EQUITY, RESTITUTION AND THE PROPRIETARY RECOVERY OF VALUE

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I. INTRODUCTION

The language of property in the private law is increasingly used to phrase remedies for the recovery of value. Where value is the subject of a claim and the courts express judgement property terms, they are enabled to confer the increased measures of recovery which proprietary remedies allow. But it may be at the expense of authenticity in the traditional concept of property. Can the old rules for the granting of proprietary relief expand to accommodate the new sense of property? Or must resort be had to some result-driven rationale to justify what is now occurring, such as unjust enrichment? Perhaps it ought be acknowledged that in determining the proprietary consequences of an entitlement to value, the courts are really exercising a discretion.

Proprietary recovery of value refers to a certain measure of recovery of *non-specific* interests in property, usually money. It does not refer to the recovery of any property *in specie* and is not the enforcement of title to, or rights over, any particular thing or monetary denomination. In all cases it is obtained through the exercise of equitable rather than common law rights.

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Chase Manhattan Bank NA v Israel-British Bank (London) Ltd[1] is an example of the proprietary recovery of value. The plaintiff was a New York Bank which mistakenly paid some $US 2 million to a second bank in New York, for the credit of the defendant bank, which carried on business in London. Shortly after receiving the mistaken credit, the defendant petitioned the English court for a winding-up order. This had the effect of precluding any action based on the defendant's personal obligation to repay the mistaken credit. So the plaintiff bank argued that it had a property entitlement in equity equal to the value mistakenly transferred. This was said to arise from a constructive trust impressed in the circumstances of a mistaken payment. Goulding J upheld the argument, stating that the "general principles of equity as applied in England" required that, where money is paid by mistake, the person receiving the money then holds an equivalent sum on constructive trust for the payor.[2] The plaintiff was given an equitable property interest in the money, enabling it to gain priority over the unsecured creditors of the defendant.

Hewett v Court[3] is another example. In that case, a builder of prefabricated houses entered a contract with the Hewetts to build a house on his own premises and transport it to their land when built. By term of the contract, the builder was to retain legal title in the house until completion. The contract also provided that during the construction the Hewetts should pay instalments of the price. Before the house had been finished, but after several payments had been made, the builder became insolvent. At this, the Hewetts argued for an entitlement to a proprietary interest in the part-built house. They were faced otherwise with the prospect of being unsecured creditors of the builder for the return of their instalments. The proprietary interest argued for was an equity in the house on account of the Hewetts' value transferred, notwithstanding the contract terms which provided that the builder retained legal title at the relevant time. The High Court allowed this proprietary claim in the form of an equitable lien over the house, which was a court-imposed security for the amount of the contract indebtedness of the builder.

The proprietary remedies in both the *Chase Manhattan* and *Hewett* cases gave priority in insolvency to what were essentially personal claims of the plaintiffs. Proprietary consequences were added to the value claims by way of annexing the claims to suitable items of property - the money paid and the partially built house, respectively. What is notable is that the proprietary remedies were not based in the title to, or ownership characteristics of, either item of property.

Common law actions to vindicate the plaintiff's ownership of property will not be considered. This is so for two reasons. First, the remedies of common

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1 [1981] 1 Ch 105; see also *Neste Oy v Lloyds Bank PLC* [1983] 2 Lloyds Rep 658 at 665. I am indebted to Professor MA Neave for her comments on an earlier draft of this article.

2 *Ibid* at 118.

3 (1983) 149 CLR 639.

law are of nature personal, rather than proprietary, with the limited exception of detinue.[4] The actions of trespass and ejectment (from land) or conversion (of goods or instruments) result merely in judgements against individual defendants. No proprietary consequences follow for the property trespassed on or the goods converted. Common law actions for the recovery of value are of a similar nature. Value claims at law are sometimes described as quasi-contract, or what common lawyers call the 'indebitatus' or 'common' counts, particularly the action of money had and received.[5] The High Court was recently concerned with the proprietary consequences of this action in *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation.*[6] The ANZ bank had mistakenly paid the Westpac bank, for the credit of one of its customers. A claim for money had and received was brought for the recovery of the value passed by the mistaken payment. One of the ways Westpac sought to defend this claim was to allege that it must fail to the extent that the ANZ was unable to trace (or identify) money which Westpac accounted to its customer for. The Court said that the defence was based on a confusion, for

> ... notwithstanding that the grounds of the action for recovery are framed in the traditional words of trust or use and that contemporary legal principles of restitution or unjust enrichment can be equated with seminal notions of good conscience, *the action itself is not for the enforcement of a trust or for tracing or the recovery of specific money or property. It is a common law action for the recovery of the value of an unjust enrichment* and the fact that specific money or property received can no longer be identified in the hands of the recipient or traced into other specific property which he holds does not of itself constitute an answer in a category of case in which the law imposes a prima facie liability to make restitution.[7] [emphasis added]

In other words, the common law action of money had and received by the defendant under a mistake of fact is not of nature proprietary. In jurisdic nature it may instead be said to be equivalent to an award of damages as substitute for the non-performance of a legal obligation.[8] To this the late Professor Stoljar has stated a contrary thesis. He saw the historical basis of common counts which relate to money to be a right to specific property.[9] So a plaintiff, he says, who uses one of these counts to recover the value of money which has passed from him, claims possession of his own property.[10] It has been said this serves

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4 Note 94 *infra.*

5 Others include 'money paid', 'land sold and conveyed' and 'goods sold and delivered'.

6 (1988) 164 CLR 662.

7 *Ibid* at 673.

8 FH Lawson *The Remedies of English Law* (2nd ed, 1980) at p 14; MJ Tilbury *Civil Remedies Vol 1* (1st ed, 1990) at [1012].

9 SJ Stoljar *The Law of Quasi-Contract* (2nd ed, 1989) at pp 5-10.

10 When money is transferred in a vitiated transaction, it is without the plaintiff's consent to the passing of property in it, *ibid* at p 6; Cf *Bullen and Leake and Jacob's Precedents of Pleadings* (12th ed, 1975) at p 665, referring to the action of money had and received in

only to make an interesting point about the history of actions, leaving the function of property in the modern world unilluminated.[11]

The second reason why the common law is irrelevant to proprietary recovery of value is because of the pre-existing ownership which must be asserted in common law actions which vindicate property ownership. This is title, constituted before the defendant received the value claimed. In the *Hewett* facts, the claimants had no proprietary entitlement to an interest in the partially constructed house until their value claim arose. It was the claim itself which gave rise to the equity, not something which preceded it.[12] Other proprietary claims to value function similarly.

'Restitution' is another name for value claims in the private law, referring to both personal and proprietary recovery. Claims in restitution are sometimes expressed to be for the recovery of the value of a 'benefit', which constitutes an 'unjust enrichment' when received by the defendant. Commentators differ over the explanatory potential of the 'unjust enrichment' formula.[13] The debate need not concern us here. What is of importance is the fact that 'restitution' is a term to describe a claim for recovery of a benefit, where the benefit is objectified as property, otherwise than by title to the property.[14] Actions based on title are sometimes distinguished from restitution as being of a 'pure proprietary' nature.[15] The matter has been pithily put by Birks;

> passive preservation of existing title is not restitution, but active creation of interests to reverse unjust enrichment is.[16]

Restitution is hence a term to describe, almost exactly, the recovery of value phenomenon which is the subject of our inquiry. Whilst restitution jurisdictionally refers to both equity and the common law, to personal and

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words unchanged over several editions; 'the law will compel a person, who has received moneys which in equity belong to another to pay them over to that other'.

11 RJ Sutton "Quasi-Contract: Lost Cause or Modern Issue?" (1990) 7 *Otago LR* 334 at p 335.

12 So in *Hewett* note 3 *supra*, at p 58, Deane J described one of the defining characteristics of the remedy as the relationship between the value claim and the house: this relationship must be "such that the [builder] would be acting unconscientiously or unfairly if he were to dispose of the property ... without the consent of the [Hewetts]".

13 See S Hedley "Unjust Enrichment as the Basis of Restitution: An Overworked Concept" (1985) 5 *Legal Studies* 57 at pp 65-6; G Fridman and J McLeod *Restitution* (1st ed, 1982) at pp 34-8; cf Lord Goff and G Jones *The Law of Restitution* (3rd ed, 1986) ("Goff and Jones") at pp 12-16.

14 Goff and Jones at pp 12-30; P Birks *An Introduction to the Law of Restitution* (Revised ed, 1989) ("Birks *Introduction*") at pp 16-27; D Stevens "Restitution, Property, and Cause of Action in Unjust Enrichment" (1989) 39 *UTLR* 258 and 325 ("Stevens") at pp 288-9.

15 Goff and Jones at pp 60-3; also Birks *Introduction* at pp 70-3, who describes such claims as being in nature such as to 'anticipate' rather than 'reverse' a right to value.

16 Birks *Introduction* at p 70. Some commentators recoil at the boldness of such a formulation when applied to interests in property; see Stevens at pp 276-8.

proprietary remedies, for present purposes our interest is confined to proprietary remedies and to equity.

II. THE LANGUAGE OF PROPERTY AND ITS ADVANTAGES

Proprietary remedies for the recovery of value exist in equity, we have said, giving rise to certain advantages. Equity presently maintains a monopoly of these remedies in Australia,[17] justifying them in its forensic language through use of the concept of 'property'. In *Re Diplock* Lord Greene said:[18]

> [E]quity regards the rights of the equitable owner as being 'in effect rights of property' though not recognised as such by the Common Law.

A finding of equitable property has the practical effect of being the functional pass to advantage in the situations listed below. Or, it could be said that an assertion of equitable property is a 'pre-emptive conclusion' on the transactional allocation of risks and benefits.[19] The main advantages are:

A. PRIORITY IN BANKRUPTCY

Bankruptcy priority may be achieved through the obtaining of a proprietary remedy against an insolvent, which does not abate with the claims of the insolvent's general creditors.[20] The effect of the remedy is that the claimant takes an item of property *in specie* with its value undiminished, whilst the general creditors receive no more than a dividend on their personal claims. This is the most frequently sought after of the proprietary advantages.

In Australia, the *Bankruptcy Act* 1966 (Cth), as incorporated into the *Corporations Law*, provides by s 5(1) that the 'property of the bankrupt', which vests in the Official Trustee for distribution amongst the creditors,[21] is 'property divisible amongst the creditors of the bankrupt'. By s 116(2)(a) such divisible property specifically excludes 'property held by the bankrupt in trust for another person'. Or, only to the extent that the bankrupt is him or her self beneficially entitled, is his or her property divisible amongst the creditors.[22]

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17 Observed by W Gummow "Unjust Enrichment, Restitution and Proprietary Remedies" in P Finn (ed) *Essays on Restitution* (1990) at p 85.

18 [1949] Ch 465 (CA) at 524, referring to the reasoning of Lord Parker in *Sinclair v Brougham* [1914] AC 398 at 442.

19 Stevens at pp 289-90.

20 See Birks *Introduction* at p 377 and Stevens at pp 290-2.

21 Section 58(1).

22 Paraphrasing the words of the Australian Law Reform Commission's recommendation in the 'General Insolvency Inquiry Report No 45' (1988) at [870]. No change to the law is proposed by the ALRC.

