owed a debt to Rock Insurance. Lord Wenlock paid Rock Insurance, discharging that debt. Second, Lord Wenlock paid money to the River Dee Company. The Company paid some of this money to its other creditors, discharging its debts to them. It then transpired that the Company's agreement to borrow money was ultra vires and void, so the Company was not contractually obliged to repay Lord Wenlock. Nevertheless, the Court of Appeal held that Lord Wenlock was subrogated to the extinguished rights of Rock Insurance and the other creditors, so the Company was obliged to repay his Lordship.

By paying Rock Insurance, Lord Wenlock discharged the Company's debt to Rock Insurance. But Lord Wenlock did not pay the Company's other creditors, so he did not discharge the Company's debts to these other creditors. Instead, he

[65] *Wenlock* (n 52).

caused the discharge of these debts by paying the Company, who then paid its creditors. Despite this difference, the Court did not treat the transactions any differently. Lord Wenlock was subrogated to the rights of Rock Insurance which he discharged, and the rights of the other creditors which he *caused* the discharge of. *Wenlock* therefore suggests that it does not make any normative difference whether C discharges D's debt or causes its discharge. Either way, C bore the burden of a debt that should have been borne by D, so C is entitled to subrogation.

On the other hand, merely causing the discharge of D's debt is not enough to justify subrogation. Consider the case where my son pays your creditor, discharging your debt. I am a but for cause of the discharge of your debt. But for my actions, my son would not have been born, so my son would not have paid your creditor and your debt would not be discharged. However, nobody would say that I bore the burden of your debt or that I should be subrogated to your creditor's extinguished rights. So, causing the discharge of D's debt is not enough to justify subrogation.

One might therefore retreat and say that C only bears the burden of D's debt where C pays X, discharging D's debt. However, there are two problems with this.

First, it would draw a distinction between Rock Insurance and the other creditors in *Wenlock*. Yet the Court saw no distinction between subrogation to Rock Insurance's rights and to the other creditors' rights.

Second, saying that C only bears the burden of D's debt where C pays X does

not sit easily with the award of subrogation in *Anfield*[66] and *Boscawen*.[67] These cases cannot be justified by a duty not to use a right for one's own benefit.[68] If these cases are to be justified, it is on the basis that C bore the burden of a debt which ought to have been borne by D. But in both cases, C did not pay X; C merely caused the discharge of D's debt. If bearing the burden of D's debt requires C to pay X, then C did not bear the burden of D's debt in *Anfield* and *Boscawen*. As a result, the award of subrogation in these cases would be unjustified.

Consequently, saying that C only bears the burden of D's debt where C pays X seems too narrow. But saying that C bears the burden of D's debt whenever C causes the debt's discharge is too wide. Where, then, is the line to be drawn?

One might say that C bears the burden of D's debt where C can trace into the discharge of D's debt. There are hints of this in the cases.[69] The courts speak of C's 'money' being used to discharge D's debt, even where it was not C who paid X.[70] In *Wenlock*, the Court sought to 'follow the [loan] money into a debt or liability of the company ... whether that pursuit be through one or more hands

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66 *Anfield (UK) Ltd v Bank of Scotland Plc* [2010] EWHC 2374 (Ch), [2011] 1 WLR 2414.

67 *Boscawen v Bajwa* [1996] 1 WLR 328 (CA).

68 See pages 211–216.

69 *Bannatyne* (n 52) 110 (Romer LJ) citing *Clayton's Case* (1816) 1 Mer 572, 35 ER 781.

70 *Re Cork* (n 57) 761 (Lord Hatherley LC); *Bannatyne* (n 52) 108 (Collins MR), 109–110 (Romer LJ); *Reversion Fund* (n 52) 379; *Liggett* (n 35) 58 (Wright J); *Burston Finance Ltd v Speirway Ltd* [1974] 1 WLR 1648 (Ch) 1652 (Walton J). Walton J's statement was approved in many subsequent cases: see n 50 on page 103.

and by one or many steps'.[71] However, subrogation cases rarely apply the complex tracing rules and subrogation seems to be possible where tracing is not.[72]

It is therefore tentatively suggested that C bears the burden of D's debt where C pays money (to X, D, or a fourth party) for the purpose of causing the discharge of D's debt, and C therefore causes the discharge of D's debt.[73] Where C acts for the purpose of causing the discharge of D's debt, the burden of its discharge can be attributed to C. Thus, in *Blackburn*, Lord Selborne LC said that 'those who pay legitimate demands ... , and have had the benefit of other people's money advanced to them *for that purpose*, shall not retain that benefit'.[74]

This explains *Wenlock*. Lord Wenlock did not intend his loan to sit untouched in the Company's account. He intended his loan to used by the Company, including for paying debts. As a result, Lord Wenlock bore the burden of the Company's debts, even when he did not pay the creditors directly, and so he was entitled to subrogation.

Conversely, where my son pays your creditor, I have not paid anyone for the purpose of discharging your debt. Consequently, I have not borne the burden of your debt and so I am not subrogated to your creditor's extinguished rights.

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71 *Wenlock* (n 52) 166 (Lord Esher MR, Fry and Lopes LJJ).

72 See pages 80–83.

73 *Re Cork* (n 57) 761 (Lord Hatherley LC); *Chetwynd v Allen* [1899] 1 Ch 353 (Ch) 353–54; *Butler* (n 35) 278; *Halifax Plc v Omar* [2002] EWCA Civ 121, [2002] 2 P&CR 26 [4] (Jonathan Parker LJ); *Anfield* (n 66) [3]–[4] (Proudman J); *Day* (n 61) [4] (Gloster LJ).

74 *Blackburn* (CA) (n 47) 71 (emphasis added).

9.4.3 Summary

One justification for subrogation is that C bore the burden of a debt which ought to have been borne by D. It is uncontroversial that this justifies subrogation where C pays X, discharging C and D's common debt to X. It was argued that this justification also applies where C pays X, discharging D's debt to X, even though C was not indebted to X. It was tentatively suggested that this justification may even apply where C pays money (to D, or a fourth party) for the purpose of causing the discharge of D's debt, and C therefore causes the discharge of D's debt.

9.5 Implications

This account explains seven rules which are otherwise difficult to justify:

(1) Subrogation gives C rights which resemble X's extinguished rights;

(2) These rights may be proprietary;

(3) These rights may be legal;

(4) In lending cases subrogation cannot give C more than it bargained for;

(5) But in common liability cases subrogation can give C more than it bargained for;

(6) Subrogation does not require proof of the unjust factor of mistake

or failure of basis;

(7) Some subrogation cases require C to trace whereas others do not.

This section considers each of these seven rules in turn, before considering the implications for whether subrogation is a remedy for unjust enrichment.

9.5.1 Why does subrogation give C rights which resemble X's extinguished rights?

Part of justifying subrogation is justifying its form.[75] A justification for subrogation must explain why subrogation gives C rights which resemble X's extinguished rights.

This chapter does so. It argues that one justification for subrogation is properly distributing the burden of a debt. If C bears the burden of D's debt and this burden should have been borne by D, then the burden must be reinstated on D and lifted from C. Subrogation achieves this by reinstating D's debt, and having D owe it to C.

[75] See page 31.

9.5.2 Why does subrogation give C proprietary rights?

A justification for subrogation must also explain why subrogation can give C proprietary rights.[76] The cases sometimes say that properly distributing the burden of a debt is the justification for subrogation to both personal and proprietary rights. For example, in *Duncan Fox*, Lord Selborne LC said that:

> there is a primary and a secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid. ... I am unable to conceive any ground on which the principle ... should ... not also extend ... to securities deposited by [D] with [X].[77]

On its own, this is not convincing. As Mitchell explains, the 'question at issue here is really whether or not the fact that [C] has discharged [X]'s securities under legal compulsion amounts to sufficient grounds for him to take them over to the detriment of [D]'s other creditors'.[78] Lord Selborne LC does nothing more than assert that it does.

Nevertheless, Lord Selborne LC is correct to equate the explanation for subrogation to proprietary rights and the explanation for subrogation to personal rights.

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[76] See page 31.

[77] *Duncan Fox* (n 7) 11–14. See also *Yonge v Reynell* (1852) 9 Hare 809, 818–19; 68 ER 744, 748–49 (Sir GJ Turner VC); *Re Downer* (n 6) 1468C–69A (Pennycuick VC); Dieckmann, 'Scots Influence on English Law' (n 6) 343–45, 349–54; Dieckmann, 'The Normative Basis of Subrogation and Comparative Law' (n 6) 76–83.

[78] Charles Mitchell, 'The Law of Subrogation' [1992] LMCLQ 483, 500.

It was argued above that subrogation to personal rights is justified where C bore the burden of a debt that should have been borne by D, as subrogation reallocates the burden to where it should be. Similarly, subrogation to proprietary rights is justified where C bore the burden of a *secured* debt that should have been borne by D, as subrogation reallocates the burden to where it should be.

For example, in *Forbes*, D agreed to a loan from X and therefore agreed to bear the burden of repaying the loan.[79] D also agreed to mortgage his property as security for X's loan. D therefore agreed not to redeem his title to the property until he had borne the burden of repaying the loan. D's other creditors did not bargain for security over the property. They therefore agreed not to have recourse to the property until D had borne the burden of his debts secured over the property.[80]

C then paid X, discharging D's debt to X and the mortgage. C therefore bore the burden of a debt which should have been borne by D. C also bore the burden of redeeming the mortgage which should have been borne by D. D's other creditors now had recourse to the property, whereas they should not have done before D had borne the burden of the debt which had been secured over the property.

To put all this right, C was subrogated to X's extinguished mortgage. This lifted the burden of the secured debt from C and reinstated it upon D. It prevented

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79 *Forbes* (n 4).

80 cf *Drew v Lockett* (1863) 32 Beav 499, 505; 55 ER 196, 198 (Sir John Romilly MR); Craig Rotherham, 'Subrogation' in Steve Hedley and Margaret Halliwell (eds), *The Law of Restitution* (Butterworths 2002) para 8.14.

D redeeming his title to the property and denied D's other creditors recourse to the property, until D had borne the burden of the debt which had been secured over the property. The justification for subrogation to proprietary rights was therefore the same as that for subrogation to personal rights: properly distributing the burden of a debt.

This justification overcomes a problem with Lord Sumption's suggestion that subrogation is justified by C's unilateral defeated expectation. Chapter 7 rejecting Lord Sumption's justification because it did not implicate D.[81] C's unilateral defeated expectation may justify giving C rights, but it does not justify putting D under a duty. If subrogation had this justification focussing only on C, then D could complain of being used 'as a means to an end, requiring them to correct an injustice that was not of their doing'.[82]

By contrast, the justification presented here overcomes this challenge. The justification is that C bore the burden of a debt which should have been borne by D. This implicates both C (who bore the burden) and D (who should have borne the burden) and so justifies subrogation both giving C a right and putting D under a duty.

Nor can D's other creditors complain of being used as a means to an end. In *Forbes*, D agreed not to redeem his title to the property until he had borne

[81] See pages 158–161.

[82] Stevens, 'The Unjust Enrichment Disaster' (n 6) 581–82. See also n 44 on page 159

the burden of repaying the loan. Thus, the burden of the debt ought to fall on D's property, but in fact this burden was borne by C. This implicates C and D's property, and so explains why subrogation should give C a right and why this right should be over D's property.

It is also significant that subrogation gives C rights which resemble X's extinguished rights, so C's security over the property cannot exceed X's extinguished security.[83] Accordingly, subrogation leaves D's other creditors no worse off. As Sir John Romilly MR explained:

> 'the second and any subsequent mortgagee [of D's property] is in no respect prejudiced by [subrogation to proprietary rights]; when he advances his money he knows perfectly well that there is a prior charge on the property [ie, X's charge] ... The amount being limited, it is a matter of indifference to him whether [X] or [C] is the prior claimant for that amount ... .[84]

Consequently, D's unsecured creditors cannot complain any more than when X assigns its security to C.

9.5.3 Can subrogation give C legal rights?

Where X had legal security, there is debate over whether subrogation gives C legal rights or only equitable rights.[85] The explanation in the previous section justifies

[83] See n 86 on page 169.

[84] *Drew v Lockett* (1863) 32 Beav 499, 505; 55 ER 196, 198 (Sir John Romilly MR). See also Rotherham, 'Subrogation' (n 80) para 8.14.

[85] See pages 39–41.

giving C legal rights in this situation. In *Forbes*, by mortgaging his legal title, D agreed not to redeem his legal title until he had borne the burden of repaying the loan. In fact, this burden was borne by C. To put the burden where it should be, subrogation gave C a legal mortgage over D's property.[86] This prevented D from redeeming his legal title until he had borne the burden, just as he had agreed. Far from being a legislative aberration,[87] Section 5 of the Mercantile Law Amendment Act 1856 is entirely justified in providing that a surety is subrogated to legal rights.

