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UNDERSTANDING TRACING RULES

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This year is the 200th anniversary of one of the leading decisions concerning the law of tracing in equity. Celebrations have not been widely held. Two centuries after this decision, the rules of tracing in equity remain very difficult to understand and very difficult to justify. But they are of immense practical importance including to the law of trusts, claims based on fraud, and claims against remote recipients of property. This year, the United Kingdom Supreme Court has also returned to the topic in the context of a claim based on non-contractual subrogation. This article explains some of the persistent problems in the law of tracing and shows how to understand the operation of equitable tracing rules.

I INTRODUCTION

Until the delivery last year of the oral presentation upon which this article is based, I had never met Tony Lee. But I had read a great deal of his writing on equity, particularly his magisterial co-authored work with the late Harold Ford, *Ford and Lee on the Law of Trusts.*[1] Tony's great contribution to the law of equity and trusts has been the clarity of his writing coupled with his desire to understand and explain the nature of things. Indeed, reading through Tony's memoirs, one episode in his life seemed to me to epitomise these twin virtues of a desire for clarity and an exploration of knowledge. Some years ago, Tony had stood up to give a lecture on succession at the University of Queensland. He noticed that the lecture theatre seemed more crowded than usual. As he began to speak on the anti-lapse rule, a young man suddenly burst out from behind a curtain dressed as The Phantom and uttering cries about "Diana" and the "Skull Cave". The young man ran from the room. Undeterred, Tony followed him. Tony was not annoyed. He was not angry. He found the student and complimented him on his costume and asked the student what the stunt meant. I know of very few lecturers who could have both the patience and the intellectual curiosity to take such an approach. But it must have been intimidating for the poor student whose pride in his meaningless prank would have been shattered by his lecturer's disappointment in a lack of underlying meaning.

In Tony's memoirs he also speaks of his disenchantment with authors who build a huge and convincing structure based upon an unstated assumption. It is this observation that is the purpose of this article about the law of tracing. For the last two centuries the judiciary in England, the United States, Australia, New Zealand and Canada has developed a law of tracing and imbued it with a considerable structure of rules. But the judiciary has never enunciated the assumptions, or normative premises, upon which the law of tracing has been built. In this article, I will focus primarily on English cases to avoid any commentary on Australian issues that might come before me. This article is divided into six parts:

(1) examples to illustrate the central issue in the article;

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[1] HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Lawbook Co, 1983).

(2) where the problems began;
(3) what does tracing try to do;
(4) the way tracing links transactions;
(5) understanding the particular rules of tracing; and
(6) the basal reason for tracing.

II EXAMPLES TO ILLUSTRATE THE CENTRAL ISSUES IN THE ARTICLE

A mistakenly overpays $1 million to B when repaying a debt. Assuming that the defendant has not changed his position or that no other defence exists, B is obliged to repay the money. But suppose that B has no assets left because the following occurs:

- The payment is made into an account of B with Westpac Bank but B, knowing the rules of tracing and suspecting an overpayment, pays $1 million to his innocent son, C, from an account at the Commonwealth Bank. Can C keep the $1 million?
- The payment is made into an account of B at Westpac Bank which was overdrawn by $1 million. Since B's account is no longer overdrawn, B now has the free use of $1 million credit in an account at the Commonwealth Bank which was used to service the debt. B pays $1 from that different account to C. A wants to recover the $1 million overpayment she made by mistake. B has no assets left. B refuses to sue C. Can C keep the $1 million that he received for nothing effectively at A's expense?
- Again, suppose that the same scenario occurs but that B knows that A is going to make the overpayment and knows that A is mistaken. In advance of A's payment, B pays the $1 million to C from the account at the different bank. Can C keep the $1 million?

In each case the broad substance of each of the transactions is as follows. A mistakenly pays $1 million to B. B pays $1 million to C. The $1 million is still held by C.

Some of the traditional rules of tracing suggest that the answer to each of these examples is that unless B sues C, C can keep the money. A has lost $1 million by mistake. The mistake, or its anticipation by B, caused C to gain $1 million. A conventional understanding of tracing rules suggests that C can keep the $1 million. Those rules sometimes involve the statement that at common law 'it is not possible to trace through a mixed bank account', or 'it is not possible to trace through an overdrawn bank account', or, more generally, 'it is not possible to trace backwards'. The purpose of this article is to suggest that something may have gone seriously wrong with the development of these rules of tracing in the last two centuries.

III WHERE THE PROBLEMS BEGAN TWO CENTURIES AGO

The beginning of much of the modern law of tracing is the decision in *Taylor v Plumer*.[2] There were two central players in the drama. The first was Sir Thomas Plumer: Solicitor General, Attorney General, the first Vice-Chancellor of England, and the Master of the Rolls. The second was his stockbroker Walsh, a very foolish man who thought that he could get away with defrauding Sir Thomas.

Following a sale of some of his stock, Sir Thomas Plumer instructed Walsh to withdraw the £22 000 in proceeds and to invest it in Exchequer Bills. Walsh obtained twenty two notes of

[2] (1815) 3 M&S 562.

£1000 but he only bought Exchequer bills for £6500. He used the rest for his own benefit, buying American shares, stock and bullion. Sir Thomas's attorney caught Walsh as he was about to board a ship for Lisbon and the United States. Walsh handed over to Sir Thomas's attorney the securities and the bullion. Walsh was tried, and convicted but later pardoned. Curiously at his trial in the Old Bailey a letter was produced which he had written to his brother. He had confessed his sins, explained that it was all to save his family from financial ruin, and expressed the hope that Sir Thomas might not make his crimes publicly known. Little did Walsh know that two centuries later law students all over the world would remember his name.

The problem was that Walsh was bankrupt. Walsh's assignees in bankruptcy claimed that the securities and bullion formed part of Walsh's estate. They said that they had legal title because Walsh had committed an act of bankruptcy when he attempted to abscond. In contrast, Sir Thomas claimed that they were his. It was clear that legal title to the securities and bullion had passed to Walsh. They had been sold to Walsh even though he had used Sir Thomas's money. The question was whether the securities and bullion were held on trust. The assignees in Walsh's bankruptcy accepted that property in the possession of an agent which is held on trust does not form part of the bankrupt estate. They also accepted that anything exchanged for the trust property, *lawfully* acquired under the trust, which is capable of being ascertained, is excluded from the bankrupt estate because the assets exchanged have become trust property as intended. But they argued that anything acquired *fraudulently* in breach of trust will form part of the bankrupt estate because the beneficiary cannot take the benefit of a fraud to the prejudice of all other creditors. Counsel for the assignees in bankruptcy gave an example which he said would lead to 'great practical inconvenience' if Sir Thomas were to succeed. Suppose, he said, a plaintiff entrusted his agent with money to purchase a horse, and the agent purchased a carriage instead. Counsel said that if A could then claim the carriage there would be great practical inconvenience. In contrast, counsel argued, if the rule were that the plaintiff is confined to a claim to the same property or to things purchased with authority then the rule would be simple and clear. Counsel admitted that there was no decided case on the point but he said that there was also no decided case against him. The one case where a principal had been entitled to claim a new asset purchased without authority was said to be of doubtful authority and no decree had been found at the Register Office.[3]