The advantage is illustrated by both the proprietary value decisions we have noted. In *Hewett v Court*,[23] the Hewetts were allowed an equitable lien over a partially constructed house as a security for recovery of their value in full in priority to the claims of general creditors. In *Chase Manhattan*[24] the paying bank with the benefit of the constructive trust recovered the mistakenly paid sum intact and unabated from the payee's liquidator, as its own property. *Cadorange Pty Ltd (in liq) v Tanga Holdings Pty Ltd*[25] was similar to *Hewett* and also involved an equitable charge. This was over land as security for a claim made by another company to secure a restitutionary or value entitlement.

B. RECOVERY OF INCREASES IN THE VALUE OF THE VALUE CLAIMED

This incident of equitable 'ownership' treats the benefit of appreciation in value, of value claimed as a proprietary right of the person with the value entitlement. In *Scott v Scott*,[26] when a trustee used trust money to make a wrongful purchase of land, the beneficiaries succeeded in a claim to (a proportion of) the increased value of the land purchased. They were not restricted to recovery of the money wrongfully taken.

C. WHERE THE PROCEEDING ON THE PERSONAL CLAIM IS BARRED

The fact that the proprietary claim very often is an alternative claim to a personal one means that it may not be liable to the same invalidities and prescriptions that affect the personal action. A statute of limitation may not apply to the proprietary claim.[27]

An illustration of this advantage is *Sinclair v Brougham*.[28] In that case persons had for many years deposited sums in and made withdrawals from what was widely known as a 'working man's bank'. Eventually the bank became insolvent, at which time it was first discovered that the 'bank' had never possessed the legal capacity to carry on a banking business. Legal proceedings were commenced to determine how the considerable shortfall in the bank's assets should be shared. In this connection the question arose, should the depositors be accorded status as ordinary creditors? Or should their claims be

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23 Note 3 *supra*.

24 Note 1 *supra*.

25 (1990) 20 NSWLR 26; a disturbing decision. See further at note 47 *infra*.

26 (1962) 109 CLR 649; *Re Tilley's Will Trusts* [1967] 1 Ch 1179 at 1189 (a point which counsel for the defendant conceded); see also dicta by Jessel MR in *Re Hallett's Estate* (1880) 13 CH D 696 at 709; Birks *Introduction* at p 387 and Stevens at pp 292-4.

27 See *Novick Estate v Lachuk Estate* (1989) 58 DLR (4th) 185; M Litman "Recent Developments in the Law of Unjust Enrichments: Survival of Actions, Accounting and Beyond" (1989) 2 *Estates and Trusts Journal* 287 at pp 289-93; J Eichengrun "The Statute of Limitations for Constructive Trusts in North Carolina" (1986) 21 *Wakes Forest L Rev* 613.

28 Note 18 *supra*.

postponed to all other creditors and the bank shareholders, because the contracts of deposit were vitiated by the bank's incapacity? In the then state of the law, incapacity of the bank meant that the depositors could not succeed in a common law action for money had and received. The ultra vires transactions were said to create no debt at law or in equity and base no implied promise. The Court of Appeal decided against the depositors for these reasons.[29] But the House of Lords vindicated the depositors' rights, through the use of equitable property rights inferred from their individual deposits. We shall see later that there was no unanimity amongst the Lords deciding this case on how the rights of property were to be conceived.[30] This may suggest that property rights were being used *instrumentally*, in order to outflank the ultra vires rule, rather than uphold any other entitlement.

Lipkin Gorman v Karpnale[31] at the penultimate stage of appeal is another (somewhat flawed) illustration of the advantage. A fraudulent solicitor had misappropriated and gambled away trust money of the firm of which he was a member. His partner sought to recover it by the (non-proprietary) legal value claim of money had and received from the casino where the money was spent. The Court of Appeal did not allow the action upon it being found that the casino had supplied good consideration for the money, in the form of gambling chips. A proprietary value claim in equity was then pursued against the bank, whose failure to make inquiries was said to have made it liable to the firm as constructive trustee.

D. THE ADVANTAGE OF AN ADDITIONAL DEFENDANT TO SUE

A person entitled to a proprietary remedy can normally follow the value of its subject into the hands of a person who possesses it subsequently to the original taker. Hence the later possessors are liable to suit in addition to the taker. This was exemplified in the Canadian case of *B.C. Teachers' Credit Union v Betterley*.[32] A rogue had misappropriated $200,000 of the plaintiff's funds, bought a house in his wife's name with part of the money, then disappeared. The plaintiff succeeded in a claim against the wife on the basis of its equitable proprietary interest in the exchange-product of its money, the house.

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29 [1912] 2 Ch 183.

30 Notes 192-200 *infra*.

31 [1989] 1 WLR 1340 (CA) at 1349-50, per May LJ, at 1364-5, per Parker LJ, Nicholls LJ dissenting; the flaw is in the fact that the equitable remedy was not in this case an alternative right against the same defendant. This was reversed by the House of Lords, [1991] 3 WLR 10, which allowed the firm's money had and received action. The firm's proprietary claim against the bank, unsuccessful in the Court of Appeal, was curiously not appealed.

32 (1976) 61 DLR (3d) 335 and see *Banque Belge v Hambrouck* [1921] 1 KB 221 (CA) and Stevens at p 294.

III. THE FORM OF THE REMEDY

Forms of the equitable proprietary remedies differ, the appropriateness of each depending on the nature of the dispute and the objectives of the litigation.[33] We shall examine what are the four main forms of proprietary remedies in value cases: the lien, the constructive trust, rescission and subrogation, after looking first at the general considerations of 'equivalence' and 'money'.

Equivalence in a remedy is desirable so that it can be said to 'match' or be equivalent to the value of the claim. Value rather than title claims to property raise this consideration peculiarly. For there is often not any direct link between the claim and the value of an item of specific property. What is implied by equivalence or value-matching is that the value subtracted from the defendant should equal the amount of the value claimed. No problems of this kind arose in *Hewett v Court*[34] (the equitable security being limited to the amount of the advance payments) or in the *Chase Manhattan* case[35] (a constructive trust of an equivalent sum to that mistakenly paid being implied). But what if, on the *Hewett* facts, an interest under a constructive trust of the whole incomplete structure had been given to the Hewetts? Then the value subtracted from the defendant might be excessive and the remedy inappropriate, depending on whether the advance payments equalled the labour and materials put into the house. Or what if the building contract were rescinded and the Hewetts were given a right to prove in the builder's bankruptcy for all the payments that they ever made? In that case the value subtracted from the builder (and his other creditors) will always be less, and sometimes substantially less than the value of the claim, depending on the extent of the bankruptcy shortfall.

Money is the subject of the majority of proprietary value claims. The money claimant seeks to recover the equivalent value of a money benefit earlier conferred on the defendant. He or she does not attempt to recover the same instruments, notes or coins. What must be distinguished are value claims to money as a medium of exchange, on the one hand, and 'pure proprietary' claims to notes or coins as the units of exchange, on the other. In general, the 'pure proprietary' rules for transfer of legal property in units which have monetary value are the same as those for the transfer of legal property in chattels. Legal property passes when the owner of the unit intends it to pass to another, who receives it with the same intention. This is subject to invalidation of the

33 Cf. Gummow, note 17 *supra* at p 71.

34 Note 3 *supra*.

35 Note 1 *supra*.

transferor's intention to transfer by a vitiating factor such as mistake or duress.[36] Delivery to the defendant is the time when money transferred normally becomes 'currency' and legal title passes.[37] 'Pure proprietary' claims to money are unusual. For in order to maintain the claims as actions at law, specific identifiability of the subject monetary units is needed at the outset and, as is often observed, money has no 'earmark' in the hands of the wrongdoer (or anyone else).[38]

A person claiming the value of money transferred is usually one who has voluntarily departed with his or her legal title to the units of exchange. A consensual transfer will have occurred, which the transferor wishes to have undone. Both the value claimant in equity and the value claimant at law need to attract equitable jurisdiction if the proprietary advantages are to be obtained. Recourse to equity will also be needed where legal property in the money has not passed, but the money is unreachable by the techniques of legal tracing.[39]

To make the first of these points again, assume that specific notes and coins are stolen from you by a violent rogue in the street. You were his involuntary and unconsenting victim. The rogue shortly after gave the notes and coins to a beggar near the scene of the crime. This beggar thereupon mixes the receipt with what remains of his takings for the previous year. At law, you will now be unable to identify, hence follow the notes and coins through to their final destination in the beggar's hands.[40] At this time the police inform you of their inability to bring the rogue to justice. Your request of the beggar that he return your money is ignored. Instead, you hear of his decision to wager the money at long odds on the Melbourne Cup. Assume further that November comes and the race is run. Fortune turns for the beggar and his unknown horse comes home in first place. He collects substantial winnings from the bet made with your money. Your lawyer may at this advise you of a proprietary advantage which will enhance your claim against the beggar for recovery of the stolen

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36 *Illich v R* (1987) 162 CLR 110 at 117 per Gibbs CJ, at 129 per Wilson and Dawson JJ, at 138 per Brennan J; *Miller v Race* (1758) 1 Burr 453 at 457; 97 ER 398 at 401, per Lord Mansfield; *Banque Belge v Hambrouck* note 32 *supra* at 330, per Scrutton LJ.

37 Cf. *Illich v R*, note 36 *supra* at 138 per Brennan J.

38 FA Mann *The Legal Aspect of Money* (4th ed, 1982) at pp 10-11 "an action for trover, or detinue, does not lie for money at large, such as a sum of money, but only for specific notes or coins, so that in practice the plaintiff must be able to identify them". The view of Bankes LJ in *Banque Belge v Hambrouck*, note 32 *supra* at 326-7, is to the contrary.

39 See note 96 *infra*.

40 Compare what is said in support of this proposition by Millett in "Tracing the Proceeds of Fraud" (1991) 107 *LQR* 71, with dicta of Bankes LJ in *Banque Belge v Hambrouck*, note 32 *supra*, at 327, allowing legal recovery in a similar example. What seems to be the view of the other two members of the Court of Appeal in the *Banque Belge* case and perhaps the balance of authority accords with what is suggested here.

money. Pursuant to the second of the proprietary advantages set out above,[41] you might try to strip the beggar of his winnings. To anticipate what is discussed below, your claim will be of nature equitable and may be maintained if the money (thing or *locus of value*), is identifiable and the beggar (defendant or final recipient) gave no consideration, was in bad faith, or took with notice of your claim.[42]

A. EQUITABLE LIEN (OR CHARGE)[43]

The proprietary remedy which best reflects the nature of a value claim is the lien. It is not a property interest *in* a thing, nor can it found a right to recover the thing from the defendant. Rather it is an interest *over* a thing or fund of money, like a mortgage. Apart from framing an entitlement to value, an equitable lien may arise from the relationship of the parties, the conduct of one or other of the parties, or by express agreement.[44] As appropriate in each of these cases, the court will order judicial sale of the subject property.[45]

In *Cadorange Pty Ltd v Tanga Holdings Pty Ltd*[46] the plaintiff claimed, amongst other things, that the defendant had been unjustly enriched at its expense. This was said to result from the plaintiff erecting a building on the land of the defendant which thereby increased in value. By the time of the action, the defendant was a company in liquidation and the land had been sold. The plaintiff claimed an equitable lien over the relevant proceeds of sale of the land, to the extent of the increment in value attributable to the claimant's activities. Cadorange could not specifically locate its value, which was part of a larger mass with which the value claimed bore no equivalence. Yet the relation between the claim and its locus in real property was the point of the litigation: obtaining the advantage of priority in bankruptcy. Both the value claim and lien were allowed by Young J.[47]

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41 At note 26 *supra*.