As such, the two justifications for subrogation in this thesis are not limited to creating equitable rights.[88] On the contrary, they suggest that where X had legal security, subrogation should be able to give C legal security. Nevertheless, even where X had legal security, subrogation will not give C legal security in two situations.

First, subrogation may be prevented from creating legal rights by formality requirements. For instance, sections 27(1) and 27(2)(f) of the Land Registration Act 2002 provide that 'the grant of a legal charge' of land 'does not operate at law until' it is 'completed by registration'.[89] By itself, subrogation does not change the register, so on its own subrogation cannot create a legal charge. However,

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86 *Forbes* (n 4) 622–23 (Hall VC).

87 Stephen Watterson, 'Subrogation, Priority Disputes and Rectification: Mapping a Route Through the Thicket' [2016] RLR 1, 11 fn 52.

88 See also page 205.

89 See also Mitchell, *The Law of Contribution and Reimbursement* (n 6) para 14.14.

subrogation can give C an entitlement to a legal charge, which C can then complete by registration. Some cases have held exactly that.[90] As a matter of authority and principle, Mitchell and Watterson are wrong to say that subrogation can only ever give C equitable and never legal rights.[91]

Second, subrogation will sometimes be prevented from creating legal rights by the rule that subrogation cannot give C more than it bargained for. This rule is considered in the following sections.

9.5.4 In lending cases subrogation cannot give C more than it bargained for

In lending cases, subrogation cannot give C more than it bargained for.[92] Existing explanations of this rule have their difficulties.

Burrows writes that 'the award of restitution should not override the risk of [D]'s insolvency that [C], albeit mistaken, had taken. Put another way . . . , [C]

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[90] *Castle Phillips Finance v Piddington* (1995) 70 P & CR 592 (CA) 602 (Peter Gibson LJ); *Cheltenham & Gloucester Plc v Appleyard* [2004] EWCA Civ 291 [23], [69]–[74] (Neuberger LJ); *Primlake Ltd v Matthews Associates (No 2)* [2009] EWHC 2774 (Ch) [17(c)], [27(Jeremy]Cousins QC); *Anfield* (n 66) [6], [40] (Proudman J). cf *Boscawen* (n 67) 341A–B, 342D (Millett LJ); *Day* (n 61) [41]–[43] (Gloster LJ); Watterson, 'Subrogation, Priority Disputes and Rectification' (n 87) 12–14.

[91] Mitchell and Watterson (n 19) paras 8.14–8.15, 8.113–8.121; Mitchell, Mitchell, and Watterson (n 8) paras 39-38, 39-48, 39-73, 39-83, 39-88; Watterson, 'Subrogation, Priority Disputes and Rectification' (n 87) 10, 12–14.

[92] See n 56 on page 105.

should not be given greater rights than it bargained for'.[93] However, Wilmot-Smith argues that this 'risk-taking reasoning' is 'circular'.[94] If subrogation could give C more than it bargained for, then C would not have taken the risk of D's insolvency by failing to bargain for proprietary rights. Thus, C only takes the risk of D's insolvency if subrogation cannot give C more than it bargained for. Therefore, the conclusion (that subrogation cannot give C more than it bargained for) drives the argument (that C took the risk of D's insolvency) to reach that conclusion. The argument is therefore circular and hides a 'deeper, unstated analysis'.[95]

Mitchell and Watterson argue that subrogation cannot give C more than it bargained for because this would contradict an operative contract to which [C] is a party'.[96] However, the authors acknowledge that this cannot explain why:

> the courts have limited a lender's rights by reference to the risks which it assumed under a void contract. ... However, these broader decisions can perhaps be explained on the more limited basis that, when it comes to justifying the availability of proprietary remedy, courts are unwilling to allow a lender to obtain priority via subrogation insofar as such priority would relieve the lender of a risk which it is considered to have voluntarily assumed, albeit under a legally inoperative transaction.[97]

As explained above, Wilmot-Smith argues that this risk-taking reasoning is circular.

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93 Burrows, *Restitution* (n 16) 155. See also 151, 167.

94 Frederick Wilmot-Smith, 'Replacing Risk-taking Reasoning' (2011) 127 LQR 610, 613.

95 Wilmot-Smith, 'Replacing Risk-taking Reasoning' (n 94) 614.

96 Mitchell and Watterson (n 19) para 7.17. See also paras 7.18–7.34; Mitchell, Mitchell, and Watterson (n 8) para 39-30 fn 67.

97 Mitchell and Watterson (n 19) para 7.35. eg *Re Wrexham* (n 46) 447 (Lindley MR), 455 (Rigby LJ).

Mitchell and Watterson continue:

> Alternatively, the[se cases] must be explained on the broader basis that the law of unjust enrichment should not put the claimant-lender into a better position as a result of its having entered a defective transaction than the position which it would have occupied if the transaction had been fully effective.[98]

However, this does not explain why the law should not put C in a better position than if the transaction had been fully effective.

In short, previous accounts have failed to convincingly explain why subrogation cannot give C more than it bargained for. This chapter helps to explain the rule. It argued that if C bore the burden of a debt which ought to have been borne by D, then subrogation is justified to properly distribute the burden of the debt. Nevertheless, if C consents to bearing the burden of D's debt then, '[j]ust as with *volenti non fit iniuria* in the law of torts, C's subjective consent means that there is no reason for the law to come to his aid'.[99]

However, if C bargained for rights in exchange for bearing the burden of D's debt, then C did not unconditionally consent to bearing the burden of D's debt. If C does not get the rights that it bargained for, then C is not in a situation that it consented to. Accordingly, the objection in the previous paragraph is removed and subrogation succeeds.

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98 Mitchell and Watterson (n 19) para 7.35.

99 Robert Stevens, 'Private Law and the Form of Reasons' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing 2019) 138.

But once C has the rights that it bargained for, C in a position that it consented to. If subrogation gave C more than it bargained for, C would be relieved of a burden that it consented to bearing. Thus, subrogation cannot give C more than it bargained for.

These principles are illustrated by *Re Wrexham Mold & Connah's Quay Railway Co.*[100] The Wrexham Railway Company had three classes of stockholders: A, B, and C. Each was entitled to interest, but the A stockholders had priority over the B and C stockholders, and the B stockholders had priority over the C stockholders. The North and South Wales Bank made an unsecured loan to the company by paying the interest due to the A stockholders. However, this loan was ultra vires the Company and void, so the Company was not contractually obliged to repay the Bank. The Court of Appeal held that the Bank was subrogated to the A stockholders' personal rights against the Company, but not their priority over the other stockholders. Accordingly, the Bank could recover from the Company, but the B stockholders had priority over the Bank.

This was the correct result. The Bank paid the A stockholders, discharging the Company's debt to them. Accordingly, the Bank bore the burden of a debt which should have been borne by the Company. The Bank had consented to this in exchange for a right to repayment from the Company. The Bank had not got that right and so it was not in a position that it consented to. Consequently, there

[100] *Re Wrexham* (n 46).

was no objection to subrogation properly distributing the burden of the debt by reinstating the Company's personal obligation to pay the A stockholders, and having the Company now owe that obligation to the Bank.

However, once the Bank had its personal right to repayment, it was in the situation that it consented to. The Bank bore the burden of discharging the A stockholders' priority debt, but the Bank consented to doing so in exchange for rights without priority. To subrogate the Bank to the A stockholders' priority would relieve the Bank of a burden which it consented to bearing. For this reason, subrogation cannot 'place the lender in a better position than that in which he would have been if his loan had not been prohibited'.[101]

In short, the reason that subrogation cannot give C more than it bargained for is that doing so would relieve C of a burden which it consented to bearing.

In fact, this account is consistent with Burrows, Mitchell, and Watterson's argument that subrogation cannot give C more than it bargained for because this would relieve C of the risk it took of D's insolvency.[102] Wilmot-Smith argues that this reasoning is circular, but this is not necessarily true.

On the one hand, the reasoning would indeed be circular if whether C took the risk of D's insolvency is an objective test which takes account of the state of the law, including the rule that subrogation cannot give C more than it bargained for.

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[101] *Re Wrexham* (n 46) 447 (Lindley MR). See also 449, 455 (Rigby LJ).

[102] Burrows, *Restitution* (n 16) 151, 155, 167; Mitchell and Watterson (n 19) para 7.35.

The conclusion (that subrogation cannot give C more than it bargained for) would be driving the argument (that C took the risk of D's insolvency).

On the other hand, whether C took the risk of D's insolvency could be a subjective test, turning only on C's state of mind. If so, the state of the law, including the rule that subrogation cannot give C more than it bargained for, would be irrelevant to whether C took the risk. As a result, the conclusion (that subrogation cannot give C more than it bargained for) would form no part of the argument (that C took the risk of D's insolvency) and so the argument would not be circular. Burrows, Mitchell, and Watterson may well have had this non-circular, subjective conception of risk-taking in mind, as the cases waver between objective[103] and subjective[104] conceptions of risk-taking.

But this creates a new conundrum. The preceding paragraphs argued that there should be no subrogation if C subjectively consented to bearing the burden of D's debt. Consider the case where I pay my friend's debt, I expect my friend to subsequently reimburse me, but I have not bargained with anyone for this right. Here, I bore the burden of a debt which should have been borne by my

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[103] *Simms* (n 34) 695C–D (Robert Goff J); *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558 ('*DMG*') [27] (Lord Hoffmann); *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 [114] (Lord Walker).

[104] *Simms* (n 34) 695C–D (Robert Goff J); *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 (HL) 363B–C (Lord Browne-Wilkinson), 401G–H (Lord Hoffmann), 410B–C (Lord Hope); *Marine Trade SA v Pioneer Freight Futures Co Ltd BVI* [2009] EWHC 2656 (Comm), [2009] 2 CLC 657 [76] (Flaux J); *BP Oil International Ltd v Target Shipping Ltd* [2012] EWHC 1590 (Comm), [2012] 2 CLC 336 [233] (Andrew Smith J); *Pitt* (n 103) [114] (Lord Walker).

friend, so there is a justification for subrogating me to the creditor's extinguished rights against my friend. If I consented to bearing the burden then I would not be entitled to subrogation. But my expectation that my friend would reimburse me shows that I did not consent, so subrogation should succeed.

Allowing subrogation fits with the thrust of Lord Sumption's judgment in *Swynson*. He stated that 'the real basis of [subrogation] is the defeat of an expectation of benefit which was the basis of [C]'s consent to the payment of the money for the relevant purpose'.[105]

However, Lord Sumption also stated that '[u]nless [C] has been defeated in his expectation of some feature of the transaction for which he may be said to have bargained, he does not suffer an injustice' 'which falls to be corrected by the law of equitable subrogation'.[106] This suggests that I should not be subrogated to the creditor's rights against my friend, since I did not bargain for anything.

If what matters is whether I *subjectively* consented to bearing the burden of my friend's debt, why do I need to bargain for something in exchange for paying my friend's debt? If I need evidence that I did not subjectively consent to bearing the burden, why does this evidence need to be in the form of a bargain? Why would an unambiguous representation not suffice?

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[105] *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2018] AC 313 [30]. See also [18], [25], [30]–[32].

[106] *Swynson* (n 105) [34]. See also [28] (Lord Sumption).

The better view is therefore as follows. C cannot call on subrogation to relieve it of the burden of a debt which it subjectively consented to bearing. At first glance, C's payment for the purpose of discharging D's debt shows that C consented to bearing the burden of D's debt. But C can produce any evidence to show that it did not consent. In all reported lending cases, this evidence included that C bargained for something in exchange for causing the discharge of the debt. However, the cases are wrong to upgrade this into a strict rule that in lending cases subrogation can never give C more than it bargained for. My expectation of reimbursement, even without bargaining for it, showed that I did not consent to bearing the burden of my friend's debt and so I should be entitled to subrogation.

This is consistent with the other judgments in *Swynson*. Lord Mance stated that 'subrogation cannot improve a lender's position, by giving him more than he expected to get. The lender need not actually to have "contracted for" or "agreed" some benefit which he did not obtain.'[107] Lord Neuberger stated that C 'must be able to show that he did not get all that he expected or thought that he had bargained for'[108] but did not require C to have actually bargained for something.

[107] *Swynson* (n 105) [86] (Lord Mance).

[108] *Swynson* (n 105) [118] (Lord Neuberger).

9.5.5 In common liability cases subrogation can give C more than it bargained for

In lending cases, subrogation cannot give C more than it bargained for,[109] whereas in common liability cases this rule does not apply.[110] The difference is generally thought to be unjustifiable.[111] However, the account put forward by this chapter can explain the difference.