Lord Ellenborough CJ rejected this argument. He decided the case for Sir Thomas. In a very famous passage he said:

> … the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood in the same way; i.e. as predicated only of an undivided and undistinguishable mass of current money. But money in a bag, or otherwise kept apart from other money, guineas, or other coin marked (if the fact were so) for the purpose of being distinguished, are so far ear-marked as to fall within the rule on this subject, which applies to every other description of personal property whilst it remains, (as the property in question did,) in the hands of the factor, or his general legal representatives.[4]

So many misunderstandings have arisen from this passage. Perhaps the most fundamental is

[3] *Whitecomb v Jacob* (1710) 91 ER 149.
[4] *Taylor v Plumer* (1815) 3 M&S 562, 575.

the notion that at common law it is not possible to trace through a mixed fund. The reason for this mistake is that many courts subsequently thought that this must have been a common law case because it was decided in the court of King's Bench. But although the case was decided in a common law court, it was an equity decision.[5] The decision was based upon the law of trusts.

The decision of Lord Ellenborough, although widely cited, has also been criticised. Recent work by Dr Cutts has suggested that Lord Ellenborough may have missed, or obscured, the most basic point of the case.[6] She explains that previous authority, which Lord Ellenborough had possibly misunderstood, had recognised that a beneficiary has a claim to assets held on trust if they are acquired by the trustee, acting as a fiduciary, with the use of trust assets.[7] As I have explained judicially, those previous authorities were also cases where the common law had applied principles of equity.[8]

Further, in a famous passage, Sir George Jessel said this about Lord Ellenborough's remarks that the right to 'follow' the thing fails when the means of ascertainment fail:

> That is correct. Now there comes a point which is not correct, but which I am afraid only ceases to be correct because Lord Ellenborough's knowledge of the rules of equity was not quite commensurate with his knowledge of the rules of the Common Law.[9]

This passage was relied upon in the United States in a famous essay by Ames,[10] and in Australia by Dixon CJ and Fullagar J in *Brady v Stapleton*.[11]

Sir George Jessel's point was that equity would still impose a charge on the indistinguishable mixed mass and, if it were a case of money, 'equity would have followed the money, even if put into a bag or into an indistinguishable mass, by taking out the same quantity'.[12] Nevertheless, however circumscribed, the principles of tracing grew apace from this midwifery by Lord Ellenborough.

I will focus on some of those rules in this article. But my concern is with the most basic principle. *Why* should Sir Thomas succeed? In other words, *why* does the 'the product of or substitute for the original thing'[13] become a right to which the owner of the original thing can claim? What are the rules of tracing really trying to do? And, to return to the examples with which I started, why is it possible to trace and claim against innocent third parties?

IV WHAT DOES TRACING TRY TO DO?

Let me begin with the most common instances of tracing. These are cases where A has a

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[5] As observed by R Pearce, 'A Tracing Paper' (1976) 40 *Conveyancer and Property Lawyer (New South Wales)* 277; S Khurshid and P Matthews, 'Tracing Confusion' (1979) 95 *Law Quarterly Review* 78; L Smith, 'Tracing in *Taylor v Plumer*: Equity in the Court of King's Bench' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 240.

[6] Tatiana Cutts, 'Not Tracing: Trustees and Fiduciary Accounting for Rights' (unpublished manuscript, 2015).

[7] *Scott v Surman* (1742) 125 ER 1235; *Burdett v Willett* (1708) 23 ER 1017.

[8] *Duckworth v Water Corporation* [2012] WASC 30 [68]–[70].

[9] *In Re Hallett's Estate* (1879) 13 Ch D 696, 717.

[10] James Barr Ames, 'Following Misappropriated Property into its Product' in James Barr Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (Harvard University Press, 1913) 412, 412.

[11] (1952) 88 CLR 322, 337.

[12] *In Re Hallett's Estate* (1879) 13 Ch D 696, 718 (Jessel MR).

[13] *Taylor v Plumer* (1815) 3 M&S 562, 575; (1815) 105 ER 721, 726.

claim against B but B is a person of straw. Also, B has withdrawn the money paid by A and given it to C. Person A will wish to claim against C. Take a common fact pattern based on this scenario and one with which I began this article. Consider a case where a plaintiff, P, overpays his creditor, D, by $1 million as part of a very large transaction. D transfers the payment, including the overpaid $1 million, to a third party, T. T still has the money. If P brought a claim against D, difficult questions could arise concerning whether D has a defence of change of position arising from his payment to T (for instance, has D changed his position if he might be able to obtain restitution from T by a legal proceeding?).

If we were starting with a blank slate, there might be an argument in favour of a general rule preventing P from bringing a claim against T. That reason is the importance of transactional links between the parties to the litigation. From the perspective of T, she has never engaged in any transaction with P. She would expect that any claim against her based on the payment would be brought by D. The facts in the example above assume that P had a claim against D for repayment of the money paid by mistake. But D might have asserted that the payment was made under contract so that D had a right to retain the money. Why should T have to defend the assertion of P's claim against D by raising D's defences? The person properly placed to do so would be D. Further, T may have a right of set-off, or another defence, against D. The proper course would be for P to sue D and to join T to the action as a necessary or proper party. Issues would then be raised about the nature of D's payment to T.

Even if there were no law of tracing, the situation discussed above would require recognition that there are two actions involved in the chain of transactions. In the first, C would sue D. In the second, D would sue T. Although in practice, these claims would often be heard in a single proceeding, this should not conceal the general principle that C's claim is against D, and D's claim is against T. The underlying reality that two claims are involved can be seen in the decision of the English Court of Appeal in *Khan v Permayer*.[14] Mr Permayer thought that he was owed money by Mr Khan and another. Mr Eaves agreed to pay Mr Permayer £40 000 of this debt and Mr Khan reimbursed Mr Eaves. In fact, no money was owed to Mr Permayer. Mr Khan sued Mr Permayer to recover the money which he had reimbursed to Mr Eaves. Strictly, there should have been two actions before the court. Mr Eaves should have sought restitution from Mr Permayer and then Mr Khan should have sought restitution from Mr Eaves. However, Morritt LJ (with whom Staughton J agreed) held that 'a payment made by a third party under a mistaken belief which gives rise to unjust enrichment of the defendant may be recoverable by the person at whose ultimate expense it was paid if that person is also acting under the same mistake as the third party'.[15] The insistence upon two mistakes is only explicable on the basis that there are two claims involved in the analysis rather than one claim against a remote recipient.