42 *Re Diplock*, [1948] 1 Ch 465, at 529-39, judgment of the Court; RH Maudsley "Proprietary Remedies for the Recovery of Money" (1959) 75 *LQR* 234 at pp 238-42; FA Mann, note 38 *supra* at p 11.

43 It is maintained by EI Sykes in *The Law of Securities* (4th ed, 1986) at p 199, that equitable liens and equitable charges are quite distinct and that only the former arise by operation of law. However recent authority uses the terms interchangeably - eg *Hewett v Court*, note 3 *supra* at 650, per Murphy J.

44 AH Silvertown, *The Law of Lien* (1st ed, 1988) at p 8.

45 *Pomeroy's Equity Jurisprudence* (1941) at [165]. This was the remedy awarded in *Hewett v Court*, note 3 *supra*.

46 Note 25 *supra*.

47 At 38-9. Despite discussion of the Birks *Introduction* and stated reliance on restitutionary principle (pp 33-5), the judgment seemed to be influenced by the non-restitutionary consideration of what the plaintiff company might have *expected* (pp 36-40). Rather

A less satisfactory example from the perspective of a litigant is *Lofts v McDonald*.[48]

A building contractor agreed with the claimant to build a house for him if a building permit could be obtained. The claimant paid the builder a deposit of $1600, to be held in trust until that event. Wrongly, the builder paid the deposit into his overdrawn bank account, whereupon a credit balance of $8.42 emerged. To this balance the builder subsequently added more than $1600 of other moneys; but before the permit was forthcoming, he died insolvent. The claimant argued an entitlement to an equitable lien and bankruptcy priority to facilitate the recovery of his deposit out of the balance in the account at the date of the builder's death. It was held that the claimant did have such a secured right, but only to the extent that the money could be *identified* as his. By application of the traditional rules this equalled a sum of only $8.42.[49] Although the claimant was not required to locate his claim in a specific asset or thing and was permitted to proceed against a larger mixed fund, traditional identification rules were applied to find the locus of value. The mixed fund corresponded to only a small part of the value claimed and the claim effectively failed. For various reasons, *Lofts v McDonald* might well be decided differently today.[50]

B. RESCISSION

This remedy, and the constructive trust which follows it, will in value claims allow claimants to recover enriching money or things *in specie*. 'Rescission' here refers to the equitable right of a party to set aside a transaction which transfers things and have re-vested in him the specific things transferred.[51] If what is to be rescinded is a contractual exchange, the right to rescind may be lost if the contracting parties cannot be practically restored to their original position before contracting.[52] In a sense, rescission is not a remedy ordered by the court at all. It is rather the exercise by a party of an option to treat a

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disquieteningly, both companies were controlled by the same individual and in the result the creditors of one company were postponed to the claim of the other.

48 [1974] 3 ALR 404 (Qld SC); see also *Scott v Scott*, note 26 *supra*; *Sinclair v Brougham*, note 18 *supra*, esp. at 441-2 per Lord Parker; *Re Diplock*, note 42 *supra*; see the (counter-factual) reasoning of Lord Templeman in *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 3 All ER 75 at 77.

49 For a discussion of the identification rules, see the text below at notes 123-39.

50 Contemporary courts are less likely to be so formalistic and more inclined to give effect to the claimant's appropriation, see note 75 *infra*; the Law Reform Commission of British Columbia "Report on Competing Rights to Mingled Property: Tracing and the Rule in Clayton's case" (1983) at p 52, makes recommendation to the contrary of how the identification rules were interpreted.

51 *Snell's Principle of Equity*, (27th ed, 1973) at p 600; Birks *Introduction* at pp 67-8.

52 *Spence v Crawford* [1939] 3 All ER 271 (HL); *Newbigging v Adam* (1886) 34 Ch D 582.

voidable transaction as void.[53] Yet rescission is appropriately dealt with under this heading for the reason that it must often be sought prior to, or as part of, other proprietary value remedies.[54]

Many rescissions in equity arise as a consequence of the representations which induce contracts proving to be false. Such rescissions include claims for the return of money paid under contracts voidable for the defendant's misrepresentation. In *Cuwen v Yan Yean Land Co*[55] the claimant purchased shares in a newly formed land acquisition company, after being induced by the defendant's representation that he and others were also taking shares. Instead, the defendant and others were using the company as a vehicle for the sale of their land. On the claimant's application, the court ordered that the defendant repay to him the purchase price for the shares he paid to the company. The claimant received his transferred value back in the same measure as he was parted from it. Interposition of a company between the claimant and the defendant was ignored. If the value changes its form (eg money transferred is used to buy other property), equity may in some circumstances still allow rescission, depending upon the complication of accounts and inquiries needed to do justice between the parties.[56]

C. CONSTRUCTIVE TRUST

In proprietary terms, this remedy performs a generalised restitutionary function. A defendant is obliged to hold the undivided beneficial interest in a sum of money or a thing he has received in trust for the plaintiff. As the constructive trust has the effect of providing for specific recovery of a particular fund or thing, a claim for it should for equivalence reasons be made only if the enrichment to be reversed is equal in value to a particular locus held by the defendant. Sometimes this is just the case. Consider again the facts in *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd.*[57] The constructive trust which Goulding J ordered showed fairly exact equivalence between the (monetary) value of the enrichment passed to the defendant and the value of the proprietary remedy sought.[58]

The existence of such equivalences in a not inconsiderable number of cases may have been the inspiration of the authors of the American Law Institute *Restatement of Restitution.* They stated the general proposition that the constructive trust arises

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53 See *Johnson v Agnew* [1980] AC 367, at 392-3.

54 *Pomeroy's Equity Jurisprudence*, note 45 *supra* at [112].

55 (1891) 17 VLR 745 (FC); also *Robinson v Abbott* [1893] 20 VLR 346.

56 And not depending on identification, see *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218; HG Hanbury and RH Maudsley, *Modern Equity* (12th ed, 1985) at p 790.

57 Note 1 *supra.*

58 As also it did in *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488 at 496 per Kearney J, discussed at note 71 *infra.*

> [W]here a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.[59]

Equivalence between the value of the claim and the value of its locus is assumed by this formula. Or, in restitutionary terminology, what is assumed is an equivalence between the value of an enrichment conferred by (or at the expense of) the claimant, and the particular benefit received by the defendant. This assumption is often unjustified. The locus of value or 'thing' possessed by the defendant then becomes resistant to being specifically attached to the value claim, implying that the claimant has not sought an appropriate proprietary remedy.

Proprietary recovery value claims should not be limited to those cases where the constructive trust remedy happens to fit. Conversely, the constructive trust should not be conceived to exist only where it can be explained in proprietary value terms. Judicial inference of constructive trusts need not correspond to the measure of any value transferred and, indeed, no transfer of value need occur at all.[60] The enrichment, if there is any, may be in the defendant's hands as a consequence of his own efforts entirely,[61] or partially,[62] and not the result of any injustice to the claimant. Equivalence may be entirely absent and irrelevant in the award of a constructive trust. Notwithstanding this, the language of value claims and unjust enrichment is used to justify the award of constructive trusts in what seems to the writer to be a far larger than appropriate number of cases.[63]

These issues were judicially considered in the *Hospital Products* litigation.[64] A New York dealer for a United States surgical goods manufacturer entered an agreement with the manufacturer USSC for the dealer to become an exclusive distributor in Australia of its surgical suture products. These were marketed under the name 'Auto Suture'. He had previously visited Australia and, upon discovering that the products were not patented in this country, took steps to register the name 'Autosuture'. He also found out the technical means of manufacturing a product competitive with Auto Suture. The dealer developed a substantial Australian distributorship business in the name of HPI, a company

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59 *Restatement of Restitution*, American Law Institute (1937), at [160].

60 Gummow note 17 *supra*, at pp 69-71 makes this point; he refers to contribution, marshalling and relief against penalties as alternative bases for constructive trusts.

61 *Boardman v Phipps* [1967] 2 AC 46; *Consul Developments Pty Ltd v DPC Estates* (1975) 132 CLR 373.

62 *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137.

63 As well as the cases in note 64 *infra*, see comments on the US and Canadian authorities referred to at notes 156-64 *infra*.

64 (1984) 156 CLR 41, reversing *United States Surgical Corporation v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157 (NSW Court of Appeal), which varied [1982] NSWLR 766 (McLelland J, at first instance).

of his own. HPI eventually manufactured a large proportion of the surgical suture products it sold and retained the profits thereon entirely. In consequence USSC sued for, amongst other things, a declaration that all the relevant assets of the dealer, including the business of HPI, were held on constructive trust for it. At first instance, McLelland J found that a fiduciary relationship existed between the dealer, HPI and USSC, that the dealer and HPI had acted in breach of it, and that they had to make a personal account of profits obtained thereby. These profits were to be computed on the basis that the breach of duty had given HPI a 'headstart' in the business it conducted. On the dealer's and HPI's appeal, the NSW Court of Appeal declared that USSC was entitled to proprietary relief by way of constructive trust over the whole business of HPI obtained at its expense.[65] Or, all the assets of HPI as at the termination of the distributorship.

When *Hospital Products* reached the High Court, it was held by Gibbs CJ, Wilson and Dawson JJ that, as the dealer and HPI owed no fiduciary duty, USSC was entitled to no proprietary relief. Instead, it was entitled to recover only in damages for breach of the distributorship agreement.[66] The majority judgment left the value of HPI's business untouched. In dissent, Mason J held that the dealer had breached a limited fiduciary duty and concurred in the personal recovery ordered at first instance.[67] Deane J agreed with Mason J, but based his concurrence with McLelland J on equitable relief against fraud and not breach of fiduciary duty.[68]

So Mason J in that case concurred in the personal liability for breach of fiduciary duty ordered at first instance. In reaching that conclusion he had this to say about the possibility of a constructive trust based on the dealer's fraud:

> The reasons which I have already given for rejecting a claim to a constructive trust for breach of fiduciary duty apply with equal force to the [fraud ground]. This is because common to both claims is the notion that the assets of HPI represent the material profit or benefit taken, in one case in breach of fiduciary duty, in the other case by means of fraud. The answer in each case is that the assets of HPI do not represent, and substantially exceed, any profit or benefit obtained by HPI in breach of its duty or by means of fraud. It is not, and could not be suggested, that in equity restitutionary relief for fraud involving actual dishonesty differs in material respects from restitutionary relief in other species of equitable fraud not involving actual dishonesty. In every case the wrongdoer's underlying liability is to account for the gain he has made.[69]

Accordingly, Mason J decided that an equitable (personal) obligation to account best matched the wrong to be remedied and not a constructive trust. For the wrong bespoke a wrongful obtaining of value, rather than the

65 In the Court of Appeal *ibid* at 264.

66 In the High Court *ibid* at 72-6 per Gibbs CJ, at 116-19 per Wilson J and at 146-50 per Dawson J.

67 *Ibid* at 11-14.

68 *Ibid* at 122-5.