The previous section argued that the rule that subrogation cannot give C more than it bargained for is best understood as a rule that subrogation should not relieve C of a burden that it consented to bearing. In a common liability case, C always has an easy way of showing that it did not consent to bearing the burden of the common debt. C can show that it paid X in order to discharge itself from the common debt and not because it consented to bearing the burden of D's share of the debt.[112] Thus, the fact C failed to bargain for rights in exchange for discharging D's debt does not show that C consented to bearing the burden of D's share of the debt. Accordingly, subrogation is justified in giving C more than it

[109] See n 56 on page 105.

[110] See n 64 on page 107.

[111] *Duncan Fox* (n 7) 20–21 (Lord Blackburn); Charles Mitchell, *The Law of Subrogation* (Clarendon Press 1994) 59, 66; Rotherham, 'Subrogation' (n 80) para 8.38; Andrew Tettenborn, *The Law of Restitution in England and Ireland* (3rd edn, Cavendish 2002) para 2-39; Mitchell and Watterson (n 19) paras 8.39–8.60; Burrows, *Restitution* (n 16) 149–50. cf Craig Rotherham, *Proprietary Remedies in Context* (Hart Publishing 2002) 262–67; Rotherham, 'Subrogation' (n 80) paras 8.34–8.35.

[112] See n 149 on page 86.

bargained for in common liability cases.

By contrast, in lending cases, C and D do not share a common debt. At first glance, C's payment for the purpose of discharging D's debt shows that C consented to bearing the burden of D's debt and so subrogation should be denied. C cannot remove this objection by saying that it paid in order to discharge itself from a debt, because C did not owe any debt. Instead, C must produce some other evidence to show that it did not consent to bearing the burden. Typically, C does this by showing that it bargained for rights in exchange for causing the discharge of D's debt. But once C has the rights that it bargained for, it consents to bearing the burden of D's debt. Thus, subrogation cannot give C more than it bargained for in lending cases.

In short, common liability and lending cases reveal different ways for C to show that it did not consent to bearing the burden of D's debt. This explains why the rule that subrogation cannot give C more than it bargained for applies only to lending cases and not common liability cases.

9.5.6 Mistake and failure of basis

This also explains why subrogation may succeed even if there is no mistake or failure of basis.[113] Hedley identifies *Reversion Fund* as an example.[114] The managing director of D, without authority, borrowed money from C on D's behalf. He used the money to discharge D's debt to X. C knew that the managing director had no authority to borrow on D's behalf, but expected D to subsequently ratify the transaction. D never did. Some time later, C sought to recover the money from D. Given that D had not authorised the loan, D was not contractually obliged to repay it. Nevertheless, a majority of the Court of Appeal held that D was obliged in equity to repay C. The Court rejected the language of subrogation,[115] but the case was subsequently rationalised in these terms.[116]

C made no mistake here: C knew that the managing director had no authority to borrow on D's behalf.[117] C's expectation that D would later ratify the loan was a misprediction of the future, not a mistake as to the past or present,[118] and

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[113] See Chapter 3.

[114] Hedley, *Restitution* (n 45) 138, 140 citing *Reversion Fund* (n 52). For two more examples, see page 98.

[115] *Reversion Fund* (n 52) 377–80, 382 (Buckley LJ), 383 (Kennedy LJ).

[116] Mitchell, *The Law of Subrogation* (n 111) 134 fn 110.

[117] Mitchell, *The Law of Subrogation* (n 111) 134–35, who therefore concludes that the case was wrongly decided and Vaughan Williams LJ's dissent is to be preferred. However, the majority decision was applied in *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] 1 Ch 246 (CA) 300A–D (Slade LJ), 307F (Browne-Wilkinson LJ), cf 302B (Slade LJ).

[118] Mitchell and Watterson (n 19) para 6.63.

mispredictions cannot be relied upon as an unjust factor.[119]

Mitchell and Watterson argue that there was a failure of basis: C only advanced the money on the basis that D would be obliged to repay it and that basis failed.[120] However, the unjust factor of failure of basis requires more than this: some authorities say that C's basis must be communicated to D[121] whereas others go further and require D to agree to C's basis.[122] On the one hand, if knowledge of C's basis suffices, then there may be a failure of basis in *Reversion Fund*. Even though the managing director had no authority to contract on D's behalf, his knowledge of C's basis may be attributable to D.[123] On the other hand, if D must agree to C's basis, then there was no failure of basis. The managing director was unauthorised to contract on D's behalf, so it seems unlikely that he was authorised to non-contractually agree to C's basis on D's behalf.

The Court assigned no importance to these difficulties in establishing a mistake

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119 See n 20 on page 96.

120 Mitchell and Watterson (n 19) para 6.59 fn 100, para 6.82.

121 *Burgess v Rawnsley* [1975] Ch 429 (CA) 442C (Browne LJ); *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB) [286] (Stadlen J); *Lissack v Manhattan Loft Corp Ltd* [2013] EWHC 128 (Ch) [88] (Roth J); Burrows, *Restitution* (n 16) 220; Burrows, *Restatement* (n 16) 88; Mitchell, Mitchell, and Watterson (n 8) paras 13-02 – 13-05.

122 *Barnes v Eastenders Cash & Carry plc* [2014] UKSC 26, [2015] AC 1 [106], [115] (Lord Toulson); *Spaul v Spaul* [2014] EWCA Civ 679 [46]–[47] (Rimer LJ); *Swynson* (n 105) [30] (Lord Sumption); Mitchell and Watterson (n 19) para 6.74; Burrows, *Restatement* (n 16) 88.

123 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC); *Bilta (UK) Ltd v Nazir (No 2)* [2015] UKSC 23, [2016] AC 1.

or failure of basis. Buckley LJ cited Lord Selborne LC's reasoning in *Blackburn*[124] and said that:

> there is, in substance, no borrowing; there is merely the replacement of one debt by another of the same amount. The existence or non-existence of borrowing power is, therefore, not material, and, consequently, [C's] knowledge as to its non-existence is not material.[125]

Thus, Buckley LJ recognised that the justification for subrogation does not depend upon C's knowledge or mistake. Instead, the justification for subrogation was that C bore the burden of a debt which should have been borne by D. To put the burden back where it should be, C was subrogated to X's extinguished rights against D. C would not be entitled to subrogation if it consented to bearing the burden of D's debt. But C's expectation of obtaining a contractual right to repayment from D showed that C did not consent to bearing the burden, even though this unilateral expectation about the future did not establish the unjust factor of mistake or failure of basis.

In short, a mistake, failure of basis, or defeated expectation can show that C did not consent to bearing the burden of D's debt, so there is no objection to subrogation. This explains why the concepts of mistake, failure of basis, and defeated expectation feature prominently in the reasoning of lending cases,[126]

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[124] *Reversion Fund* (n 52) 376–77 citing *Blackburn* (CA) (n 47) 71 (Lord Selborne LC).

[125] *Reversion Fund* (n 52) 373.

[126] See Chapter 3.

even though they cannot justify subrogation.[127] It also explains why subrogation succeeded in *Reversion Fund* despite the difficulties in establishing a mistake or failure of basis in that case.

9.5.7 Some subrogation cases require C to trace whereas others do not

Some cases require C to trace into the discharge of D's debt to X[128] whereas others do not.[129] In *Menelaou*, the Supreme Court was split on this issue. Lord Carnwath stated that subrogation requires C to trace[130] whereas the majority held that it is enough for C to cause the discharge of the debt.[131] This can now be understood: there are two different justifications for subrogation; one requires tracing whereas the other does not.

Chapter 8 argued that subrogation can be justified by a duty not to use a right for one's own benefit. It showed that this duty justifies subrogation if a trustee exchanges a right held on trust for the discharge of its debt. Tracing is how this is proved. Furthermore, the beneficiary's right to prevent the trustee using a right

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127 See pages 148–165.

128 *Boscawen* (n 67).

129 See pages 80–83.

130 *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66, [2016] AC 176 ('*Menelaou* (SC)') [118]–[132].

131 *Menelaou* (SC) (n 130) [27], [38], [50], [53] (Lord Clarke), [85], [92], [96]–[98] (Lord Neuberger), [141] (Lord Kerr and Lord Wilson).

for its own benefit persists against third parties who acquire a right derived from a right held on trust. Tracing identifies rights derived from rights held on trust and so identifies the third parties against whom the beneficiary's right persists and against whom subrogation is justified. As a result, tracing is central to this first justification for subrogation.

This chapter identified a second, alternative justification for subrogation: that C bore the burden of debt that should have been borne by D. This does not require C to trace into the discharge of the debt; it is enough that C causes the discharge of the debt.[132]

The cases are therefore correct to sometimes require tracing and sometimes require causation. Where subrogation is justified by a duty to hold a right for another's benefit, C must trace. But to justify subrogation on the basis that C bore the burden of debt that should have been borne by D, causation is enough.

9.5.8 Is subrogation a remedy for unjust enrichment?

This chapter argued that recoupment, contribution, and subrogation are justified by C bearing the burden of a debt which should have been borne by D. This has implications for whether these are remedies for unjust enrichment.

Cane writes that 'classifications in the law' can perform two functions.[133] The

[132] See pages 237–241.

[133] Peter Cane, *The Anatomy of Tort Law* (Hart Publishing 1997) 198. See also Kit Barker,

first is 'expository': 'to make it easier to understand, expound and teach the law, and to make it more user-friendly for lawyers seeking to solve real-life problems for clients'.[134] The second is 'dispositive': determining the 'criteria of success and failure in legal actions'.[135]

Saying that subrogation is a remedy for unjust enrichment is a classification. Part I showed that this classification does not perform a dispositive function. Subrogation and direct unjust enrichment claims are governed by different rules; unjust enrichment does not supply the rules which govern subrogation; unjust enrichment does not determine the criteria for success and failure of subrogation.

Nor does unjust enrichment perform an expository function. As Hilliard explains:

> the burden of payment has fallen unfairly ... . This rationale is sufficient in itself both to determine the measure of relief and explain why such relief should be granted. It is unnecessary to go on to enquire as to the extent of [D]'s gain, whether such gain was at [C]'s expense and whether any defences are available: the rationale above takes care of everything. ...

'Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons' in Jason W Neyers, Mitchell McInnes, and Stephen GA Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing 2004) 84; Charlie Webb, 'Treating Like Cases Alike: Principle and Classification in Private Law' in Andrew Robertson and Tang Hang Wu (eds), *The Goals of Private Law* (Hart Publishing 2009); Charlie Webb, 'What is Unjust Enrichment?' (2009) 29 OJLS 215, 228. cf Ewan McKendrick, 'Taxonomy: Does it Matter?' in David Johnston and Reinhard Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2002) 639; Barker, 'Understanding the Unjust Enrichment Principle in Private Law' (n 133) 91.

[134] Cane (n 133) 198.

[135] Cane (n 133) 198.

> Unjust enrichment ... adds needless complexity, replacing a one stage process (Is the distribution of liability equitable?) with a four stage version (Is [D] enriched? Is this at [C]'s expense? etc.). Unjust enrichment is both unnecessary and undesirable here.[136]

Indeed, a poor expository classification leads to bad disposition of claims. It is easy to slip from the idea that subrogation cases are best *exposited* using the four unjust enrichment questions to the error that subrogation cases are *disposed* of by the rules which govern direct claims.

Conversely, good exposition and just disposition go hand in hand.[137] Where C bore the burden of a debt which should have been borne by D, that burden needs to be lifted from C and reinstated upon D. This is achieved by giving C new rights against D which resemble X's extinguished rights against D. The argument that 'C bore the burden of a debt which should have been borne by D' can only justify remedies of this form: subrogation, recoupment, and contribution. Other remedies (including direct unjust enrichment claims) have a different form, so cannot share the same justification, and so are governed by different rules.

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[136] Hilliard (n 14) 554 (footnote omitted). See also *Trades House of Glasgow v Ferguson* 1979 SLT 187 (IH) 192 (Lord Justice-Clerk Wheatley); Sonja Meier, 'No Basis: A Comparative View' in Andrew Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 359–61; Rajiv Shah, 'Reasons for Unjust Enrichment' (PhD thesis, University of Cambridge 2018) <www.repository.cam.ac.uk/handle/1810/290112> accessed 29 March 2020, 39–42, 196–98; McBride (n 6) 213; Sonja Meier, 'Enrichment "At the Expense of Another" and Incidental Benefits in German Law' [2019] Acta Juridica 453, 460–61; Niall Whitty, 'Rights of Relief, Subrogation and Unjustified Enrichment in Scots Law' [2019] Acta Juridica 493, 509–10, 518; Helen Scott, 'Comparative/Civilian Perspectives' in Elise Bant, Kit Barker, and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar Publishing 2020) 165.

[137] McKendrick (n 133) esp 639.

Consequently, subrogation and direct claims have a different form and a different justification; they are and should be disposed of by different rules. They should therefore be exposited separately. Classifying subrogation as a remedy for unjust enrichment performs neither an expository nor a dispositive function.

