

# Is the Thief a Trustee?

Principled Approaches to Proprietary Restitutionary Remedies

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## Chapter I: Introduction

The topic of this dissertation lies at the intersection of many theoretical debates in the law of restitution; it concerns the relationship between wrongs and unjust enrichment, equity and the common law, and personal and proprietary remedies. The purpose of this dissertation is to resolve some of these debates in the particular context of theft and by doing so cast light on the implications of varying theories of proprietary restitution.

The primary factual scenario under examination is the situation where a non-fiduciary (“the thief”) obtains possession of property without the knowledge of the true owner. There are a number of similar scenarios such as theft by fiduciaries<sup>1</sup> and the obtaining of property through fraud,<sup>2</sup> which overlap with the core factual scenario under examination but different concerns arise in relation to these.<sup>3</sup>

There is a long but slim line of authority supporting the proposition that the thief holds stolen property on trust. The earliest case cited is usually *Black v S Freedman & Co Ltd*,<sup>4</sup> a case that regained some notoriety after being cited by the House of Lords in *Lipkin Gorman v Karpnale*.<sup>5</sup> The most famous reference to the idea that the thief holds stolen property on trust is the dicta of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*.<sup>6</sup>

I agree that the stolen moneys are traceable in equity. But the proprietary interest which equity is enforcing in such circumstances arises under a constructive, not a resulting, trust. Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity.

That passage highlights several of the controversies that surround this topic. The first controversy is whether, if any trust is to be recognised, that trust is properly characterised as a resulting or constructive trust. The differences between these two trusts will be analysed in

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<sup>1</sup> See for example *Foskett v McKeown* [2001] 1 AC 102 (HL).

<sup>2</sup> See for example *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281.

<sup>3</sup> Primarily the differing nature of the duty placed upon a fiduciary and the different approach the law takes to vitiation rather than absence of intent in the case of fraud.

<sup>4</sup> *Black v S Freedman & Co Ltd* (1910) 12 CLR 105.

<sup>5</sup> *Lipkin Gorman v Karpnale* [1991] 2 AC 548 at 565G.

<sup>6</sup> *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 716C. For a recent application of this dicta see *Armstrong DLW GMBH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2012] 3 All ER 425 at [127]–[129].

chapter II. However, for the most part, terminological differences will be put aside to focus on the central and important question of whether a proprietary interest should be recognised. Chapter II will also analyse the roles of unconscionability and unjust enrichment in the recognition of varying types of trusts and provide a suggested approach towards the creation of equitable proprietary rights.

The other controversy implicit in Lord Browne-Wilkinson's statement is whether, again if a trust arises at all, it arises over the stolen property itself, or the traceable proceeds of that property. Those distinct possibilities are taken in turn in chapters III and IV. When we turn to the proceeds of stolen property the contentious issues multiply. The result depends in part on what type of property is stolen and what it is exchanged for. The attitude of the law towards money and bank accounts impacts on the analysis heavily.

The central thesis is that the trust is an appropriate response to theft, but only in certain circumstances. These are the circumstances where the thief is unjustly enriched by a property right that comes at the expense of the victim's property rights. Unjust enrichment provides the best principled justification for the creation of equitable property rights following theft, but the knowledge and associated unconscionability of the thief are relevant to shaping the personal duties that help protect this property right. The trust analysis is also preferable to other proprietary claims based on a power model<sup>7</sup> or a persistence of property model.<sup>8</sup>

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<sup>7</sup> See generally Peter Birks *Unjust Enrichment* (2nd ed, Oxford University Press, Oxford, 2005) at 183; and Birke Häcker "Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model " (2009) 68(2) CLJ 324.

<sup>8</sup> See *Trustee of FC Jones & Sons v Jones* [1997] Ch 159 (CA); and Graham Virgo *The Principles of the Law of Restitution* (2nd ed, Oxford University Press, Oxford, 2006) at 570.

## Chapter II: Theories of Trust

Lord Millet, writing extrajudicially, described the confusion surrounding constructive trusts as “a disgrace to our jurisprudence”.<sup>9</sup> The term is used in a variety of situations to mean different things.<sup>10</sup> As noted by Lord Millet, one of the confusions surrounding the term constructive trust is whether it is used in an institutional or remedial sense.<sup>11</sup> In its institutional sense the term is used to distinguish the constructive trust from the resulting or other types of trust; it describes in what situation the trust occurs.<sup>12</sup> In its remedial sense the term constructive trust can be used to distinguish the trust from other types of personal and proprietary remedy, for instance the equitable lien or account of profits.<sup>13</sup> For the avoidance of doubt, I will use the term non-express trust to cover the remedial sense and the terms constructive and resulting in the institutional sense. It should be noted that the terms institutional and remedial are sometimes used in a different sense, where the remedial constructive trust is described as some form of discretionary remedy.<sup>14</sup> Such a characterisation is not helpful.<sup>15</sup> The law responds to certain events with remedies, one of these remedies is a non-express trust.

There are two distinct but related problems for this chapter to assess: what are the consequences of a non-express trust and what gives rise to it? The first question is difficult because the trust is such a flexible instrument; the consequences of finding a non-express trust, or labelling a person a trustee vary with differing levels of both personal and proprietary rights.<sup>16</sup> Having identified the consequences of finding a non-express trust the next step is to

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<sup>9</sup> Lord Millet "Restitution and constructive trusts" (1998) 114 LQR 399 at 399.