Another illustration can be used to show why claims against subsequent recipients actually involve multiple claims rather than a single claim. P mistakenly pays $10 000 to D. Then D uses the money to purchase a car from T who is a bona fide purchaser for value without notice. T then makes a gift of the $10 000 to T2. Neither at common law nor in equity is it possible to claim successfully against either T or T2. Because T was a bona fide purchaser, the claim against T is extinguished. The defence of bona fide purchase is designed to ensure the security of transactions generally. Consequently, a claim must fail against the subsequent recipient, T2.[16] In other words, although T2 is a volunteer, the claim against T2 will fail because, to use Professor Birks' colourful metaphor, P cannot 'leapfrog' T and sue T2

[14] [2001] BPIR 95.
[15] Ibid [40].
[16] *Lowther v Carlton* (1741) 26 ER 549; *Wilkes v Spooner* [1911] 2 KB 473, 487–8 (Farwell LJ).

directly.[17]

As we have seen, as a matter of principle the effect of permitting a claim to be brought against a third party based upon a series of transactions emanating from those between P and D is that all the intermediate parties should be joined to the action. There are a series of claims with the third party involved by the final person's transaction with her. However, there are many instances where there would be no purpose for the law to require all parties to be joined in an action against the ultimate recipient. The principles of tracing reflect this liberal approach. The tracing principles allow a claim against an ultimate recipient where the claim against the intermediary is clear and any defences, such as change of position, are concerned only with the particular interests of the defendant rather than broader policy considerations such as the need for security of transactions (seen in the bona fide purchase defence).

An early example predating *Taylor v Plumer* is the decision in *Harrison v Pryce*[18] in 1740. Governor Edward Harrison paid £1000 to the South Sea company for stock. By mistake, the legal title to the stock was transferred to a *different* person named Edward Harrison. The other Edward Harrison transferred the stock to a broker, Round. Round sold the stock and paid the proceeds to the different Edward Harrison. The simplest action would have been by Governor Harrison against the South Sea Company. He paid money for stock that he did not receive. Separately, the South Sea Company would have an action against Edward Harrison who mistakenly received the company's stock. The South Sea Company could have claimed either the value of the stock or the proceeds that Edward Harrison subsequently received. But Governor Harrison (through his executors) brought his action against Edward Harrison without joining the South Sea Company. Lord Hardwicke recognised that the claim ought to have been brought by Governor Harrison against the company. But, nevertheless, he held that Edward Harrison's estate must account to Governor Harrison for the value of the stock.

The same liberal approach was taken more than two centuries later, after *Harrison v Pryce* had been long forgotten. The leading authority became a case called *El Ajou v Dollar Land Holdings plc*.[19] The case of *El Ajou* involved a massive share fraud in which victims were defrauded into paying money for worthless shares. The money received subsequently passed through a long chain of transactions. Millett J explained that a claim could be brought despite the long chain of transactions by creating a 'notional' charge over the assets being traced. He said that a plaintiff's:

> ability to trace his money in equity is dependent on the power of equity to charge a mixed fund with the repayment of trust moneys, not upon any actual exercise of that power. The charge itself is entirely notional.[20]

Although Millett J's decision was subsequently overturned (for different reasons) by the Court of Appeal,[21] in a subsequent hearing of the case, Robert Walker J approved this reasoning of Millett J.[22] The question before Robert Walker J in the second part of the trial was whether the claimant could assert a charge over a property held by the defendant into

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[17] Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd ed, 2005) 94–8. See *Brown v Galbraith* [1972] 1 WLR 997.
[18] *Harrison v Pryce* (1740) 27 ER 664; *Harrison v Harrison* (1740) 26 ER 476.
[19] [1993] 3 All ER 717.
[20] [1993] 3 All ER 717, 737.
[21] [1994] 2 All ER 685.
[22] *El Ajou v Dollar Land Holdings plc (No 2)* [1995] 2 All ER 213, 221, 223.

which the claimant's payments could be traced. The defendant against whom the charge was asserted pleaded that the claim *consequent upon tracing* could not be made because it would prejudice the rights of other potential third party claimants. Robert Walker J held that:

> a) There might possibly be circumstances in which a defendant could prove prejudice to third parties and therefore raise an equitable *jus tertii* defence, but there was no evidence before him that there would necessarily be prejudice to innocent third parties.
>
> b) Further, any potential prejudice to third parties as a result of claims which arise as a result of the tracing process can be accommodated by placing the plaintiff on terms (giving the example of a requirement for an indemnity).
>
> c) Further still, the court must have a strong inclination to order that a defendant is charged with the receipt of proceeds which traceably derive from a fraud.[23]

The intermediate parties were again ignored by a fiction that the transfer was 'direct' in *Relfo Ltd v Varsani*.[24] Relfo owed £1.4m to Her Majesty's Revenue and Customs. One of the shareholders and directors, Mr Gorecia, wrongfully paid out £500 000 from Relfo's bank account in London into a bank account in Latvia, in exchange for a debt owed to it by Mirren. From the bank's point of view, Mr Gorecia had authority to pay the money but he did so in breach of his duties as a director. The payment caused Relfo to become insolvent. On the same day another company, Intertrade, paid the dollar equivalent (after fees) of £500 000 to Mr Varsani's bank account in Singapore. Mr Gorecia was closely associated with the Varsani family. The circuit of payments was a dishonest design to divert funds to Mr Varsani to whom Mr Gorecia had caused trading losses. Some days later, Mr Varsani paid $100 000 to Mr and Mrs Gorecia.

In the English Court of Appeal, Mr Varsani argued the rules of tracing did not permit the payment from Relfo's account to be traced into Mr Varsani's account. The Court of Appeal rejected this argument. As for the tracing rules, the Court of Appeal accepted that an inference could be drawn that the money paid from Relfo was the 'source' of the money paid to Mr Varsani and therefore was its 'substitute'.[25] Applying this to the law of unjust enrichment, Arden LJ said that 'as a matter of substance, or economic reality, Mr Bhimji Varsani was a direct recipient'.[26] It appears that what is meant by this language is that the intermediaries were all part of the fraud. They could not have had any defence, still less any defence that was not peculiar to their own interests.