9.6 Summary

This chapter identified a second justification for subrogation: properly distributing the burden of a debt. Where C bears the burden of a debt which should have been borne by D, subrogation lifts that burden from C and reinstates it upon D by giving C rights which resemble X's extinguished rights. Subrogation therefore ensures that the burden of a debt falls where it should.

10 Conclusion

10.1 Introduction

This chapter concludes the thesis. Section 10.2 summarises the conclusions of each chapter of the thesis. Section 10.3 considers the implications for subrogation and Section 10.4 considers the implications for the wider law.

10.2 Summary

Subrogation to extinguished rights ('subrogation') describes a particular form of rights: C's new rights against D resemble X's extinguished rights against D. Chapter 1 identified four controversies surrounding subrogation:

- Is subrogation a remedy for unjust enrichment?
- Is subrogation redundant?
- What is the justification for subrogation?
- When should subrogation occur?

The thesis sought to resolve these controversies.

Part I asked whether, as the law stands, subrogation is redundant. It is often said that subrogation to personal rights and direct unjust enrichment claims are governed by the same rules, so they are available in the same circumstances and have the same effect.[1] On this view, subrogation to personal rights always duplicates a direct claim and so subrogation to personal rights is redundant. Furthermore, it is said that subrogation to proprietary rights is different only because it gives C proprietary rights; in all other respects subrogation to proprietary rights is governed by the same rules as direct claims.[2]

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[1] See pages 17–31.

[2] See pages 21–26.

Part I conceded that subrogation to personal rights *in common liability* cases *usually* duplicates recoupment and contribution. However, this does not prove subrogation redundant in *all* cases.[3] Part I argued that, in misappropriation and lending cases, none of the propositions in the previous paragraph are true.

- Chapter 2 showed that the rules which determine whether D was enriched at C's expense in direct claims do not apply to subrogation.
- Chapter 3 showed that a defeated unilateral expectation about the future can render D's enrichment unjust in subrogation cases, whereas this is not so in direct claims.
- Chapter 4 showed that many direct claims are subject to the change of position defence, whereas there is no convincing authority for this defence applying to subrogation.
- Chapter 5 showed that direct claims reverse a transaction whereas subrogation does not.

Chapter 6 therefore concluded that subrogation and direct claims are governed by different rules. Subrogation is available in different circumstances, and has a different effect, compared to direct claims. Accordingly, subrogation to personal rights does not duplicate a direct claim, and so subrogation to personal rights is not redundant. Instead, subrogation has a unique role to play. Chapter 6 then

[3] See pages 26–30.

considered the implications of this. Most importantly, judges and scholars are wrong to rely on subrogation cases as authority for the rules which govern direct claims, and wrong to rely on cases of direct claims as authority for the rules which govern subrogation.

Part II then asked what the law should be. It asked what, if anything, justifies subrogation and, in light of that, when should subrogation occur?

Chapter 7 rejected a number of previous attempts to justify subrogation. Chapters 8 and 9 argued that there is not one justification for subrogation but two. Each justification is sufficient on its own, and each mandates a different set of circumstances in which subrogation ought to occur.[4]

Chapter 8 argued that one justification for subrogation is a duty not to use a right for one's own benefit. This justifies subrogation when, in breach of trust, a trustee or third party traceably discharges their own debt to X.

Chapter 9 identified a second justification for subrogation: that C bore the burden of a debt which ought to have been borne by D. This uncontroversially justifies recoupment, contribution, and subrogation where C and D share a common debt to X, and C pays X discharging both C and D. It also justifies subrogation where C is not indebted to X but nevertheless pays X, discharging D's debt to X. It may even justify subrogation where C does not pay X, but C makes a payment

[4] cf American Law Institute, *Restatement of the Law Third: Restitution and Unjust Enrichment* (American Law Institute Publishers 2011) §24, §57.

(to D or a fourth party) for the purpose of causing the discharge of D's debt, and C does so cause this discharge.

In a very loose sense, the two justifications could be collapsed into one. D's duty to hold a right for C's benefit could be described as one reason why the burden of the debt ought to fall on D not C.

However, on closer inspection, the two justifications are quite different. The former justification requires C to trace into the discharge of the debt whereas the latter does not.[5] The latter justification requires C to pay X, D, or fourth party for the purpose of discharging the debt.[6] By contrast, the former justification does not require C to do anything and operates even where C has suffered no loss.[7]

Together Parts I and II addressed the question of whether subrogation is a remedy for unjust enrichment. It is generally assumed that there are two consequences of subrogation being a remedy for unjust enrichment. One consequence is that subrogation is governed by the same rules as direct unjust enrichment claims.[8] Part I showed that subrogation is not a remedy for unjust enrichment in this sense.

Another consequence of subrogation being a remedy for unjust enrichment is that when a court is faced with a subrogation claim, it should ask itself the four unjust enrichment questions:

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5 See pages 261–262.

6 See pages 228–241.

7 See 187–193.

8 See pages 17–31.

(1) Has [D] been enriched?
(2) Was the enrichment at [C]'s expense?
(3) Was the enrichment unjust?
(4) Are there any defences available to [D]?[9]

Part II argued that subrogation is not a remedy for unjust enrichment in this sense either. Chapter 8 argued that subrogation to traceably discharged debts cannot be explained as a remedy for unjust enrichment. Instead, subrogation to traceably discharged debts is justified by a duty not to use a right for one's own benefit. This is sufficient in itself to justify subrogation and the four unjust enrichment questions are a distraction. Chapter 9 argued that if C bore the burden of a debt which ought to have been borne by D, then subrogation is justified without anything more and the four unjust enrichment questions are again a dangerous distraction.[10]

Before subrogation was recognised as a remedy for unjust enrichment, the test for subrogation was 'empirical':[11] subrogation occurred in certain well-established categories of cases, but beyond them subrogation's availability was disputed.[12] When the courts endorsed the view that subrogation is a remedy for unjust enrichment, this was replaced with a unified test: subrogation should occur

[9] *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938 [10] (Lord Clarke). See also n 62 on page 16.

[10] See pages 262–265.

[11] *Orakpo v Manson Investments Ltd* [1978] AC 95 (HL) 104C–G (Lord Diplock), 110D–E (Lord Salmon).

[12] See pages 34–36.

whenever a party is unjustly enriched by the discharge of X's rights at C's expense, and should not be limited to the previously established categories.[13]

However, subrogation is not a remedy for unjust enrichment in this sense, either. The two justifications for subrogation operate in different circumstances. For example, where subrogation is justified by a duty not to use a right for one's own benefit, C must trace into the discharge of D's debt. By contrast, where subrogation is justified by properly distributing the burden of a debt, tracing is unnecessary and it is enough that C caused the discharge of D's debt.[14] As a result, the test for when subrogation should occur varies depending upon the justification for subrogation. There is no unified test for when subrogation should occur. Consequently, subrogation cannot be a remedy for unjust enrichment in the sense that unjust enrichment supplies a unified test for when subrogation should occur.

Nevertheless, this does not mandate a return to the opaque 'empirical' test. Chapters 8 and 9 each identified a justification for subrogation and, from that justification, deduced a clear test for when subrogation is available.[15]

In short, subrogation is not a remedy for unjust enrichment in the senses that are usually assumed. Perhaps subrogation is a remedy for unjust enrichment

[13] See pages 36–41.

[14] See page 261–262.

[15] See page 269.

in another sense.[16] However, this thesis argued that unjust enrichment does not supply the rules which govern subrogation, nor does it justify subrogation, nor does it supply the rules which should subrogation, nor should it structure the courts' analysis of a subrogation claim. Given all this, it is not clear what can be gained by calling subrogation a remedy for unjust enrichment.

In sum, this thesis offered a solution to four controversies surrounding subrogation. Although there have been previous attempts to resolve these controversies, this thesis was unique in three ways. First, while the four controversies have previously been conflated, the thesis clearly separated them. Second, the thesis re-evaluated the controversies in light of the new Supreme Court decisions on subrogation,[17] as well as recent developments in unjust enrichment.[18] Finally, in light of these developments, the thesis challenged the orthodox understanding of subrogation. Contrary to orthodoxy, it argued that subrogation and direct unjust enrichment claims are governed by different rules; that subrogation has not one justification but two; and that subrogation is not a remedy for unjust enrichment.

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16 MJ Cleaver, 'Equitable Subrogation in Australia and England' (2018) 29 Journal of Banking and Finance Law and Practice 34, 53.

17 *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66, [2016] AC 176 ('*Menelaou* (SC)'); *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29, [2018] AC 275 ('*ITC* (SC)') [49] (Lord Reed); *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2018] AC 313; *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39, [2018] 3 WLR 652 [68] (Lord Mance, Lord Reed, and Lord Hodge).

18 eg *ITC* (SC) (n 17); *Prudential* (n 17); Andrew Burrows, '"At the Expense of the Claimant": A Fresh Look' [2017] RLR 167; Robert Stevens, 'The Unjust Enrichment Disaster' (2018) 134 LQR 574; Lionel Smith, 'Restitution: A New Start?' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing 2019).

These conclusions have important implications for subrogation and the wider law. Section 10.3 considers the implications for subrogation. Section 10.4 considers the wider implications.

10.3 Implications for subrogation

The body of the thesis has drawn many implications for subrogation. Subrogation is governed by different rules to direct unjust enrichment claims.[19] Subrogation is therefore available in different circumstances, and has a different effect, compared to direct claims. As a result, subrogation does not duplicate direct claims, so subrogation is not redundant. In addition, subrogation cases cannot be relied upon as authority for the rules which govern direct claims. Equally, cases involving direct claims cannot be relied upon as authority for the rules which govern subrogation.

It was shown that the courts were correct to award subrogation in cases such as *Forbes*, *Blackburn*, *Wenlock*, *Re Wrexham*, *Boscawen*, and *Gertsch*,[20] although the reasons that the courts gave were not always correct.[21] The mystery of why

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[19] See Chapters 2–6

[20] *Forbes v Jackson* (1882) 19 ChD 615 (Ch); *Cunliffe Brooks & Co v Blackburn and District Benefit Building Society* (1884) 9 App Cas 857 (HL) ('*Blackburn* (HL)'); *Baroness Wenlock v River Dee Co (No 2)* (1887) 19 QBD 155 (CA); *Re Wrexham Mold & Connah's Quay Railway Co* [1899] 1 Ch 440 (CA); *Boscawen v Bajwa* [1996] 1 WLR 328 (CA); *Gertsch v Atsas* [1999] NSWSC 898.

[21] See Chapters 7–9.

some subrogation cases require C to trace, whereas others do not, was solved.[22] As was the mystery of why subrogation cannot give C more than it bargained for in lending cases, whereas this rule does not apply to common liability and misappropriation cases.[23] If X had legal security, subrogation should give C legal security and not just equitable security.[24]

This section adds three further implications:

- In *BFC*, the Court of Appeal was correct to deny subrogation, and the House of Lords was incorrect to award it.[25]
- In *Menelaou*, the Supreme Court was correct to award C a remedy, but incorrect to award subrogation.[26]
- In *Swynson*, the Supreme Court was correct to deny subrogation.[27]

Each case will be analysed in turn.

10.3.1 *BFC*

In *BFC*, D owned property subject to X's first charge and OOL's second charge. C agreed to loan money to D, via Mr Herzig, to partially pay off X's charge,

[22] See pages 261–262.

[23] See pages 248–257.

[24] See pages 205, 246–248.

[25] *Banque Financière de la Cité SA v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) ('*BFC*').

[26] *Menelaou* (SC) (n 17).

[27] *Swynson* (n 17).

provided that OOL was bound by a 'postponement letter'. Under that letter, OOL would not demand repayment of its loan until C had been repaid. C performed its side of the bargain before discovering that the postponement letter did not bind OOL. As a result, C could not rely on the postponement letter to obtain priority. Nevertheless, C argued that it had priority over OOL's second charge because it was subrogated to X's first charge insofar as it was extinguished.

The Court of Appeal explained that C bargained for priority over OOL, but not for proprietary rights. As a result, subrogation to X's extinguished charge would give C more than it bargained for.[28] The Court therefore denied subrogation and held that OOL had priority over C.

This was correct. C paid the loan monies for the purpose of partially discharging X's charge and had consented to bear the burden of discharging these proprietary rights in exchange for personal rights. Subrogating C to proprietary rights would therefore relieve C of a burden that it consented to bearing, which is unjustified.

Nor could subrogation be justified by a duty not to use a right for one's own benefit. The parties did not agree that Mr Herzig or D should hold their right to the loan monies for C's benefit, so there was no such duty.

One might point to the fact that Mr Herzig misrepresented his authority to bind OOL.[29] If Mr Herzig made this misrepresentation on behalf of D, then C

[28] *BFC* (n 25) 231D (Lord Hoffmann).

[29] cf Peter Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 97.

would have a power to rescind its loan agreement with D. When C exercised this power, D would come under a duty to hold any right it had to the loan monies for C's benefit, which could justify subrogation against D.