<sup>10</sup> See generally AJ Oakley *Constructive Trusts* (3rd ed, Sweet & Maxwell, London, 1997); Gbolahan Elias *Explaining Constructive Trusts* (Oxford University Press, Oxford, 1990); M Cope *Constructive Trusts* (The Law Book Company, Sydney, 1992); and DWM Waters *The Constructive Trust: The Case for a New Approach in English Law* (Athlone Press, University of London, London, 1964).

<sup>11</sup> Millet, above n 9 at 402.

<sup>12</sup> What exactly these situations are is controversial, see the discussion below at Chapter II B.

<sup>13</sup> See further Birks, above n 7 at 303 where the distinction is described as a ‘trust as event’ versus ‘trust as response’.

<sup>14</sup> *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, above n 6 at 714H–715A; and *Re Polly Peck International plc (in administration)(No 2) Marangos Hotel Co Ltd v Stone* [1998] 3 All ER 812 at 825–826.

<sup>15</sup> See Peter Birks "Property and Unjust Enrichment: Categorical Truths" [1997] NZ L Rev 623 at 641.

<sup>16</sup> See for example *Englewood Properties v Patel* [2005] EWHC 118 (Ch), [2005] 1 WLR 1961 at [41]–[43] for a discussion of the varying duties that exist under the trust of property subject to a sale and purchase agreement before title passes. See further Robert Chambers *Resulting Trusts* (Oxford University Press, Oxford, 1997) at ch 9 discussing the varying duties that can apply to resulting trustees.

assess what the principled basis of that trust is. There are competing explanations based on unconscionability and unjust enrichment. These explanations will be explored and it will be shown that there is a role for unjust enrichment in the creation of a non-express trust, but that unconscionability is also relevant.

### ***A What are the Consequences of Finding a Trust?***

What rights, both personal and proprietary, does a beneficiary have under a non-express trust? If a variety of rights can be recognised, are these rights attributable to a difference between resulting and constructive trusts or some other division that is easily identifiable? Three differing sets of outcomes can be discovered: personal rights only, proprietary rights only, and a combination of both.<sup>17</sup>

#### *1. Proprietary rights only*

The common factor in these situations is that the only duty that the trustee will be under is “to restore the property on demand, if still in possession of it”.<sup>18</sup> The trustee in this situation is under no additional duties in respect of the trust property. There are a range of different views on the scope of the trust that only gives rise to proprietary rights. However proponents at both ends of the spectrum tend to concede that the reason this is called a trust is that we have no other name for it.<sup>19</sup> On the orthodox approach this situation is confined to

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<sup>17</sup> The situation of personal rights only is an anomaly that seems to be losing support. The liability for knowing assistance is sometimes described as liability to account as a constructive trustee. In this situation there is no property for the trust to attach to and the use of the term trustee can be misleading. See Charles Mitchell "Assistance" in Peter Birks and Arianna Pretto (eds) *Breach of Trust* (Hart Publishing, Oxford, 2002); *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 (CA) at 408–409; Jessica Palmer "Attempting Clarification of Constructive Trusts" (2010) 24 NZULR 113 at 129–130; and John McGhee (ed) *Snell's Equity* (32nd ed, Sweet and Maxwell, London, 2010) at [26-004]. But see Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff and Jones: The Law of Unjust Enrichment* (8th ed, Sweet and Maxwell, London, 2011) at [38-18]–[38-19]; and David Hayton, Paul Matthews and Charles Mitchell (eds) *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th ed, LexisNexis, London, 2010) at [98.7] for the position that describing the knowing assister as a constructive trustee can be useful. As the thief's interaction with property is not in the nature of knowing assistance this possibility is not explored any further.

<sup>18</sup> See Jeffrey Hackney *Understanding Equity and Trusts* (Fontana, London, 1987) at 167; and Chambers, above n 16 at 209–210. This situation is also sometimes referred to as a “bare trust”, see McGhee, above n 17 at [21-027].

<sup>19</sup> See *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, above n 6 at 707E per Lord Browne-Wilkinson: “a question of semantics”; Palmer, above n 17 at 119; Millet, above n 9 at 404; and Birks, above n 7 at 302–307.



vindication of pre-existing property rights.<sup>20</sup> An example of this narrow view is the obligation on the innocent donee of trust property to return the property to the beneficial owner when asked.<sup>21</sup> Such a recipient owes no personal duties to the beneficiary whilst they are ignorant of the origin of the property. However, they are sometimes referred to as a trustee.<sup>22</sup> A wider approach allows for the creation of property rights in response to unjust enrichment, with no corresponding personal liability as a trustee.<sup>23</sup> An example of the wider position is the suggested proprietary right arising as a result of a mistaken payment.<sup>24</sup> The difference between these two situations is that in the former the property is already impressed with trust when it is received, whereas in the latter situation the law is creating an equitable property right.<sup>25</sup>

It will be seen that there are two major conflicts in this area. The first relates to how we recognise or create proprietary rights, and the second to whether these rights are properly described as beneficial interests under a trust. The first of these problems is assessed in the next section<sup>26</sup> and the second is largely semantic. The important point is that there are some situations where the maximum extent of the duty on the recipient is to transfer the property when requested.

These types of trust have also been referred to both as resulting and constructive. An example of the resulting trust situation is *Re Muller*.<sup>27</sup> In that case, two children had bank accounts opened in their names by the now deceased without their knowledge. They were

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<sup>20</sup> See *Virgo*, above n 8 at 593 and 638; *Re Diplock* [1948] 1 Ch 465 (CA) at 539; and *Foskett v McKeown*, above n 1 at 109A and 111D.