V THE WAY IN WHICH TRACING LINKS TRANSACTIONS

We have seen that tracing is concerned with a claim brought by a plaintiff against a defendant at the end of a chain of transactions where it would be a waste of time to join any party to an intermediate transaction to the proceedings. In Part V of this article I will turn to how the rules of tracing give effect to that idea. But, for the moment I want to deal with the manner in which transactions must be linked in the law of tracing. Two options have been identified in the case law. The first is a 'tracing value through substitutions' analysis. The second is a 'causally linked transactions' approach. Of the two, the second accords more closely with the

[23] Ibid 223–4.
[24] [2014] EWCA Civ 360.
[25] Ibid [56]–[60].
[26] Ibid.

recent existing cases and provides a principled basis for its future development. The second view requires that the transaction with the defendant be caused or anticipated by the defective transaction.

As for the 'tracing value through substitutions' approach, perhaps the most famous academic pronouncement of this view was the academic work of Professor Lionel Smith in the masterly monograph *The Law of Tracing*, which was based upon his doctoral dissertation. Professor Smith developed a distinction that had been drawn by Professor Peter Birks. The distinction was between (i) following, (ii) tracing and (iii) claiming. In Smith's words, the process of following 'seeks to locate a thing, usually in order to assert pre-existing rights [to] it'.[27] But when we trace, we 'trace value, which moves from one repository into another when one asset is substituted for another'.[28] Hence, according to Smith, the tracing exercise must begin with something of value: a proprietary right, a personal right, or the receipt of services that enhances the value of an asset.[29] In *Foskett v McKeown*, Lord Millett adopted the analysis of Professor Lionel Smith that the law of tracing identifies the passage of value from one asset into its substitute: 'what is traced is not the physical asset itself but the value inherent in it'.[30]

However, there are difficulties with this analysis as a sufficient basis upon which a tracing claim can succeed. First, in none of these cases was causation between the relevant links argued as an issue in any detail. Secondly, and fundamentally, the notion of a 'transfer of value' by a substitution is flawed. In many cases in which the law of tracing is engaged, for example, there is no substitution of one right for another, through which transfer of value can be traced. Rather, there is simply a matched creation and destruction of value. Tracing through bank accounts is a classic example. In these cases, there may be a series of transactions between a variety of bank accounts and involving a significant number of intermediaries. However, at each stage, there is no exchange or substitution of one right for another. Rather, each recipient has an increase in the value of the debt owed to him by a particular bank with a corresponding (more or less) decrease in the value of the debt owed to the payer by her particular bank. What links the matched destruction and creation of value is a transaction. And it is only where there is a series of such transactions that are sufficiently linked that the law of tracing is engaged.

Consider the example of *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation.*[31] In that case, the ANZ bank had mistakenly transferred $114 158 to Westpac Bank to the credit of one of Westpac's customers. But the instruction from ANZ's customer was to transfer $14 158 not $114 158. The High Court of Australia observed that it was common ground that if ANZ had demanded repayment of $100 000 immediately after Westpac had received it, then Westpac would have been liable to repay it.[32] The problem that this case illustrates for the tracing value through substitutions analysis is that nothing is substituted. ANZ's customer had, and has, an account with ANZ. So did, and does, Westpac's customer. At the end of the day, when all bank transactions were netted, these amounts would have affected a digital entry made by each of ANZ and Westpac. But nothing passed from one bank to the other and there was no substitution. The tracing metaphor, and the idea

[27] Lionel D Smith, *The Law of Tracing* (Clarendon Press, 1997) 119.
[28] Ibid 119.
[29] Ibid 120.
[30] [2001] 1 AC 102, 128–9.
[31] (1988) 164 CLR 662.
[32] (1988) 164 CLR 662, 671.

of a substitution, invokes the idea of a movement or exchange of one thing for another. But no funds ever 'move' between bank accounts. All that occurs is that an electronic record is made by P's bank which reduces the value of the rights that P has against his bank and another electronic record is made by D's bank which increases the value of the rights that D has against her bank. The electronic entry by D's bank is *caused* by an instruction from P's bank. It should make no difference, as a matter of principle, which account of P's is reduced by his bank. There is a transaction, and there is causation.

An analysis of tracing as involving an exchange or substitution was rejected by the New South Wales Court of Appeal in *Evans v European Bank*.[33] In that case, the European Bank received a deposit of the proceeds of fraud. This caused the European Bank to deposit an equivalent amount in its own name with Citibank. In the leading judgment, Spigelman CJ said:

> [I]n property law, the new 'asset' constituted by the European Bank deposit with Citibank, was not, to use Lord Millett's terminology, a 'substitute for the old [asset]', constituted by the Benford deposit with European Bank. That 'old asset' has never been transformed or 'substituted' into any thing. The funds had been employed by the bank, but the 'old asset' always existed and still exists. The Benford account was always in credit, whether as a deposit account or as a current account. There was no occasion on which the value inherent in the account, which Benford held as trust property, had become located in the value inherent in the deposit with Citibank. No process of the character referred to by Lord Millett as 'substitution' has occurred.[34]

This leads us to the second analysis identified in the cases, namely that tracing rules are concerned with identifying when one transaction, actual or anticipated, has *caused* another.[35] The aspect of Lord Millett's decision in *Foskett v McKeown*[36] that I accept is that when dealing with account transfers, '[t]here is simply a series of debits and credits which are causally and transactionally linked'.[37]

The fundamental point about the rules of tracing is that on this approach the rules are concerned to establish two elements: (i) transactions; and (ii) a causal link between the transactions. Neither is sufficient by itself. As for transactions, it is essential that a transaction occur before tracing can be possible. A simple example is a person who mistakenly leaves the heating on in his flat. This not only causes him a loss but it also has the consequence, which he did not desire, of free heating to his upstairs neighbour who would otherwise have had to pay for the same heat.[38] The upstairs neighbour's benefit might have been caused from downstairs but it was not the result of a transaction with the downstairs neighbour. The upstairs neighbour can keep the benefit. This is the effect of the decision in *Ruabon Steamship Co Ltd v London Assurance Co Ltd.*[39] In that case, insurers were liable to pay the cost of repair of a ship including docking costs, arising from an accident. The owner used the time while the ship was being repaired in dry dock to have the ship surveyed for the purposes of a required Lloyd's classification. The insurers claimed contribution from the owner for the saved

[33] [2004] NSWCA 82. See also *Hillig v Darkinjung* [2006] NSWSC 1217 [20].
[34] [2004] NSWCA 82, at 139.
[35] For the first scholarly articulation of this analysis, see Birks, above n 17, 94–8.
[36] See also *Robb Evans of Robb Evans & Associates v European Bank Limited* [2004] NSWCA 82 [134]–[135] (Spigelman CJ, Handley and Santow JJA concurring).
[37] [2001] 1 AC 102, 128.
[38] Birks, above n 17, 158–9.
[39] [1900] AC 6.

docking expenses which the owner would otherwise have incurred. The House of Lords rejected the claim. The owner obtained a benefit but it was not linked to any transaction with the insurers. A more recent example is the decision in *TFL Management Ltd v Lloyds TSB Bank Plc*.[40] The facts of that case, as Floyd LJ succinctly summarised them, were that X spent money seeking a judgment for the recovery of a debt from Y. X failed to recover the debt because the court finds that the debt was not owed to Y by X, but owed by Y to Z. Z then recovers the debt, relying on the judgment. X sought restitution of unjust enrichment against Z, claiming that X's claim saved Y's legal expenses that would have been incurred in recovery from Z. There was no transaction between X and Z and no causally linked transaction. Although a majority of the English Court of Appeal refused to award summary judgment, Floyd LJ in the majority described the arguments against recovery as 'powerful'.[41] The writing was on the wall for the trial.