However, the first instance judge found that Mr Herzig's misrepresentation was not made on D's behalf.[30] As a result, when D acquired a right to the loan monies in exchange for a contractual duty to repay the loan, D was a bona fide purchaser for value without notice. D therefore acquired the right to the loan monies free from C's power to rescind. C could not impose on D a duty to hold its right to the loan monies for C's benefit, and so such a duty could not justify subrogation.

The Court of Appeal was therefore correct to include the fact that D had not made a misrepresentation as a reason for denying subrogation[31] and the House of Lords was wrong to dismiss this as irrelevant.[32]

In the House of Lords, C modified its claim. C conceded that it was not entitled to be subrogated to X's extinguished proprietary rights, giving it priority over all D's unsecured creditors. Instead, C sought, and the House of Lords awarded, subrogation to X's extinguished rights only as against OOL.[33] This was novel: in all other cases of subrogation to extinguished proprietary rights, C obtained

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30 *BFC* (n 25) 227G–H (Lord Steyn), 231B–C, 235F–G (Lord Hoffmann), 246B–C (Lord Hutton).

31 *BFC* (n 25) 227G–H (Lord Steyn), 231B–C, 235F–G (Lord Hoffmann), 246B–C (Lord Hutton).

32 *BFC* (n 25) 227G–H (Lord Steyn), 235F–H (Lord Hoffmann), 243A–E (Lord Hutton).

33 *BFC* (n 25).

priority over all D's unsecured creditors.[34]

The House of Lords justified this as a remedy for OOL's unjust enrichment,[35] with the unjust factor described as either C's mistake[36] or defeated expectation.[37] However, it has already been shown that this reasoning fails to justify subrogation.[38]

Moreover, the result in *BFC* cannot be saved by either justification for subrogation in this thesis. Subrogation cannot be justified by a duty not to use a right for one's own benefit. OOL did not traceably acquire a right, so never came under any such duty.[39]

Nor can subrogation be justified on the basis that C bore the burden of a debt which should have been borne by D. It is D who figures in this justification; it is a justification for subrogation to rights against D and not a justification for subrogation against one of D's creditors like OOL.

One might think that this justification can be modified to explain the result in *BFC*. In *Forbes*, part of the reason that C was subrogated to X's extinguished mortgage was that D's creditors had not bargained for security over the property.

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[34] Charles Mitchell and Stephen Watterson, *Subrogation: Law and Practice* (rev edn, OUP 2007) paras 8.54–8.55; Charles Mitchell, Paul Mitchell, and Stephen Watterson, *Goff and Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) para 39-54.

[35] *BFC* (n 25) 226F–28F, 231H (Lord Hoffmann), 238H (Lord Clyde).

[36] *BFC* (n 25) 227E (Lord Steyn), 234G–35A (Lord Hoffmann).

[37] *BFC* (n 25) 227D–F (Lord Steyn), 234G (Lord Hoffmann), 235H (Lord Hutton), 237D–G (Lord Clyde).

[38] See pages 148–165.

[39] See pages 213–216.

They had therefore agreed not to have recourse to the property until D had borne the burden of his debts secured over the property.[40]

Similarly, in *BFC*, OOL had bargained for a second charge. OOL had therefore agreed not to have recourse to the property until D had borne the burden of the debts secured by the first charge. However, C (and not D) had borne the burden of partially discharging X's first charge. This gave OOL recourse to the property before D had borne the full burden of the debt which had been secured by the first charge. OOL had recourse to the property sooner than it had agreed; OOL had more than it had bargained for.

To put this right, C was subrogated, as against OOL, to X's first charge insofar as it was discharged. OOL therefore got only what it had bargained for: recourse to the property after D had borne the full burden of the debt secured by the first charge.

In *Forbes*, D's other creditors were relevant as part of the justification for subrogation to proprietary rights against D.[41] However, the previous two paragraphs take a further step and allow a free-standing claim against those creditors. Armstrong and Cerfontaine observe that this creates a problem: a circular system of priorities.[42] C was only subrogated to X's extinguished rights as against OOL.

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40 See page 244.

41 See page 244.

42 Mark Armstrong and Alexandrine Cerfontaine, 'Subrogation, Unjust Enrichment and Insolvency: A French View of *Banque Financière de la Cité SA v Parc (Battersea) Ltd*' in

Consequently, subrogation gave C priority over OOL but not D's other creditors, so D's preferred creditors had priority over C. Meanwhile, OOL's charge gave it priority over D's other creditors, including the preferred creditors. Thus, C had priority over OOL, who had priority over D's preferred creditors, who had priority over C. This is a circular system of priorities, making it impossible to know who should be paid first.[43]

In sum, the result in *BFC* cannot be supported by the House of Lords' reasoning, or by either of the justifications for subrogation offered by this thesis. Unless another justification can be found, the House of Lords' decision that C had priority over OOL was wrong, and the Court of Appeal's decision that OOL had priority over C was right.

10.3.2 *Menelaou*

In *Menelaou*, D's parents had title to Rush Green Hall, which was subject to C's charge.[44] D's parents decided to sell Rush Green Hall and use the proceeds to buy a new property, Great Oak Court, from X. C released its charge over Rush Green Hall in exchange for a new charge over Great Oak Court. However, D's parents registered Great Oak Court in D's name. D had not consented to C's new charge,

Francis Rose (ed), *Restitution and Insolvency* (Mansfield Press 2000) 103–04.

43 Armstrong and Cerfontaine (n 42) 103–04; Mitchell and Watterson (n 34) para 8.144.

44 *Menelaou* (SC) (n 17).

which was therefore invalid. On the face of it, then, C had no security. However, the Supreme Court held 'that [C] is entitled to be subrogated to an equitable charge by way of an unpaid vendor's lien over ... Great Oak Court'.[45]

Four possible justifications for this decision will be considered:

(1) D was unjustly enriched at C's expense.

(2) A *Quistclose* trust allowed C to trace into the discharge of X's rights.

(3) *Buhr v Barclays Bank* allowed C to trace into the discharge of X's rights.

(4) C bore the burden of a debt which ought to have been borne by D.

It will be concluded that two of these arguments justified giving C rights, but not one justified these rights taking the form of subrogation.

First, the majority justified subrogation as a remedy for unjust enrichment,[46] with the unjust factor identified as C's mistake, failure of basis, or defeated expectation.[47] It has already been shown that this reasoning cannot justify subrogation.[48] Nor can this justify a direct unjust enrichment claim: *Menelaou* does not fit *ITC*'s

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[45] *Menelaou v Bank of Cyprus UK Ltd* [2013] EWCA Civ 814 [2] (Floyd LJ) affd *Menelaou* (SC) (n 17) [52] (Lord Clarke), [105] (Lord Neuberger), [107], [140] (Lord Carnwath), [141] (Lord Kerr and Lord Wilson).

[46] *Menelaou* (SC) (n 17) [18], [37], [49]–[50] (Lord Clarke), [61]–[99] (Lord Neuberger), [141] (Lord Kerr and Lord Wilson).

[47] *Menelaou* (SC) (n 17) [21]–[22] (Lord Clarke).

[48] See pages 148–165.

requirement of a direct transfer of value from C to D.[49]

Second, Lord Carnwath took a different approach. He suggested that the parents' solicitor held the right to the proceeds of the sale of Rush Green Hall under a *Quistclose* trust for C.[50] C could therefore trace through the payment of the proceeds to X, and into the discharge of X's unpaid vendor's lien, subrogating C to the extinguished unpaid vendor's lien.[51]

If there was indeed a *Quistclose* trust,[52] then Lord Carnwath was correct to say that this justified giving C rights but incorrect to say that this justified subrogation. Because of the *Quistclose* trust, the solicitor had a duty to hold its right to the proceeds of sale for C's benefit.[53] The proceeds were then paid to X, in exchange for X transferring title to Great Oak Court to D. Accordingly, tracing showed that D's title to Great Oak Court derived from the solicitor's right to the proceeds of sale. D was not a bona fide purchaser for value without notice.[54] The solicitor's duty to hold its right to the proceeds for C's benefit therefore persisted against

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49 See Chapter 2.

50 *Menelaou* (SC) (n 17) [133]–[139] citing *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL).

51 *Menelaou* (SC) (n 17) [140].

52 For criticism, see David Winterton, 'Unjust Enrichment and Rough Justice' [2016] RLR 164, 171; Stevens, 'The Unjust Enrichment Disaster' (n 18) 599 fn 96.

53 *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [77]–[100] (Lord Millett). Lord Millett dissented on a different point but his analysis of *Quistclose* trusts is authoritative: *Challinor v Juliet Bellis & Co* [2015] EWCA Civ 59 [55] (Briggs LJ).

54 *Menelaou* (SC) (n 17) [36] (Lord Clarke), [70] (Lord Neuberger).

D.[55] On one view, this duty required D to hold any profits from that right for C's benefit. On another view, as D did not have the original right to hold on trust, she must hold the traceable substitute right on trust. Either way, D was required to hold her title to Great Oak Court on constructive trust for D.

However, this duty not to use a right for one's own benefit could not justify subrogation.[56] It was the solicitor, not D, who paid X. D never had a right to the money used to pay X. Accordingly, D was never under a duty in relation to the right used to extinguish X's lien and so such a duty could not justify subrogation to the extinguished lien.

In short, Lord Carnwath's *Quistclose* trust justified D holding her title to Great Oak Court on trust for C, but did not justify subrogation. The possibility of D holding title to Great Oak Court on trust for C was raised at first instance[57] but in the Court of Appeal and Supreme Court C only pursued subrogation.[58] This was the remedy that the Supreme Court awarded.[59] Consequently, Lord Carnwath's reasoning did not justify the remedy that the Court awarded.[60]

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55 See page 205.

56 See pages 213–216.

57 *Menelaou v Bank of Cyprus Plc* [2012] EWHC 1991 (Ch) [12], [14], [19] (David Donaldson QC).

58 *Menelaou v Bank of Cyprus Plc* [2013] EWCA Civ 1960, [2014] 1 WLR 854 ('*Menelaou* (CA)') [1], [13] (Floyd LJ).

59 See n 45 on page 281.

60 cf William Swadling, 'In Defence of Formalism' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing 2019) 113–15.

In argument, C raised a third possible justification for subrogation. C relied on *Buhr v Barclays Bank* for the proposition that it could trace into the discharge of X's lien, justifying subrogation.[61] This argument was not considered in the Court's judgment.[62]

Where D acquires a right derived from a right held on trust, D must hold that right on trust unless she is a bona fide purchaser for value without notice.[63] *Buhr* established that the same principle applies to charges.[64] The Court of Appeal held that 'security in an asset carries through to its proceeds'.[65] Unfortunately, the chargee argued,[66] the defendant conceded,[67] and the Court held[68] that this meant that the chargee had a constructive trust over the proceeds. It is not clear why the charge should transform into a trust over the proceeds. The better view is that the Court only recognised a trust because of the defendant's concession. The logic of the Court's reasoning suggests that it should be a charge that persists over the proceeds.

Applying this reading of *Buhr* to *Menelaou*, C's charge over Rush Green Hall

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61 *Buhr v Barclays Bank Plc* [2001] EWCA Civ 1223.

62 *Menelaou* (SC) (n 17) [53] (Lord Clarke), [104] (Lord Neuberger), [133] (Lord Carnwath).

63 See page 205.

64 Magda Raczynska, *The Law of Tracing in Commercial Transactions* (OUP 2018) para 4.02.

65 *Buhr* (n 61) [50] (Arden LJ). For analysis of why, see Raczynska (n 64) chs 6 and 7.

66 *Buhr* (n 61) [8] (Arden LJ).

67 *Buhr* (n 61) [44] (Arden LJ).

68 *Buhr* (n 61) [49] (Arden LJ).

persisted over the solicitor's right to the traceable proceeds of sale, and in turn D's traceably acquired title to Great Oak Court.[69] The Court was therefore correct to hold that C was entitled to a charge over D's title to Great Oak Court.

But this does not explain the form that the charge took.[70] The Court held 'that [C] is entitled to be subrogated to an equitable charge by way of an unpaid vendor's lien over ... Great Oak Court'.[71] *Buhr* did not justify subrogation or giving C an unpaid vendor's lien.

Finally, there are difficulties with justifying subrogation on the basis that C bore the burden of a debt which ought to have been borne by D. If C bearing the burden of a debt requires C to be the person who pays X, then this justification cannot justify subrogation in *Menelaou* since C did not pay X.