<sup>21</sup> *Foskett v McKeown*, above n 1 potentially falls within this category, although the property received was the traceable product of trust property rather than trust property itself.

<sup>22</sup> See *Boscawen v Bajwa* [1996] 1 WLR 328 (CA) at 328 and 334; David Hayton (ed) *Underhill and Hayton: Law Relating to Trusts and Trustees* (15th ed, Butterworths, London, 1995) at 369–370; contrast *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, above n 6 at 707C–E and Hayton, Matthews and Mitchell, above n 17 at [28.1].

<sup>23</sup> The unjustly enriched recipient would be personally liable for the value of what they have received, the argument advanced here is that the trustee has no additional duties to maintain the trust property and can make use of the change of position defence.

<sup>24</sup> *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1976] Ch 105 (Ch); questioned in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, above n 6 at 714–715.

<sup>25</sup> But see Andrew Burrows "Proprietary Restitution: Unmasking Unjust Enrichment" (2001) 117 LQR 412 for the argument that *Foskett v McKeown*, above n 1 is better explained as a case of reversing unjust enrichment than vindicating pre-existing property rights, even though their Lordships used the language of vindication. Burrows argument is that claiming substitutes is justified in unjust enrichment.

<sup>26</sup> See below Chapter II B.

<sup>27</sup> *Re Muller, Cassin v Mutual Cash Order Company Ltd* [1953] NZLR 879 (SC); see also Chambers, above n 16 at 205.

held to be resulting trustees of the deposits and the accrued interest for the benefit of the deceased's estate.<sup>28</sup> The point to note is that the trust arose without the knowledge of the children.<sup>29</sup> Without such knowledge the trustee is under no duty except to restore the property, if still in possession of it.

An example of this situation being called a constructive trust is the innocent donee of trust property.<sup>30</sup> Again the donee has no knowledge of the origin of the property but is still considered to hold it on trust. A controversial example of this type of trust is the trust arising in *Chase Manhattan Bank N.A. v Israel-British Bank (London) Ltd.*<sup>31</sup>

What is common to these trusts is that the recipient receives the property without knowledge of the plaintiff's interest. What differentiates the cases is the type of interest the plaintiff had in the property before the defendant received it. In the cases described as resulting, the plaintiff has transferred their legal interest to the trustee and a new equitable beneficial interest is created in response to an absence of intention to pass the beneficial interest.<sup>32</sup> In the constructive trust cases, the trustee receives property that is already subject to the plaintiff's beneficial interest in circumstances that are not sufficient to clear that beneficial interest. Thus the situation where the trustee is obliged to return the property if still in possession of it can be described as either resulting or constructive. The difference between the two types of trust is not in outcome but in causative event.

## 2. *Personal rights in addition to proprietary rights*

There are situations where both proprietary and personal rights arise under the trust but the scope of the personal rights varies. The best example of this situation is the constructive trust over profits earned by a defaulting trustee.<sup>33</sup> In this instance the duties the trustee owes over

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<sup>28</sup> *Re Muller, Cassin v Mutual Cash Order Company Ltd*, above n 27 at 883.

<sup>29</sup> But see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, above n 6 at 705H where Lord Browne-Wilkinson attempted to re-explain this case and others as trusts that only arose once the trustee was made aware of the factors giving rise to the trust. This is inconsistent with the wording of Northcroft J in *Re Muller, Cassin v Mutual Cash Order Company Ltd*, above n 27 at 882: "an acquisition of property by one person in the name of another makes that other a trustee for the purchaser".

<sup>30</sup> See Palmer, above n 17 at 115–116.

<sup>31</sup> *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*, above n 24. Although it has subsequently been suggested that this trust would be better described as resulting, see Chambers, above n 16 at 129.

<sup>32</sup> See Chambers, above n 16 at 220; see further Virgo, above n 8 at 596–599.

<sup>33</sup> For instance *Attorney-General for Hong Kong v Reid* [1994] 1 NZLR 1 (PC).

the newly acquired property are the same as those owed over the initial trust property.<sup>34</sup> A further example of this type of situation is the resulting trust that occurs when an express trust fails.<sup>35</sup> Again it can be seen that this factual outcome can be described as either a constructive or resulting trust. What differs is the causative event of the trust.

The labels constructive and resulting tell us nothing about the types of duties owed by a trustee. Resulting and constructive trustees can both owe a wide variety of obligations depending on the factual situation. Therefore it is important to consider these factual situations to determine when particular rights and obligations arise.

### ***B What Gives Rise to a Trust?***

Birks' map of causative events provides a useful starting point for attempting to answer this question.<sup>36</sup> Instead of asking whether we have a constructive or resulting trust we could instead ask what type of event has occurred and then how the law chooses to respond to that event. We would have trusts that responded to consent, wrongs, unjust enrichment and potentially other miscellaneous events.<sup>37</sup> The express trust arises out of consent. It is less clear whether other trusts are responding to unjust enrichment or wrongs. The two main categories that are suggested to give rise to non-express trusts are unconscionability<sup>38</sup> and unjust enrichment.<sup>39</sup> Those who advocate for an unjust enrichment approach also recognise that there can be trusts that respond to unconscionability as well.<sup>40</sup> But those who advocate for unconscionability tend to see this as the exclusive factor in deciding when a trust will arise.<sup>41</sup>

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<sup>34</sup> See *Foskett v McKeown*, above n 1 at 108G–109C where Lord Browne-Wilkinson described traceable proceeds of the misappropriation of trust property as being held on the same express trust. Although not using the term constructive trust, his Lordship's reasoning supports the idea that the same duties will be owed in respect of profits or traceable products of misappropriation of trust property. See further Robert Chambers "Liability" in Peter Birks and Arianna Pretto (eds) *Breach of Trust* (Hart Publishing, Oxford, 2002) at 28–30.