The second requirement, causation, is more contentious. Suppose a plaintiff mistakenly pays a $1 coin to a defendant who then buys her weekly lottery ticket with the coin. The lottery ticket later proves to be the winning ticket, now worth $1 million. The transaction involving the purchase of the lottery ticket is connected to the mistaken payment transaction because it used the same $1 coin. But the lottery ticket would have been purchased by the defendant in any event. The purchase was not caused by the mistaken payment. The defendant can keep $999 999. However, many leading cases on tracing have not needed to grapple with any consideration of causal rules.[42]

There can sometimes be difficult evaluative assessments involved in determining whether there is a causal link between two transactions. An example is the decision of the Court of Appeal, currently on appeal to the Supreme Court in *Investment Trust Companies v Revenue and Customs*.[43] In that case, the claimants obtained services from companies described as the Managers. On a notional amount of £100, by which the reasoning was expressed, the claimants paid value added tax (VAT) to the Managers. The Managers only paid £75 to Her Majesty's Revenue and Customs due to a set-off that they had for £25. The Court of Appeal held that the Revenue was enriched at the expense of the claimants by £75. A crucial issue was whether the £75 enrichment was at the expense of the claimants. There were difficulties with establishing a causal link between the £100 paid by the claimants to the Managers and the £75 paid by the Managers to the Revenue. The contractual obligation of the claimants to pay VAT to the Managers was quite different from the terms of the Managers' statutory liability to account for VAT to the Revenue (including with various set-offs). The Court of Appeal noted the conclusion of the trial judge that the claimants had not proved that the VAT would not have been paid but for the payments by the claimants to the Managers.[44] However, the Court of Appeal agreed with the trial judge that the causal test should be applied liberally: the 'requirement of causation was met by having regard to the economic and commercial reality'.[45] It is not clear whether the Court of Appeal was suggesting that the but for test was met on its view of the facts or whether some other test should replace the test for causation. The dearth of analysis on this point was said to be justified by a restrictive approach to recovery where there is a valid contract with an intermediate party.

[40] [2014] WLR 2006.
[41] Ibid [64].
[42] For instance, *Sinclair v Brougham* [1914] AC 398.
[43] [2015] EWCA Civ 82.
[44] [2015] EWCA Civ 82 [43].
[45] Ibid [69].

VI UNDERSTANDING THE PARTICULAR RULES OF TRACING

With this tentative understanding of the rules of tracing as concerned with (1) a series of transactions that are (2) causally linked to a defective transaction, we can then turn to the particular rules of tracing.

A *The Lowest Intermediate Balance Rule*

One rule of tracing is the 'lowest intermediate balance rule'. Suppose P mistakenly pays $10 000 to D, who withdraws that value from his bank account, reducing the account balance to zero, and spends it. D later deposits $10 000 into his bank account and spends that money to purchase a car. The 'lowest intermediate balance rule' means that the transaction purchasing the car is not linked to P's payment of $10 000 unless D's later deposit was intended to replace the $10 000 paid by P. As Campbell J said in *Re French Caledonia Travel Service Pty Ltd*,[46] relying on *James Roscoe (Bolton) Ltd v Winder*:

> absent any payment in of money with the intention of making good earlier depredations, tracing cannot occur through a mixed account for any larger sum than is the lowest balance in the account between the time the beneficiary's money goes in, and the time the remedy is sought. In a case where the type of tracing being attempted involves detailed analysis of what has become of the property of a particular beneficiary, and into what other assets it has been converted or mixed, the lowest intermediate balance rule is fundamental to a principled approach to tracing.[47]

The focus in the lowest intermediate balance rule upon D's *intention* emphasises that the underlying concern of tracing rules is to establish a causal link between two or more transactions. It requires that the latter transaction would not have occurred 'but for' the earlier defective transaction. However, as we will see below, there is one significant exception to this in cases of 'backwards tracing'. This exception is where the defective transaction occurs *after* the transaction with the defendant, but a fraudster intends to use the proceeds from the later transaction in the earlier defective transaction.

B *Tracing Through Mixed Funds*

One of the most difficult tracing rules to reconcile with an understanding of tracing as concerned with causally linked transactions is where the defendant against whom the tracing claim is brought receives money from an account which includes both credits that are caused by an earlier defective transaction as well as credits deriving from other transactions. As we have seen, the rule in *Taylor v Plumer* was thought to be that at common law it is not possible to trace through mixed funds. This was, and is, an error even apart from the fact that *Taylor v Plumer* was an equity decision.

For some time the tracing rule adopted in the cases which permitted tracing through a mixing of funds was 'first in first out'.[48] This rule was based on a misunderstanding of *Clayton's case* which was not a case about tracing at all.[49] The rule was said to be 'really a rule of convenience based on so-called presumed intention'.[50] This rule of convenience was criticised

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[46] (2003) 59 NSWLR 361 [175].
[47] [1915] 1 Ch 62.
[48] See the discussion in *Re French Caledonia Travel* (2003) 59 NSWLR 361 [20]–[172] (Campbell J).
[49] *Devaynes v Noble* (1816) 35 ER 767. See Smith, above n 27, 185–94.
[50] *In Re Diplock; Diplock v Wintle* [1948] 1 Ch 465, 554.

as a fiction that could work injustice.[51] It is now rejected in many cases.[52]

In the place of a 'first in first out' rule, there have been a number of alternatives applied or contemplated. One of those alternatives is pro-rata distribution amongst the contributors to the account.[53] This is, again, a rule of convenience. On occasion, cases have refused to apply it even between innocent parties.[54] In *Scott v Scott*,[55] the High Court of Australia considered the liability of a trustee of a deceased estate who mixed the trust funds with his own and purchased property with the combined fund. The High Court did not need to decide the point but the court said that there was much to support the view that the estate could trace its money through a mixed account into the property and claim a proportionate beneficial interest in the increased value of it.[56]