However, this thesis tentatively suggested that C need not pay X. It argued that C bears the burden of a debt where C made a payment (to X, D, or a fourth party) for the purpose of causing the discharge of the debt.[72] In *Menelaou*, C made no payment. But it did release its charge over Rush Green Hall for the purpose

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69 Stevens, 'The Unjust Enrichment Disaster' (n 18) 599. One month after Rush Green Hall was sold, C released its charge over Rush Green Hall: *Menelaou* (SC) (n 17) [7] (Lord Clarke). But it did not follow that C had released its *Buhr* charge over the proceeds of sale or D's title to Great Oak Court. C only released its charge over Rush Green Hall on condition that C was granted a new charge over Great Oak Court and this did not happen.

70 cf Swadling, 'In Defence of Formalism' (n 60) 113–15.

71 See n 45 on page 281.

72 See pages 228–241.

of allowing the proceeds of sale to be used to purchase Great Oak Court.[73] One might therefore say that C bore the burden of discharging X's unpaid vendor's lien.

Nevertheless, it is not clear that the burden of the debt should have been borne by D. This will be illustrated in two stages. First, it is not clear that D should have borne the burden of paying the purchase price of Great Oak Court. Second, it is not clear that D should have borne the burden of extinguishing the lien.

Turning first to the debt, on the one hand, D contracted with X to purchase Great Oak Court so — as between D and X — D agreed to bear the burden of paying the purchase price.[74] On the other hand, D agreed on the basis that the property was a gift from her parents so — as between D and her parents — D had *not* agreed to bear the burden of paying the purchase price.[75] Which of these constructions should govern the relationship between D and C? For the purposes of C's subrogation claim, had D agreed to bear the burden of paying the purchase price?

Ultimately, a personal claim was not pursued in *Menelaou*; C only sought subrogation to X's unpaid vendor's lien.[76] It is unclear whether the burden of discharging this lien should have been borne by D. On the one hand, the unpaid

[73] *Menelaou* (SC) (n 17) [5] (Lord Clarke).

[74] *Menelaou* (SC) (n 17) [4] (Lord Clarke).

[75] *Menelaou* (SC) (n 17) [4] (Lord Clarke).

[76] *Menelaou* (SC) (n 17) [55] (Lord Clarke), [82] (Lord Neuberger).

vendor's lien could be interpreted as denying D possession until she bore the burden of paying the purchase price. On the other hand, the reason that the law imposes an unpaid vendor's lien is to protect the unpaid vendor by entitling it to possession until the purchase price is paid. This reason does not require the purchaser to be the person who bears the burden of paying the purchase price.

In short, C arguably bore the burden of discharging X's unpaid vendor's lien, but it is unclear whether this burden ought to have been borne by D. It is therefore difficult to justify subrogation on the basis that C bore a burden which should have been borne by D.

To sum up, Lord Carnwath's reasoning justified D holding her title to Great Oak Court on trust for C. *Buhr* justified C having a charge over D's title. However, C sought neither remedy. Instead, C sought, and the Court granted, an order that C was subrogated to X's unpaid vendor's lien. There was no justification for this order and the Court was wrong to make it. *Menelaou* was therefore wrongly pleaded and wrongly decided.

10.3.3 *Swynson*

In *Swynson*, X loaned money to EMSL, on the basis of D's negligent due diligence report. EMSL defaulted. C made a new loan to EMSL, which it used to repay X's loan. This meant X suffered no loss as a result of D's negligence, and so X

could not recover damages from D.[77] ESML then went into liquidation, so could not repay C's loan. C therefore sought to be subrogated to X's discharged right to sue D for negligence.

The Supreme Court denied C's claim. Lord Sumption stated that C had not 'bargain[ed] for a right to recover substantial damages from [D]'[78] and so was not 'defeated in his expectation of some feature of the transaction for which he may be said to have bargained'.[79] Similarly, Lord Neuberger and Lord Mance explained that C 'got precisely what he thought he was getting from the transaction in question, namely repayment to [X] of the original loan, and a right to recover the new loan from EMSL'.[80]

This was the correct result for the correct reasons. Recall the example of my son paying your debt. I caused the discharge of your debt, but this is not enough to justify subrogating me to your creditor's rights on the basis that I bore the burden of your debt. The burden of discharging of your debt cannot be attributed to me because I did not act for the purpose of causing its discharge. Similarly, in *Swynson*, C caused the reduction of D's liability to nil. But C had not acted for this purpose so could not claim to have borne the burden of D's debt. Lord

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77 *Swynson* (n 17) [11]–[17] (Lord Sumption), [45]–[54] (Lord Mance), [92]–[108] (Lord Neuberger).

78 *Swynson* (n 17) [33].

79 *Swynson* (n 17) [34].

80 *Swynson* (n 17) [119] (Lord Neuberger). See also [87] (Lord Mance).

Neuberger and Lord Mance were therefore right to deny subrogation because C 'got precisely what he thought he was getting from the transaction'.[81]

Even if C had borne the burden of D's debt, C consented to doing so in exchange for a right to repayment from ESML. C had that right to repayment from ESML. Subrogation would therefore relieve C of a burden that it consented to bearing and so Lord Sumption was right to deny subrogation on the basis that C had everything that it had bargained for.

Finally, subrogation could not be justified by a duty not to use a right for one's own benefit, since D never acquired a right so never came under any such duty.

In short, the Court denied subrogation in *Swynson* for the right reasons.

10.4 Wider implications

The aim of this thesis was to resolve four controversies surrounding subrogation. In doing so, the thesis uncovered implications for at least five other areas of law:

(1) Marshalling;

(2) Imputed intention;

(3) Trusts over traceably acquired rights;

(4) Recoupment and contribution; and

[81] *Swynson* (n 17) [119] (Lord Neuberger). See also [87] (Lord Mance); *Swynson Ltd v Lowick Rose LLP* [2015] EWCA Civ 629, [2016] 1 WLR 1045 [25] (Longmore LJ), [48] (Davis LJ) cf [59] (Sales LJ).

(5) Unjust enrichment.

Each will be considered in turn.

10.4.1 Marshalling

First, the thesis has implications for marshalling. Marshalling involves at least three parties: the debtor, senior creditor, and junior creditor. It is best explained by way of example. Say the debtor owes £100 to the senior creditor who has security over two properties, Whiteacre and Blackacre, which are each worth £100. The debtor also owes £100 to the junior creditor who has security over Whiteacre, ranking behind the senior creditor's security. However, the junior creditor does not have security over Blackacre. If the debtor is solvent, then both creditors can be paid.

The problem arises if the debtor is insolvent.[82] If the senior creditor chooses to realise its security over Blackacre, then the junior creditor can realise its security over Whiteacre and so both creditors will be paid. However, if the senior creditor chooses to realise its security over Whiteacre, then the senior creditor's right to £100 will exhaust Whiteacre (which is only worth £100), leaving the junior creditor unsecured. The junior creditor would then compete with the debtor's unsecured creditors. As such, the senior creditor's choice of which security to realise can

[82] *National Crime Agency v Szepietowski* [2013] UKSC 65, [2014] AC 338 [32] (Lord Neuberger).

affect whether or not the junior creditor will be paid.

Marshalling prevents the senior creditor's choice prejudicing the junior creditor. If the senior creditor chooses to realise its security over Whiteacre, then the junior creditor can take the benefit of the senior creditor's extinguished security over Blackacre. The junior creditor is said to have 'the right to have the two securities marshalled so that both he and [the senior creditor] are paid so far as possible'.[83]

Marshalling is controversial in at least two ways. First, Rotherham writes that the 'doctrine of marshalling represents a decision to privilege the position of secured creditors (mainly institutional lenders) over unsecured lenders (generally, smaller contract creditors) for reasons which have never been satisfactorily explained'.[84]

Second, the relationship between marshalling and subrogation is contentious. Sometimes marshalling and subrogation are distinguished and analysed separately.[85] Hare writes that:

> unlike in the subrogation context, the junior creditor's funds are not being used to discharge the debtor's indebtedness to the senior credi-

[83] *Re Bank of Credit and Commerce International SA (No 8)* [1996] Ch 245 (CA) 271G (Rose LJ), approved *Szepietowski* (n 82) [2] (Lord Neuberger). See also *Ex p Kendall* (1811) 17 Ves Jun 514, 520; 34 ER 199, 201 (Lord Eldon LC); *Webb v Smith* (1885) 30 ChD 192 (CA) 200 (Cotton LJ); *Re Bank of Credit and Commerce International SA (No 8)* [1998] AC 214 (HL) 230H–31B (Lord Hoffmann); *Szepietowski* (n 82) [1], [31]–[32] (Lord Neuberger); Todd Cleaver, 'Marshalling' (1991) 21 Victoria University Wellington LR 275; JD Heydon, MJ Leeming, and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th edn, Butterworths 2015) ch 11.

[84] Craig Rotherham, 'Subrogation' in Steve Hedley and Margaret Halliwell (eds), *The Law of Restitution* (Butterworths 2002) para 8.72. See also Charles Mitchell, 'Book Review' [2000] LMCLQ 589, 589.

[85] *Re Dent Co* [2016] EWHC 2650 (Ch), [2017] Ch 422 [26], [29]–[30] (Norris J).

> tor. Equally, it has never been a requirement of subrogation, unlike marshalling, that the creditors have a common debtor.[86]

On the other hand, marshalling is sometimes treated as an example of subrogation,[87] 'akin to subrogation',[88] or 'a species of subrogation'.[89] The metaphor of standing in another's place is used in relation both doctrines.[90]

This thesis has implications for these controversies. To demonstrate this, three types of marshalling case must be distinguished:

(1) The core case described above.

(2) The so-called 'extended' case.[91]

(3) *Re Stratton*, in which marshalling was controversially extended further still.[92]

The extended case and *Re Stratton* can be explained as instances of subrogation properly distributing the burden of a debt. By contrast, there is no justification

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86 Christopher Hare, 'Marshalling Marshalling' in Paul S Davies, Simon Douglas, and James Goudkamp (eds), *Defences in Equity* (Hart Publishing 2018) 242. See also S Rory Derham, 'Set-off Against an Assignee' (1991) 107 LQR 126, 131–32.

87 Mitchell, 'Book Review' (n 84) 590; Rotherham, 'Subrogation' (n 84) para 8.72.

88 *Highbury Pension Fund Management Co v Zirfin Investments Ltd* [2013] EWHC 238 (Ch), [2014] Ch 359 ('*Highbury* (Ch)') [15] (Norris J).

89 Derham (n 86) 132; Heydon, Leeming, and Turner (n 83) para 11-020.

90 Marshalling: eg *Aldrich v Cooper* (1803) 8 Ves Jun 382, 32 ER 402. Subrogation: eg *Drew v Lockett* (1863) 32 Beav 499, 503–04; 55 ER 196, 197–98 (Sir John Romilly MR); *Re Cork and Youghal Railway Co* (1868–69) LR 4 Ch App 748, 759, 761 (Lord Hatherley LC); *Patten v Bond* (1889) 60 LT 583 (Ch) 585–86 (Kay J).

91 *Highbury Pension Fund Management Co v Zirfin Investments Ltd* [2013] EWCA Civ 1283, [2014] Ch 359 ('*Highbury* (CA)') [2] (Lewison LJ).

92 *Re Stratton ex p Salting* (1883) 25 ChD 148 (CA).

for subrogation in the core case. To substantiate these arguments, each of the three types of case will now be considered in turn.

10.4.1.1 The core case

Starting with the core case, here marshalling cannot be justified as an instance of subrogation.

Marshalling cannot be justified by a duty not to use a right for one's own benefit. The junior creditor's charge over Whiteacre means that the debtor owes a duty to the junior creditor to hold its title as security. But the junior creditor cannot trace from Whiteacre into Blackacre, and so this duty cannot justify giving the junior creditor rights over the title to Blackacre.

Nor can marshalling be justified because C bore the burden of a debt which should have been borne by D. In marshalling cases, the debtor pays its debt to the senior creditor; the burden of this debt is already properly distributed before marshalling.

One might instead change focus and argue that the burden of the debt to the junior creditor should fall on Blackacre, instead of making Blackacre available to the debtor's unsecured creditors. However, there is no good reason why the burden of the debt to the junior creditor should fall on Blackacre, and there is a good reason to make Blackacre available to the unsecured creditors. Namely, the junior creditor never bargained for rights over Blackacre. As Mitchell explains:

> It is also open to a junior creditor to protect himself by contracting with the debtor to take junior security over [Blackacre] as well as [Whiteacre], and if he chooses not to do this, but instead to charge the debtor at a higher rate reflecting the lower value of his security over [Whiteacre], then the law has no need to put him into a better position than the one he has bargained for[.][93]

Marshalling, then, cannot be justified by properly distributing the burden of a debt.