<sup>35</sup> See Chambers, above n 16 199.

<sup>36</sup> See Birks, above n 7 at ch 2.

<sup>37</sup> See at 303–304.

<sup>38</sup> *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, above n 6 at 709C.

<sup>39</sup> Chambers, above n 16; and Birks, above n 7 at ch 8.

<sup>40</sup> See for example Michael Bryan "The criteria for the award of proprietary remedies: rethinking the proprietary base" in Michael Bryan (ed) *Private Law in Theory and Practice* (Routledge-Cavendish, Oxford, 2007) at 272; Elias, above n 10; and Birks, above n 7 at 34.

<sup>41</sup> *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, above n 6 at 709C.

## 1. Unconscionability

Trusts are a creation of equity and unconscionability is often regarded as the touchstone of equity, thus there has been a long association between a declaration of trust and a finding of unconscionability.<sup>42</sup> However, unconscionability is a vague concept and it can be difficult to describe exactly what the role of unconscionability is in awarding a trust.<sup>43</sup> There are two situations where it is often invoked. The first involves situations where an individual receives the plaintiff's property.<sup>44</sup> The other is where property is received that is not the plaintiff's, but the circumstances in which it is received render it unconscionable for the recipient not to hold it on trust for the plaintiff.<sup>45</sup>

### (a) Receipt of plaintiff's property

In *Westdeutsche* Lord Brown-Wilkinson described all trusts as responding to unconscionability.<sup>46</sup> His Lordship was concerned with whether there could be an equitable property interest following an ultra vires transfer of property. He concluded that there could not; a trust could only arise when the conscience of the recipient had been affected.<sup>47</sup> The ignorant recipient of a void or mistaken payment could not have his conscience affected when he was unaware of the invalidity or mistake.<sup>48</sup>

Lord Browne-Wilkinson discusses the liability of an innocent recipient of trust property and concludes that such a recipient should not be described as a trustee as they have no personal liability towards the beneficial owner.<sup>49</sup> His Lordship does accept that the beneficial owner has the ability to recover the property and does have a continuing property right.<sup>50</sup> His

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<sup>42</sup> At 709C.

<sup>43</sup> See McGhee, above n 17 at [26-002].

<sup>44</sup> *Foskett v McKeown*, above n 1; but see Burrows, above n 25.

<sup>45</sup> *Attorney-General for Hong Kong v Reid*, above n 33; See also Roy Goode "Property and Unjust Enrichment" in Andrew Burrows (ed) *Essays on the Law of Restitution* (Oxford University Press, Oxford, 1991) at 220 for the distinction between these two situations; and Palmer, above n 17 at 133 where the two situations are described as the "vidacatory constructive trust" and the "creationary constructive trust".

<sup>46</sup> *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, above n 6 at 709C: "the basic premise on which all trust law is built, viz. that the conscience of the trustee is affected."

<sup>47</sup> At 709C.

<sup>48</sup> Compare *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*, above n 24.

<sup>49</sup> *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, above n 6 at 707B–E.

<sup>50</sup> At 707D. This property right also extends to traceable substitutes, see *Foskett v McKeown*, above n 1 at 109.

Lordship then continues to discuss the situation where there is no pre-existing equitable interest in the property transferred:<sup>51</sup>

Therefore, in order to show that the local authority [the recipient of the money under the void contract] became a trustee, the bank must demonstrate circumstances which raised a trust for the first time either at the date on which the local authority received the money or at the date on which payment into the mixed account was made.

The circumstances which Lord Brown-Wilkinson was referring to are twofold. First there must be some recognised event that can create a proprietary right. Second the trustee must be aware of these circumstances.<sup>52</sup> In this case his Lordship was concerned only with resulting trusts and therefore, in his opinion, the event was either where A makes a voluntary payment to B or where A transfers property to B on trust, but the trust does not exhaust the entire beneficial interest.<sup>53</sup> His Lordship did recognise that there may be other events that give rise to a constructive trust,<sup>54</sup> but as the case in front of him was not argued on the basis of finding a constructive trust he did not fully explore these circumstances.<sup>55</sup> When discussing *Chase* his Lordship concluded that a mistaken payment could be a sufficient circumstance to give rise to a trust when coupled with the subsequent knowledge of the recipient that the payment was mistaken.<sup>56</sup>

An interesting parallel to Lord Browne-Wilkinson's statements in *Westdeutsche*<sup>57</sup> is his Lordship's later statements in *Foskett v McKeown*:<sup>58</sup>

In my judgment, the beneficial ownership of the policy, and therefore the policy moneys, cannot depend upon how events turn out. The rights of the parties ... were fixed when the relevant premiums were paid when the future was unknown.

There, his Lordship expressed the view that property rights should be determined at the time of receipt rather than at some later time. This contrasts strongly with His Lordship's reinterpretation of *Chase* where the existence of a beneficial interest was suggested to depend

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<sup>51</sup> *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, above n 6 at 707G.

