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TRACING AND THREE-PARTY RESTITUTION

The writer argues that tracing claims, whether at law or in equity, are restitutionary in nature, and a restitutionary framework can be used to rationalise this area of the law. In consequence, the threshold for tracing in equity and some of the received learning on common law tracing require re-examination, and the divergent outcomes at law and equity after a successful tracing exercise should be rationalised. In addition, the restitutionary liability of the agent who receives a bribe and the recipient who claims from such an agent is explicable on tracing principles.

I. INTRODUCTION

THE principle of unjust enrichment asserts that one person should not be unjustly enriched at the expense of another. It was only in 1978 that Lord Diplock denied the existence of any such general principle in English law.[1] In 1991, however, the House of Lords in *Lipkin Gorman* v *Karpnale Ltd*[2] gave the doctrine of unjust enrichment a proper place in English jurisprudence. This recognition does not mean that there is a general cause of action in unjust enrichment. But neither is it merely meant to be explanatory of the old cases in quasi-contract. It is a procreative as well as a guiding principle. It is procreative because it is capable of generating new causes of action founded on unjust enrichment.[3] It is also a guiding principle because it can be used to rationalise the existing law in so far as it is founded on restitutionary principles.[4]

Most restitutionary claims involve only two parties. For example, when the plaintiff pays money by mistake to the defendant, there is a direct shift of wealth from the plaintiff to the defendant. In some other claims, the benefit comes not from the plaintiff, but from a third party. The most important instance of this situation of three-party restitution is what is

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1 *Orakpo* v *Mansons Investments Ltd* [1978] AC 95, 104.

2 [1991] 2 AC 548. A full discussion of this case is found in Birks, "The English Recognition of Unjust Enrichment" [1991] LMCLQ 473.

3 *Woolwich Equitable Building Society* v *Inland Revenue Commissioners* [1992] 3 WLR 366.

4 It has been most productive in the law relating to mistaken payments: *Barclay's Bank Ltd* v *Simms & Son* [1980] QB 677; *David Securities Pty Ltd & Ors* v *Commonwealth Bank of Australia* (1993) 109 ALR 57 (High Court, Australia); *Air Canada* v *British Columbia* (1989) 59 DLR (4th) 161 (Supreme Court, Canada).

known as a tracing claim. Tracing claims have significant advantages over two-party personal claims. Some of these are: (1) the plaintiff can follow his property through the hands of intermediate recipients, and through substitutions of the property for other property, to third and subsequent parties, (2) the plaintiff can claim priority in respect of identifiable property in the case of the recipient's insolvency, and (3) the plaintiff can claim the profits made from the identified property.

It is possible to trace both at law and in equity. However, due to their divided jurisdiction, different rules were developed. Unsurprisingly, equitable developments drove many away from the common law rules, which were consequently neglected. Many writers have called for a more consistent approach towards the rules,[5] and others have argued that common law tracing is less restrictive than it is conventionally thought to be.[6]

Recent judicial elucidations have thrown new light on the nature of tracing and its relationship to the principle of unjust enrichment. It is argued that tracing can be explained on a restitutionary basis, and that recent developments are consistent with this explanation. It is further argued that, in view of these developments, (1) the requirement of a fiduciary relationship before equity allows tracing requires re-examination, (2) the time has come to recognise that some of the perceived limitations of common law tracing are misconceived, (3) the restitutionary liability of an agent for bribes, as well as the restitutionary liability of a volunteer who takes from him, is explicable on common law tracing principles, and (4) the remedies following a successful tracing exercise at law and in equity should be rationalised.

II. A Restitutionary Framework

A. *The Principle of Unjust Enrichment*

The principle of unjust enrichment prescribes that a defendant who has been unjustly enriched at the expense of the plaintiff should restore, or make restitution of, that enrichment to the plaintiff. The word *restitution* describes a response to an event.[7] That event is the unjust enrichment of the defendant at the plaintiff's expense, and the response is to reverse the enrichment.

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5 Denning, "The Recovery of Money" (1949) 65 LQR 37; Babafemi, "Tracing Assets: A Case for the Fusion of Common Law and Equity in English Law" (1971) 34 MLR 13; Goode, "The Right to Trace and its Impact in Commercial Transactions" (1976) 92 LQR 360, 528.

6 Scott, "The 'Right' to Trace at Common Law" (1967) UWALR 463; Kurshid & Matthews, "Tracing Confusion" (1979) 95 LQR 78; Pearce, "A Tracing Paper" (1976) 40 Conv 277.

7 Birks, *Introduction to the Law of Restitution* (1989 Reprint).

There are four basic elements in the principle of unjust enrichment.

First, the defendant must be enriched. This raises the question of what amounts to a legally recognised benefit.[8] However, the problem does not arise where the defendant has received money, or the equivalent of money, since it is a medium of exchange and can be used to purchase anything the defendant considers valuable. This article is primarily concerned with monetary claims, and the issue of benefit is not discussed.

Secondly, the enrichment must be at the expense of the plaintiff. Here, most writers would draw a line between subtractive enrichment, and wrongful enrichment.[9] Subtractive enrichment occurs when the plaintiff can draw a direct causal link between his deprivation and the defendant's gain. For example, if the plaintiff is coerced by threat to pay the defendant money, there is a direct correlation between the plaintiff's loss and defendant's gain. Similarly, if the plaintiff by mistake pays money to the defendant.

The second sense of 'at the expense of occurs when the defendant has done a wrong to the plaintiff, as result of which some benefit accrues to the defendant. Here the plaintiff may not suffer any loss at all. For example, a chattel which has been unlawfully detained is returned undamaged, and the plaintiff did not intend to use it anyway.[10] These restitutionary actions are generally available for wrongs which protect proprietary interests, and may extend to interests which are like property.[11] Some writers call this the *disgorgement* principle.[12]

Thirdly, the enrichment must be unjust. This is the reason why the enrichment must be reversed. Examples of unjust factors are mistake and duress (which can be said to affect the intention or volition of the plaintiff, and because the plaintiff was not acting under full autonomy, restitution is justifiable). Another example is a condition which has failed (failure of consideration). Birks has tried to give some structure to the law of restitution by categorising the actions into a series of headings. In addition to the above, there is the ground of ignorance (*a fortiori* from mistake), transactional inequality (used to explain undue influence) and policy-motivated restitution. For the second sense of 'at the expense of', the unjust factor is the wrong that has been committed. One may not be able to draw the lines clearly, and it may be possible for a fact situation to fall into more than one unjust factor. For example, duress involves some wrongdoing

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[8] Beatson, "Benefit, Reliance, and the Structure of Unjust Enrichment" in Beatson, *Use and Abuse of Unjust Enrichment* (1991).

[9] This line is most clearly seen in Birks, *supra,* note 7.

[10] *Strand Electric and Engineering Co* v *Brisford Entertaintments* [1952] 2 QB 246.

[11] *Surrey County Council & Anor* v *Bredero Homes Ltd* [1993] 3 All ER 705.

[12] *Eg,* Smith, "The Province of the Law of Restitution" [1992] Can Bar Rev 672.

on the part of the defendant, but it also affects the donative intention of the plaintiff. The "policy-motivated" restitution appears to be a dumping ground for a miscellany of actions which is difficult to put into any of the previous grounds.

Fourthly, the restitutionary action may be met by restitutionary defences. The strategy for the law of restitution places considerable reliance on defences to deal with the problem of security of receipt. The pace of development will depend largely on the confidence that the defences can perform an effective job of providing protection for recipients. In addition to the defence of *bona fide* purchaser and estoppel, new defences have emerged. The most significant one is the change of position defence. It has been judicially recognised in England,[13] Canada,[14] Australia.[15] Essentially, since the defendant has acted on the payment and spent some of the money received, it is unfair to require the defendant to make restitution of the entire sum received. This is not a discretionary defence, but is founded on legal principles, though it is not totally clear what the operative principles are. The House of Lords in *Lipkin Gorman* has left it vague for future judicial development.[16] Not much more is said than that it is applicable when the innocent party's position is so changed that the injustice of requiring him to repay, or to repay in full, outweighs the injustice of denying the plaintiff restitution.[17] Mere spending will not be enough.[18]

B. *Common Law Tracing, Equitable Tracing and Restitution*

There are salient differences between equitable and common law tracing which must be pointed out at the outset. In equity, the plaintiff must establish either a subsisting equitable proprietary interest, or a fiduciary duty, to trace. Tracing at common law does not require a fiduciary relationship, but the plaintiff must follow his legal property. The plaintiff must establish that the defendant has received the plaintiff's legal property. The rules of identification in equity are said to be metaphysical,[19] and are extremely flexible. The corresponding rules at common law are said to be much more rigid. The traditional view is that the common law is extremely materialistic. It cannot trace through mixtures, and it must follow material objects. Until

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[13] *Lipkin Gorman, supra,* note 2.
[14] *Rural Municipality of Storthoaks* v *Mobil Oil Canada Ltd* (1975) 55 DLR (3d) 1.
[15] *David Securities Pty Ltd & Ors* v *Commonwealth Bank of Australia* (1993) 109 ALR 57.
[16] *Supra,* note 2, at 580.
[17] *Supra,* note 2, at 579.
[18] *Supra,* note 2, at 580.
[19] *Re Diplock* [1948] Ch 465, 520.

Lipkin Gorman,[20] the exchange-product rule stood on no sure footing.[21] It was also thought the common law tracing must adhere strictly to the law of property.[22] In equity, the remedies upon successful identification may be a charge on the assets in the hands of the defendant, or a personal action in knowing receipt. At common law, the only remedies are personal, consisting of an action for money had and received in the case of money, or in the case of chattels, an action in the tort of conversion or detinue. These tort actions may in turn be waived and an action be brought for money had and received. Whereas the common law actions are based on strict liability, the equitable action of knowing receipt requires some degree of fault on the part of the recipient. The liability in both the equitable action for knowing receipt and the common law action for money had and received is based on receipt, and does not depend on any surviving property in the hands of the defendant.

One supposed difference between common law tracing and equitable tracing is that while equitable tracing is a remedy, common law tracing is only evidential. This distinction is conceptually unsound. In both cases, tracing identifies the assets in relation to which the plaintiff seeks his remedies, whether at law or in equity.

In *Lipkin Gorman,*[23] common law tracing was explained on a restitutionary basis. The action for money had and received against the defendant to whom the plaintiff's legal property was traced –

> is founded simply on the fact that, as Lord Mansfield said, the third party cannot in conscience retain the money, or, as we say nowadays, *for the third party to retain the money would result in his unjust enrichment at the expense of the owner of the money.*[24]

Lord Goff further expressed hope that the recognition of the principle of unjust enrichment, with the development of the change of position defence, would result in a more consistent approach to tracing claims at law and in equity.[25] In contrast, in *Hongkong and Shanghai Banking Corp Ltd* v *United Overseas Bank Ltd,*[26] (hereafter *Hongkong and Shanghai Bank)* Hwang JC said:

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[20] *Supra,* note 2.

[21] See the trenchant criticisms in Kurshid & Matthews, "Tracing Confusion" (1979) 95 LQR 78. The learned editor of Hayton & Marshall, *Cases and Commentaries on the Law of Trusts* (9th ed, 1991) adopts the criticism.

[22] See, *eg,* Kurshid & Matthews, *ibid,* especially at 78, note 5.

[23] *Supra,* note 2.

[24] *Lipkin Gorman, supra,* note 2, at 573 (emphasis added).

[25] *Supra,* note 2, at 581.

[26] [1992] 2 SLR 495.