69 *Ibid* at 115.

misappropriation of the title to specifically returnable things representing that value.

To further make the point, Mason J referred to what he described as the 'striking' example of *Timber Engineering Co Pty Ltd v Anderson.*[70] The case was in some ways similar to *Hospital Products.* A fraudulent employee had diverted business from his employer to a company owned and operated by himself and certain others. Upon finding fraud and breach of fiduciary duty, Kearney J ordered that the whole of the business of the company was held on constructive trust for the employer. It was necessary to the decision, however, and this is the point that distinguishes it from *Hospital Products*, that the business of the company represented the measure of value obtained by the wrong.[71] So it might be said of cases in this area that sometimes the locus of value (or thing) will equal the value of the enrichment.[72] Sometimes it will not.[73] Sometimes it will greatly exceed the value of the enrichment.[74] The constructive trust is an appropriate value remedy only in the first eventuality.

A restitutionary constructive trust ordered in a value claim may also arise by way of the court giving effect to an *appropriation* of money or a thing to the claimant's entitlement. The process called 'unmixing' is an instance of this. Where a defendant appropriates a formerly mixed thing (especially money) to meet the plaintiff's claim, if and when that claim is made, he impresses a constructive trust on what he appropriates.[75] The same idea was exemplified in the court giving effect to the appropriation of a different party in *Barclays Bank v Quistclose Investments Ltd.*[76] A beneficial interest was there founded on the expressed intention of the claimant, when it transferred property to the defendant. In consequence, the proposition is said to be established that where A pays money to B for a specific purpose, B does not acquire an absolute interest in the money; B becomes subject to an equitable obligation to apply the

70 Note 58 *supra.*

71 *Id* at 496, Kearney J having found that every valuable opportunity which the wrongdoer's company received, all its resources and even the time of its employees was provided by the employer.

72 *Timber Engineering Co Pty Ltd v Anderson,* note 58 *supra*; *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd,* note 1 *supra.*

73 *Hospital Products Ltd v United States Surgical Corporation,* note 64 *supra.*

74 *Re Diplock,* note 42 *supra* at 545-64 - entitlement traced to building improvements made to Guy's Hospital.

75 Cf *James Roscoe (Bolton) Ltd v Winder* [1915] 1 Ch 62 at 67 per Sargant J; *Re Stillman and Wilson* (1950) 15 ABC 68 at 72 per Clyne J; in *Re Diplock,* note 42 *supra* at 551-2, it seemed that the National Institution for the Deaf had 'unmixed' some of the moneys which had been wrongly paid to it, with the proprietary liability consequences we have noted. However, on receiving further evidence of the transaction (at 559-64), the Court reversed this part of its order.

76 [1970] AC 567.

money for that purpose.[77] The purpose of whichever party, claimant or defendant, is effectuated by the court through the remedial imposition of a resulting or constructive trust.

D. SUBROGATION

This equitable remedy is like rescission in being not of itself proprietary, but leading in many cases to a plaintiff becoming entitled to property interests at law, or equitable proprietary relief. It is a kind of device, whereby the courts transfer usually common law rights from one person to another as justice requires.[78]

In value claims, its operation has been likened to tracing.[79] What is by subrogation 'traced' (or followed) is a debt or other obligation discharged. Birks maintains that the value which bases the claim survives in the form of a discharged mortgage or security.[80] Further to the tracing metaphor, the claimant's recovery is said by Birks to depend on the claimant having a sufficient 'proprietary basis' in the locus of value. If he has such a basis, value in a discharged obligation can be followed through substituted forms and into different hands. This is a proprietary rationale for what will often be a remedy with only personal consequences in litigation. The Birks theory should perhaps be treated as a curiosity, much as the proprietary theory or Professor Stoljar for money counts.[81] In the next paragraph we shall examine how subrogation may be proprietary in the course of practical litigation.

Subrogation is frequently described by the metaphor that the claimant is enabled to 'stand in the shoes' of the person from whom the remedy is sought.[82] If those rights are of a proprietary nature, and the claimant is otherwise entitled, then equity will enable him or her to succeed to the rights and all the proprietary advantages which they entail. Usually, where subrogation is claimed, the assets of the claimant have been used in the discharge of an obligation owed by the defendant to a third party. Here it may be just that on account of discharging the obligation, the claimant is allowed to exercise rights against the defendant

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77 Stated in A Arora "The Bank's Liability as Constructive Trustee" (1990) *J Bus L* 217 at p 226; the proposition has attracted favourable comment and acceptance in Australia: LJ Priestley "The Romalpa Clause and the Quistclose Trust" in P Finn (ed) *Equity and Commercial Relationships* (1987) at pp 235-6; *Re Groom* (1977) 16 ALR 278; *Rose v Rose* (1986) 7 NSWLR 679; *Re Veli* (1988) 18 FCR 204.

78 Cf the words of Lord Diplock in *Orakpo v Manson Investments Ltd* [1978] AC 95 at 104, on how the rights transferred may be still existing, fulfilled or only hypothetical. See also the text at note 92 *infra*.

79 See Birks *Introduction* at p 96.

80 Birks *Introduction* at pp 94-5 and p 390; see, eg the text below at notes 92 and 93 *infra*.

81 Note 9 *supra*.

82 Eg *Blackburn Building Society v Cunliffe Brooks & Co* (1882) 22 C D 61 at 71 per Lord Selborne (CA).

owed. That obligation may have been a debt or other contractual liability, or a tortious duty to pay compensation for loss caused. If the obligation was or could have been secured by a proprietary interest, the claimant may succeed to that interest if it is just and equitable that he or she should. Three parties are involved: the two between whom the primary obligation subsisted and a claimant who claims to have discharged that obligation, for which he was liable in some other manner.[83]

The use of subrogation in the value claims with which we are concerned is particularly to obtain the proprietary advantages. How this is done is best illustrated by example. Although the remedy is undoubtably broader,[84] the following are established routes to subrogatory relief.

(i) Contracts of guarantee

In *Everingham v Waddell*,[85] a surety paid out in full a promissory note, the payment of which by the party primarily liable he had guaranteed. He was held thereupon to be entitled to have assigned to him securities, a bill of exchange and the benefit of a stock mortgage, which the party entitled to payment on the note held from the debtor. In this way he became a secured creditor through the use of the subrogation remedy in combination with an unsecured value entitlement. Subrogation of this type is provided by statute,[86] said to be declaratory of an equitable principle which continues to apply outside the terms of the enacted words.[87]

(ii) Bills of exchange

A party assumes a liability 'secondary' to parties who accept a bill of exchange and their sureties by virtue of having drawn or endorsed the bill.

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83 Goff and Jones at pp 525-7, the plaintiff is usually liable secondarily, except in insurance situations referred to below. If he or she acts officiously in discharging the obligation of another, then no entitlement to be subrogated will arise: *Owen v Tait* [1976] 1 QB 402; cf Goff and Jones at pp 529-31.

84 In *Orakpo v Manson Investments Ltd*, note 78 *supra*, at 110 Lord Salmon said that the right is to a remedy which should be available, "when the courts are satisfied that reason and justice demand that it should be"; see also *Morganite Ceramic Fibres Pty Ltd v Sola Basic Australia Ltd* [1987] 11 NSWLR 189, at 196 per Smart J.

85 (1881) 7 VLR (L) 180, discussed in *Australian Conference Association Ltd v Mainline Constructions Pty Ltd (in liq)* (1978) 141 CLR 335 at 348-50 per Gibbs ACJ, Jacobs and Murphy JJ.

86 In States, but not Territories, by s 8A *Usury, Bills of Lading and Written Memoranda Act* 1902-1934 (NSW), s 52 *Supreme Court Act* 1986 (Vic), s 4 *Mercantile Act* 1867-1896 (Qld), s 17 *Mercantile Law Act* 1935 (SA), s 1 *An Ordinance for Adopting Certain Ordinances of the Imperial Parliament* (WA), s 13 *Mercantile Law Act* 1935 (Tas).

87 *Commissioners of the State Savings Bank of Victoria v Patrick Intermarine Acceptances Ltd (in liq)* [1981] 1 NSWLR 175, per Meares J.

A party assumes a liability 'secondary' to parties who accept a bill of exchange and their sureties by virtue of having drawn or endorsed the bill. Where the party secondarily liable pays on the bill, subrogation may entitle him or her to the benefit of securities for payment possessed by the holder or person paid. This is by virtue of both equitable doctrine and statute.[88] By reference to a right of subrogation which the claimant would otherwise have had, the bill holder was sued in *Dalgety v Commercial Bank of Australia.*[89] This was for discharging an equitable mortgage in support of the bill given by the party primarily liable. In the circumstances of the case, however, the claimant was found to have no equity to maintain the suit.[90]

(iii) Contracts of loan

These are the most important proprietary use of subrogation. Direct transfer of legal or equitable security rights to a lender who pays out secured creditors may be ordered. Whether proprietary effect is given to a subrogation equity depends on what the parties intentions were at the time of the claimant making the loan. There is a presumption that where a third party pays out a mortgage, the rights against the mortgagor which it secures are intended by all parties to the transaction to be kept alive for the third party's benefit.[91] In *Evandale Estates Pty Ltd v Keck,*[92] William Keck had purchased land upon payment of a small deposit from his own funds, the balance being paid from funds lent to him by Evandale Estates. The lender then caveated the land purchased, stating that it had become entitled to an interest in the land (a proprietary right) by operation of the doctrine of subrogation. Specifically, as lender to a purchaser of land, Evandale Estates claimed by subrogation an entitlement to the equitable lien which would otherwise have arisen to secure the interest of an unpaid vendor. Hudson J decided this case adversely to the lender and its subrogation claim on the basis that it was not 'just or equitable' that the lender should get security. The court found that 'from the whole circumstances of the transaction [and] the intention of the parties' it did not appear that the lender was to have the security of the property for his loan.[93] This and the outcome in the previous case underline the discretionary nature of this equitable remedy.

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88 See acts in note 86 *supra,* also s 64(2) *Bills of Exchange Act* 1909 (Cth), and s 87(1) *Cheques and Payment Orders Act* 1986 (Cth).

89 [1981] 2 NSWLR 211, per Rogers J.

90 A surprising decision, in view of the peremptory nature of the statutory provisions.

91 *Ghana Commercial Bank v Chandiram* [1960] AC 732, at 745 (PC); *Paul v Spierway* [1976] 1 Ch 220, at 234 per Oliver J.

92 [1963] VR 647; see also *Nottingham Permanent Building Society v Thurstan* [1903] AC 6 and *Orakpo v Manson Investments Ltd,* note 78 *supra.*

93 *Ibid* at 652.