<sup>52</sup> At 705D–706A and 709D.

<sup>53</sup> At 708A–E.

<sup>54</sup> At 716G–H.

<sup>55</sup> At 703B.

<sup>56</sup> At 715B.

<sup>57</sup> At 715B.

<sup>58</sup> *Foskett v McKeown*, above n 1 at 111C.

on the recipient subsequently becoming aware of the injustice.<sup>59</sup> In *Foskett* the future events in question related to the value of the substitute asset rather than the existence of a property right, but surely the same policy should apply.<sup>60</sup> If property rights are to be certain then they should be determined at the time of transfer rather than depending on some potential future event. The logic behind the idea that property rights can depend on the subsequent state of a recipient's knowledge is one that has been strongly criticised.<sup>61</sup> The timing of the creation of property rights can be crucially important for a number of reasons, including priority on insolvency,<sup>62</sup> rights to profits<sup>63</sup> and tax obligations.<sup>64</sup> To make such outcomes dependant on a "wholly uncertain"<sup>65</sup> future is undesirable. One particularly useful example is given by Chambers:<sup>66</sup>

Consider an example in which A pays money by mistake to B, who makes a gift of that money to C, who has no notice of the mistake. If, as Lord Browne-Wilkinson suggests, the trust of a mistaken payment depends on the recipient's notice, C's beneficial entitlement to that money will depend on whether B had notice of the mistake before the gift to C was made. It is difficult to understand why B's notice should matter or why the outcome should be any different if C had received the mistaken payment directly from A.

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<sup>59</sup> *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, above n 6 at 714–715.

<sup>60</sup> In *Foskett* the plaintiffs were purchasing property in Portugal. Mr Murphy was holding their purchase money on express trust. He used some of the trust money to pay premiums on his life insurance policy. His policy was held on trust for the benefit of his children. Mr Murphy committed suicide and the children obtained the benefit of the insurance policy. The plaintiffs claimed to be entitled to a share of the insurance pay-out in proportion to the contributions they had provided. The question was whether the plaintiffs were entitled to this proportionate share or whether they should be limited to a lien for the value of the misappropriated funds.

<sup>61</sup> See Virgo, above n 8 at 611–612; Andrew Burrows *The Law of Restitution* (3rd ed, Oxford University Press, Oxford, 2011) at 180; and Chambers, above n 16 at 208.

<sup>62</sup> See *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*, above n 24.

<sup>63</sup> The beneficiary's right to the accumulated interest in *Re Muller, Cassin v Mutual Cash Order Company Ltd*, above n 27 is arguably further evidence for the property right being determined at the time of receipt rather than when the trustees were made aware.

<sup>64</sup> See *A Taxpayer v Commissioner of Inland Revenue* (1997) 18 NZTC 13,350 (CA) at 13368 where stolen money was held on trust from the moment of theft, therefore the thief incurred no tax liability. The specific tax implications of this decision have subsequently been changed by the Income Tax Act 2007 (NZ), s CB 32 which provides that a thief will be assessed for the value of the property they obtain possession of even if they hold that property on constructive trust.

<sup>65</sup> *Foskett v McKeown*, above n 1 at 111B.

<sup>66</sup> Chambers, above n 16 at 208; a similar example is given by Burrows, above n 61 at 180 in the context of priority on insolvency.

It would seem that making property rights contingent upon the knowledge of the recipient is undesirable. Lord-Browne-Wilkinson accepted this in the context of pre-existing beneficial interests in *Foskett* but seems to have been happier to introduce this uncertainty in *Westdeutsche*.

In attempting to uphold a role for unconscionability as the basis for the creation of equitable property rights under a constructive trust, Virgo limits the relevant time period for enquiry into the defendant's knowledge to the time of receipt.<sup>67</sup> This avoids the uncertainty present in Lord Browne-Wilkinson's approach, but substantially narrows the scope of proprietary relief.<sup>68</sup> This narrowing is counteracted by the somewhat wider approach that Virgo takes to resulting trusts, which he characterises not as relying on the unconscionability of the recipient, but rather on the absence of intent of the transferor.<sup>69</sup>

This approach is to be preferred to that of Lord Browne-Wilkinson. By resting all trusts on the knowledge of the recipient, Lord Browne-Wilkinson's approach unnecessarily narrows the scope of proprietary remedies and at the same time makes them uncertain and arbitrary. However, there remains a problem with Virgo's approach. His categorisation of absence of intent to benefit is much narrower than that of Chambers and Birks.<sup>70</sup> Instead of aligning absence of intent to benefit with the traditional vitiating factors addressed in an unjust enrichment claim, Virgo confines his resulting trust analysis to fewer vitiating factors. He is not explicitly clear on what the exact difference is; but for example he regards situations where the true owner had no intent to benefit because the property was stolen, or where the property was transferred as the result of undue influence to be sufficient.<sup>71</sup> Conversely in situations such as mistaken payments Virgo would regard the intent to benefit as not sufficiently vitiated.<sup>72</sup> It is in these situations that Virgo sees a role for the constructive trust and unconscionability. Where the recipient of another's property is aware of some problem with the transaction, which falls short of an absence of intent to benefit, then they hold the property on constructive trust.<sup>73</sup> For example in circumstances where the recipient knew at

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<sup>67</sup> Virgo, above n 8 at 612.