Consequently, if the core case of marshalling is to be justified, one must look beyond the justifications for subrogation. In the leading Supreme Court decision of *National Crime Authority v Szepietowski*, Lord Neuberger suggested that:

> the right to marshal is an incident of the second mortgage when it is granted . . . . It is normally easy to imply a common intention on the part of the parties to the second mortgage (the mortgagor and the second mortgagee) that there should be a right to marshal where the second mortgage secures a debt due from the mortgagor, because such a right is to the manifest advantage of the second mortgagee and of no significance either way to the mortgagor.[94]

However, marshalling is an arcane doctrine and most parties are unlikely to be aware of it. If the contract is silent about marshalling, it seems fictional to interpret this silence as agreement to marshalling.[95]

A better explanation focuses on the fact that, were it not for marshalling, the senior creditor would have the ability to determine a priority dispute. On the one

[93] Mitchell, 'Book Review' (n 84) 591.

[94] *Szepietowski* (n 82) [54] (citation omitted).

[95] See also Hare (n 86) 244–46.

hand, if the senior creditor chose to realise its security over Blackacre, then the junior creditor's security over Whiteacre allows it to be paid before the debtor's unsecured creditors. On the other hand, if the senior creditor chose to realise its security over Whiteacre, then the junior creditor would lose its security and compete with the unsecured creditors for the proceeds of Blackacre. In effect, then, the senior creditor's choice would determine a priority dispute between the junior creditor and the unsecured creditors. A priority dispute should not be determined by a private party who could abuse their power. As Lord Neuberger explained:

> there are also good practical reasons for equity adopting the doctrine, namely the unattractive and adventitious benefit which would otherwise be accorded to the [senior creditor]. If marshalling was not available to the [junior creditor], the [senior creditor]'s free right to choose the property against which he enforced could have substantial value. In effect, he could auction that right as between the [junior creditor] (who would be prepared to pay him to enforce against [Blackacre]) and the unsecured creditors of the mortgagor (who, especially where the mortgagor was actually or potentially insolvent, would be prepared to pay him to enforce against [Whiteacre]).[96]

Consequently, one might think that the law should step in and resolve the priority dispute between the junior creditor and unsecured creditors, rather than leaving it to the senior creditor's whim.

Marshalling achieves this. If the senior creditor chooses to realise its security over Blackacre, then the junior creditor's security over Whiteacre allows it be paid before the unsecured creditors. To take the priority dispute out of the senior

[96] *Szepietowski* (n 82) [36]. See also Heydon, Leeming, and Turner (n 83) para 11-180.

creditor's hands, the law must ensure the same result if the senior creditor makes a different decision. Thus, if the senior creditor chooses to realise its security over Whiteacre, marshalling ensures that the junior creditor is again paid before the unsecured creditors. Marshalling therefore ensures that the junior creditor has priority, regardless of how the senior creditor behaves.

Whether or not this argument is convincing, it does not justify subrogation. Subrogation gives C new rights against D which resemble X's extinguished rights against D.[97] At most, the argument above justifies giving the junior creditor priority over the unsecured creditors in the event of the debtor's insolvency. It does not justify giving the junior creditor a fully-fledged security interest over Blackacre, resembling that the senior creditor used to have. As Swadling explains, this would be a clumsy way for the law to resolve a priority dispute. Giving the junior creditor a security interest over Blackacre not only gives protection in the event of the debtor's insolvency. It also gives the junior creditor other advantages, such as potentially binding third parties who acquire title to Blackacre, which have not been justified.[98]

Conversely, if the junior creditor truly deserves priority over the unsecured

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97 See n 7 on page 3.

98 William Swadling, 'Policy Arguments for Proprietary Restitution' (2008) 28 LS 506; William Swadling, 'The Fiction of the Constructive Trust' (2011) 64 CLP 399; William Swadling, 'Unjust Enrichment: Value, Rights, and Trusts' (2021) 137 LQR 56. See also Lionel Smith, 'Unravelling Proprietary Restitution' (2004) 40 Canadian Business LJ 317, 331–337; Elise Bant and Michael Bryan, 'Specific Restitution Without Trusts' (2012) 6 J Eq 181.

creditors, then it should not matter whether Blackacre is subsequently destroyed or becomes worthless.[99] Yet giving the junior creditor a security interest over Blackacre means that the junior creditor loses its priority if Blackacre is destroyed or becomes worthless. In short, the need to prevent the senior creditor deciding the priority dispute justifies giving the junior creditor priority over the unsecured creditors, but it does not justify subrogating the junior creditor to the senior creditor's extinguished security over a specific property.

Smith suggests that the subrogation of sureties is also justified by the need to prevent a creditor deciding a priority dispute between third parties. He writes that:

> The result could also be justified as analogous to the doctrine of marshalling. The creditor could, if he wished, realise on the security, thereby extinguishing it, and then sue the surety for any deficiency. If he chooses to sue the surety first, why should the unused security enure to the benefit of unsecured creditors of the debtor?[100]

Certainly, this is a similarity between the justification for marshalling and the justification for the subrogation of sureties. However, on closer inspection, the reason for marshalling is different to the reason for subrogation in both scope and effect.

As for scope, one reason for subrogation is that C bore the burden of a debt

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[99] Swadling, 'Policy Arguments for Proprietary Restitution' (n 98) 524.

[100] Lionel Smith, 'Book Review' (1995) 9 TLI 133, 134 fn 4. See also Charles Mitchell, *The Law of Contribution and Reimbursement* (OUP 2003) para 2.22.

which ought to have been borne by D. This justifies the subrogation of sureties.[101] But it also justifies subrogation in cases where C pays D's debt to X, even though C was not obliged to do so.[102] In these cases, X had no right against C; X had no choice to make and no ability to decide a priority dispute. By contrast, the justification for marshalling is premised on the senior creditor having a choice and an ability to decide a priority dispute.

Turning to effect, the need to prevent the senior creditor deciding a priority dispute justifies giving the junior creditor priority over the unsecured creditors. But this does not justify subrogating the junior creditor to the senior creditor's extinguished security over a specific property. By contrast, C bearing the burden of a debt which ought to have been borne by D justifies giving C rights which resemble X's extinguished rights. If the burden of the debt should have fallen on a specific property, then C is subrogated to security over that property.[103] Consequently, the justification for marshalling must be distinguished from the justification for the subrogation of sureties.

In sum, there is plausibly a justification for giving the junior creditor priority over the unsecured creditors. The effect of marshalling in the core case is therefore defensible. But unless another justification can be found, there is no reason

[101] See pages 219–223.

[102] See pages 228–241.

[103] See pages 243–248.

to give the junior creditor rights resembling the senior creditor's extinguished rights or security over a specific property. Consequently, it seems that there is no justification for subrogation in the core case of marshalling.

10.4.1.2 The extended case

The argument that the senior creditor should not determine the priority dispute applies with equal force to the extended case. But unlike the core case, in the extended case the junior creditor is (also) entitled to subrogation to properly distribute the burden of a debt. This requires some explanation.

In the extended case, Whiteacre and Blackacre have different titleholders; the titleholder of Blackacre is the principal debtor whereas the titleholder of Whiteacre acts as surety. Take *Highbury Pension Fund Management Co v Zirfin Investments Ltd.*[104] There, Zirfin had title to a property, subject to Barclays' first charge and Highbury's second charge. In addition, Zirfin's affiliates owed a debt to Barclays, secured by a charge over the affiliates' property, a guarantee from Zirfin, and the first charge over Zirfin's property. Zirfin's property was sold and the proceeds used to discharge the affiliates' debt to Barclays. This left Highbury unsecured.

The Court of Appeal held that Highbury was entitled to marshal Barclays' charge over the affiliates' property, insofar as it was discharged. Lewison LJ explained that:

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[104] *Highbury* (CA) (n 91).

> as between [Zirfin] and the affiliate Zirfin was entitled to ensure that the affiliates bore ultimate liability for their own debts. ... Where two persons are liable to a creditor for the same debt, but as between themselves one of them is primarily liable and the other is only secondarily liable, the debtor with the secondary liability is entitled to be exonerated from liability by the primary debtor.[105]

This reasoning focuses on the relationship between Zirfin and the affiliates. It can justify a claim by Zirfin against the affiliates. However, this reasoning does not explain the result of the case: that Highbury had a claim against the affiliates.

Instead, the focus needs to shift to the proper distribution of burdens as between Highbury and the affiliates. When the proceeds of Zirfin's property were used to pay the affiliates' debt, Highbury lost its second charge. As a result, Highbury bore some of the burden of the affiliates' debt, whereas this burden should have been borne by the affiliates. The burden therefore needed lifting from Highbury and reinstating upon the affiliates. This was achieved by giving Highbury a new charge over the affiliates' property, resembling that Barclays used to have.

The core case and the extended case are therefore different. In the extended case, the burden of a debt should be reinstated on Blackacre, whereas in the core case there was no reason for this. This is for two reasons.

First, in the extended case of *Highbury* there was a positive reason for reinstating the burden of the debt on Blackacre. The affiliates' debt was secured over 'Blackacre' but the affiliates did not bear the burden of their debt; the burden of the debt

[105] *Highbury* (CA) (n 91) [5], [19].

therefore needed reinstating in its proper place. By contrast, in the core case this positive reason did not apply. The debtor's debt to the senior creditor was secured over Blackacre and the debtor bore the burden of this debt; the burden of the debt was already properly distributed before marshalling.

Second, in the core case there was a negative reason why the junior creditor was not entitled to security over Blackacre. The debtor had title to Blackacre, the debtor owed a debt to the junior creditor, but the junior creditor failed to bargain for security over Blackacre. By contrast, in the extended case of *Highbury*, the affiliates had title to 'Blackacre' but they owed no debt to Highbury. Highbury could not be expected to bargain for security over 'Blackacre'; the titleholder was not their debtor.

In sum, in the extended case of marshalling, subrogation is justified to properly distribute the burden of a debt.

10.4.1.3 *Re Stratton*

The same justification works in *Re Stratton*, a controversial case on the fringes of marshalling.[106] In that case, the Warre Brothers were in the business of selling brandy. They owed a debt to their bank which was guaranteed by Stratton. The Warre Brothers then sold twenty-five quarter casks of brandy to Salting. The Court of Appeal refers to the brandy as Salting's 'property' so title seems to have

[106] *Re Stratton* (n 92).

passed.[107] Without Salting's consent, the Warre Brothers pledged the casks to their bank. The bank realised its pledge and sold the brandy.

On these facts, it would seem that Salting had a claim in the tort of conversion against the Warre Brothers and the bank. However, Salting did not pursue these claims. Instead, Salting pursued Stratton. The Court of Appeal held that marshalling allowed Salting to claim the benefit of Stratton's guarantee.

This was a yet further extension of marshalling, beyond the core case and beyond even the extended case. In the core case and the extended case, there were two properties — Whiteacre and Blackacre — and marshalling gave the junior creditor priority over Blackacre. In *Re Stratton*, there was no 'Blackacre'. Stratton's personal guarantee took its place. Marshalling gave Salting a personal claim against Stratton.

Meagher, Gummow, and Lehane criticises the result on three grounds:

> (i) treating the right of a party to marshall as analogous to that of a surety to subrogation to the rights of the principal creditor; whereas in the usual case there is no question that the [junior creditor] is in any way secondarily liable for the debt [which is] the subject of the [senior creditor]'s rights so as to succeed to them upon satisfaction of the [senior creditor's] claim from [Whiteacre];
> (ii) prejudicing [Stratton] by the unrelated claims of [Salting]; and
> (iii) overlooking the effect of *Ex parte Kendall* [in which marshalling was denied because the senior and junior

[107] *Re Stratton* (n 92) 152 (Cotton and Lindley LJJ).

creditors did not share the same debtors.][108]

However, these problems disappear if the language and technicalities of marshalling are jettisoned.[109] Instead, *Re Stratton* is a case of subrogation properly distributing the burden of a debt. The burden of the Warre Brothers' debt should be borne by Stratton (the guarantor) and not Salting (the innocent customer). Giving Salting rights against Stratton which resembled the bank's extinguished rights against Stratton therefore properly distributed the burden of the debt.

One might ask whether Salting bore the burden of the Warre Brothers' debt. Chapter 9 argued that bearing the burden of a debt requires C to pay money (to X, D, or a fourth party) for the purpose of causing the discharge of D's debt.[110] In *Re Stratton*, Salting did not pay anyone for the purpose of discharging the Warre Brothers' debts. However, by realising the pledge and selling the brandy to pay the Warre Brothers' debt, the bank extinguished Salting's title to the brandy. Cotton LJ explained that this amounted to Salting bearing the burden of the debt:

> the bank have paid themselves by selling the property of Mr. Salting. In that state of circumstances he stands in the position of a surety, that is to say, his property has been taken to pay another person's debt, and, in my opinion, he is entitled to say that any other security, which the bank, who have thus applied his property, hold, should be applied for his benefit.[111]

[108] Heydon, Leeming, and Turner (n 83) para 11-155 citing *Ex p Kendall* (n 83).

[109] cf Mitchell and Watterson (n 34) para 6.45 fn 65.

[110] See pages 228–241.