IV. THE BASIS OF THE PROPRIETARY ENTITLEMENT

Examination of this may be said to amount to the 'de-construction' of the proprietary entitlement. We shall begin by (again) excluding the common law from our inquiry. For the award of judgements *personal* in nature, binding persons rather than things, even if property rights are thereby vindicated, it is not germane. It is only proprietary remedies which lead to the advantages we have outlined. Those actions whereby proprietary relief was once obtainable at law have now almost all fallen into disuse, excepting exercise of the discretion to order specific return of a thing detained in detinue[94] and the common law lien.[95] The much discussed 'tracing at common law'[96] is no part of proprietary recovery. Such tracing is a technique to facilitate only personal judgments, beyond detinue and the lien.[97] Another exception should be mentioned. This is where a personal and non-proprietary action for recovery of property value at law, such as a right to conversion damages, is pressed against a bankruptcy trustee. If the trustee does not disclaim the property, he assumes it with all the liabilities that it had in the bankrupt's hands. Any personal recovery will in this event be unaffected by insolvency of the bankrupt, whose doings in relation to property have given rise to the action. This is exemplified where the claimant sues the bankruptcy trustee in money had and received for retention of misappropriated money.[98]

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94 Discussed in *McEown v Cavalier Yachts Pty Ltd* (1988) 13 NSWLR 303, at 307-308 per Young J F Trindade and P Cane in *The Law of Torts in Australia* (1985) at p 137 observe that specific return in a detinue action is rarely ordered, but it may still be available in cases including "where it can be shown that the defendant is insolvent and therefore unable to pay any damages that might be awarded against him" (no authority cited). The rules of court of each of the Australian state and territory Supreme Courts provide for the remedy, which derives from s 78 *Common Law Procedure Act* 1854 (UK).

95 It has been said that this legal remedy is really only a form of judgement execution, see Stevens at p 275; Sykes, note 43 *supra* at p 1009, lists ten such liens.

96 For example, S Kurshid and P Matthews "Tracing Confusion" (1979) 95 *LQR* 78; M Scott "The Right to Trace at Common Law" (1966) 7 *UWALR* 463; RA Pearce "A Tracing Paper" (1976) 40 *Convey* 278.

97 In *Coleman v Harvey* [1989] 1 NZLR 723, noted (1990) 106 *LQR* 552, the application of common law tracing to follow the silver in coins which the plaintiff had sold into ingots produced by an insolvent refining company yielded only a personal judgement in conversion, a judgement of use in the case against a solvent co-tortfeasor. See *Lipkin Gorman v Karpnale* in the House of Lords, note 31 *supra*, where tracing at law was used to establish the firm's title to sue in an action for money had and received: at 21-2 per Lord Templeman, at 27-9 per Lord Goff.

98 As in *Scott v Surman* (1742) Willes 400, 125 ER 1235; an action in damages for conversion against the trustee would have had the same result.

V. COMPETING FORMULATIONS OF THE PROPRIETARY ENTITLEMENT

There are probably two distinct formulations of the proprietary basis at present. First, a traditional view, which maintains that the claimant must show indicia of a *continuing proprietary interest*, in money or a thing which is to be found in the defendant's hands. What interests are continuing for the purposes of this view depends on the operation of the identification (or tracing) rules.[99] Secondly, there is a simplified view that proprietary advantages should be granted according to the existence in each case of certain established criteria of unjust enrichment.[100] Goff and Jones propose a 'just and equitable' proprietary discretion, another form of the simplified view.[101]

A. THE TRADITIONAL VIEW

The doctrinal basis of most of the English and Australian authority on the award of equitable proprietary remedies is that a 'proprietary interest' is the necessary basis of a proprietary claim. The interest must 'continue' until it is asserted, through being at all times identifiable in the defendant's hands.[102] Continuing identifiability of the money or thing representing the initial value received is in this way a 'connecting factor' required for the grant of specific relief.[103]

(i) An equitable proprietary interest

The equitable jurisdiction needed for a proprietary claim is most commonly generated when property is administered either in trust, or pursuant to a fiduciary relationship. There is in these cases a necessary separation of the

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99 As employed in *Scott v Scott*, note 26 *supra* and *Re Goode* (1974) 24 FLR 61; in *Chase Manhattan*, note 1 *supra* at 118 Goulding J uses the phrase 'continuing proprietary interest' to compendiously refer to the traditional rules. Recent academic statements of the traditional view were made in Birks *Introduction* at pp 378-9, RM Goode "Ownership and Obligation in Commercial Transactions" (1987) 103 *LQR* 433, at pp 437-8 and G Elias, *Explaining Constructive Trusts* (1990) at pp 145-50.

100 The 'radical' view, as described by G Elias *ibid* at pp 155-64. It is as formulated by the Supreme Court of Canada in *Pettkus v Becker* [1980] 2 SCR 834 per Dickson J (a matrimonial situation) and applied by the same court in *Hunter Engineering Company Inc v Syncrude Canada Ltd* [1989] 1 SCR 426 (a commercial dispute).

101 At pp 77-81.

102 Birks *Introduction*, Chapter 11, where a 'right to trace' basis is proposed in addition. This is denied by Gummow, note 17 *supra* at pp 81-5, who states that there can be no tracing without the claimant first showing his right to equitable intervention. But cf *Black v S Freedman & Co* (1910) 12 CLR 105 (equitable tracing following theft), which seems contrary to Gummow's position.

103 Stevens at p 289.

legal and equitable titles to the claim's subject, a process which Birks likens to the "passing of the property through a prism".[104] So it is that in proprietary claims the equitable title can be said to 'detach' and vest in the claimant, leaving the defendant with the bare legal title.[105] Equitable proprietary interests are also generated when the jurisdiction of equity is attracted by fraud,[106] mistake,[107] failure of consideration[108] or unconscionability of various types.[109] Some recent examples are:

> If a trustee uses trust money to purchase land for himself, the trust beneficiaries can claim an equitable interest in the land, corresponding to their previous interests in the trust money.[110] (breach of trust)
>
> When one spouse asserts a legal title to land, upon failure of a joint venture between the spouses relating to the land, the other spouse may be declared to possess an equitable interest in the land.[111] (unconscionability)
>
> If a dishonest employee forges a cheque of his employer and passes it to accountants complicit in the crime, the employer can rely upon the crime to claim an interest in the proceeds of the cheque in the accountants' hands.[112] (fraud)

Where the value claim arises from a *wrong* committed against the claimant, rather than a subtraction of value from his or her resources, proprietary relief is usually withheld. Courts applying the traditional view have in the past been unwilling to annexe a claim based in a wrong to property which the wrongdoer has used in accomplishment of the wrong.[113] For in these cases the value of the remedy is difficult to match with any proper measure of the value of the claim; a wrong committed has infrequently an ascertainable value (or cost).

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104 Birks *Introduction* at p 380.

105 See Gummow's explanation of 'the Birks rationale', note 17 *supra* at pp 80-1.

106 For example, *Black v S Freedman & Co* note 102 *supra*, at 109 per Griffith CJ; *Spedding v Spedding* (1913) 30 WN (NSW) 81; *Creake v James Moore & Sons Pty Ltd* (1912) 15 CLR 426 at 432 per Griffiths CJ; *Re Dover Pty Ltd and the Companies Act* (1981) 6 ACLR 307; *Lipkin Gorman v Karpnale Ltd*, at first instance, [1987] 1 WLR 987, at 1008-14 per Alliot J; *Agip (Africa) Ltd v Jackson* (CA) [1991] 3 WLR 116, at 131-4 per Fox LJ (Butler-Sloss and Beldam LJJ agreeing).

107 For example, *Chase Manhattan Bank NA v Israel-British Bank London Ltd*, note 1 *supra*; *Re Attorney General of Canada and Northumberland General Insurance Co* (1987) 58 OR (2d) 592.

108 See *Sinclair v Brougham*, note 18 *supra* at 423, a contentious assertion of Viscount Haldane.

109 See the reasoning of Deane J in *Muschinski v Dodds* note 62 *supra* at 620. In the US proprietary interests in equity have been held to arise from conversion, breach of contract and wrongful disposal of security interests, see DA Oesterle "Deficiencies in the Restitutionary Right to Trace" (1983) 68 *Cornell L Rev* 172 at p 178 and authorities there cited.

110 See *Scott v Scott*, note 26 *supra*.

111 See *Muschinski v Dodds*, note 62 *supra*.

112 See *Agip (Africa) Ltd v Jackson*, note 106 *supra*.

113 See Birks *Introduction* at pp 313-14.

Considerations of equivalence applied to wrongs cases endorse the reservations of the traditional view.

The authority of *Lister v Stubbs*[114] was a definitive refusal by the Court of Appeal in England to grant proprietary relief to the victim of a wrong. A firm claimed proprietary relief in respect of bribes wrongly received by one of its employees. The subject of the claim was land in which the bribes had been invested. The Court would not allow the firm to proceed against the land, restricting it to personal remedies for recovery of the value of the bribes from the employee. Argument that the employer had in these circumstances an interest in the land was dismissed, as "confounding obligation with ownership".[115] A claimant, it may be generalised, must be connected with the subject of the claim by more than obligations owed by the defendant. The *Lister* decision has been criticized in Australia,[116] although recently re-endorsed in England.[117] Birks approves of the decision. He says that the employer's claim "failed for want of a sufficient proprietary base".[118] But, it might be asked, did not a sufficient equity arise through the employee's acceptance of the bribe in breach of fiduciary duty owed to the employer?[119]

Other limits on what constitutes a proprietary interest for this purpose are constituted by the traditional equitable defences - delay, hardship and bona fide purchase being particularly applicable in value claims.[120]

(ii) Identification of the interest

At the identification stage of the proprietary value claim, the claimant's interest is traced into existing property in the hands of the defendant. This is so that the interest once established can be said to *continue*, as a connecting factor. The entitlement of the claimant in this way is 'annexed' to the money or thing which forms the claim's subject.

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114 (1890) 45 Ch D 1 (CA), an appeal from a refusal to grant an interlocutary injunction.

115 *Ibid* at 15 per Lindley LJ.

116 In *Consul Developments Pty Ltd v DPC Estates Pty Ltd* [1974] 1 NSWLR 443, at 470 (reversed in the High Court on another point, note 1 *supra*); R Meagher, W Gummow and J Lehane, *Equity Doctrines and Remedies*, (2nd ed, 1984) at [541], but cf dicta of Gibbs CJ in *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 378.

117 In *Attorney-General's Reference (No 1 of 1985)* [1986] QB 491 and *Islamic Republic of Iran v Denby* [1987] 1 Ll LR 367.

118 Birks *Introduction* at p 389.

119 See *Daly v Sydney Stock Exchange Ltd*, note 116, at 378 per Gibbs CJ, and J Starke "The High Court and the Limits of the Doctrine of Constructive Trusts" (1987) 61 *ALJ* 241 at p 244.

120 See I Spry *Equitable Remedies*, (4th ed, 1990) at pp 182-200 (hardship) and at pp 222-41 (delay); Goff and Jones at pp 716-18 and Stevens at p 328 (bona fide purchase).

Identification is sometimes uncomplicated and annexure is established easily. In *Baumgartner v Baumgartner*,[121] male and female parties to a de facto relationship had 'pooled' their resources in order to acquire a house. Upon purchase of the house, legal transfer of it was made into the man's name alone. The relationship then foundered. The woman was in this event held entitled to equitable proprietary relief, upon the man refusing to recognise what interest in the house she had acquired by virtue of the pooling arrangement. The woman was given an interest in the house under a constructive trust on account of her pool contributions. In this case, the locus of value to be identified was a house, unmixed with other land or goods and legally registered in the man's name.