<sup>68</sup> See Palmer, above n 17 particularly at 121, 123 and 129 for another suggested method of refining an unconscionability approach to be less uncertain by redefining unconscionability as deemed intention. See further, CEF Rickett "The Classification of Trusts" (1999) 18 NZULR 305 at 327–328.

<sup>69</sup> Virgo, above n 8 at 598.

<sup>70</sup> At 603–604.

<sup>71</sup> At 603–604.

<sup>72</sup> At 603–604.

<sup>73</sup> At 608–610.

the time of receipt that the transaction was void, or that the consideration has failed totally, or that the payment was mistaken; those circumstances could give rise to a constructive trust.<sup>74</sup>

This approach narrows the problem rather than removing it. By continuing to see a role for unconscionability in the creation of property rights when the property is transferred from the plaintiff, the status of the plaintiff's property rights is rendered uncertain. Property rights are of primary importance in disputes with third parties and therefore the knowledge of the recipient of the property should not be the decisive factor in whether or not a property right is recognised.<sup>75</sup>

Both Virgo and Lord Browne-Wilkinson are concerned with avoiding "excessive proprietary protection".<sup>76</sup> By this Virgo means that the courts should attempt not to disturb security of receipt and the statutory insolvency scheme. These are valid aims, but another equally if not more important aim for a legal system is consistency. If the law is willing to enforce property rights against innocent and unknowing recipients in some circumstances then we should attempt to be consistent in the circumstances that we do.

By Lord Browne-Wilkinson's account these circumstances should be limited to enforcing pre-existing property rights, by Virgo's account they should be limited to situations where there is an absence of intent to benefit. I agree that both of these situations should give rise to proprietary rights. The problem is that both see a role for unconscionability in the creation of proprietary rights when the property in question has come from the plaintiff. To an extent this can be explained by their concern about security of receipt, however a bona fide purchase defence seems to be a better way to protect security of receipt.<sup>77</sup> Security of receipt is not something we should award everyone, it is something that those who have innocently relied on should have the benefit of. This is much better achieved by allowing the plaintiff continued property rights, but making these vulnerable to defences.

The insolvency concern is also better addressed by an approach that doesn't premise the creation of property rights on unconscionability. If we are concerned about doing justice between various creditors of the insolvent, is it best to premise that justice on knowledge of the insolvent, or should we instead base it on the relative equities of the creditors? Basing

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<sup>74</sup> At 610; see also *Neste Oy v Lloyd's Bank plc* [1983] 2 Lloyd's Rep 658 (QB) at 666.

<sup>75</sup> See Burrows, above n 61 at 180.

<sup>76</sup> Virgo, above n 8 at 598; and *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, above n 6 per Lord Browne-Wilkinson at 704A–705B.

<sup>77</sup> See Elias, above n 10 at 19–21 and 119–125.



priority on the knowledge of the insolvent seems arbitrary. Take the example of the mistaken payment. A mistakenly pays money to B and then becomes insolvent. On an approach that sees knowledge as the relevant factor in determining whether a proprietary right is recognised, A's priority over other perhaps equally mistaken creditors depends on the state of B's knowledge.

If the unconscionable element is knowledge that you received another's property unjustly, then all the unconscionability element is adding is knowledge of the type of claim that the defendant is subject to. The better position is to regard the absence of knowledge on the part of the recipient of a mistaken payment not as preventing the creation of an equitable property right, but rather as limiting the scope of the personal liability that the recipient will face. There is no reason why an innocent change of position defence could not also apply to proprietary rather than personal claims.<sup>78</sup> Such a defence, coupled with the bona fide purchase defence would mitigate the potential concerns about the harshness of proprietary remedies.<sup>79</sup>

(b) Receipt of property other than from the plaintiff<sup>80</sup>

In this situation there is a role for unconscionability. The reason for this is that there can be no basis for the plaintiff's property rights arising from unjust enrichment or from a persistence of property theory as the property or enrichment has not come from or at the expense of the plaintiff. The prime example of the constructive trust responding to unconscionability in this context is the trust recognised in *Attorney-General for Hong Kong v Reid*.<sup>81</sup> The Privy Council held that bribes received by a fiduciary in the scope of their fiduciary duty were held on trust. This case is explicable on the basis of unconscionability. Mr Reid breached his fiduciary duty to the Hong Kong government and in order to protect the nature of that relationship he was deemed to hold the bribes he received on trust.<sup>82</sup> The mistake made by those who favour unconscionability reasoning is to take the fact that some

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<sup>78</sup> See Burrows, above n 61 at 547–548; *Boscawen v Bajwa*, above n 22 at 341C per Millet LJ; but see *Foskett v McKeown*, above n 1 at 127G per Lord Millet.

<sup>79</sup> See Elias, above n 10 at 119–125.

<sup>80</sup> Because this dissertation is focused on theft the analysis in this section is presented briefly.

<sup>81</sup> *Attorney-General for Hong Kong v Reid*, above n 33.