As a matter of principle, rather than convenience, perhaps the best solution should be whether the first transaction between the plaintiff and defendant was a cause of the second transaction between the defendant and the third party. If so, then the plaintiff should be entitled to claim a share of the benefit received by the defendant from the second transaction, in proportion with the contributions of the other causes. As with the lowest intermediate balance rule, this will require an assessment of the intention of the defendant in entering the second transaction. However, this is not the state of the law. In *Foskett v McKeown*, Lord Millett explained that the orthodox view was that where money of two innocent contributors has been mixed, 'there is no basis upon which any of the claims can be subordinated to any of the others'.[57] This would appear to apply even to a case, such as arises in a Ponzi scheme, where a wrongdoer maintains a record of intention concerning the use of particular payments from the mixed fund. Again, the refusal to take this approach appears to be a pragmatic concession to the fact that these records are often impossible to reconstruct in a genuine way.[58]

There is a further exception to a pure causal rule. Where the defendant is a wrongdoer the courts will not permit the wrongdoer to rely on causal arguments for the wrongdoer's own benefit to defeat a claim for tracing. For instance, in *Re Oatway; Hertslet v Oatway*,[59] a trustee misappropriated £3000 of trust money. The trustee paid the money into his bank account which also contained £4000 of his own funds. The trustee then spent the money in the account. The only asset which remained from the expenditure was shares of £2137 value. The trial judge, Joyce J, held that the trustee was not permitted to argue that the shares were purchased with his own funds.[60] As the Vice-Chancellor said in a well-known passage in *Frith v Cartland*:

> If a man has £1000 of his own in a box on one side, and £1000 of trust property in the same box on the other side, and then takes out £500 and applies it to his own purposes, the Court will not allow him to say that money was taken from the trust fund. The trust must have its

[51] *Re Registered Securities Ltd* [1991] 1 NZLR 545, 553.
[52] See the discussion in *Re French Caledonia Travel* [2003] NSWSC 1008; (2003) 59 NSWLR 361 [168] (Campbell J).
[53] *Barlow Clowes International Ltd v Vaughan* [1992] 4 All ER 22; *Russell-Cooke Trust Co v Prentis* [2003] 2 All ER 478; *Commerzbank Aktiengesellschraft v IMB Morgan plc* [2004] EWHC 2771 (Ch).
[54] *Re Global Finance Group Pty Ltd* (2002) 26 WAR 385.
[55] (1963) 109 CLR 649.
[56] Ibid 660.
[57] [2001] 1 AC 102, 132.
[58] *Madoff Securities International Ltd v Raven & Ors* [2013] EWHC 3147 (Comm) [278] (Popplewell J).
[59] [1903] 2 Ch 356.
[60] See also *Scott v Scott* (1963) 109 CLR 649, 659 (the Court).

> £1000 so long as a sufficient sum remains in the box.[61]

In other words, a defendant who wrongfully receives money cannot disprove causation if the receipt *could* have been caused by the use of funds held for the plaintiff. The argument cannot be made even if a defendant maintains a ledger allocating the funds in the mixed account and demonstrating an intention to use some funds for his own purposes. This disapplication of causal rules against a wrongdoer is not unique to the law of tracing.[62]

C *Tracing into an Overdrawn or Loan Account*

It has been held that at common law it is not possible to trace into an overdrawn account.[63] As a matter of principle it is hard to see why this should be the case for three reasons. First, suppose that a wrongdoer has an account with an overdraft limit of $100 000. The account is overdrawn to the limit. The wrongdoer pays $50 000 of funds misappropriated from his plaintiff employer into the overdrawn account and, soon after, withdraws $50 000 to purchase an asset. If the $50 000 had been paid into an account with no balance then the employer could have traced the value to the asset purchase. Why, as a matter of principle, should it be any different if the $50 000 was used to reduce an overdraft to create the same purchasing power for the later transaction? Secondly, the cases discussed below, which recognise 'backwards tracing', are premised upon the assumption that it is possible to trace into an overdrawn account. Finally, there should be no difference between accounts in debit and those in credit if tracing rules were ultimately rationalised around principles of causation concerning related transactions.

However, this overdrawn account restriction has been applied in a number of cases. For instance, in *Russell Gould Pty Ltd v Ramangkura*,[64] an alleged unauthorised payment was made from the plaintiff company's bank account to the defendant's home loan account, clearing her debt. The New South Wales Court of Appeal held that the single payment concealed two transactions. The first transaction was that the company had discharged a debt owed to its director in the amount of the payment. The second transaction was that the director had instructed the company's bank to pay the money to the defendant.[65] In terms of an unjust enrichment analysis, since the director had a juristic reason for the receipt of the money, there could be no unjust enrichment claim against him and the payment could not be traced into the subsequent transaction. However, the Court of Appeal also said that it would not have been possible to trace the value to the defendant because the process of tracing was defeated by the payment into her loan account. Barrett JA (with whom Bathurst CJ and Ward JA agreed) said that the 'money had no identifiable existence after the payment'[66] and that 'no process of following or tracing countenanced by the common law allows to be identified in the Defendant's hands anything that represents that money'.[67]

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[61] (1865) 71 ER 525, 527. See *Re Hallett's Estate; Knatchbull v Hallett* (1880) 13 Ch D 696, 719–20 (Jessel MR); *Parker v The Queen* (1997) 186 CLR 494, 502 (Brennan CJ).

[62] For example, *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 & 5)* [2002] 2 AC 883. See Leonard Hoffmann, 'Causation' in Richard Goldberg (ed), *Perspectives on Causation* (Hart, 2011) 6–7 .

[63] *Serious Fraud Office v Lexi Holdings plc* [2009] QB 376 [50] (Keane LJ); *Re B A Peters Plc* [2010] 1 BCLC 142 [15] (Lord Neuberger MR).

[64] [2014] NSWCA 310.

[65] Ibid [39] (Barrett JA; Bathurst CJ and Ward JA agreeing).

[66] Ibid [36].

[67] Ibid [38].

D *Tracing Backwards*

The effect of recognising that causal links between transactions are sufficient invites questions of the test for causation to be applied to determine whether one transaction causes another. Courts are only now beginning to grapple with this question. One of the most difficult examples of it is 'backwards tracing'. Suppose that D borrows money from a bank to buy a yacht. At the time D borrows the money, he intends to embezzle the funds from his employer to repay the loan. D, who has authority to draw from his company's account, then withdraws funds and uses them to discharge his loan. Can the company trace 'backwards' into D's purchase of the yacht?