From such a straightforward situation, complication may arise, first, where the property passes from person to person. Where it does, the property may be identified in the possession of the subsequent person. Consider *Black v S. Freedman & Co*,[122] where John Black was employed by the claimant. He stole cash from his employer and paid it into his banking account. From this account he drew money and paid it into the account of his wife, Isabella. After John Black had been prosecuted, the employer tried to recover from Isabella the balance in her account. That money was identified as the employer's, upon it being inferred that the only possible source of Isabella's credit balance was her husband's theft.[123]

Tracing property interpersonally instances a species of the 'additional defendant advantage'. In *Black's* case, the value, as cash, was followed into the hands of the wife, who thereupon became liable as an additional defendant to the employer's suit.[124] The general liability of strangers to become defendants additional to one initially wrongful, or in breach of trust, has been formulated in *Barnes v Addy*.[125] The stranger must either receive property impressed with a trust, or knowingly assist the trustees in a dishonest and fraudulent design. This formulation has been generally approved in Australia and extended to fiduciaries and persons holding property in a fiduciary capacity.[126]

The identity of property may also be traced as it passes from one *form* to another. Where the claimed money or a thing has either been exchanged or had its character altered, the claimant may succeed to rights to or over the end-product.[127] Sometimes the end-product has become a mixture of the claimant's money or things and those of other claimants. At other times the money or

121 Note 62 *supra* at 147-8 per Mason CJ, Wilson and Deane JJ.

122 Note 102 *supra*.

123 *Ibid* at 109 per Griffith CJ, with whom Barton and O'Connor JJ agreed, who held that the wife was not entitled to assert the equitable defence of bona fide taker for value; a comparable situation arose in *Banque Belge v Hambrouck*, note 32 *supra*.

124 It was also followed into a changed form, when it became Isabella's right against her bank.

125 (1874) 9 Ch App 244, at 251-2 per Lord Selborne LC.

126 See *Paul A Davies (Australia) Pty Ltd v Davies* [1983] 1 NSWLR 440.

127 Cf the language of Scrutton LJ in *Banque Belge v Hambrouck*, note 32 *supra* at 330.

things are mixed with the defendant's value. In such cases, equity has evolved a number of rules to resolve the questions of whether and how the claimant is able to identify and claim a proprietary interest in the form which the value eventually takes. These essentially are:[128]

(a) If the defendant has used the claimant's money or thing (and none other) in exchange for some other money or thing, the claimant has an election either to identify and take the other in specie, or to take a lien over it toward the satisfaction of his value claim.[129]

(b) If the defendant mixes his own value with the claimant's money or things so that they are unidentifiable separately, and then reinvests or dissipates part of the mixed fund, the defendant is treated as having re-invested or dissipated that part of the fund which identifies the greatest recovery of the claimant's value.[130]

(c) If the defendant mixes his own value with the claimant's money or things so that they are unidentifiable separately, dissipates all or part of the mixed fund, then adds back all or part of what he dissipated, whether the claimant is able to identify any part of his value claim in the fund depends on what the defendant's intention was at the time of his adding back.[131]

(d) If the defendant mixes the money or things of two or more persons who each have equitable proprietary claims against him, then dissipates part of the mixed fund, the loss will be borne equally by the two claimants unless the fund constitutes a running account. If the fund is such an account, like a current account at a bank, the loss will be borne by the claimants on a 'first in, first out' basis.[132]

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128 Following the formulation of Goff and Jones at pp 72-7.

129 This is referred to as "the election in *Hallett's case*", (*Re Hallett's Estate* (1879) 13 Ch D 696, at 709 per Jessel MR); as explained in *Scott v Scott*, note 26 *supra* at 660-4 per McTiernan, Taylor and Owen JJ.

130 This statement compresses and expresses functionally two statements of principle: *Re Hallett's Estate*, note 26 *supra* at 709 per Jessel MR (trustee is presumed to draw out and dissipate his own money first) and *Re Oatway* [1903] 2 Ch 356 at 361 per Joyce J (trustee is unable to claim any part of a mixed fund until he has restored trust money).

131 *James Roscoe (Bolton) Ltd v Winder*, note 75 *supra* (no intention to reconstitute the original trusts); *Lofts v McDonald*, note 48 *supra* at 407 per Campbell J (original trusts exhausted).

132 There is little authority on this. Principle suggests that the loss should be borne equally by the two persons entitled unless, on authority, the 'first in, first out' rule in *Clayton's case* (*Devaynes v Noble* (1817) 1 Mer 572; 35 ER 781) applies. See *Jacobs' Law of Trusts in Australia* (5th ed, ed R Meagher and W Gummow, 1986), at [2717]. The LRCBC "Report on Competing Rights to Mingled Property", note 50 *supra* at p 48, recommends abolition of the *Clayton's case* rule with the recovery of mingled funds being proportionate in all cases.

(e) If the defendant innocently mixes his money or thing with the money or thing of the claimant so that they cannot be identified separately, then the parties are entitled to participate in the mixed fund in the proportions of their separate values mixed. This is unless the fund is a running account, when 'first in, first out' rule applies.[133]

(f) If the defendant mixes his value with the money or things of the claimant so that the interests are unidentifiable separately and therewith purchases an investment which appreciates in value, the claimant and the defendant are entitled to shares in that increased value proportionate to their original contributions.[134]

(g) Identification is impossible and the claimant's proprietary right is extinguished in circumstances including the following:

  (i) If the claimant's money or thing reaches the hands of a bona fide purchaser.[135]

  (ii) If the claimant's money or thing is consumed, either without residue or without discharge or an existing liability of the defendant.[136]

  (iii) If it would be inequitable to allow the claimant to trace or be subrogated to a creditor's rights.[137]

The usually cited shortcoming with traditional identification is that its rules are arbitrary. Or, as it has been put, the rules are not 'congruent' with any more generalized principle of recovery in the law.[138] If these criticisms are accepted, it is said to follow that the rules have no point and are redundant.[139] This is a doubtful conclusion. Could it not be said that the rule that traffic must drive on the left-hand side of the road is to the same degree arbitrary and lacking in congruence? It could not be suggested that the traffic rule has no point or is redundant. Another criticism of the traditional rules is that they operate on the basis of "accidental" features of a transaction which are unrelated to the

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133 *Re Diplock*, note 42 *supra* at 551-2 and 554-6, judgment of the court.

134 *Re Tilley's Will Trusts* note 42 *supra* at 1189 per Ungoed-Thomas J. This claim to value 'not specifically serverable' raises a matter expressly undecided in *Scott v Scott*, note 26 *supra* at 664, but McTiernan, Taylor and Owen JJ indicated their support for the proposition here advanced; see the LRCBC "Report on Competing Rights to Mingled Property", note 50 *supra* at p 53, and Goff and Jones at p 76.

135 As it did and the exchange-value of company shares was untraceable in *Brady v Stapleton* (1952) 88 CLR 322, at 332-3 per Dixon CJ and Fullagar J.

136 *Re Diplock*, note 42 *supra* at 521.

137 *Ibid*, re the 'inequity' of allowing tracing to building improvements made to Guy's hospital, at 547-50, and of allowing subrogation to the discharge mortgage of the Leaf Homoeopathic Hospital, at 549-50.

138 Such as the reversal of unjust enrichment, or a 'corrective justice' rule, see Stevens at p 271.

139 *Ibid* at p 276.

substantial merits of the claim.[140] But why should we expect the rules which *define* a proprietary entitlement to operate causally within the making of litigious claims? It is a little like expecting the traffic rule to be congruent with the abstract tendencies of drivers to drive on one or other side of the road.

(iii) Fiduciary relationship confusion

We have seen that a need for a fiduciary relationship pertains to that stage of a proprietary value claim where a proprietary interest is to be established. Under the present 'identification' heading, it is the annexure of that interest to the value, and not its constitution, which is our concern. Annexure (identification and tracing) is a mechanical activity, not of itself amounting to a cause of action.[141] Yet for a long time the commonly held doctrinal view was that tracing was some sort of 'equity', a cause of action with independent rules regulating its availability.[142] This is now not the law of Australia.[143] However the heresy still persists in some quarters, and it must be understood to be properly dispelled.

For this, one must recall that the bringing of a proprietary claim in equity also involves the need to identify (or trace) the proprietary interest into the possession of the defendant. If the fiduciary relationship means of establishing a proprietary interest were to be regarded as the only means of establishing one, and the exercise is transposed to the identification stage of the analysis, then the existence of a fiduciary relationship could come to be thought of as a 'condition of a right to trace'. Some such process happened in equitable doctrine this century, associated with the English and Australian reception of the decision in *Re Diplock*.[144] That case was concerned with both stages of the process here outlined: definition of an equitable proprietary interest and formulation of the right to trace. The Court of Appeal also needed to take a view on what was decided by what has been said to be the confusing precedent of *Sinclair v Brougham*.[145] It adopted the following jurisdiction principle, which it attributed to Lord Parker in the earlier case:

> equity may operate on the conscience not merely of those who acquire a legal title in breach of some trust, express or constructive, or some other fiduciary obligation

140 Oesterle, note 109 *supra* at p 174-5.

141 A point about tracing made twice in Birks *Introduction*, at pp 75 and 83.

142 Cf the 'tracing equity' reference of Lord Sumner in *Sinclair v Brougham*, note 18 *supra* at 459; see Stoljar, note 9 *supra* at p 132.

143 *Muschinski v Dodds*, note 62 *supra* at 616-17 per Deane J; H Ford and W Lee, *Principles of the Law of Trust*, (2nd ed, 1990) at [716.3]. It is no longer part of the law of New Zealand either, see *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180, at 186 per Cooke P and at 93 per Somers J (CA).

144 Note 42 *supra*.

145 Note 18 *supra*.

> ... [but others] provided that as a result of what has gone before some equitable property interest has been created and attaches to the property.[146]

The Court is saying that equity may in some cases be attracted by the existence of a fiduciary relationship and not in other cases. Perhaps because the purpose of the Court in that case in examining the extent of equitable jurisdiction was to determine the availability of a remedy employing the tracing technique, the Authorised Report headnote of the case was as follows. The case was said to establish the 'much wider principle' that tracing is available if:

> there was originally such a fiduciary or quasi-fiduciary relationship between the claimant and the recipient of his money as to give rise to an equitable proprietary interest in the claimant.[147]

Which is to conflate the stages of analysis. Yet in England, *Re Diplock* has not had its authority doubted and is still seen to require a fiduciary relationship as a precondition to the right to trace.[148] The requirement has given rise to considerable academic criticism.[149] Practical difficulties are, however, conveniently avoided by those English cases which tend to 'discover' fiduciary relationships on the most unlikely facts.[150]

B. THE SIMPLIFIED VIEW

The simplified view asks no more than whether it is just that the claimant should have priority in his debtor's bankruptcy, whether it is just that the claimant should enjoy an increase in the value of the enriching money or thing, and so on through the list of proprietary advantages. In addressing policy issues directly, the simplified view perhaps is in accord with the temper of modern times. It may not be too bold to say that a new contender for Australian orthodoxy in the grant of proprietary remedies has appeared.[151]

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146 Note 42 *supra* at 530 and see also at 536, where the creation of equitable property interests by 'wrongful or unauthorised dealing' is referred to.

147 *Ibid* at 467.

148 See *Agip (Africa) v Jackson* [1990] Ch 265 at 290, where Millett J said of the requirement that it was "questionable, but cannot be reviewed at first instance"; in *Neste Oy v Lloyds Bank PLC*, note 1 *supra* at 665-6, Bingham J also questioned the requirement.