<sup>82</sup> At 331.

trusts respond to the unconscionability of the defendant and to extrapolate that to a general position that all trusts necessarily need to respond to unconscionability.<sup>83</sup>

A possible reason for this confusion comes from the broad way in which we define the fiduciary duty not to profit. The idea of the no profit rule seems to encapsulate both the misuse of property and of position. Whilst both can be seen as unconscionable in a broad sense, in the case where the defaulting trustee uses trust property there is another justification for a constructive trust over the profits that comes from unjust enrichment.<sup>84</sup> The defaulting trustee has enriched themselves at the expense of the beneficiaries' rights. This type of enrichment is the type that is sufficient to create proprietary rights.<sup>85</sup>

### (c) Conclusion on unconscionability

There are some situations where unconscionability is the basis of the creation of an equitable proprietary right, but this does not mean that it is the basis of the creation of every equitable proprietary right. The equitable rights that beneficiaries have against traceable substitutes in the hands of innocent volunteers are not explicable on the basis of unconscionability. Likewise the beneficial interests that mistaken payers should enjoy in the proceeds of their mistaken payment should not depend on the knowledge of the recipient. Knowledge and unconscionability are relevant to shaping the personal duties that support the property right, they prevent the application of bona fide purchase and change of position defences, but they should not be prerequisites to the creation of equitable interests under a non-express trust.

## 2. *Unjust enrichment*

The weaknesses with an unconscionability approach have been pointed out; it leads to uncertainty and arbitrariness in the plaintiff's property rights. This is undesirable given the importance of property rights in insolvency, and therefore in disputes with other creditors. The only time that unconscionability should play a role in the creation of property rights is in

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<sup>83</sup> See generally Elias, above n 10 for an in depth discussion of the different aims that trusts can pursue.

<sup>84</sup> See Chambers, above n 34 at 29–30 for a development of this argument. Essentially, whilst it is an equitable wrong to expropriate trust property, it could also be conceived of as an unjust enrichment. This can be seen as a parallel to the alternative conceptions of restitution for civil wrongs, a topic discussed further below at ch III D and ch IV A 2.

<sup>85</sup> See below ch II B 2.

the situation where the property has not come from the plaintiff, but should still be considered held on trust for their benefit because of some wider duty that the defendant owes.<sup>86</sup>

There are several approaches advocated by those who see a role for unjust enrichment in the creation of property rights; the risk of insolvency approach,<sup>87</sup> the proprietary base,<sup>88</sup> and a newer approach that has been suggested by Chambers, which I shall call the kind of enrichment approach.<sup>89</sup> I will suggest that we can gather some insights from this kind of enrichment approach to improve the proprietary base model.

(a) The risk of insolvency

Burrows is a proponent of the risk of insolvency approach.<sup>90</sup> His suggestion is that unjust enrichment should give rise to proprietary restitution when the plaintiff can be regarded as analogous to a secured creditor in not taking the risk of the defendant's insolvency. He suggests that this will generally be the case when the plaintiff is ignorant of the transaction, or when the plaintiff's consent is vitiated by mistake, duress or undue influence. However, he notes in some situations that these factors will not give rise to proprietary restitution, for example where the plaintiff makes a mistake of law about the validity of a contract under which the plaintiff was to have no security. In these situations the plaintiff is held to have taken the risk of insolvency.<sup>91</sup>

Michael Bryan has criticised this approach saying that we could equally say that the mistaken payer only takes the risk of insolvency if the contract is legally valid.<sup>92</sup> However, this criticism is weakened by Bryan's subsequent attempt to fit *Westdeutsche* into the proprietary

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<sup>86</sup> See *Attorney-General for Hong Kong v Reid*, above n 33.

<sup>87</sup> Burrows, above n 25 at 425–428.

<sup>88</sup> Goode, above n 45 at 225 and 232; Peter Birks *An Introduction to the Law of Restitution* (revised ed, Oxford University Press, Oxford 1989) at 378–385; and Birks, above n 7 at 182.

<sup>89</sup> Robert Chambers "Two Kinds of Enrichment" in Robert Chambers, Charles Mitchell and James Penner (eds) *The Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press, Oxford, 2009).

<sup>90</sup> Burrows, above n 25 at 425–428; and Burrows, above n 61 at 176–179.

<sup>91</sup> Burrows, above n 61 at 177 uses this analysis to explain why there was no proprietary remedy in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, above n 6 as even though the swap contract was void ab initio the bank had taken the risk of insolvency in this void contract. Compare *Banque Financière de la Cité v Parc Battersea Ltd* [1999] 1 AC 221 where the money was advanced on the basis that there would be a security interest. Even though the promise of security was outside the authority of the agent making the promise unenforceable, the money had been advanced on that assumption and therefore the bank was in an analogous position to a secured creditor.

<sup>92</sup> Bryan, above n 40 at 278.

base approach.<sup>93</sup> Bryan argues that the case is one of subsequent failure of consideration even though the contract was ultra vires the council. He states: “the critical question is whether the money paid under the loan agreement is intended to be at the free disposal of the borrower.”<sup>94</sup> We could use Bryan’s own criticism to say that the money is only intended to be at the free disposal of the borrower if the borrowing is legally valid. But his criticism still exposes an important tension in the risk of insolvency approach; relying on contracts or intentions that are later shown to be void or vitiated to control proprietary relief weakens the attractiveness of an approach based on taking the risk of insolvency.

#### (b) The proprietary base

The proprietary base approach has been advanced by Roy Goode<sup>95</sup> and Peter Birks,<sup>96</sup> and it was explained by Chambers in *Resulting Trusts* as having four key elements:<sup>97</sup>

... the claimant (i) has provided the property and (ii) did not intend to benefit the recipient in the circumstances and, further, that the property (iii) is identifiable in the hands of the recipient and (iv) has never been a freely available part of his or her general assets before the right to restitution arose.