> Nonetheless, it should be noted that there are growing doubts whether it is desirable to develop the law of restitution using the concept of common law tracing, or whether equitable tracing or some broader principle of unjust enrichment would provide a more rational and flexible remedy.[27]

Hwang JC's views were based on the doubts cast on common law tracing by Millet J, extra-judicially,[28] and in *Agip (Africa) Ltd* v *Jackson,*[29] as well as the confirmation of the High Court view in the Court of Appeal[30] in the same case. Millet J has also expressed extra-judicially the view that the law should develop equitable tracing in a restitutionary direction, abandoning common law tracing altogether. These views were expressed before the House of Lords decision in *Lipkin Gorman.* However, even after *Lipkin Gorman,* Millet J has reiterated his views on the inadequacies of common law tracing in *El Ajou* v *Dollar Land Holdings Plc & Anor.*[31]

Reconsideration must be given to the supposed limitations of common law tracing once it has been put on a restitutionary basis, since many of these limitations arose from a proprietary conception of the action. Equity has had a headstart in developing in a restitutionary direction because it viewed proprietary notions as pliable. It cannot be said that the common law is so stultified that it is beyond development. Further it cannot be desirable to develop one action fully and leave the other undeveloped, unless the other is totally abandoned. So long as there are advantages in pursuing common law tracing, it will be quite impossible to suppress it. Presently there are three. First, a fiduciary relationship is unnecessary. Secondly, the action for money had and received is independent of the fault of the recipient. Thirdly, there may be some advantages in pursuing a tort action, which is possible only through common law tracing.

C. *Tracing: Property or Restitution?*

There is some debate as to whether tracing properly belongs to the law of property or the law of unjust enrichment. Generally, rules of property are facultative. The general rule is that property passes according to the intention of the donor. In equity, the picture is somewhat more complex because of equity's flexible remedial proprietary powers.[32] Even so, if the

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[27] *Ibid,* at 504.
[28] Millet, "Tracing the Proceeds of Fraud" [1991] 107 LQR 71.
[29] [1989] 3 WLR 1367.
[30] [1991] 3 WLR 116.
[31] [1993] 3 All ER 717.
[32] See, *eg, Lonrho Plc* v *Fayed (No 2)* [1991] 4 All ER 961; *LAC Minerals Ltd* v *International Corona Resources Ltd* (1989) 61 DLR (4th) 14 (Supreme Court, Canada). The degree of

proprietary powers are remedial, the source of the powers is at least arguably found in unjust enrichment, rather than in property *per se.* A proprietary analysis will have to conform with rules of property. The plaintiff identifies assets in the hands of the defendant as his own according to the rules of property. On the other hand, the hallmark of a pure restitutionary model is a causative approach. Of course, it is free to borrow the concepts from property law. A restitutionary analysis merely requires that the plaintiff shows that the defendant has been unjustly enriched at the plaintiff's expense. A restitutionary analysis of tracing asks three questions:

First, when does the plaintiff have title to trace? This question is independent of the issue of the unjust factor. Obviously an unjust factor has to be established first. The question is, what else is necessary? The traditional answer has been the existence of the plaintiff's property or quasi-property[33] in the hands of the first recipient. This initial property interest is not a logical prerequisite in restitutionary reasoning. This may suggest that tracing should be allowed for all restitutionary claims. However, tracing is a special application of the principle of unjust enrichment, because the plaintiff can potentially sue several defendants, though subject to the principle against double recovery. If *A* can trace his money through *B,* to *C,* then, subject to possible defences, *A* can potentially sue both *B* and C. *C* can be said to be unjustly enriched *at the expense of A,* when *A* can also sue *B*,[34] only if an extended meaning of "at the expense of" is accepted. There must therefore be some special reason for allowing the plaintiff to trace. For example, Birks argues that tracing is only possible with an "undestroyed proprietary base". Under this approach, it must be shown that "in some sufficient sense, the money received by the defendant belonged to the plaintiff."[35] In the pure restitutionary model, if the property or quasi-property is still a requirement, it operates as a policy threshold. It can then be said that only the protection of certain rights can justify the use of this powerful machinery.

Secondly, what are the rules of identification? There must be rules of identification to demonstrate that what the defendant holds in his hands is the 'traceable' product of the plaintiff's original property. This is to show that the defendant's enrichment is indeed at the expense of the plaintiff.

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flexibility is itself in dispute: see, *eg:* Davies, "Duties of Confidence and Loyalty" [1990] LMCLQ 4; Birks, "The Remedies for Abuse of Confidential Information" [1990] LMCLQ 460.

[33] This is used to refer to the situation where the property in the first recipient's hand can be said to belong to the plaintiff by virtue of the existence of a fiduciary duty.

[34] Assuming that *B* can be found, and is solvent. It does not matter that usually *C* is sued because either of the assumption is false, as long as theoretically, *A* has a choice of defendants.

[35] Birks, *supra,* note 2, at 481.

Ex hypothesi, there is no need to follow rules of property. This approach leaves open the question of what rules should be used. Birks warns of the dangers of an untrammelled 'but for' causation test.[36] He argues that tracing is the process of identification of the "path of value through a chain of substitutions".[37] But it is difficult to pin down the "path of value" without resort to some kind of rules of causation.

Thirdly, what remedies follow successful identification? In a pure restitutionary analysis, proprietary remedies are not necessarily available. Taking the civil law lead, the primary remedy for reversing unjust enrichment at common law is a personal action (*ie,* the money had and received). However, equity can act on the title, albeit indirectly, by acting *in personam* on the conscience of the defendant, which act binds the whole world except the *bona fide* purchaser of the legal interest for value without notice. Goff & Jones advocate, as a restitutionary rule, a proprietary remedy whenever it is just to impose one.[38] This rule may be too intractable. However, if a proprietary or at least a quasi-proprietary threshold is imposed at the first stage of the inquiry, then it may justify the imposition of a proprietary remedy.

Using different frameworks for analysis may lead to different results. However, because the two approaches are not mutually exclusive, and overlap of policies may be possible, the difference becomes essentially one of technique. On the one hand, it can be argued that there are restitutionary functions to be performed within the law of property. For example, the personal common law action in money had and received against a subsequent recipient can be viewed as restitution playing a subsidiary and supportive role to property law. The action for money had and received has been argued by some to be founded on the defendant's receipt and retention of the plaintiff's property.[39] On the other hand, after *Lipkin Gorman,*[40] it can be argued that it is property law that plays the secondary role. The foundation for the action for money had and received lies in the principle of unjust enrichment. The defendant was liable because the money which he had received was causally related to the property, which the plaintiff had lost, in a sufficient way that justifies the defendant making restitution to the plaintiff. The same can be said of equity. Where property reasoning is used with restitutionary reasoning, it can be said either that the property rules are being shaped by restitutionary considerations, or *vice versa.*

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[36] Birks, *supra,* note 2, at 481; Birks, "Persistent Problems in Misdirected Money: A Quintet" [1993] LMCLQ 219, 230, at footnote 65.

[37] Birks, "Persistent Problems in Misdirected Money: A Quintet" [1993] LMCLQ 219, 230.

[38] Goff & Jones, *The Law of Restitution* (3rd ed, 1986), at 77-81.

[39] For a further elaboration of this argument, see *infra,* main text surrounding note 115.

[40] *Supra,* note 2.

A restitutionary framework for analysis is adopted here for several reasons. First, it is the preferred methodology in the House of Lords in *Lipkin Gorman.* Secondly, restitutionary principles appear to play such a major role in the rules of tracing today that it is questionable whether the property model is valid any longer. Thirdly, it does not meet with the problem of foreign rules of property when tracing through different jurisdictions in cases involving international transfers of funds.

The present law employs elements from both the proprietary and restitutionary analysis. A restitutionary framework that uses proprietary concepts will be used, because it gives the best fit with the way the law has developed. The present law of tracing suffers from imbalances, within equity, within the common law, and between the two streams of learning. These problems are best seen through a comparative analysis of the common law and equitable rules that answer the three questions above.

III. Re-Thinking the Fiduciary Requirement in Equity

Common law has a simple answer to the question of when to allow tracing. The plaintiff must show that he has legal property to follow. He has to show that he had some legal title which he had not given up by the facultative rules of transfer. Hence, if he has passed his property under a contract, he must either show that the contract was void, or set aside the contract if it is voidable at law,[41] before he can have legal property to follow.

In contrast, equity allows the plaintiff to trace when there is either a fiduciary duty or a subsisting equitable proprietary interest.[42] Thus in equity, one does not need an initial proprietary interest to start tracing.[43] Today, the fiduciary requirement appears to be a mechanical *post-hoc* justification.[44] In *Sinclair* v *Brougham,*[45] it was found to exist as between depositors and directors of a company by payment of money over to the

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[41] By way of analogy from the position in equity: *Daly* v *Sydney Stock Exchange* (1986) 160 CLR 371, *per* Deane J at 387-390 (High Court, Australia); The Australian position has been accepted as correct in *Lonrho Plc* v *Fayed (No 2), supra,* note 32, at 971, *per* Millet J. See also *El Ajou* v *Dollar Land Holdings, supra,* note 31, at 734.

[42] *Re Diplock* [1948] Ch 465; *El Ajou, supra,* note 31, at 733-734.

[43] Even if one does, it can be argued that the fiduciary relationship creates a subsisting equitable interest, which is what Goulding J came close to saying in *Chase Manhattan Bank NA Ltd* v *Israel-British (London) Bank Ltd* [1981] Ch 105.

[44] *Chase Manhattan Bank NA* v *Israel-British (London) Ltd* [1981] Ch 105; *Agip (Africa)* v *Jackson, supra,* note 29, at 1386-1387.

[45] [1914] AC 398. See also *Westdeutsche Landesbank Girozentrale* v *The Council of the London Borough of Islington* (Unreported (1991 Folio No 825, 1991 Folio No 720), 12 February 1993, Hobhouse J), where a fiduciary relationship was found in respect of money paid over under an *ultra vires* interest-rate-swap contract.

company pursuant to an *ultra vires* contract. In *Chase Manhattan Bank NA Ltd* v *Israel-British (London) Ltd,*[46] the plaintiff bank had been instructed to remit £2 million to the defendant. It did so. However, a clerical error caused the bank to think that there were further instructions to remit another £2 million to the defendant. Thus the plaintiff mistakenly paid the defendant a second time. The defendant went into liquidation, and the court held that the plaintiff could, subject to the rules of identification, trace the money mistakenly paid out. The fiduciary relationship was found to exist by virtue of the mistaken payment.[47]

But even in more progressive New Zealand, the fiduciary relationship has not been totally expurgated. It has merely been substituted with the no less nebulous requirement of "unconscionability".[48] This demonstrates a fear of equitable tracing going out of control. It is much better to consider why *A* is allowed to claim against subsequent transferees at all. If it is because of a desire to protect *A*'s property,[49] then a rational consideration of the circumstances under which *A* cannot be said to have lost his property interest is a more logical approach than the incantation of a magic formula like 'fiduciary'. The common law model of protection of property provides a more stable analysis. In *Sinclair* v *Brougham,* legal title did not pass under the void contract.[50] This could have been a sufficient justification, but the only reason equity could not trace on that ground is the supposed rule that equity cannot follow property with undivided legal and equitable estates. The maxim that equity follows the law, which should be most appropriate here, is said to be inapplicable.[51] *Chase Manhattan* is more difficult to explain on this ground, since the nature of the mistake did not appear to prevent the passing of property at common law, although it must be admitted that the question is surrounded by some uncertainty.[52] Perhaps,

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[46] [1981] Ch 105.

[47] This case was followed by Goh J in *Chartered Bank* v *Sin Chong Hua* (Unreported, Suit No 3888 of 1983, High Court, Singapore, 3 September 1991) where money had been paid out by a bank under a mistake of fact.

[48] *Elders Pastoral Ltd* v *Bank of New Zealand* [1989] 2 NZLR 41.

[49] Which may include quasi-property.

[50] There is some suggestion of this in the case: see the discussion in Kurshid & Matthews, *supra,* note 21, at 96-97.