[111] *Re Stratton* (n 92) 152.

The meaning of bearing the burden of a debt must therefore be expanded to mean either (i) C pays money (to X, D, or a fourth party) for the purpose of causing the discharge of D's debt, and C therefore causes the discharge of D's debt; or (ii) the discharge of D's debt extinguishes C's property right.

10.4.1.4 Summary

The arguments of this thesis require the core case of marshalling to be distinguished from the extended case and *Re Stratton*. In the core case, there may be a justification for giving the junior creditor priority over the unsecured creditors. But it seems that there is no justification for subrogating the junior creditor to the senior creditor's extinguished rights. In the core case, then, marshalling should be distinguished from subrogation. By contrast, in the extended case and *Re Stratton*, subrogation is justified to properly distribute the burden of a debt. It is therefore unsurprising that there is controversy over the relationship between subrogation and marshalling: subrogation is justified in some marshalling cases and not in others.

10.4.2 Imputed intention

The arguments of this thesis can also explain some cases in which the courts rely on imputed intention to give a lender priority. Take *Equity & Law Home Loans v*

Prestidge.[112] Mr Prestidge and Mrs Brown purchased a house, which was registered in Mr Prestidge's name. Part of the purchase price came from X's £30,000 loan to Mr Prestidge, which was secured by a charge over the property. However, Mr Prestidge intended to 'cheat' Mrs Brown.[113] Without Mrs Brown's knowledge, Mr Prestidge borrowed £43,000 from C, secured by a new charge over the house. Mr Prestidge used £30,000 of C's loan to repay X's loan, extinguishing X's charge. Mr Prestidge 'pocketed' the remaining £13,000 and defaulted on C's loan.[114] C sought possession of the house. Mr Prestidge conceded that he held the house on trust for Mrs Brown,[115] and Mrs Brown argued that her beneficial interest had priority over C's charge.

Giving the judgment of the Court of Appeal, Mustill LJ explained that Mrs Brown had consented to X's charge as it was necessary for the house to be purchased in the first place.[116] Mustill LJ imputed to Mrs Brown the intention to consent to the replacement of X's charge with C's, 'whether [Mrs Brown] knew about it or not, provided that it did not change [her] position for the worse'.[117] Accordingly,

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[112] *Equity & Law Home Loans Ltd v Prestidge* [1992] 1 WLR 137 (CA). I am grateful to Andreas Televantos for identifying this case as an example of subrogation. See also *Bristol and West Building Society v Henning* [1985] 1 WLR 778 (CA); *Paddington Building Society v Mendelsohn* (1985) 50 P&CR 244 (CA).

[113] *Prestidge* (n 112) 140G (Mustill LJ).

[114] *Prestidge* (n 112) 141D (Mustill LJ).

[115] *Prestidge* (n 112) 142E (Mustill LJ).

[116] *Prestidge* (n 112) 144B.

[117] *Prestidge* (n 112) 144B–C.

C had priority over Mrs Brown to the extent of £30,000.[118]

Millett LJ explained that he imputed this intention to Mrs Brown because it was 'common sense'[119] and:

> Any other answer would be absurd, for it would mean that if Mr. Prestidge had in good faith and without the knowledge of [Mrs Brown] transferred the mortgage to another society in order, say, to obtain a more favourable rate of interest, she would suddenly receive a windfall in the shape of the removal of the encumbrance which she had intended should be created in consequence of a transaction which could not do her any harm and of which she was entirely ignorant.[120]

The problem with this reasoning is that it is unclear whether Mrs Brown agreed to this, or would have agreed had she thought about it. As a result, Mustill LJ's reliance on imputed intention seems fictional. As Lord Kerr put it in *Jones v Kernott*:

> The reason that I question the aptness of the notion of imputing an intention is that, in the final analysis, the exercise is wholly unrelated to ascertainment of the parties' views. It involves the court deciding what is fair in light of the whole course of dealing with the property. That decision has nothing to do with what the parties intended, or what might be supposed would have been their intention had they addressed that question.[121]

Nevertheless, the result in *Prestidge* can be explained as an example of subrogation properly distributing the burden of a debt. To use Lord Kerr's language,

[118] *Prestidge* (n 112) 144E–H (Mustill LJ).

[119] *Prestidge* (n 112) 144B–C.

[120] *Prestidge* (n 112) 143H.

[121] *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776 [74].

this was why it was 'fair' to give C priority over Mrs Brown.

To explain: Mr Prestidge agreed to borrow £30,000 from X, and agreed to give X a charge over the property. Mr Prestidge therefore agreed to bear the burden of repaying the loan, and agreed that this burden should fall on the property. Mrs Brown consented to X's charge,[122] so agreed that her interest should be incumbered until Mr Prestidge bore the burden of repaying X. Even if she did not consent, X's charge had priority over Mrs Brown's interest as it was first in time.[123] Accordingly, Mrs Brown's interest should be incumbered until Mr Prestidge bore the burden of repaying X.

But it was C, not Mr Prestidge, who bore the burden of repaying X. It is true that C did not pay X. However, it was tentatively argued that C can bear the burden of a debt by paying money for the purpose of causing the discharge of a debt.[124] That was the case here. C's loan was paid to Mr Prestidge, who paid X, discharging his debt to X. C therefore caused the discharge of Mr Prestidge's debt to X. The judgment does not expressly say that C's loan was for the purpose of discharging X's charge. However, Mr Prestidge used part of C's loan to discharge X's charge, instead of keeping the full £43,000. From this it can be inferred that C made a first legal charge a condition of its loan, and that C therefore paid part

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122 *Prestidge* (n 112) 144B (Mustill LJ).

123 *Abbey National Building Society v Cann* [1991] 1 AC 56 (HL); *Southern Pacific Mortgages Ltd v Scott* [2014] UKSC 52, [2015] AC 385.

124 See pages 228–241.

of its loan for the purpose of discharging X's charge. Thus, C paid money for the purpose of discharging Mr Prestidge's debt to X. As a result, C bore the burden of Mr Prestidge's £30,000 debt to X. This left Mrs Brown's interest unincumbered, whereas it should have been incumbered until Mr Prestidge bore the burden of the £30,000 debt to X.

To put this right, C was subrogated to X's extinguished charge, giving it priority over Mrs Brown to the extent of £30,000. This lifted the burden of the £30,000 debt from C and reinstated the £30,000 incumbrance on Mrs Brown's interest, thus properly distributing the burden of the debt.

In short, *Prestidge* sails under false colours. The Court relied upon the fiction of imputed intention, but the result is better understood as an example of subrogation properly distributing the burden of a debt.

10.4.3 Trusts over traceably acquired rights

The thesis has implications for another area of law: trusts over traceably acquired rights. Chapter 8 argued that trusts over traceably acquired rights and subrogation to traceably discharged rights are both justified by a duty not to use a right for one's own benefit.[125] They are not remedies for unjust enrichment.

[125] See Chapter 8.

10.4.4 Recoupment and contribution

Chapter 9 dealt with recoupment and contribution.[126] In brief, the justification for subrogation, recoupment and contribution is that C bore the burden of a debt which ought to have been borne by D; it is inaccurate to describe this as an unjust factor of 'legal compulsion' or 'secondary liability'; and the four unjust enrichment questions are a distraction.

10.4.5 Unjust enrichment

Finally, the thesis has implications for the law of unjust enrichment. There is controversy over whether unjust enrichment creates personal and proprietary rights, or only personal ones.[127] Uncontroversial examples of unjust enrichment creating proprietary rights are difficult to find.[128] Subrogation to proprietary rights is the only example which the courts have clearly recognised as a remedy for unjust

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[126] See Chapter 9.

[127] cf eg WJ Swadling, 'Property and Unjust Enrichment: From Genes to Pension Funds' in JW Harris (ed), *Property Problems* (Kluwer Law International 1998); Swadling, 'Policy Arguments for Proprietary Restitution' (n 98); Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2011) ('*Restitution*') ch 8; Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) ('*Restatement*') 159–71; Mitchell, Mitchell, and Watterson (n 34) ch 37; Graham Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2016) ('*Principles*') 10.

[128] cf eg *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] 1 Ch 105 (Ch); *Neste Oy v Lloyds Bank Plc* [1983] 2 Lloyd's Rep 658 (QB); *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL); *Re Farepak Food and Gifts Ltd* [2006] EWHC 3272 (Ch), [2008] BCC 22; *Angove's Pty Ltd v Bailey* [2016] UKSC 47; [2016] 1 WLR 3179.

enrichment.[129] Burrows therefore writes that 'subrogation is of central importance to the continuing debate and controversy over the extent of, and justification for, proprietary restitution'.[130]

This thesis argued that subrogation is not a remedy for unjust enrichment. As a result, the central example of unjust enrichment creating proprietary rights is lost. In addition, the thesis argued that trusts over traceably acquired rights are not remedies for unjust enrichment.[131] This makes it harder to argue that unjust enrichment creates proprietary rights.

Overall, the thesis argued that subrogation, recoupment, contribution, and trusts over traceably acquired rights are not remedies for unjust enrichment. Cases involving these doctrines cannot be relied upon as authority for the rules which govern direct unjust enrichment claims, and vice versa. This plays into the new wave of scepticism over whether unjust enrichment is a unified subject.[132] But it does not necessarily follow that the law of unjust enrichment has no future or that its recognition was a 'disaster'.[133] While subrogation, recoupment, contribution,

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[129] See page 8.

[130] Burrows, *Restitution* (n 127) 147.

[131] See Chapter 8.

[132] Peter G Watts, '"Unjust Enrichment" — the Potion that Induces Well-meaning Sloppiness of Thought' (2016) 69 CLP 289; Charlie Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (OUP 2016); Tatiana RS Cutts, 'Modern Money Had and Received' (2018) 38 OJLS 1; Stevens, 'The Unjust Enrichment Disaster' (n 18); Smith, 'Restitution' (n 18). cf Burrows, '"At the Expense of the Claimant"' (n 18); Andrew Burrows, 'In Defence of Unjust Enrichment' (2019) 78 CLJ 521.

[133] Stevens, 'The Unjust Enrichment Disaster' (n 18).

and trusts over traceably acquired rights are not remedies for unjust enrichment, the thesis has no reason to doubt that some other claims are united as remedies for unjust enrichment.[134]

The importance of separating subrogation from unjust enrichment can be illustrated by returning to two hypothetical cases, *Valet v Chips* and *Footman v Pasta*. In both cases, C's defeated expectation of obtaining a mortgage in the future caused C to make a loan to a husband. In *Valet*, the husband used the loan to pay off a mortgage over his wife's property. In *Footman*, the husband used the loan to make an extravagant cash gift to his wife. In both cases, the wife was unaware of C's expectation of obtaining a mortgage, and she refuses to give C a mortgage. It was explained that Lord Sumption's reasoning in *Swynson* suggests that C should have a claim against the wife in *Valet* but not *Footman*.[135]

If one focuses on enrichment, then it seems inconsistent to treat *Valet* and *Footman* differently. The wife is better off in both cases.[136]

However, this thesis explains why the two cases should be treated differently. *Valet* is analogous to *Reversion Fund*:[137] C bore the burden of a debt which ought

134 Smith, 'Restitution' (n 18) 110–16.

135 See pages 161–165.

136 *Phillips v Homfray (No 1)* (1870-71) LR 6 Ch App 770; Peter Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) ('*Introduction*') 129; William Swadling, 'The Myth of *Phillips v Homfray*' in William Swadling and Gareth Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (OUP 1999); Birks, *Unjust Enrichment* (n 29) 59–61; Burrows, *Restatement* (n 127) 41; Mitchell, Mitchell, and Watterson (n 34) ch 5.

137 *Reversion Fund and Insurance Co Ltd v Maison Cosway Ltd* [1913] 1 KB 364 (CA) discussed

to have been borne by the wife. C's defeated expectation of obtaining a mortgage in the future shows that C did not consent to bearing this burden. It is therefore justified to subrogate C to the extinguished mortgage.

By contrast, in *Footman* no debt was discharged; C did not bear the burden of a debt which ought to have been borne by the wife. The justification for subrogation giving C rights in *Valet* therefore cannot justify giving C rights in *Footman*. The fact that C has a disappointed unilateral expectation might be a reason for giving C rights, but it does not explain why the wife should be under any duty.[138] Consequently, there is a justification for giving C rights against the wife in *Valet* but not *Footman*.

In short, subrogation describes a unique form of rights: giving C rights against D which resemble X's extinguished rights against D. This requires particulars justification, one of which is that C bore the burden of a debt which ought to have been borne by D. This justification only works where a debt was discharged. As a result, cases of a discharge of a debt raise unique considerations and are not simply another example of D being unjustly enriched. This normative difference has been obscured by ignoring the unique form that subrogation takes and thus the particular justifications that subrogation requires.

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on pages 258–261 of this thesis.

[138] See n 44 on page 159.

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