149 See Goff and Jones at pp 69-72; Birks *Introduction* at pp 383-5; H Hanbury and R Maudsley *Modern Equity*, (11th ed, eds R Maudsley and J Martin, 1981) at p 668; R Maudsley "Proprietary Remedies for the Recovery of Money" (1959) 75 *LQR* 234 at p 241; Pearce, note 96 *supra* at p 286; D Waters *The Constructive Trust* (1964) at pp 4-5.

150 Hence the 'instrumental' fiduciary relationship, inferred to facilitate a meritorious action. In *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*, note 1 *supra* at 119 the fiduciary relationship was constituted by the mere *receipt* of mistakenly paid funds by a party otherwise at arm's length.

151 D Waters in "Where is Equity Going? Remedying Unconscionable Conduct" (1988) 18 *UWALR* 3 at pp 10-11, states that Australia is or should be moving towards the simplified view.

Goff and Jones are adherents to this view in about its most simplified form:

> [I]n our view the question whether a restitutionary proprietary claim should be granted should depend on whether it is just, in the particular circumstances of the case, to impose a constructive trust on, or an equitable lien over, particular assets, or to allow subrogation to a lien over those assets. It is the nature of the plaintiff's claim itself which is critical in determining whether a restitutionary proprietary claim should be granted.[152]

The traditional rules are said by Goff and Jones to describe an 'obscure' process which has 'little logical appeal'. From this it follows that the traditional view is unsuited to resolve issues of justice in insolvency.[153]

In the United States, the doctrine as to when the courts will order equitable proprietary relief has for more than fifty years been connected with the concept of unjust enrichment.[154] In the most recent edition of *Scott on Trusts*[155] the following passage appears.

> The general principles with reference to unjust enrichment that are the basis of constructive trusts and the analogous equitable remedies of equitable lien and subrogation are also at the basis of quasi-contractual obligations. The chief difference is that quasi-contractual actions are usually enforceable by an action at law, the purpose of which is to impose a personal liability on the defendant; whereas the enforcement of a constructive trust is by a proceeding in equity to compel the defendant to surrender specific property.

Thus, the text states, both specific remedies in equity, as well as those personal remedies at law of the quasi-contractual kind, are based in unjust enrichment. More traditional concepts of 'property' and 'the proprietary base' are not used. This has, at first, a paradoxical sound to it. A 'proprietary' right is inferred without reference to any property criteria. The paradox recedes when it is recognised that the notion of 'property' serves mainly as a pass to the advantages we have described, in terms also unrelated to property.[156] United States treatment of particular remedies has left the remedial equitable lien relatively undeveloped. In its place the role of the constructive trust is correspondingly enlarged.[157] In a leading text is it said:

> The constructive trust may be defined as a device used by chancery to compel one who unfairly holds a proprietary interest to convey that interest to another to whom it justly belongs. When a court of equity finds that a defendant is the holder of a property interest which he retains by reason of unjust, unconscionable,

152 Goff and Jones at p 78.

153 *Ibid* at pp 79-80.

154 Cf. the 1937 treatment of equitable remedies in the Restatement, note 59 *supra* at [160].

155 (4th ed (1989), ed WF Fratcher) at [461], and see the authorities there cited.

156 See the text at notes 17-32 *supra*.

157 See GG and GT Bogert *The Law of Trusts and Trustees*, (revised 2nd ed, 1984) at [32], where equitable liens are defined into two classes, both of which are concerned with security for legal debts; the constructive trust concerned with 'justice', is contrasted.

or unlawful means, it takes such interest from the defendant and vests it in the wronged party.[158]

A comparable form of the simplified view is also now orthodoxy in Canada,[159] with the constructive trust as the primary form of remedy.[160] This can be seen from the following passage from one of the *Rathwell v Rathwell* judgments, in the Supreme Court of Canada.[161]

> The constructive trust amounts to a third head of obligation, quite distinct from contract and tort, in which the court subjects "a person holding title to property ... to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it" ... The constructive trust is an obligation of great elasticity and generality.

The author of those words also described criteria for when an unjust enrichment occurs.[162] These are when there has been:

1. enrichment of the defendant;
2. corresponding deprivation of the plaintiff; and
3. the absence of a juristic reason for the enrichment.[163]

Does this formula express the kernel of what generations of doctrinal refinement have achieved with less certainty elsewhere? One might be a little doubtful, but it should be acknowledged that the formula has the advantage of being straightforward to encapsulate and apply. The first criterion neutrally states the background to what constitutes the claim. The second adds elements of proportionality and detriment. The third criterion of 'absence of jurisdic

158 *Ibid* at [471].

159 Fridman and McLeod, note 13 *supra* at pp 569-70 "the plaintiff must be able to establish that as against the actual holder of the property it is unjust that he not be allowed to retake possession of it"; G Klippert *Unjust Enrichment* (1983) at pp 181-2 "The matter is one of justice and fairness. The good conscience of the Court of Chancery is the model for vetting the remedial nature of an unjust enrichment action"; P Maddaugh and J McCamus *The Law of Restitution* (1990) at p 93 "the constructive trust is a remedial device imposed in order to prevent unjust enrichment".

160 In Canada, as in Australia, the 'unjust enrichment' constructive trust early appeared in (quasi) matrimonial situations: *Rathwell v Rathwell* [1978] 2 SCR 423, 83 DLR (3d) 289; *Pettkus v Becker* [1980] 2 SCR 834, 117 DLR (3d) 257; since then in Canada it has been extended to include commercial injustices as well, as in *Hunter Engineering Co v Syncrude* [1989] note 100 *supra*. In each of these cases Dickson J (later ACJ) wrote the leading judgment.

161 *Rathwell, ibid* at 454, 305-6 per Dickson J, Laskin CJC and Spence J concurring (Supreme Court); see also *Degleman v Guarantee Trust Co and Constantineau* [1954] 4 DLR 725 and Maddaugh and McCamus, note 159 *supra* at pp 87-93.

162 In *Rathwell, ibid* at 453-62 and 306-7.

163 These criteria have come to supplant the rules for the award of the restitutionary remedy at law of money had and received; see *Cherrington v Mayhew's Perma-Plants* [1990] 5 WWR 208 at 211 per Hollinrake JA (mistaken payment).

reason' refers to other legally recognised sources of enrichment.[164] So it is that the sense of unjust enrichment adverts to the pattern of other rights in the private law.

Can the simplified view perform the same functions as the traditional rules of equity? Goode states that the traditional learning on 'property' and what can serve as a proprietary base "delimits what is fair to creditors".[165] In the traditional rules, equity and insolvency lawyers periodically 'discover' refinements. The rules form a sort of 'code' which can theoretically be consulted in advance of parties' dealings that involve value claims and proprietary consequences. This state of affairs, at least in theory, is more congruent with the rule of law than a simplified unjust enrichment principle or discretion.

However in practice affairs may be different. The simplified view should be assessed after it is remembered that the traditional property analysis has always been rather tenuous.[166] One might go further and say that in value cases the Australian courts now have posed to them a choice: between either result-driven conferral of property rights, or an admission that in most value cases there is no locus to which an authentic notion of property can be attached.[167]

The unjust enrichment approach to proprietary remedies is not as yet at or near acceptance by the body of Australian jurists.[168] What might be more acceptable in its place and not much different is a principled discretion, specific to policy choices. Following are some suggested criteria for the exercise of the discretion, specific to the first 'advantage' of bankruptcy priority.

(i) To what degree has the claimant not equally shared the risk *of the defendant's insolvency with the defendant's general creditors?*

The risk consideration often plays an unspoken part in the judicial selection of the categories of the traditional approach. At other times it is expressly adverted to, as in the decision of the Privy Council in *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd.*[169] In that case, a Bahamian court had been asked to determine a priority question arising from a bank's insolvency. Were the beneficiaries of a trust, of which the bank was trustee, entitled to an equitable lien and priority to ordinary depositors in respect of the trust fund deposits? The question was resolved by the Board using the traditional categories and the answer was a simple 'no', in the absence

164 Such as inheritance, contract etc, see *Cherrington v Mayhew's Perma-Plants, id.*

165 Note 99 *supra* at p 444.

166 See the discussion of *Sinclair v Brougham* at notes 28-30 *supra.*

167 Stevens at p 260.

168 Not acceptable, for example, to Gummow, note 17 *supra* at pp 53-60, perhaps for the reason that it presently explains too little.

169 [1986] 1 WLR 1072; see also the dissenting joint opinion of Wilson and Dawson JJ in *Hewett v Court*, note 3 *supra* at 658.

of impropriety or breach of trust. The trust was here no more than an unsecured creditor of the bank. But the advice of the Board went on to consider the position which would have obtained if the bank as trustee had been in breach of trust. In that event:

> an equitable charge secures for the beneficiaries and the trust priority over the claims of the customers in respect of their deposits and over the claims of all other unsecured creditors. This priority is conferred because the customers and other unsecured creditors *voluntarily accept the risk* that the trustee bank might become insolvent and unable to discharge its obligations in full. On the other hand ... the trust never accepted any risks involved in the insolvency of the trustee bank.[170] [emphasis added]

(ii) To what degree is the nexus between the claimant and the defendant other than one of simple contract?

It was once an orthodox principle that in an action based on non-performance of an obligation under a simple contract, no more than general creditor status could be acquired.[171] But now the contractual divide between ownership and obligation is more contentious.[172] No longer can it be confidently asserted that breach of simple contract, without breach of trust or equitable wrong, cannot yield a proprietary remedy.[173] In his dissenting judgment in *Hospital Products Ltd v United States Surgical Corporation*,[174] Deane J would have made the HPI liable as a constructive trustee for profits made through its flagrant breach of contract. It has recently been suggested that a proprietary remedy is appropriate where the breach of contract 'entails' a breach of the claimant's trust, or a misuse of his property.[175] Doctrine is apparently undergoing a change here and the policy of the criterion is a now little uncertain.

Reservations stated, application of the criterion can be seen in the way that the insolvency value claim in *Re Goode*[176] was dealt with. In that case, a shareholder had before his insolvency conducted his business in a very unorthodox fashion. He had placed share 'scrip' (documents of share title)

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170 *Space Investments*, note 48 *supra* at 1074 per Lord Templeman.

171 See, for example, Goff and Jones, (2nd ed, 1978) at p 370, where no proprietary action is said to arise from breach of contract.

172 Goff and Jones, 3rd ed, at pp 457-8, was more guarded. In 1989 Birks, in his *Introduction* 'Endnotes' at p 471, qualified his 1986 remarks (made at pp 334-6) which had denied the possibility of a proprietary remedy. See also Birks "Restitutionary Damages for Breach of Contract: *Snepp* and the Fusion of Law and Equity" [1987] *LMCLQ* 421; cf S Stoljar "Restitutionary Relief for Breach of Contract" (1989) 1 *JCL* 1.

173 See DM Paciocco "The Remedial Constructive Trust: A Principled Basis for Priority Over Creditors" (1989) 68 *Canadian Bar Rev* 315 at pp 342-5; G Jones "The Recovery of Benefits Gained from a Breach of Contract" (1983) 99 *LQR* 443.