[51] Millet also argues that equity can follow common law property: *supra,* note 28. *Banque Beige pour l'Etranger* v *Hambrouck* [1921] 1 KB 321 could be seen as a case of equity following the law. But Fox LJ thought that in the light of the cases decided since then, it was only open to the House of Lords to take this position: *Agip (Africa) Ltd* v *Jackson* [1991] 3 WLR 116, 129-131.

[52] A simple mistake as to a fact going to liability apparently does not suffice: *Chambers* v *Miller* (1862) 13 CB (NS) 125 (inadvertence to the fact that the payee's account was already overdrawn). The question was considered by the Australian High Court in *Ilich* v *The Queen* (1986) 162 CLR 110, in which, though they were dealing with a criminal case, all

in mistaken payments, it is easier to pass legal title than to pass equitable title,[53] and the 'fiduciary' relationship was merely another way of saying that the mistake prevented equitable property from passing.[54]

IV. Re-thinking Common Law Tracing

A. *Rules of Identification in Equity*

The causative dimension of the equitable rules is obvious. Equity allows the beneficiary to trace his property from person to person, even when the property has been mixed. This is possible because equity is able to charge the mixed fund with the repayment of the money of the plaintiff. Millet J in *El Ajou* v *Dollar Land Holdings Plc & Anor*[55] explained the mechanics of the tracing rules:

> [T]he 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 notional.[56]

Millet J has written extra-judicially:

> Equity acts on the conscience of the recipient; and the existence of a *direct causal connection* between the debit and the credit should sufficiently identify the one as the source of the other to enable the

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judges thought common law principles were applicable. Mistakes which are "fundamental", which prevent property from passing are: A mistake as to the identity of either the object transferred, or the transferee: *per* Wilson, Dawson and Brennan JJ; a mistake as to the nature of the act: *per* Brennan J; a mistake as to the value or quantity of the subject matter transferred: *per* Wilson, Dawson JJ and Gibbs CJ, *contra* Brennan J.

[53] In equity, a gift may be set aside if it was made "under some mistake, of so serious a character as to render it unjust on the part of the donee to retain the property given to him.": *Ogilvie* v *Littleboy* (1897) 13 TLR 399, 400, *per* Lindley LJ. For example, a deed of appointment made when the settlor had forgotten that there was an earlier appointment had been set aside on the basis of mistake: *Hood of Avalon (Lady)* v *Mackinnon* [1909] 1 Ch 354. However, it is difficult to characterise the payment in *Chase Manhattan supra,* note 46, as having been made in inadvertence to the fact that the defendant had already been paid. There is a further difficulty with technique. If the mistaken payment is merely liable to be set aside in equity, it is questionable whether it can be set aside after insolvency: *Westpac Banking Corporation* v *Markovic* (1985) 82 FLR 7 (Supreme Court, South Australia).

[54] See Birks, *supra,* note 7, at 381-383.

[55] [1993] 3 All ER 717.

[56] *Ibid,* at 737, Millet J's emphasis. His Lordship said this in the context of tracing through foreign jurisdictions, but if it can apply to international transfers, *a fortiori* it can apply to domestic transactions.

> money credited to B's account to be taken to represent the money debited to A's account.[57]

The plaintiff is not following property, but a trail of 'value',[58] established by rules of causation. The "direct causal connection" is really a matter of evidence that may depend on the facts of each case. For example, in a telegraphic transfer, the debit in one country and a credit in another would be sufficient.[59] Equity also has no problems tracing money through clearing houses.[60] Where an intermediate recipient paid money out to the defendant before receiving reimbursement from the plaintiff, equitable tracing was also possible.[61] In *El Ajou,*[62] the plaintiff's money was traced through several jurisdictions into a bank account of an intermediate recipient, which was used as a security for another bank to lend money to the defendant. It was after the loan had been defaulted that the second bank called for the money in the first bank. Millet J decided that the plaintiff could trace in equity. It may be possible to break the chain of causation by showing that the diverter of the funds had substantial money of his own,[63] but in itself that may not be fatal. Identification may still be possible if the plaintiff can show, on a balance of probabilities, that the source of the payment was derived from his own money rather than from the diverter's.

Once the assets in the hands of the defendant have been identified as being sufficiently linked to the plaintiff's original property, equity will act against the defendant. These assets can be claimed by the plaintiff not because they have always been his property, but because –

> [a]n English court of equity will compel a defendant who is within the jurisdiction to treat assets in this hands as trust assets if, having regard to their history and his state of knowledge, it would be unconscionable for him to treat them as his own.[64]

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[57] Millet, "Tracing the Proceeds of Fraud" [1991] 107 LQR 71, at 75 (emphasis added).
[58] See also Birks, *supra,* note 37, at 228-231.
[59] *Agip (Africa), supra,* note 29. See also *Chase Manhattan Bank, supra,* note 46, at 121, where Goulding J said, "when equitable rights are in question, the court does not encourage fine distinctions founded on the technicalities of financial machinery." He had also allowed equitable tracing through a telegraphic transfer.
[60] *El Ajou, supra,* note 31, at 734.
[61] *Agip (Africa), supra,* note 29.
[62] *Supra,* note 31, at 734.
[63] *El Ajou, supra,* note 31, at 734.
[64] *El Ajou, supra,* note 31, at 737.

Equity intervenes to create the proprietary interest for the plaintiff. Whether this trust is considered institutional or remedial is semantic, if it arises as a matter of principle and not discretion, and if it operates retrospectively. It operates outside the facultative framework of property transfer, and it does not come into being (albeit that when it does it is retrospective) until the plaintiff has taken some action against particular defendants. Millet J insisted that it is a "subsisting trust".[65] However, since its remedial nature is undeniable, the learned judge probably meant that the trust has all the characteristics of an institutional trust.

Equity also allows tracing from one product to another in the hands of a trustee.[66] The beneficiary does not need to ratify the breach of trust to treat the exchange product as his. Ratification would prevent the beneficiary from suing the trustee for breach of trust. It is clear that if the exchange product is of less value than the money lost by the beneficiary, the beneficiary can have a charge over the product without losing the right to sue the trustee for the shortfall.[67] The conventional explanation is that the trustee is estopped from denying that the change in assets is a breach of trust.[68] This is a fiction. There is no need to resort to this explanation. The exchange establishes that there is a sufficient direct causal connection between the original product and the substitute product, for equity to act on it.

Equity has also devised a number of rules for tracing through mixed funds. The beneficiary ranks *pan passu* with innocent parties like other benefiaries and innocent volunteers.[69] As against fraudulent trustees, the worst is assumed of the trustee. If money is taken out of the mixed fund and lost, it is assumed that the trustee has taken out his own money.[70] If the money is taken out and a good investment is made, the trustee cannot deny that he had used the beneficiary's money for the investment.[71] If the account is a current account, it was thought that *Clayton's* case[72] mandated the first-in-first-out rule, which can be arbitrary and unjust. The Court of Appeal has clarified that this is not an invariable rule.[73] Further, the beneficiary cannot claim for anything more than what is the lowest intermediate balance in the account, unless it can be shown that the trustee intended to put money

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[65] *Supra,* note 31, at 739.
[66] Including a constructive trustee.
[67] *Re Hallet's Estate* (1880) 13 Ch D 696, 709.
[68] Millet J, *Agip (Africa) Ltd* v *Jackson* [1989] 3 WLR 1367, 1381.
[69] *Re Diplock* [1948] Ch 465.
[70] *Re Hallet's Estate* (1880) 13 Ch D 696.
[71] *Re Oatway* [1903] 2 Ch 256.
[72] (1817) 1 Mer 572 (35 ER 781); *Re Diplock* [1948] Ch 465.
[73] *Barlow Clowes International Ltd* v *Vaughan* [1992] 4 All ER 22.

back to repay the beneficiary.[74] Except for the last rule, the causal connection is weighted against the trustee, to show disapprobation of the breach of trust.[75]

B. *Rules of Identification at Common Law*

The rules of identification at common law, in contrast, have closer links with the law of property. They can be traced back to *Taylor* v *Plumer.*[76] In that case, a stockbroker of the defendant had used the defendant's money to purchase property without the defendant's authority. Shortly thereafter, the stockbroker went bankrupt. The defendant seized the property from the stockbroker as he was trying to flee the country. The stockbroker's trustee in bankruptcy unsuccessfully sued the defendant in trover. Lord Ellenborough CJ 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 fails when the means of ascertainment fail, which is the case when the subject is turned into money, 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.[77]

1. *Exchange product*

Many writers have cast doubts on the exchange product rule. The latest edition of Hayton & Marshall[78] endorses the view of Kurshid & Matthews[79] that the exchange product rule is inherently fallacious. They submitted that where *B* takes A's money, and uses it to buy a chattel from *X, X* clearly intends the property in the chattel to pass to *B,* and not *A*. Hence, title

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[74] *Roscoe* v *Winder* [1915] 1 Ch 62.

[75] A discussion of a mathematical approach to the question of causation in tracing mixed funds can be found in Finkelstein & Robbins, "A Probabilistic Approach to Tracing Presumptions in the Law of Restitution" (1983) 24 Jur J 65.

[76] (1815) 3 M & S 562 (105 ER 721). It has been pointed out that this was really a case dealing with equitable tracing: Goode, "The Right to Trace and its Impact in Commercial Transactions" (1976) 92 LQR 360, 369 at footnote 36; Kurshid & Matthews, *supra,* note 21. But it has been treated as a common law decision in many cases, including *Lipkin Gorman, supra,* note 2. It will be assumed that it is a common law case.

[77] *Ibid,* at 575.

[78] Hayton & Marshall, *Cases and Commentary on the Law of Trusts* (9th ed, 1991), at 533.

[79] Kurshid & Matthews, *supra,* note 21.

can only pass to *A* if *X* had intended the property to pass to *A,* or if *B* had appropriated[80] that chattel to A.[81]

If accepted, it presents considerable difficulties for tracing to or through exchange products. In rare cases, tracing is possible within this facultative framework of property law. For example, in *Lipkin Gorman,*[82] a compulsive gambler who was a partner in the plaintiff solicitors' firm had taken money out of the firm's accounts, which eventually reached the defendant casino. Part of the money was taken out as cash, and a part by a bank draft made out in the name of the partnership, which the partner then fraudulently endorsed to the defendant. It was held in the case that the firm had the right to immediate possession of the draft, because it was made out by the bank in favour of the firm. Hence the firm could sustain an action against the bank for conversion of the draft.

However, many exchanges do not bear that quality. More often than not, the exchange product is intended for the rogue who had misappropriated the plaintiff's money, since in most cases, the original owner of the exchange product would know nothing about the rights of the original owner of the substituted product. The House of Lords was faced with this problem in *Lipkin Gorman,* with respect to the cash, because it was found as a matter of law that legal title in the cash had passed to the rogue partner. Nonetheless, the firm was able to assert title to the money in the rogue's hands, in order to sue the casino for money had and received, because the money was the exchange product of the firm's property, its legal chose in action against the bank, which the partner had caused to be diminished in value. Lord Goff said, "of course, 'tracing' or 'following' property into its product involves a decision by the owner of the original property to *assert his title* to the product in place of his original property."[83] Moreover, tracing at law does not depend on the plaintiff adopting any act of the defendant or any other intermediate recipient.[84] That power to assert title can be exercised retrospectively, subject to the limitation that it cannot be so exercised to make an innocent recipient a wrongdoer.[85]

The nature of the power has not been clearly explained. Birks calls it a "power *in rem"* that the plaintiff can exercise to vest title in himself.[86] Goode has argued that the nature of the plaintiff's right to an exchange

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[80] Presumably they were referring to the doctrine of attornment.

[81] The only exception they would make to fit the cases is in the use of the "negotiability veil" where money or negotiable instrument is exchanged for money or negotiable instrument.