In principle, the answer is that it should be possible. The two transactions are linked, although not in the usual way. Usually, the transactions would be linked because D would have embezzled the money before entering into the transaction to purchase the yacht. However, in this example it is the *intention* to embezzle that causes the purchase of the yacht and the later embezzlement is the fulfilment of that intention.

Until recently there was very little authority considering the phenomenon of tracing backwards. In *Bishopsgate Investment Management Ltd v Homan*,[68] Dillon LJ considered that backwards tracing should be possible.[69] Leggatt LJ considered that it should not be possible.[70] Curiously, Henry LJ agreed with both judgments.[71] In other decisions, the concept of backwards tracing has been supported,[72] although there are also opposing views[73] and the phenomenon is not consistent with the principle that tracing cannot occur through an overdrawn or loan account. The best approach was that of Scott LJ in *Foskett v McKeown*, who considered that tracing backwards should be possible but only where 'it can be shown that it was always the intention to use the trust money to acquire the asset'.[74]

The approach of Scott LJ was adopted by the Privy Council in *The Federal Republic of Brazil v Durant International Corporation (Jersey)*.[75] In that case, Mr Maluf was mayor of a Brazilian public authority. He received bribes of US $10.5 million in connection with public road building contracts. He was held to be liable for the amount of the bribes. The Jersey courts also found that British Virgin Islands companies (a parent called Durant and its subsidiary) which he controlled were liable as constructive trustees. In the Privy Council, Durant argued that only $7.7 million of the bribes could be traced to it because (i) the amount of the bribes were paid to Durant *before* they had been paid to Mr Maluf, (ii) Mr Maluf made the payment to Durant from a bank account which was mixed with other money and the lowest intermediate balance rule prevented recovery of the amount of the later bribe payments. The Privy Council rejected both submissions essentially for pragmatic reasons. One reason was that without backwards tracing, any sophisticated fraudster would be able to defeat an otherwise effective tracing claim simply by manipulating the sequence in which credits and debits were made to his account.[76] Another reason, quoting from Professor Burrows, was that

[68] [1995] Ch 211.
[69] Ibid 217.
[70] Ibid 221.
[71] Ibid 222.
[72] *Shalson v Russo* [2003] EWHC 1637 (Ch) [141] (Rimer J); *Foskett v McKeown* [1998] Ch 265, 284 (Scott LJ).
[73] *Foskett v McKeown* [1998] Ch 265, 289 (Hobhouse LJ).
[74] Ibid 284.
[75] [2015] UKPC 35.
[76] [2015] UKPC 35 [13].

even in the most common tracing cases, banks often credit the account of a recipient before the account of the payer is debited.[77] Hence, the Board effectively accepted that where payments are made in *anticipation* of the receipt from a later transaction then the earlier receipt can be traced from the later payment. This can constitute an exception to the lowest intermediate balance rule, or the rule preventing tracing through mixed funds.

VII THE BASAL REASON FOR TRACING

I have come to the end of this article and explained an overarching basis upon which the rules of tracing might be rationalised. That is, that they might be understood as rules which are concerned with establishing causal links between (i) one defective transaction and (ii) the occurrence or anticipation of the transaction in question with the defendant. But, despite all the detail of this exposition, I still feel a little like the student dressed up in the Phantom outfit at the end of Tony Lee's lecture. Tony's question would be: why? By what *principle* can a plaintiff succeed when the plaintiff shows the existence of a transaction which is causally related to her initially defective transaction? In the examples with which I began, *why* is it that the mistaken person, A, is entitled to recover not merely from B to whom the money was immediately paid but also, as an alternative claim, from C who is the person to whom B paid the money?

As it is not fashionable to speak of the law of unjust enrichment in Australia, I will simply suggest that the principle underlying recovery appears to be that the defendant recipient C is 'enriched', that the enrichment appears to be 'at the expense of' the plaintiff A because it is causally linked to A's defective transaction, and that A's mistake is the reason why the transaction is defective and 'unjust'. I would also venture to suggest that C may have a defence, available in claims based on unjust enrichment, if C had changed her position by spending the money before obtaining notice of A's claim.

It may be that this underlying explanation will prove controversial even in England where, in 1991, the House of Lords had relied upon rules of tracing in the very case which recognised the law of unjust enrichment: *Lipkin Gorman v Karpnale Ltd*.[78] In that case, Cass was a rogue partner of a firm of solicitors (Lipkin Gorman). Cass withdrew £323 222 from the solicitors' client (trust) account. He gambled and lost the money at the Playboy Club (Karpnale). The solicitors succeeded in a claim against the Playboy Club for unjust enrichment based on the club's receipt of the gambled funds. The claim was subject to a defence of change of position. The House of Lords held that when Cass withdrew money from Lipkin Gorman's client account he became the legal owner of the notes.[79] Although he was not authorised to gamble with money from the client account, he was authorised to withdraw it. The rules of tracing would therefore seem to have been important to establish a transactional link between Lipkin Gorman and then Cass and the Playboy Club. The House of Lords did not explain the way in which the transactional links between Lipkin Gorman and Cass, and Cass and the Playboy Club operated to establish the liability of the Playboy Club.

One view of their Lordship's reasoning is that they saw the case as involving one transaction rather than two. In other words, the claim involved Lipkin Gorman directly asserting a claim against the Playboy Club for unjust enrichment. For instance, although their Lordships

[77] Ibid [14].
[78] [1991] 1 AC 548.
[79] Following *Union Bank of Australia Ltd v McClintock* [1922] 1 AC 240 and *Commercial Banking Co of Sydney Ltd v Mann* [1961] AC 1.

recognised that Cass obtained title to the money withdrawn, they may have been working from a model in which Cass, as a partner, obtained title to the money as a joint tenant with the other partners. For instance, Lord Goff referred to the money received as the property of the solicitors:

> There is in my opinion no reason why the solicitors should not be able to trace their property at common law in that chose in action [ie their client account], or in any part of it, into its product, i.e. cash drawn by Cass from their client account at the bank. Such a claim is consistent with their assertion that the money so obtained by Cass was their property at common law.[80]

Indeed, it had been conceded by counsel for the Playboy Club that Lipkin Gorman could have required Cass to deposit the funds into its account.[81] The answer, therefore, to the question of why the Playboy Club's enrichment was 'at the expense of' the solicitors was that, as Finkelstein J later explained, 'the House of Lords held that the club was enriched at the expense of the firm because it had received property belonging to the firm'.[82]

However, a better approach, consistent with the emphasis on tracing, is to understand the decision as involving two transactions: one between Lipkin Gorman and Cass, and the other between Cass and the Playboy Club. The Playboy Club had no defence of bona fide purchase and, with Lipkin Gorman as a party the Playboy Club should not have succeeded with a defence based on Cass' illegality.