174 By Deane J in the High Court, see *Hospital Products*, note 64 *supra* at 124.

175 Cf Birks *Introduction* at p 471.

176 Note 99 *supra*.

coming into his possession, both as a part of his business and from his personal dealings, into a mixed pool. From this pool he satisfied indiscriminately the buying or selling orders of his clients and the needs of his private speculations. He did not use a trust account to hold moneys passed to him by clients who instructed him to purchase shares on their behalf. Instead, he placed those moneys in a personal bank account which was at all material times overdrawn.

Insolvency caught up with this broker. One of the difficult questions which arose in the administration of his bankrupt estate was whether any of the scrip which was then in the broker's pool did not pass to his bankrupt estate and was liable to satisfy the specific entitlements of any and which of his clients.[177] White J in the South Australian Insolvency Court treated this question in the traditional way. He asked whether any of the clients could establish a 'trust', entitling that client to a beneficial interest in scrip. This scrip would in consequence not pass to the bankrupt estate. In stating this principle, he did not refer to the nature of the dealing between each client and the broker:

> Scrip and money given by a client to a broker - while it is held in specie or in identifiable form eg. in a trust account - may perhaps be characterised as property held 'in trust' and therefore may not pass to the [bankruptcy] trustee. It is held by a fiduciary on a constructive trust and there seems to be some doubt whether that is a substantial trust or a mere formula for equitable relief ... Where the broker has dealt with the scrip or money in some way, so that it ceases to exist in its original form or in such trust account, the property representing (in part or in whole) the original money or scrip can no longer be said to be subject to the original constructive trust which, ex hypothesi, has been breached, so that the property representing the original trust property passes to the [bankruptcy] trustee, who takes it 'subject to the equities' ... One of such equities is the equitable right of clients to trace (in so far as possible) and charge the funds and assets in the hands of the [bankruptcy] trustee.[178]

One of the 'equities' of a client in the broker's insolvency, as White J saw it, equalled the ability of that client to trace specific scrip into the pool. Yet as we have seen, tracing here refers to the quite arbitrary exercise of identification of value in a mixed fund.[179] Almost none of the clients was able to trace his or her entitlement according to the traditional rules. A governing principle of 'identification' having been stated in the terms above, conformably with authority, the case was then decided in a different and more practical way. White J drew a distinction between those clients who had dealt with the broker as a fiduciary (on a transaction by transaction basis), and those clients who had a running account with the broker.[180] Clients of the former kind, in relation to whom the broker was a fiduciary, were allowed priority.[181] Parties in a simple contract relationship were not.

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177 *Ibid* at 67.

178 *Ibid* at 68.

179 See the text at notes 129-39 *supra*.

180 Note 99 *supra* at 77-8.

181 *Ibid* at 71-6.

Creditors in *Re Goode* were in this way accorded property rights according to the type of business arrangement entered into with the debtor. To put this contract nexus criterion in philosophical terms, *distributive* justice, between client and client, is adjusted *commutatively*, in terms of the dealing each client had with the broker.[182]

(iii) Did the claimant have a reasonable expectation *of a proprietary interest?*

This criterion expresses what is often the primary justification given by the courts in the award of a proprietary remedy, particularly in spousal cases. Consider the claim of a spouse which arises when an erstwhile spouse (and co-habitee) enforces his or her legal title to a home property. The other spouse and claimant may have contributed to the purchase or improvement of the home, believing reasonably that it was common property, or at least that he or she had an interest in it. The claimant may legitimately expect to receive a fair interest in the property upon dissolution of the spousal arrangement. Mere receipt of money for services rendered is insufficient.[183]

Parties to commercial dealings are often taken to address expectations differently. Commercial parties are more distant from one another and can be expected to protect their expectations by bargaining for them.[184] Also, an expectation engendered by the bankrupt in one business creditor may not be relevant to the general body of business creditors. On the one hand, as the general body of creditors have not contributed to that expectation, it should not be allowed to postpone their claims. On the other hand, the expectation created is one of the unavoidable circumstances that the creditors found their debtor in. The merits are difficult to balance. Equity is not a regime directed to the protection of expectations. In formal terms, expectations have no significance in restitutionary value claims.[185]

(iv) The behaviour of the defendant

We have seen that the effect of the traditional rules is that a dishonest defendant is more readily made a constructive trusteee than an honest one.[186] This may be so sometimes for the reason that equity acquires its jurisdiction to make a proprietary order by reason of the defendant's fraudulent behaviour.[187] At other times, fraud extends the identification rules which make proprietary

182 See J Finnis *Natural Law and Natural Rights* (1980) at pp 189-93.

183 For example, see *Muschinski v Dodds*, note 62 *supra* at 593-8 per Gibbs CJ, 610-14 per Deane J and *Baumgartner v Baumgartner*, note 62 *supra* at 147-9 per Mason CJ, Wilson and Deane JJ.

184 Paciocco, note 173 *supra* at p 346.

185 Discussed in Birks *Introduction* at pp 44-8.

186 See text at notes 130-9 *supra*.

187 As in *Black v S Freedman & Co*, note 102 *supra* and *Banque Belge v Hambrouck*, note 32 *supra*.

relief available.[188] Paciocco suggests that the behaviour of the defendant should be irrelevant to the decision whether or not to award proprietary relief.[189] As suggested above in the case of the claimant's expectations, the general creditors must take their debtor in the condition that they find him or her. Here this means subject to all the equities created by the debtor's conduct. Elements of a debtor's behaviour, like expectations created, may be part of what defines a priorities problem.

At other times, the defendant's behaviour is quite irrelevant to the claimant's entitlement. It is behaviour causally unconnected with any equity arising. In *Wrobel Estate v Wrobel*[190] children made a value claim against their father, claiming a constructive trust in right of their deceased mother's estate. Evidence accepted by the court was that throughout the married life of the mother and father, the mother had worked tirelessly in the acquisition and disposal of various residential properties. Some of these were owned jointly, but the majority were owned by the father alone. The mother had made the domestic economies to facilitate saving for the properties' purchase. She performed most of the physical work needed to improve the condition of houses on the land before profitable resale. In so doing, "she deprived herself of many of the ordinary pleasures of life which most people in her situation would consider normal". Notwithstanding these selfless acts, the mother was the fatal victim of the father's anger: he was charged with the crime of her murder and pleaded guilty to manslaughter. Thereafter, a proprietary value claim was made by the children to the properties still in the father's name only. It was held by the court that, for this claim, the ordinary principles applicable to the award of constructive trusts should apply not withstanding the father's shameful conduct. An attempt made for the children to have the constructive trust awarded on a basis analogous to 'punitive damages' was rejected. What was awarded to the wife's estate was a not uncommon one-half interest in the properties.[191]

VI. CONCLUSION

Has there been a "profligate use of proprietary remedies in the commercial area"?[192] Is the traditional notion of 'property' stretched beyond authenticity in recent value claims of a proprietary nature? These are questions which may have arisen from looking at the process of creating new property by annexure of

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188 *Re Hallett's Estate*, note 26 *supra*.

189 Paciocco, note 173 *supra* at p 348.

190 (1988) 67 OR (2d) 151 per Yates J (Ontario Supreme Court).

191 *Ibid* at 155. Of course, as the court held further, the father was prevented by his crime from sharing with the children in the mother's estate.

192 Observed by R Austin in "Commerce and Equity - Fiduciary Duty and Constructive Trust" (1986) 6 *OJLS* 444 at p 454.

value entitlements to items of existing property.[193] No definite answer to the question is suggested. What is put forward in conclusion is a brief sketch of how the simplified approach to proprietary issues might work. It is for the reader to judge how useful the application of the simplified approach is.

The problem for the sketch is posed by *Sinclair v Brougham*, which we examined above.[194] The facts, it will be recalled, concerned the insolvency of a 'working man's bank' and the discovery that all the 'bank's' obligations to repay its depositors were void. In the legal proceedings following to determine priorities, the problem arose that if the depositors' claims were not creditors' claims, they might be ranked behind the claims of bank shareholders. Victory for the shareholders certainly had the appearance of injustice, given that the assets available to the 'bank's' shareholders were swollen by wrongful receipt of the depositors' funds.[195] Speeches in the House of Lords unanimously managed to avoid the effect of the ultra vires rule. The depositors were given partial relief through finding and vindicating a right of 'property'. This the depositors were found to have in their deposits, although each speech read to the House described the property right differently. Viscount Haldane LC saw the right to have arisen from "moneys paid upon a failure of consideration".[196] Lord Parker treated it as an "equity arising from breach of a fiduciary relationship".[197] Lord Sumner described it as a "tracing equity"[198] and Lord Dunedin struck a modern note by describing it as a "superfluity or unjust enrichment".[199] In each speech the 'property' of the depositors was traced to a mixed fund of assets. In that fund the depositors and shareholders were in equity held entitled to participate equally. In this *result* the Lords were unanimous.

By what criteria might the simplified approach have solved the problem? How could the doctrinal conundrums be avoided? First, the sharing of risk criterion indicates a practical difference between those who were comprised in the only two groups of persons in the eventual litigation: depositors of funds and shareholders in the bank. Whilst the depositors' claims may still be doubtful as 'debts' under the appropriate legislative scheme,[200] they have arguably accepted the risk of the bank's insolvency less than the bank's corporators. This conclusion is not weakened by technical invalidity of the depositors' claims at common law. Secondly, the 'contract nexus' criterion may not indicate any distinction (and priority) for the depositors, along fiduciary or

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193 See notes 122-3 *supra.*

194 At notes 28-30 *supra.*

195 See the speech of Lord Dunedin in the House of Lords, note 18 *supra* at 431-2, and the dissenting judgement of Fletcher-Moulton LJ in the Court of Appeal, [1912] 2 Ch 183 at 224.

196 Note 18 *supra* at 423, Lord Atkinson agreeing.

197 *Ibid* at 441.

198 *Ibid* at 459.

199 *Ibid* at 437, perhaps differing from the other Lords because of his Scots background.

200 s 553(1) *Corporations Act* 1990 (Cth).

other lines,[201] unless the actual terms of the contracts are looked at. The company itself is not on the face of things constituted the depositors' fiduciary or agent. Looking to the contract terms is not the way we have expressed this criterion,[202] so the conclusion flows that it points away from priority for the depositors. Thirdly, the 'expectation of proprietary interest' criterion: for this it must be acknowledged that in the current state of the law the relationship of banker and customer without more cannot create a proprietary interest.[203] Hence the depositors will not have a reasonable expectation of a proprietary interest. This criterion may also point away from success for the depositors. Fourthly, the 'behaviour of the defendant' criterion: for this assume that the bank would be attributed with the misconduct of the directors in overseeing the bank's entry into the ultra vires transactions. Such an attribution of responsibility for the wrong, perhaps, would have been sufficient of itself to resolve the case. That is, to postpone the claims of the bank's corporators against the wronged depositors.[204] If this fourth criterion is replaced with a principle of 'unjust enrichment',[205] the depositors may obtain priority on a very comparable working of the 'swollen assets' theory above referred to.[206]

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201 Pace Lord Parker, *ibid* at 441, who held that the directors of the bank were 'fiduciary agents' in receiving the deposits.

202 Note 172 *supra.*

203 Note 171 *supra*

204 See the discussion of Lord Parker, note 18 *supra* at 441-4.

205 See text at notes 164-6 *supra.*

206 See text at note 195 *supra.*