[82] *Supra,* note 2.

[83] *Lipkin Gorman, supra,* note 2, at 573 (emphasis added).

[84] *Lipkin Gorman, supra,* note 2, at 573. See also *Taylor* v *Plumer, supra,* note 76.

[85] *Lipkin Gorman, supra,* note 2, at 573.

[86] *Supra,* note 2.

product is *ad rem, ie,* a personal right to possession.[87] This proprietary nature can produce some problems. What if the plaintiff traces *to* a chose in action? In what way can the plaintiff assert title to a chose, given that the common law has no machinery to compel an assignment? It is suggested that the lack of machinery is unimportant, since the absence of such machinery[88] does not prevent assertion of title to tangibles. After all, if common law can trace *from*[89] and *through*[90] a chose in action, there is no reason for saying that it cannot trace to one.[91] The inability to assign simply means that the plaintiff is left to an action in money had and received.

Whatever the nature of this power, it fixes on the property by virtue of the fact that it is causally related to the plaintiff's original property. The analogy with the equitable technique of the notional charge is compelling. In both cases, one is not following title, but following a trail of 'value'.[92] In both cases, the plaintiff has some kind of power over the money in the hands of the intermediate recipient and eventually the final recipient not because the money 'belongs' to him by the facultative rules of property law, but because it is derived from property which is his. The exchange product rule, far from being an anomalous exception to property law, is the paradigm case[93] of a causative link between the plaintiff's original property and the substitute property. *Lipkin Gorman* demonstrates that the common law rules of identification can be as *causative* as equitable ones. At least in respect of exchange products, tracing at law can be as metaphysical as tracing in equity.

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87 Goode, "The Right to Trace and its Impact in Commercial Transactions" (1976) 92 LQR 360, 368-371.

88 The historical background for this lack of machinery is discussed further, *infra,* in the main text as well as in note 187.

89 *Lipkin Gorman, supra,* note 2.

90 See Goode, "The Right to Trace and Its Impact on Commercial Transactions" (1976) 92 LQR 360, 381. See also *Banque Beige, infra,* note 105.

91 Lai J accepted *sub silentio* in *Sumitomo Bank Ltd* v *Kartika Ratna Thahir & Ors* [1993] 1 SLR 735 that it is indeed possible to trace to a chose in action at common law. Furthermore, the second defendant's liability in *Banque Belge,* facts discussed in main text surrounding *infra,* note 105, could arguably be based on the fact that the money lost by the plaintiff bank was traced to the chose received by her as a result of depositing the cheque at her bank (the third defendant). *Contra* Goode, *ibid,* at 380-381, who argued that the liability was based on her bank's collection of the money on her behalf. This argument involves tracing the money *through* the clearing house.

92 *Supra,* note 37.

93 From a purely causative point of view, however, the exchange product rule has been criticised as being inconsistent with the "but for" test of causation: Oesterle, "Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in the UCC §9-306" [1983] Cornell LR 172. But it can be said to satisfy a different test of causation in the exchange of value.

2. *Materialism*

It makes little sense to say that common law tracing is causative in respect of exchange products, but not in respect of other rules of identification. Millet J in *Agip (Africa)*[94] suggested that, at common law, a distinction has to be drawn between following property into its product in the hands of one person, and following property from person to person. In the former it can follow a chose in action, but in the latter, it cannot. No authority is cited for constructing this unnatural rift. Normally, *B* steals A's property to exchange for something for himself. But it may be that *B* uses it to exchange it for property which is passed to C directly. In *Marsh* v *Keating,*[95] a rogue forged a power of attorney and caused the plaintiff's shares to be sold. The proceeds were received by the firm in which the rogue was a partner. There was no doubt that the plaintiff could follow the chose into the proceeds in the hands of the firm.[96] Similarly, there is no reason why a chose cannot be followed from one person to another, for example, when it is assigned, or where the doctrine of survivorship applies.[97]

It has been seen how equity has used logical links by virtue of the "direct causal connection" test to identify property. In all the examples given,[98] it had been asserted that the common law is helpless. If there is a clear causative link, there is no reason why the link should only be visible to equity.

In *Hongkong and Shanghai Bank,*[99] an employee of the plaintiff bank, fraudulently caused money belonging to the plaintiff's Philippines branch to be telegraphically transferred to a joint account of the employee and her husband at the plaintiff's New York branch. The employee then arranged for a transfer of a substantial portion of the sum from the New York branch to the plaintiff's Singapore branch. There she drew a draft on the bank and deposited it with the defendant bank. The common law analysis in the case was only *obiter dicta,* because Hwang JC chose to rely on equitable tracing. On one analysis, the money was followed from Philippines to Singapore. Hwang JC in *obiter dicta* confined the reasoning of Millet J on telegraphic transfers to transfers between different banks. His Honour was of the opinion that the common law could trace in a telegraphic transfer from one branch of a bank to another, although they

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[94] *Supra,* note 29, at 1382.
[95] (1834) 1 Bing NC 198 (131 ER 1094).
[96] The firm was liable by virtue of its *receipt* of the sum of money, not by virtue of the rogue's liability.
[97] *Sumitomo Bank Ltd* v *Kartika Ratna Thahir & On* [1993] 1 SLR 735.
[98] See *supra,* main text after note 58.
[99] *Supra,* note 26.

are in different countries. It made no difference in the case, since it was a single legal entity and could always start tracing from the branch at the receiving end of the telegraphic transfer. But the single legal identity of the bank is independent of the question of the distinctiveness of the property being traced. It may be that a plaintiff is tracing through several branches of Bank A in different countries, and finally to Bank B, all by telegraphic transfers. If common law tracing can make the journey in inter-branch transfers, it is hard to see why it cannot survive the journey in inter-bank transfers. It is difficult to accept that the plaintiff's common law claim in *Hongkong and Shanghai Bank* should depend on the fortuitous event of the money being laundered through its own branches and not through another bank.

Further support for the argument against materialism may be found in the way the common law has demonstrated some flexibility with the use of proprietary notions.

First, the legal property from which to start tracing can be a chose in action. *Lipkin Gorman* is a clear authority.[100] In *Agip (Africa),*[101] a fraudulent accountant had altered the plaintiff's payment orders causing the plaintiff's bank to pay money to third parties. Millet J found that the plaintiff had title to trace at law, because the bank had paid out the money as the plaintiff's agent, and thus had paid out the plaintiff's money. However, the common law tracing action failed at the identification stage. The relationship between the plaintiff and its bank was one of creditor and debtor. In the light of *Lipkin Gorman,* a better explanation of the case is that the plaintiff could start tracing from its legal chose against the bank.[102]

Secondly, the rules for identification of the legal property that has been lost by the plaintiff can also surmount the technicalities of the financial machinery. In *Hongkong and Shanghai Bank,*[103] the question of title to trace at law was not explicitly adverted to, but it is suggested that the plaintiff had *locus standi* to trace, notwithstanding that the plaintiff could not point to any specific legal asset that was lost. The crediting of the account of

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[100] See also *Marsh* v *Keating* (1834) 1 Bing NC 198 (131 ER 1094).

[101] *Supra,* note 29.

[102] It has been suggested that the plaintiff could still sue its bank – its chose in action against the bank was undiminished: Birks, *supra,* note 2, at 481. In *Agip (Africa), supra,* note 29, at 1379, we are told that the plaintiff had unsuccessfully sued its (Tunisian) bank in Tunisia. It is not clear from the judgment whether the plaintiff failed in Tunisia on a point of substance or procedure. The proper law of the debt (whether it be treated as the *lex situs* or the proper law of the contract giving rise to the debt), in the absence of further information, is probably the law of Tunisia. It must be taken that the debt was not payable under the substantive law of the proper law of the debt, and so the plaintiff had lost legal property.

[103] *Supra,* note 26.

the employee creates a debt against the bank. This must mean that the net assets of the bank has been correspondingly diminished. The book entries should be allowed as evidence that the corresponding amount of legal property[104] must have been lost. Alternatively, on the restitutionary analysis as argued, the protection of proprietary interests is the *reason* rather than the *basis* for allowing tracing, a wider view can be taken of the notion of legal property that has been lost by the plaintiff.

In *Banque Beige pour L'Etranger* v *Hambrouck,*[105] the first defendant had forged a cheque drawn on the plaintiff bank. The first defendant deposited it with his bank. He then drew his own cheque from his account at his bank in favour of his mistress the second defendant, who in turn banked it in her own account with her own bank, the third defendant. The third defendant paid out the balance in the second defendant's bank account into court, and was discharged from the proceedings. It was held that the plaintiff could trace its property to the money paid into court. Not only was the second defendant liable for money had and received,[106] but the title in the money paid into court was also declared to belong to the plaintiff. The simple analysis that the bank had obviously paid out its own money on a voidable transaction is met with the problem that the bank used a clearing house, where only net balances may be payable by one bank against another at the end of the day. The court did not see this as a problem,[107] and on the foregoing analysis, the bank should have no problem establishing a title to trace at law.

3. *Mixture*

The common law cannot trace through mixtures.[108] But because the action for money had and received is based on receipt of the plaintiff's money, and not dependent on the survival of title, it can be said that the common law cannot trace through mixtures, but it can trace to one. Common law can also trace money into and out of a bank account, provided that no other money have been put into the account.[109] This is not a concession of the

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[104] Some difficulty may arise if *all* of the bank's assets are equitable property, but this is an unlikely situation.

[105] [1921] 1 KB 321.

[106] Presumably the third defendant was also liable in money had and received as well: see Goode, "The Right to Trace and Its Impact in Commercial Transactions" (1976) 92 LQR 360, 380-381; Scott, "The 'Right' to Trace at Common Law" (1966) 6 UWALR 463, 487-488.

[107] See especially, Atkin LJ, *supra,* note 105, at 332.

[108] See *Taylor* v *Plumer, supra,* note 76.

[109] *Banque Beige, supra,* note 105.

mixture rule, but the result of the exchange product rule. The money is exchanged for a chose in action. Hence, it is generally not possible to trace money into a bank's assets at common law.[110] In *Banque Belge,*[111] there was a declaration that the money in the third defendant bank to the account of the second defendant belonged to the plaintiff even at law. This can only be so because the money had been paid out by the third defendant into court, to the presumptive owner of the chose in action against the bank. The plaintiff could trace to that chose, and the money paid into court was the exchange product of that chose, so the plaintiff could assert title to that money.

Traditionally, three arguments have been made against the mixture rule.[112] The most common argument is that for other chattels, mixture leads the common law to apportionment by way of common ownership.[113] The reasoning has never been judicially applied to money.[114] If accepted, this mechanism is not as powerful as the equitable charge. *B* takes $100 of A's money and mixes $100 of his own. Out of this mixture, *B* gives *C* $100. In equity, A can potentially have a charge over *C*'s $100. Under common ownership reasoning, *A* can only trace $50 to *C,* since A owns an undivided half of the mixture.

The second argument uses the concept of property in a common law 'fund'. In this theory, the defendant is liable in an action for money had and received because he is unjustly retaining the property of the plaintiff. A notable proponent of this theory was the late Professor Stoljar.[115] However, his views are ignored in Goff & Jonesp[116] and very cogently criticised by Fridman & McLeod.[117] According to this theory, the action for money had and received is a "proprietary claim" to an equivalent sum

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[110] In *Hongkong and Shanghai Bank, supra,* note 26, the *obiter* suggestion (at 502, 503) that it was possible for the plaintiff to have a proprietary remedy against the bank at common law must be subject to the possibility of identification of specific assets in the bank as traceable products of the plaintiff's original property.

[111] *Supra,* main text after note 105.