Despite the express recognition in *Lipkin Gorman* of a claim for unjust enrichment being based on tracing, there have been a series of cases in which claims based on tracing have been described not as unjust enrichment claims but as 'property' claims. The label 'property' does not explain why D must make restitution of *value* (including in the form of personal rights such as a bank account) to P. The cause of action is rarely made explicit. The cause of action is based on unjust enrichment or, sometimes, wrongdoing.

An example where a claim based on tracing appeared to be recognised as an unjust enrichment claim is the decision in *Trustee of the Property of F C Jones & Sons v Jones*,[83] where a partner drew three cheques, totalling £11 700, on the partnership account after having committed an act of bankruptcy. After a series of transactions, the proceeds of the cheques were obtained by Mr Jones' wife who invested the money in an account with Raphael & Sons in potato futures. The value of her investment increased to £50 760. The Official Trustee in bankruptcy demanded the return of the balance of the Raphael & Sons account, £49 860. Raphael & Sons interpleaded. Mrs Jones conceded that an act of bankruptcy had been committed prior to the withdrawal of funds by her husband. But she argued that she was entitled to keep the profits. The Court of Appeal held that the £49 860 was to be paid to the Trustee. Lord Justice Millett said:

> If she made a profit, how could she have any claim to the profit made by the use of someone else's money? In my judgment she could not. If she were to retain the profit made by the use of the trustee's money, then, in the language of the modern law of restitution, she would be

[80] [1991] 2 AC 548, 574. See also 562–6 (Lord Templeman).
[81] 'Cass's title is liable to be displaced by the solicitors' claim': [1991] 2 AC 548, 555.
[82] (2003) 21 ACLC 1948, 1962.
[83] [1997] Ch 159.

> unjustly enriched at the expense of the trustee.[84]

Although this recognition by Millett LJ was consistent with *Lipkin Gorman*, and although it provides a strong explanation for a claim against Mrs Jones, it is very difficult to see how it is an explanation for why the Official Trustee was entitled to any more than £11 700 plus interest. The transaction between Mr and Mrs Jones conferred a benefit upon her of £11 700. Her later investments were made as a result of valid contracts which were never rescinded, even notionally. Perhaps for this reason, Lord Millett later explained extra-judicially that he did not consider that the recovery of the profits was explicable on the basis of unjust enrichment:

> the Court of Appeal went out of its way to say that the trustee was not suing Mrs Jones for [unjust enrichment]. In fact he was not suing her at all. He was suing the bank [Raphaels] for the balance due to her on her deposit account, and his cause of action was in debt. The dispute between the trustee and Mrs Jones was a property dispute: who owned the disputed property, ie the right to claim payment from the bank: a chose in action. It had nothing to do with unjust enrichment.[85]

But Lord Millett's explanation of a right to the profits based on 'property' is also problematic. There was no 'property dispute'. The debt was owed from Raphael & Sons to Mrs Jones. They did not undertake to pay anyone else. Although their debt to her, consisting of her rights against them, was traceably the product of rights previously held by the partnership, this cannot change the fact that the common law rights against Raphael & Sons were hers and hers alone. The claim was not a 'property' claim.

An anti-unjust enrichment approach was also taken by the House of Lords in *Foskett v McKeown*.[86] In that case, the plaintiffs' trust funds were misappropriated and used to pay premiums for a life insurance policy. After the insured died, the policy was worth a multiple of the value of the misappropriated funds: around £1 million. A majority of the House of Lords held that the plaintiffs could trace the value of their misappropriated funds into the life insurance policy and claim a proportionate amount of the much greater value.[87] The majority said that the basis for this claim was not unjust enrichment but was 'property'. Again, the label 'property' does not explain why the claimants were entitled to a claim of a much greater value than their initial rights. Lord Hoffmann suggested the policy reason for this principle was that the case was akin to the Roman principle of *confusio*.[88] A confusion occurs if things that are mixed are not easily separable.[89] The mix is owned in common in proportion to the parties' contributions to the mixture. *Foskett* did not involve a mixing of assets.

VIII POSTSCRIPT

On 17 June 2015, almost exactly two centuries after the decision in *Taylor v Plumer*, the Supreme Court of the United Kingdom heard an appeal involving questions of tracing. The

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[84] [1997] Ch 159, 168.
[85] Peter Millett, 'Proprietary Restitution' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co, 2005) 309, 323.
[86] [2001] 1 AC 102.
[87] [2001] 1 AC 102, 108 (Lord Browne-Wilkinson) and 129 (Lord Millett, with whom Lord Hoffmann agreed).
[88] [2001] 1 AC 102, 115.
[89] *Indian Oil Corporation Ltd v Greenstone Shipping SA (Panama)* [1988] QB 345.

case was *Bank of Cyprus UK Ltd v Menelaou*.[90] In that case, the parents of the appellant, Melissa, purchased a property called Great Oak Court in her name to be used as the family home and held on trust for her and her siblings. Melissa was only able to pay the vendor because her parents sold the previous family home called Rush Green Hall, which was owned by them. The Rush Green Hall property had been mortgaged to the Bank of Cyprus. The proceeds from the sale of it were used to buy Great Oak Court in Melissa's name. If the proceeds from Rush Green Hall had not been used, the vendor of Melissa's property would have had an unpaid vendor's lien over it. The Bank of Cyprus expected to obtain a charge from Melissa over Great Oak Court but the charge over Melissa's property was invalid because her signature had been forged. One argument by the Bank of Cyprus was that Melissa would be unjustly enriched from the use of the proceeds which it paid to her parents unless it were subrogated to the unpaid vendor's lien that would otherwise have existed. The Court of Appeal granted this relief.

When the case came before the Supreme Court of the United Kingdom, Queen's Counsel for the appellant began his submissions by saying that the case was not concerned with unjust enrichment. He said that claims based on subrogation or tracing were 'property' claims not 'unjust enrichment' claims. Whatever the merit of unjust enrichment as an underlying explanation of recovery based upon the rules of tracing, it is very difficult to see how the word 'property', which has numerous different meanings in different contexts, can provide any separate or additional normative explanation. In the United Kingdom Supreme Court decision, the submission to the contrary was not accepted. Lord Neuberger (with whom Lords Kerr and Wilson agreed) concluded his judgment with the following observation which touched upon the relationship between unjust enrichment and property:

> The reasons which persuade me that the unjust enrichment claim can properly be satisfied by subrogation to the Lien … are precious close to those which persuade me that there is a very strong case for saying that the Bank had a proprietary interest in the £875,000…[91]

[90] [2015] UKSC 66 (Neuberger LJ).
[91] Ibid [106].