[112] There are two minor ways in which mixtures have in fact been overcome in the cases. One is by way of concession by counsel: *Lipkin Gorman, supra,* note 2. The other is to invoke the *de minimis* rule: Atkin LJ in *Banque Beige, supra,* note 105; Hwang JC in *Hongkong and Shanghai Bank, supra,* note 26.

[113] The behaviour of property other than money in a mixture is examined in MacCormack, "Mixture of Goods" (1990) 10 LS 293; see also Matthews "Proprietary Claims at Common Law for Mixed and Improved Goods" [1981] CLP 159.

[114] In *Lipkin Gorman, supra,* note 2, at 572, Lord Goff said, "at common law, property in money, like other fungibles, is lost as such when it is mixed with other money." The comparison with other fungibles is not strictly accurate. See, *eg, Indian Oil Corporation Ltd* v *Greenstone Shipping SA (Panama)* [1987] 3 WLR 869. See also MacCormack, *ibid.*

[115] Stoljar, *The Law of Quasi-Contract* (2nd ed, 1989).

[116] Goff & Jones, *supra,* note 38.

[117] Fridman & McLeod, *Restitution* (1982), at 31-34.

of the plaintiff's money received by the defendant, rather similar to the charge over mixed funds in equity.[118] How the tracing will work is unclear, since the idea had never been fully developed.

The third argument relies on *Jackson* v *Anderson.*[119] The plaintiff's Spanish dollars were mixed in a barrel with a third party's. The third party wrongfully sold the contents of the barrel to the defendant, in circumstances where the defendant did not acquire overriding title. It was held that since the third party had disposed of the whole contents of the barrel to the defendant, the defendant must have received the whole of the plaintiff's property. Therefore it was liable for conversion. This is different from the co-ownership argument, since co-ownership would have defeated the claim at that time.[120] This argument is sustainable on property principles, since, as Lord Ellenborough CJ had pointed out, the loss of identity is really a matter of evidence.[121]

All three arguments were made on the premise that common law tracing is proprietary, and they seek one way or another to define property behaviour. But if tracing is restitutionary, then 'property' merely clouds the real inquiry – can the defendant be said to be enriched *at the expense of the* plaintiff? Indeed, the removal of the inquiry from the law of property avoids complicated questions of priority over the defendant's general assets in an insolvency,[122] leaving the plaintiff to a personal action in money had and received.[123] Of course, rules of causation have to be developed. It could be a fairly mathematical approach, akin to common ownership reasoning. Or, it could be a narrow causative test of the 'hermetically sealed barrel' akin to the reasoning in *Jackson* v *Anderson.*[124] Using this test on the earlier example, A would not be able to prove that *C* had received any of his money.

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[118] Stoljar, *supra,* note 115, especially at 130-131. Stoljar's theory, if accepted, has very important repercussions. First, the plaintiff's continuing property over mixed funds will give him priority in an insolvency. Secondly, it follows from the availability of the charge-like device that the common law is able to trace property in mixed funds from the initial to a subsequent recipient, whereas ordinarily any mixture would have prevented any further following. Thirdly, the continuing existence of the plaintiff's property would mean that the plaintiff also has a claim to any profits made from the use of such property.

[119] (1811) 4 Taunt 24 (128 ER 235).

[120] Mansfield CJ found that the plaintiff and defendant were not co-owners. At that time co-owners could only sue each other for conversion in a case of destruction of property: *Morgan* v *Marquis* (1854) 9 Ex 145 (156 ER 62).

[121] *Taylor* v *Plumer, supra,* note 76.

[122] Subject to limited claims – see *infra,* main text surrounding note 217. Equity has gone very far in this respect – see *infra,* note 169.

[123] Although, as can be seen later, tort claims after common law tracing can give priority to the plaintiff, these actions tend to be rare.

[124] *Supra,* note 119. This argument could have worked on the facts of *Lipkin Gorman, supra,* note 2, since the plaintiff firm had given credit for whatever money the rogue partner himself had.

Alternatively, the test of directness that equity uses could be adopted. There is much to be said for the view that the rules of identification should be the same for both law and equity.

V. Tracing Bribes

Sumitomo Bank Ltd v *Kartika Ratna Thahir & Ors*[125] presents an interesting factual matrix for three-party restitution. Pertamina, the plaintiff,[126] had employed a fiduciary to negotiate with two German contractors, Klockner and Siemens for important contracts relating to the construction of the infrastructure for some steel works. In the course of his duties, the fiduciary took substantial bribes from these contractors. The bribes were deposited at the Sumitomo bank in Singapore, one in the joint names of the fiduciary and his wife, who was the defendant,[127] and the rest in the sole name of the fiduciary. They were all eventually transferred to their joint names. The fiduciary died and the defendant took the whole sum by survivorship. The issue raised was whether the plaintiff could recover the bribes, not from the agent, but from the subsequent recipient claiming from the agent. Lai J held that the bribes were the equitable property of the plaintiff, and therefore they could be followed in equity to the recipient.[128] On the common law analysis of the case, Lai J accepted that there was a cause of action in money had and received against the fiduciary in respect of the bribes. His Honour further decided that the plaintiff could trace the bribes at common law to the defendant, and thus the defendant was also liable for money had and received.

A. *Title to Trace at Common Law*

The bribes paid by the contractors were intended for the fiduciary, and at common law, by the facultative rules of property law, the legal title passed to him.[129] The question of title to trace was not addressed. It is necessary

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[125] [1993] 1 SLR 735.

[126] In the relevant interpleader issue.

[127] In the relevant interpleader issue.

[128] In so doing, Lai J had refused to follow the controversial English Court of Appeal case in *Lister* v *Stubbs* (1890) 45 Ch D 1. The reasoning in equity has been approved by the Privy Council in another case: The *Attorney General for Hong Kong* v *Reid & Ors* [1993] 3 WLR 1143 (on appeal from New Zealand).

[129] See Lord Templeman in *The Attorney General for Hong Kong* v *Reid & Ors, ibid. Contra Morison* v *Thompson* (1874) LR 9 QB 480, where, in an action for money had and received, the bribes were described as "belonging absolutely" to the principal. This must be taken as a figure of speech, or as seen later, an oblique reference to the principal's power to assert title to this sum of money: see *infra,* main text following note 154.

to advert to the nature of the action in money had and received. There are three theories that have been put forward to support the action.

The first, the historical justification, lies in implied contract. This is a result of the historical background of the action in money had and received. In form, because of the tortuous history of the forms of actions, the *indebitatus assumpsit,* the ancestor of the action for money had and received, included an assertion that the defendant owed the plaintiff a sum of money, and being so indebted, promised to pay. The promise was fictional in most cases, but as late as the turn of the twentieth century, some judges were still talking about the action for money had and received, as if there must be a contract.[130] A generation later, however, Lord Atkin was able to say, and quite emphatically too, that the promise was purely a fiction of the forms of actions, and was imputed by the courts.[131] On this theory, because of the affinity with the law of contract, only a debt is created.

The modern theory of the action for money had and received lies in unjust enrichment.[132] This theory only gives an alternative explanation of the action. It does not alter the nature of the action as one sounding only in debt. Lai J in *Sumitomo Bank*[133] also appears to have accepted that the action for money had and received is founded on unjust enrichment.

If all the plaintiff had against the fiduciary was a debt, then the bribes cannot be said to belong to the plaintiff. At this stage, the plaintiff has no legal property to follow.

The third theory provides a possible explanation. This is the obscure property theory of the money had and received alluded to earlier.[134] However, it is unlikely that the attention of the learned judge in *Sumitomo Bank* had been brought to this arcane theory. Further, the theory does not accord with the tenor of the judgment. The theory necessitates property surviving in mixed funds, and the learned judge did see that as a potential problem for common law tracing.

Another possible explanation of the case is that the action against the defendant was not in subtractive enrichment, but in restitution for wrong. This explanation does not depend on the necessity of establishing a title to trace. The only clue pointing to this analysis is the statement that the defendant's complicity in the entire corrupt bargain was another reason for

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[130] *Sinclair* v *Brougham, supra,* note 45, at 452, *per* Lord Sumner.

[131] *United Australia Ltd* v *Barclays Bank Ltd* [1941] AC 1, 26-29.

[132] *Lipkin Gorman, supra,* note2 (Englsaid); *David Securities Pty Ltd &Ors* v *Commonwealth Bank of Australia* (1993) 109 ALR 57 (High Court, Australia); *Air Canada* v *British Columbia* (1989) 59 DLR (4th) 161 (Supreme Court, Canada).

[133] *Supra,* note 125.

[134] *Supra,* main text following note 115.

restitution.[135] This statement is otiose in a purely subtractive analysis, since the liability in an action for money had and received in such a claim is independent of fault. This may be an acceptance that the tort of inducing a breach of contract can be waived.[136] Alternatively, it could be an inchoate equitable wrong of inducing a breach of fiduciary duty which triggers a restitutionary remedy.[137]

It is suggested that, as in *Lipkin* Gorman,[138] the title of the plaintiff in *Sumitomo Bank*[139] to trace can be found if one takes a step back in the transaction. The plaintiff had legal title to the money which it had paid out to the contractors.

Courts take a strict approach to bribery cases. It will not inquire into the briber's motive. It will presume that the agent was influenced by the bribe, and that the price of the goods sold to the principal has been inflated by the amount of the bribe.[140] Where an agent has received a bribe, the principal has two causes of actions against both the briber and the agent, in money had and received for the sum of the bribe, or in tort for actual losses. The remedies are alternative and not cumulative.[141] The basis of the action in money had and received against the agent is generally thought to be founded in restitution for wrong.[142] The basis of the liability of the briber is less well established, but it is thought to be the excess payment to the briber. The overpayment is not merely the quantum of

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[135] *Supra,* note 125, at 794.

[136] A possible early authority is *Lightly* v *Clouston* (1808) 1 Taunt 112 (127 ER 774). The waiver of such a tort has been recognised in the United States: *Federal Sugar Refining Co* v *United States Equalisation Board* 268 F 575 (1920).

[137] The Court of Appeal in *Metall and RohstuffAG* v *Donaldson Lufkin & Jenrette Inc & Anor* [1989] 3 All ER 14, refused to accept the existence of the "tort" of inducing a breach of trust in the context of a jurisdictional question (O 11, Rules of the Supreme Court) in private international law. Beatson, "The Nature of Waiver of Tort" in Beatson, *Use and Abuse of Unjust Enrichment* (1991) suggested that the common law action for money had and received by the principal against the agent is really an instance of common law restitution for an equitable wrong. If this is correct, then there is no reason why the common law cannot allow restitution for the equitable wrong of assisting in a breach of fiduciary duty.

[138] *Supra,* note 2.

[139] *Supra,* note 125.

[140] *Hovenden & Sons* v *Millhoff* (1900) 83 LT 41, *per* Romer LJ at 43.

[141] *Mahesan* v *Malaysia Housing Association* [1979] AC 374.

[142] Goff & Jones, *supra,* note 38, at 654-658; Reynolds ed, *Bowstead on Agency* (15th ed, 1985), at 185; Beatson & Reynolds, "Bribery of Agent" (1978) 94 LQR 345; Needham, "Recovering the Profits of Bribery" [1979] 95 LQR 536. In *Sumitomo Bank, supra,* note 125, Lai J also thought that the wrongdoing of the agent was the basis of the action against him (at 793 for common law, at 810-811 for equity). In fact, nearly all the cases which have allowed the principal to recover against the agent have given as the main reason the wrongdoing of the agent.

liability, but the rationale[143] and the basis[144] of the action.[145] This suggests that the analysis of the action is within subtractive enrichment. The principal may avoid the transaction, but even if he does not, he does not forgo his remedies in restitution.[146] The subsistence of the contract, which ordinarily stands in the way of restitution by subtractive enrichment,[147] is no bar to the restitutionary action against the briber. This must be because in the eyes of the law, there is no consideration for the payment in excess of the true price.

If that is so, then, in addition to the personal action, does the plaintiff have title to trace?[148] It could be argued that the excess payment was made in mistake. He thought that sum went into the purchase of the consideration, but instead, it was actually meant for his own agent. Alternatively, he thought that he was buying something (with the excess) which was already his (by virtue of the true price). A mistake as to the fundamental nature of the act can prevent legal title from passing,[149] and it is possible for the intention to pass property in money to be vitiated to the extent of an overpayment.[150] One possible objection is that the sum was paid out as a whole, and the mixture rule comes into operation, preventing any property in any distinct part of the money paid. One may resort to *Jackson* v *Anderson*[151] and say, either as a matter of property law as the case stands for, or alternatively as a matter of causation as argued, that as the principal paid out the whole sum, therefore he must have paid out the sum in respect of which title did not pass,[152]

B. *Identifying the Bribes at Common Law*

Even if the plaintiff has established his title to trace, he still has to exercise the rules of identification and follow the money to the subsequent re-

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[143] Beatson & Reynolds, "Bribery of Agent" (1978) 94 LQR 345, 346.

[144] *Arab Monetary Fund* v *Hashim & Ors* [1993] 1 Lloyd's Rep 543, 564-565.

[145] This is put forward with some hesitation, since Lord Diplock thought there were some conceptual difficulties with this cause of action in *Mahesan, supra,* note 141, at 383, though he did not explain what they were.

[146] Or in tort.

[147] Hence, a contract must be void, or avoided (*Daly* v *Sydney Stock Exchange* (1986) 160 CLR 371), or at least terminated or discharged (see generally, Goff & Jones, *supra,* note 38, Pan II, Section D).

[148] The existence of a title to trace is not inconsistent with the availability of an action in money had and received. The point is that the title to trace does not necessarily follow from an action in money had and received.

[149] Brennan J, *llich* v *The Queen* (1986) 162 CLR 110, 139.

[150] Gibbs CJ, *ibid,* at 119.

[151] *Supra,* note 119.

[152] Admittedly, the writer is not aware of any authority for common law tracing *through* the briber.

cipient.[153] Here no amount of ingenuity can overcome the traditional rules of identification that are blinded by mixtures and materialism, short of an abandonment of them in favour of a causal formula, as argued.

But *Lipkin Gorman*[154] shows an alternative route. Given the presumptions made by the law in relation to a bribery transaction,[155] the agent cannot deny the causal link between the excess payment made by the principal to the briber, and the bribe received by the agent from the briber. The agent's breach of duty had caused the plaintiff's money (to the extent of the overpayment) to be misapplied, in consequence of which he had obtained the bribes. This is no different from *Lipkin* Gorman,[156] where the gambling partner had caused the plaintiff firm's chose in action to be diminished in exchange for the cash. In other words, the bribe in the hands of the agent is the *exchange product* of the legal property of the plaintiff (in excess of the true consideration), which the agent had caused to be paid over to the German contractors. In both cases, legal title to the money belongs to the immediate recipient. In both cases, the plaintiff should be able to assert title to the money.

To this analysis, two objections may be made, based on the mixture rules.

First, it may be pointed out that the substitution is not a 'clean' one – the entire sum was paid to the contractor, only part of which was the excess payment. The same argument that there is title to trace, above, can meet this objection. *Ex hypothesi,* only the part of the money in excess of the true price is being followed.

Secondly, it may be argued that the principal had paid out at least part of the money to the contractors by telegraphic transfers, and at least part of the bribes was received by the agent from the contractors by similar means and, following *Agip (Africa),*[157] even if there is title to trace, tracing at law is impossible. Even if it is accepted that person to person tracing at common law is materialistic, it is learned from *Lipkin Gorman* that exchange product tracing is causative. Hence, if *B* steals *A*'s chattel, and sells it to a buyer overseas, and the payment is remitted to *B*[158] by telegraphic transfer, the money is clearly the exchange product of *A*'s legal property. There is no reason for common law not to allow *A* to assert title to the money so remitted. If the argument appears strange, it is because of the

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[153] Usually, this will be the agent.
[154] *Supra,* note 2.
[155] *Supra,* main text around note 140.
[156] *Supra,* note 2.
[157] *Supra,* note 29.
[158] It should make no difference even if the money is remitted to C, a volunteer, instead of *B:* see *supra,* main text surrounding note 95.

unnatural division between the causative exchange product rule and the materialistic person to person tracing rules.

Tracing analysis can be applied to two other bribery scenarios, apart from the factual matrix in *Sumitomo Bank,*[159] where the principal pays the money over to the third party, and the third party pays money to the agent.

First, the principal hands money over to the agent, without passing legal title to the agent, to pay to the third party. The agent pockets part of the money designated as a commission and pays the rest to the third party. This is the clearest case where the common law can trace. Legal title in the money retained by the agent is still vested in the principal.

In the second scenario, the principal hands money over to the agent, without passing legal title to the agent, to pay to the third party, and the agent hands the whole sum over to the third party. *Prima facie,* legal title would have passed to the third party. The third party then takes out a sum equivalent to the bribe, and hands it over to the agent. Legal title to the bribe belongs to the agent. However, it can be argued that the agent had acted outside his authority in making the payment in excess of the true price, and therefore the principal's legal title in that sum in excess did not pass. The briber is estopped from arguing that there was apparent authority, because he cannot assume that the agent had informed the principal of the commission.[160] In this case, the agent's bribe, as in the *Sumitomo* type of case is the exchange product of the legal property of the principal which the agent had misapplied.

If the tracing analysis is accepted, then the agent can be liable on the basis of subtractive enrichment as well as enrichment by wrong. There is nothing wrong with this concurrence of liability.[161] It also means that so long as the bribe remains identifiable, the principal can trace it to subsequent recipients. *A fortiori,* tracing is possible in equity as well.[162] An alternative tracing analysis lends further credibility to the argument that, at common law, the agent is not only liable for the sum of the bribe received, but also for profits made by the use of such bribes, in the action for money

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[159] *Supra,* note 125.

[160] *Grant* v *Gold Exploration and Development Syndicate Ltd* [1900] 1 QB 233.

[161] This would be called "alternative analysis" by Birks, *supra,* note 7, at 314-315.

[162] Provided the agent is a fiduciary, which is usually the case. Any tracing analysis in equity would also be an alternative to the analysis based on restitution for wrong. *Contra* Tjio, "Rethinking the Personal and Proprietary Distinction" [1993] SJLS 198, at 205, who argued that it is artificial to divide the the principal's property into the true price and the excess payment. But see *supra,* note 150.

had and received.[163] This would bring the common law position closer to equity.[164]

Tracing analysis would not be possible where the plaintiff had lost no property at all. One example is where the plaintiff is the provider of services, and its agent has received a commission for causing the plaintiff to accept a lower price for services rendered. Since there is no property in services, there is nothing for the plaintiff to trace. Another example is *AG* v *Reading*.[165] A military serviceman, who was the agent of the Crown, had taken substantial bribes while on a posting in the Egyptian customs. These bribes were confiscated by the British Crown. The British Crown suffered no loss. It was held that the agent could not get the money back from the Crown. In these cases, resort must be made to wrongful enrichment analysis.

VI. RE-THINKING THE OUTCOME OF TRACING

A. *Remedies for Equitable Tracing*

In equity the plaintiff can follow his property to anyone except the *bona fide* purchaser[166] for value without notice.[167] The defence is historically a jurisdictional one. The jurisdiction of equity is based on conscience and therefore the court of equity could not assert jurisdiction over anyone whose conscience was clear. Such a person had a clear conscience when he obtained a legal title for value without notice of the equities.[168] Equity would have no reason to interfere with common law ownership. Today, this defence has to take into account the exigencies of the commercial world.

The equitable proprietary claim is independent of the state of mind of the defendant. It is at the stage of the defence of *bona fide* purchase that the degree of knowledge of the defendant becomes relevant. The plaintiff has a charge over the identified assets[169] for repayment of the value of the property that is properly his. This remedy would be crucial in the case of

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[163] See the argument in the context of restitution for wrongs: Needham, "Recovering the Profits of Bribery" (1979) 95 LQR 536.

[164] See *supra,* note 128.

[165] [1951] AC 507.

[166] Whether there must be a purchase of legal interest or an equitable interest depends on whether the plaintiff has a subsisting equitable estate or a mere equity, respectively.

[167] Obviously the plaintiff cannot proceed against anyone who takes from such a purchaser, whether he takes with or without notice. The exception is when the fraudster takes from this purchaser. In that case, equity will not allow him to take advantage of his own wrong: Barrow's case: (1880) 14 Ch D 432, 445.

[168] *Pilcher* v *Rawlins* (1872) LR 7 Ch App 250.

[169] Even if they comprise mixed funds. Recently, courts have gone very far in allowing the plaintiff to trace to the general assets of the defendant: *Space Investments Ltd* v *Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 3 All ER 75; *Westdeutsche*

the plaintiff's insolvency, but it is only good for the assets which remain in the hands of the defendant.

Where the property has been dissipated, the plaintiff is left to a personal action for knowing receipt.[170] In contrast to the proprietary action, some knowledge on the part of the recipient is required. The requisite level of knowledge is much disputed.[171] An apparent distinction is drawn between commercial and non-commercial contexts. At least in commercial contexts, the balance of authorities in England supports some kind of improbity.[172] Negligence would probably not be enough. In *Eagle Trust SBC Securities,*[173] Vinelott J warned against taking the five levels of knowledge listed in *Baden Delveaux*[174] as rigid categories. He said that they were merely guidelines for the court to infer whether the defendant had been acting as an honest and reasonable person. *Re Montagu*[175] is authority that the same test applies to volunteers in non-commercial contexts.[176] However, the court would be more prepared to infer knowledge in such cases.[177] It is not logical to draw a line between commercial and

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Landesbank Girozentrale v *The Council of the London Borough of Islington;* (Unreported (1991 Folio No 825, 1991 Folio No 720), 12 February 1993); *Liggett* v *Kensington* [1993] 1 NZLR 257 (NZ CA). This comes close to the suggestion of Goff & Jones based on the swollen assets theory. The strict rules of identification are abjured, and the plaintiff is entitled to a share of the defendant's property so long as his general assets can be said to have been swollen by the plaintiff's input. See Goff & Jones, *supra,* note 38, at 80, especially at note 24.

[170] Receipt by agents, also known as ministerial receipts, is beyond the scope of this article.

[171] Birks, *supra,* note 37, at 223-229, summarises the latest developments in the debate.

[172] *Eagle Trust Plc* v SBC *Securities Ltd* [1992] 4 All ER 488; *Cowan de Groot Properties Ltd* v *Eagle Trust Plc* [1992] 4 All ER 700; *Polly Peck International* v *Asil Nadir and Ors* [1992] 2 Lloyd's Rep 238, 243. *Contra, El Ajou* v *Dollar Land Holdings, supra,* note 31, where Millet J suggested that if an honest and reasonable person would have made enquiries but the particular defendant did not, there can be liability. The difference may be more conceptual than real. Whereas Vinelott J in *SBC Securities* would infer knowledge in such circumstances, Millet J, it seems, would impute it. Knox J in *Cowan de Groot* uses the language of both inference and imputation. In New Zealand, negligence suffices for liability: *Powell* v *Thompson* [1991] 1 NZLR 597; *Equiticorp Industries Group Ltd* v *Hawkins* [1991] 3 NZLR 700.

[173] *Ibid.*

[174] [1983] BCLC 325: (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such enquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; and (v) knowledge of circumstances which would put an honest and reasonable man on enquiry. It is generally accepted that improbity covers the first three types.

[175] [1987] 2 WLR 1192.

[176] Volunteers will be rare in a commercial context. One significant exception is that banks taking deposits are considered volunteers both at law (*Lipkin Gorman, supra,* note 2) and in equity (*Hongkong and Shanghai Bank, supra,* note 26).

[177] *Cowan de Groot Properties Ltd* v *Eagle Trust Plc* [1992] 4 All ER 700, 760.

non-commercial transactions and have different rules for both. The reasoning in the cases[178] must be read as using commercial dealing as the motivation for setting a standard of liability, rather than to make a rule of law. The *Re Montagu* treatment of the volunteer in a non-commercial context suggests that this is the correct reading. The fact that the court may be more willing to find that the volunteer in a non-commercial context has the required knowledge[179] is not inconsistent with this unitary approach. The standards of honest and reasonable behaviour must take into account all the circumstances of the case, including the stresses of commerce.

The personal and proprietary claims were brought a step closer in *Polly Peck International Plc* v *Asil Nadir and Ors,*[180] where Scott LJ suggested that the same requirements must be established for both types of claim. This was in the context of a purchaser. However, the requirements in a claim against a volunteer would still differ depending on whether the claim is personal or proprietary.

B. *Remedies for Common Law Tracing*

To protect plaintiff's legal property, the common law uses the precept *nemo dat quod non habet* – the defendant cannot obtain a title that is any better than the person through whom he claims. He takes the property subject to any prior defect of title.

In the interest of security of transactions, however, several important exceptions have been developed to the *nemo dat* rule. In these cases, the plaintiff has to bear the risk of loss. One category is statutory, where the defendant takes free of any prior defect in title under defined circumstances. One important example is the holder in due course of a bill of exchange.[181] Other examples are, sale in market overt under the Sale of Goods Act,[182] and sale by mercantile agents under the Factors Act.[183] The most significant common law exception is that the recipient of money takes free of any defect of title where the money passes as currency.[184] Money passes as currency only where the recipient accepts it in good faith

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[178] *Supra,* note 172.
[179] *Supra,* note 177, at 760.
[180] [1992] 2 Lloyd's Rep 238, 247.
[181] Bills of Exchange Act (Cap 23, 1985 Ed).
[182] Sale of Goods Act 1979 (UK). This Act applies in Singapore by virtue of the First Schedule of the Application of English Law Act (No 35 of 1993).
[183] Factors Act 1889 (UK). See comments, *ibid.*
[184] *Miller* v *Race* (1758) 1 Burr 452 (97 ER 398); *Wookey* v *Pole* (1820) 4 B & Ald 1 (106 ER 839); *Foster* v *Green* (1862) 7 H & N 881 (158 ER 726).

and for value.[185] This rule is very important for the safe conduct of commerce.[186]

Where the plaintiff can establish title to the property in the defendant's hands, the plaintiff's remedies are controlled by the nature of the jurisdiction at common law. Unlike equity, the common law does not have the power to compel people to perform actions.[187] The common law dispenses personal remedies to vindicate the proprietary interest of the plaintiff. The common law protects the plaintiff's interests in two ways. First, the plaintiff can sue for money had and received. Secondly, subject to the identifiability of the asset, and requirements of tort law, the plaintiff can sue in tort.

The theoretical bases of the action for money had and received have been examined above.[188] Originally it would only lie for the receipt of *money*,[189] but later it was accepted that it could be used for things which were received as money.[190] Today it is also available for the receipt of pure intangibles like choses in action.[191] Liability is strict, and attaches upon the receipt of the money. Sir Nicholas Browne-Wilkinson VC (as he then was),

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[185] *Ibid.*

[186] Title at law can also be defeated by loss of identity in a mixture with other property. For chattels other than money, the common law has rules for determining any surviving ownership depending on the nature of the mixture: *supra,* note 113.

[187] For instance, the action in detinue was originally one for the specific recovery of chattels, but it did not take long for the court to realise that it was meaningless for the court to order the defendant to transfer the chattel, when it did not have the machinery to execute that particular order. So they gave the defendant the option of paying its market value: *Phillips* v *Jones* (1850) 15 QB 859, 867 (117 ER 687). The only machinery which the common law had was the execution of judgment by the sheriffs against the defendant's general assets. The courts therefore gave the defendant the option of returning the chattel or paying the market value of it. There are very limited actions in the common law that can allow the plaintiff to get his property back *in specie.* Reception is a self-help remedy, where the plaintiff is allowed to use reasonable force to get his property back. A rare recorded instance of this is *Taylor* v *Plumer* (1815) 3 M & S 562 (105 ER 721). This remedy is seldom used because it is unclear how much force can be used: Lawson, *Remedies of English Law* (2nd ed, 1980), at 28. Another limited remedy is replevin, an action known to the ancient common law and recorded by Coke (Col Litt 145b, cited in *Halsbury's Laws of England* (4th ed), vol 13, § 374, footnote 3). The plaintiff would ask for the return of identified chattel in the hands of the defendant, upon an undertaking to take out a legal action to determine their respective rights. In England, the action is generally used in cases of distress by landlords, and the action is taken by the tenant as an alternative to trespass to goods. In America, it is more generally used as a restitutionary remedy (Palmer, *The Law of Restitution* (1978), vol 1, §§ 1.1, 1.4). It lies for money as well, provided it can be specifically identified: *Dowdy* v *Calvi* 125 P 873 (1912).

[188] *Supra,* main text after note 129.

[189] *Nightingale* v *Devisme* (1770) 5 Burr 2589 (98 ER 361).

[190] Jackson, *The History of Quasi-Contract in English Law* (1936), at 79-80.

[191] See, *eg, Sumitomo Bank, supra,* note 125.

referring to the action for money had and received, said, "I am of the view that quasi-contractual obligations of this kind arise from the receipt of the money."[192] Millet J said, "the common law claim for money had and received is a personal and not a proprietary claim and the cause of action is complete when the money is received."[193]

Although liability is strict, the operation of the defence of purchaser in good faith must be considered. It is technically a defence but, nonetheless, it is up to the plaintiff to show that the defendant did not take in good faith.[194] To establish that the defendant has not taken free of the plaintiff's title, the plaintiff has to show that the defendant had known of the defect in the title, or had wilfully refused to make any inquiries in suspicious circumstances.[195] Negligence is not enough.

In tort, the actions are in detinue, and trover or conversion. They only lie for tangible property, and never for intangible property, like a debt. Tort actions are not as significant as the action for money had and received in today's context.[196]

Detinue, though abolished in England,[197] is still part of the common law of Singapore.[198] It is the form of action to take when there has been an unlawful failure to deliver up goods when demanded by the person who is entitled to possession. The plaintiff has no right to the return of the chattel.[199] The defendant has the option of returning the chattel or paying its market value.[200] Today, the High Court in England has a statutory discretion to order specific restitution.[201] Because of its historical origins,

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[192] *Re Jogia* [1988] 2 All ER 328, 338.

[193] *Agip (Africa) Ltd* v *Jackson* [1989] 3 WLR 1367, 1380. Millet J further said that the action for money had and received against subsequent transferees is only good for the value retained, not the value received (at 1384). This can only be correct if there had been a *bona fide* change of position: see *Lipkin Gorman, supra,* note 2.

[194] *King* v *Milsom* (1809) 2 Camp 7 (107 ER 1062); *Solomon* v *Bank of England* (1810) 13 East 136 (104 ER 319). The position is the same for negotiable instruments.

[195] *Raphael & Anor* v *Bank of England* (1855) 17 CB 167 (139 ER 1030); *London Joint Stock Bank* v *Simmons* [1892] AC 201. These cases dealt with negotiable instruments, but on this point there is no distinction between money and negotiable instruments: see *Miller* v *Race, supra,* note 184.

[196] With the possible exception of conversion of negotiable instruments.

[197] Torts (Interference with Goods) Act 1977 (UK), s 2(1).

[198] See, *eg, The Kota Sejarah* [1991] 1 MLJ 136.

[199] *General and Finance Facilities Ltd* v *Cook Cars (Romford) Ltd* [1963] 1 WLR 644.

[200] *Supra,* note 187.

[201] This power was given by s 78 of the Common Law Procedure Act 1854 (UK). It survives today as s 3(2) of the Torts (Interference with Goods Act) 1977 (UK). It is an interesting question whether the courts in Singapore have the same power. Up to 1964, the jurisdiction and powers of the High Court were linked to that in England. The Court of Judicature Act 1964 (Malaysia) broke the link. The problem is analogous to that faced by the court in respect of equitable damages in *Shiffon Creations (Singapore) Pte Ltd* v *Tong Lee*

detinue only lies for specifically identified chattels. It was necessary to ascertain the thing that was being detained. Hence, detinue only lies for money where it is kept in a bag or otherwise kept separate.

Trover was an action in trespass on the case, based on the fiction that the defendant had found the plaintiff's goods, and converted them to his use.[202] Today the fiction is dropped altogether, and the plaintiff simply sues in conversion. Conversion is a wrongful act of dealing with the goods in a manner inconsistent with the rights of the true owner, with an intention to deny the owner's right, or to assert a right that is inconsistent with the owner's right.[203] An intention to assert a right that happens to be inconsistent with the owner's rights is sufficient, because it is the inconsistency that forms the gist of the action. Hence, liability for conversion is strict, in the sense that ignorance of the true owner's rights is irrelevant.[204] The subject matter of conversion is specifically identified property, but the destruction of the plaintiff's title in his property, by causing the loss of identity of such property, can itself be an act of conversion.[205] Hence, the defendant who receives money, in an identifiable form, belonging to the plaintiff, and keeps it in a bundle, is liable in detinue.[206] But if the defendant has mixed the money, thus causing it to lose its identity, thereby destroying the plaintiff's title, then he cannot be liable for detinue, for he has nothing left to show,[207] but nonetheless he may have converted the money.

Co Pte Ltd [1988] 1 MLJ 363, [1991] 1 MLJ 65. *Quaere,* whether paragraph 14 of the First Schedule of the Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed) empowering the court to "grant all reliefs and remedies at law and in equity, including damages in addition to, or in substitution for, an injunction or specific performance" gives the court this power in detinue actions.

[202] That trover lies for money that is identified is well established: *Miller* v *Race* (1758) 1 Burr 452 (97 ER 398); *Hall* v *Dean* (1600) Cro Eliz 841 (78 ER 1068); *Draycott* v *Piot* (1601) Cro Eliz 818 (78 ER 1045); *Orton* v *Butler* (1822) 5 B & Ald 652 (106 ER 1329).

[203] Atkin LJ in *Lancashire and Yorkshire Railway Co* v *MacNicoll* (1918) 88 LJ KB 601, 605. One need not be an absolute owner to sue. One who is a rightful possessor or has a right to immediate possession can sue for conversion. See, *eg. The Winkfield* [1902] P 42; *Armory* v *Delamirie* (1722) 1 Stra 505 (93 ER 664). Where the subject matter of the action is a negotiable instrument, it is the person with the right to immediate possession who can sue in conversion.

[204] There is a limited exception for the conversion by a banker of a bill of exchange, in s 85, *Bills of Exchange Act* (Cap 23, 1985 Ed), where absence of negligence is a good defence.

[205] See authorities cited in *Halsbury's Laws of England* (4th ed), vol 45, § 1416, footnote 12. For example, the burning of a bill of exchange thereby destroying the owner's title is an act of conversion: *M'Kewen* v *Cotching* (1857) 27 LJ Ex 41.

[206] See Scott, "The 'Right' to Trace at Common Law" (1967) UWALR 463, and the authorities cited at 473-475.

[207] Unless the defendant is a bailee, where only loss without negligence is a defence. In England, the action of conversion is taken. See *Halsbury's Laws of England* (4th ed), vol 45, § 1422, at footnote 12.

It is not possible to assert title *retrospectively* to property in order to found an action in tort, because that would be to turn an innocent recipient into a wrongdoer.[208] It is for this reason that conversion did not lie in *Lipkin Gorman,*[209] and not that conversion *never* lies for money. On the other hand, where no retrospectivity is involved, one can sue in conversion or detinue even for exchange products.[210]

The availability of tort actions can pose a difficulty. Although the amount of damages in conversion or detinue may be the same as the debt claimed in money had and received, the action is *ex delicto,* and not in restitution. Hence restitutionary defences, including *bona fide* change of position, are irrelevant.[211] Even if the change of position defence is available, it is *ex hypothesi* not applicable to a wrongdoer.[212] The wrongdoer forfeits security of receipt. It may be said that the defendant has committed a wrong, but it must be remembered that it is a strict liability wrong.[213] Further, there may not be a defence of contributory negligence.[214] One way out is to utilise the argument made by Kurshid & Matthews that the common law exchange product rule is only effective for money and negotiable instruments.[215] But this may be an overkill, because the interposition of an ordinary chattel in a chain of substitutions will break the causal link. A more radical solution is to treat tracing as purely restitutionary, and jettison the tort rules altogether, leaving the plaintiff to a restitutionary money claim, subject to restitutionary defences, in all cases except in the situation where the plaintiff's property in a tangible asset is being followed according to rules of property law without recourse to causative rules, to the defendant. A distinction would then be drawn between following property, which can lead to tort claims, and following 'value', which only leads to

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[208] *Supra,* note 85.

[209] *Supra,* note 2. Lord Templeman said that conversion never lies for money "taken and received as *currency":* at 559 (emphasis added). Money did not pass as currency in that case, because of the nullity of the consideration. *Contra* Watts, "Unjust Enrichment and Misdirected Funds" (1991) 107 LQR 521.

[210] *Golightly* v *Reynolds* (1772) Lofft 88 (98 ER 547).

[211] *Contra* the approach of Lord Templeman in *Lipkin Gorman, supra,* note 2, especially at 567, who considered the claim for the converted draft as part of the claim for unjust enrichment. The other three judges agreed with Lord Goff that the conversion was a separate claim.

[212] Lord Goff thought that the *bona fide* change of position defence would not be available to wrongdoers: *Lipkin Gorman, supra,* note 2, at 580.

[213] But see *supra,* note 204.

[214] The common law position is unclear: *Lumsden & Co* v *Trustee Savings Bank* [1971] 1 Lloyd's Rep 114 suggests that it is available, but *contra Lloyds Bank* v *Savory* [1933] AC 201. The English position is that contributory negligence does not apply: s 11(1), Torts (Interference with Goods) Act 1977,

[215] *Supra,* note 81.

restitutionary claims. This may be justifiable because tort claims manifest a very strong protection for the proprietary rights of the owner, and may not be appropriate in restitutionary tracing.

Like equity, common law tracing can also give the plaintiff priority in insolvency, albeit in more limited circumstances. The general rule is that if the plaintiff cannot identify his property in the insolvent estate, he loses all priority. However, if a chattel is an identifiable product of the plaintiff's property, then the trustee in bankruptcy is personally liable for an action in tort.[216] There is a similar personal liability for money had and received if money is received in exchange for a traceable asset of the plaintiff after bankruptcy.[217]

C. *Rationalising the Outcome*

In summary, if –

(A) the plaintiff has traced his property to money received by a purchaser, then, subject to any applicable defences,

(1) in equity, he can make –

(a) a personal claim, if some knowledge can be shown, or

(b) a proprietary claim, if some knowledge can be shown,[218]

where the level of knowledge is probably the same in both cases;[219]

(2) at law, he can make –

(a) a personal claim in money had and received, if some knowledge can be shown, or

(b) a claim in tort, if money was in a bag or otherwise segregated, if some knowledge can be shown, subject to the rules of tort, and subject to the rule against retrospective exercise of the power to assert title,

where the level of knowledge is the same for both, since the same defence of purchaser in good faith is applicable. However, it is unclear if the level of knowledge is the same as that required in equity.

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[216] See Kurshid & Matthews, *supra,* note 21.

[217] *Scott* v *Surman* (1742) Willes 400, 404 (125 ER 1235). It is apparently possible to assert title to the exchange product even after bankruptcy.

[218] By way of the *bona fide* purchaser defence.

[219] *Polly Peck, supra,* note 180.

(B) If the plaintiff has traced his property to money received by a volunteer, then, subject to any applicable defences,

(1) in equity, he can make –

(a) a personal claim, if some knowledge can be shown, or

(b) a proprietary claim, without showing any knowledge;

(2) at law, he can make –

(a) a personal claim in money had and received, without showing any knowledge, or

(b) a claim in tort, without showing any knowledge, if money was in a bag or otherwise segregated, subject to the rules of tort, and subject to the rule against retrospective exercise of the power to assert title.

If the plaintiff traces to chattel instead of money in the hands of the defendant, the position in equity is the same. At common law, the plaintiff is left to his action in tort,[220] subject to requirements of identifiability, tort rules, the rule against retrospective exercise of the power to assert title, and the exceptions to the *nemo dat* rule.

The absence of symmetry is obvious. There is substantial similarity between (A)(1) and (A)(2). Some kind of dishonesty is probably desirable for those who have given value to protect their interest in the finality of transactions and uphold their confidence in the financial system.

Another problem lies with (B)(1)(a), the claim in equity against the volunteer. Essentially, the doctrinal debate is whether the liability for knowing receipt in equity is grounded in conscience or in unjust enrichment. The former school of thought contends that the liability attaches because the recipient is culpable in failing to prevent a loss to the trust. Hence, some kind of blameworthiness on the part of the recipient is required. The latter argues that liability arises simply because the recipient has been unjustly enriched at the expense of the *cestui que trust* by the receipt of trust property.[221] Fault of the recipient is therefore irrelevant, and liability should be strict.[222] The main argument is based

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[220] But see *supra,* main text surrounding note 190.

[221] Millet, *supra,* note 28, also in *El Ajou* v *Dollar Land Holdings, supra,* note 31, at 736; See also *Powell* v *Thompson, supra,* note 172, especially at 608.

[222] The main proponent of this position is Bilks: see, *eg,* Birks, *supra,* note 37; Birks, "Misdirected Funds Again" (1989) LQR 528; Birks, "Misdirected Funds" (1989) 105 LQR 352; Birks, *Restitution – The Future* (1992), Ch 2. See Millet, *supra,* note 28, but *contra* his judicial position in *Agip (Africa), supra,* note 29, and *El Ajou, supra,* note 31.

on symmetry with the common law, and the *Re Diplock*[223] line of equitable cases, which does not require fault on the recipient's part. This position is not necessarily harsh once the *bona fide* change of position defence is taken into account.[224] It is not impossible for equity to cross the barrier to strict liability. As Davies said:

> But a volunteer's conscience can be clear and his pocket also enriched. It by no means follows from a clear conscience at the time of receipt that no question arises of reversing an enrichment; with maybe change of circumstances as an available defence.[225]

Recognising unjust enrichment as the basis of receipt-based liability does suggest that knowing receipt as a fault-based cause of action is redundant, the work in equity being done by the *Re Diplock* type action. This suggestion is not novel.[226] But adjustments have to be made. First, there is the requirement in the *Re Diplock* cases that remedies be exhausted against the trustee before the plaintiff can proceed against subsequent recipients. Secondly, the relevance of fault in knowing receipt cases must be moved to the defences stage. This creates a problem with *Re Montagu,*[227] but it has been suggested by at least one writer that it was necessary to show dishonesty in the case only to overcome the limitation period.[228] Nevertheless, there are understandable fears about making this leap. It depends on the degree of confidence placed on the effectiveness of the restitutionary defences. Fault-based liability may be justifiable if there is genuine concern about security of receipt,[229] but it is only a blunt instrument. The way forward is to develop clear principles for the change of position defence.

Another dissimilarity arises out of the peculiar nature of law and equity in the way they protect proprietary interests. Equity allows the plaintiff

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[223] [1948] Ch 465. It may have been thought to be confined to the context of administration of a deceased estate: *Ministry of Health* v *Simpson* [1951] AC 251, but some cases have applied the doctrine outside that situation: *Re Leslie (J) Engineers Co Ltd (in liquidation)* [1976] 1 WLR 292; *Baker (GL) Ltd* v *Medway Building and Supplies Ltd* [1958] 1 WLR 1216.

[224] See *Lipkin Gorman, supra,* note 2 at 581 – though formulated for the common law action, it is intended to apply to equitable claims as well.

[225] Davies, "The Re-Awakening of Equity's Conscience", in *Equity and Contemporary Legal Developments* (Goldstein ed, 1992), at 60.

[226] Austin, "Constructive Trusts" in *Essays in Equity* (Finn ed, 1985). See also, Davies, *ibid.*

[227] *Supra,* note 175.

[228] See Birks, *supra,* note 37, at 228-229.

[229] *Contra* the approach of Brennan J in *David Securities Pty Ltd & Ors* v *Commonwealth Bank of Australia* (1993) 109 ALR 57, where the fear of too much restitution affecting finality of transactions led him to prefer fault-based restitutionary liability for payments under mistake of law.

to make a proprietary claim. The common law allows for actions in tort, where restitutionary defences do not seem to apply. These are consequences of using proprietary reasoning, treating the end product as belonging to the plaintiff. It is therefore important that there should be a strong reason for allowing tracing in the first place. They may be justifiable if the plaintiff had a proprietary interest in the first place, which he did not validly dispose of.

VII. CONCLUSION

The present law on tracing contains both proprietary and causative analysis. Common law tracing is more heavily weighted with proprietary elements, while equitable tracing is more causative. The equitable rules of identification are so causative that a restitutionary model possesses greater explanatory power. The common law rules are also causative, at least with respect to the exchange product rule. The recognition of the causative nature of these rules strongly suggests that the restitutionary analysis is the correct one. The traditional learning is that the common law is materialistic and cannot trace through mixtures. But it is not logical that common law and equity have different rules for identification. It is even more illogical to recognise some of the common law rules as causative, but not others. The cue can be taken from *Lipkin Gorman,*[230] and both actions should be developed along restitutionary principles, instead of developing one at the expense of the other.

The recognition that tracing rules are restitutionary does not mean that property rules are ignored entirely. Tracing is an extraordinary procedure, which can lead to remedies which treat the defendant's assets as if they belong to the plaintiff. It should only be available under stringent conditions. The suggestion here is that it should not be invoked if the transaction is such that the plaintiff's intention to pass property has not been vitiated to the extent that property has failed to pass. This is the common law position. It is an approach that is worth pursuing, although it may be uncertain today what factors will prevent property from passing,[231] and rules should be developed in this direction. It is an approach from which equity can learn, instead of relying on the vague conception of a fiduciary relationship.

The existence of a restitutionary personal remedy should not automatically entitle the plaintiff to trace. In the situation where an agent has received bribes and passed them on to a third party, a tracing analysis is possible and this is the better explanation of the common law claim in

[230] *Supra,* note 2.

[231] For example, for the law of mistaken payments, see in respect of common law, *supra,* note 52, and in respect of equity, *supra,* note 53.

Sumitomo Bank.[232] The tracing analysis provides an alternative to the reasoning based on restitution for wrong, without replacing it. The analysis is especially useful for the common law, which does not have a remedial proprietary jurisdiction.

Finally, fault should not be relevant in a restitutionary action that is based on receipt of property that is sufficiently causally related to the plaintiff's original property. In this area, the common law learning has been closer to the spirit of the principle of unjust enrichment. The fault requirement is symptomatic of a lack of confidence in restitutionary defences to protect the interests of the recipient. It is true that the defences lack sharp definition at the moment. The development of these defences must be high on the agenda for the law of restitution, in order to give greater effect to the principle of unjust enrichment.

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[232] *Supra,* note 125.

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