This gives similar results to a risk of insolvency approach but the key distinction has already been noted; the proprietary base approach is not concerned with the actual intentions expressed by the parties, if when expressing those intentions the parties were labouring under a vitiating factor. Instead it draws the line between proprietary and non-proprietary relief on the basis of legal doctrine.<sup>98</sup> This approach seems more favourable because it does not rest upon making use of terms or intentions that have been held to be ineffective for other reasons.<sup>99</sup>

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<sup>93</sup> At 284.

<sup>94</sup> At 284.

<sup>95</sup> Goode, above n 45 at 225 and 232.

<sup>96</sup> Birks, above n 88 at 378–385 and Birks, above n 7 at 182.

<sup>97</sup> Chambers, above n 16 at 234 and 147.

<sup>98</sup> Bryan, above n 40.

<sup>99</sup> This criticism is similar to the concern expressed in *Sinclair v Brougham* [1914] AC 398 (HL) at 417 where the court was unwilling to imply a contract in a situation where the law had deemed the parties unable to contract. Although this implied contract fiction is no longer good law; see *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 (HL) at 28; and *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, above n 6 at 710E–F. The suggestion that a particular contract is void so we shouldn’t rely on its terms could be seen as a modern equivalent of the concern expressed in *Sinclair v Brougham*.

However, a problem with the proprietary base approach has been recognised by Craig Rotherham.<sup>100</sup> He sees the proprietary base as “some odd residue of property—something which ‘subsists’, even when it is clear there is no continuing proprietary interest.”<sup>101</sup> This relationship between property and the proprietary base can be unclear. As Birks sees unjust enrichment as based on value,<sup>102</sup> what does it mean to say that the plaintiff “provided the property”? As we will see property can mean many things, and more than one property right can exist in one piece of property. For instance the plaintiff provides the physical asset to the defendant, but not the particular property right that the defendant enjoys, is this sufficient for the proprietary base?<sup>103</sup> By abstracting all enrichments to value, but still making use of the term property, the proprietary base theory suffers from some of the same problems that an approach based on metaphors of persisting property does. We are asked to accept a conception of property that is grounded in the assets transferred, rather than thinking about the rights that attach to those assets.

#### (c) Enrichment by assignable rights

Chambers has suggested that the focus should be on the kind of enrichment.<sup>104</sup> That there should only be one type of restitution and that is to give back the enrichment.<sup>105</sup> This contradicts standard unjust enrichment theory that tends to see enrichment in terms of value rather than rights.<sup>106</sup> Chambers advances different conceptions of property that he considers useful to aid this analysis and concludes that where the enrichment is an assignable right then this should trigger proprietary restitution.<sup>107</sup>

Chambers argues that the two kinds of enrichment approach explains situations where the Court does not enquire into the value of the right received. In this class of cases he puts *Foskett* arguing that the House of Lords was not concerned with the ultimate value of the right

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<sup>100</sup> Craig Rotherham *Proprietary Remedies in Context: A Study in the Judicial Redistribution of Property Rights* (Hart Publishing, Oxford, 2002) at Ch 15.

<sup>101</sup> At 335.

<sup>102</sup> Birks, above n 7 at 49–52.

<sup>103</sup> I argue this is what occurs when a thief steals property in chapter III.

<sup>104</sup> Chambers, above n 89 at 243 and 267–269.

<sup>105</sup> At 267–269.

<sup>106</sup> At 243.

<sup>107</sup> At 256.

received.<sup>108</sup> This analysis has merit in focusing our attention more closely on what we mean by property, however it needs a further refinement.

Whilst Chambers argues that it is the kind of enrichment that matters he appears to discount the at the expense of question. When explaining *Foskett* Chambers states: “the claimant’s expense consisted of value and the defendant’s enrichment consisted of a right.”<sup>109</sup> However, I would suggest that the better analysis takes note of the fact that the enrichment was also at the expense of the plaintiff’s rights. When the trust money held by Mr Murphy on behalf of the plaintiffs was misappropriated to pay his life insurance premiums, the beneficiaries of that life insurance policy were benefited by a right, in that they received additional units in the life insurance policy. This enrichment was also at the expense of the plaintiff’s rights. They no longer held the beneficial interest to the purchase money. The law reversed the unjust enrichment of the beneficiaries of the life insurance policy by creating a new right in that policy in favour of the plaintiffs. While the initial value of the rights received was important for determining what share of the insurance pay-out the plaintiffs would receive, it also mattered that what they lost was a property right, not just value.

This distinction is important in cases where it may be said that the defendant received an assignable property right, but it wasn’t at the expense of the plaintiff’s rights. I will argue this is the situation where property is stolen.<sup>110</sup> The thief gains property rights in the form of a possessory title, but because the victim of the theft retains their better title to the goods, this enrichment is not at the expense of the plaintiff. However, value is still transferred from the victim to the thief; the victim of theft has lost some of the enjoyment that they could practically obtain from possession. Therefore I will argue that there should be a claim for personal restitution for the value of this use, but not proprietary restitution for the rights that the thief obtained. This focuses back on the first element of the proprietary base,<sup>111</sup> providing some clarification about the relationship between property and proprietary base.

### ***C Conclusion***

In this chapter we have seen that trusts arise in a variety of situations outside of the express intentions of the parties. Further we have seen that there is a wide variety of duties that we

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<sup>108</sup> At 260–261.

<sup>109</sup> At 89 at 261.

<sup>110</sup> See Chapter III B below.

<sup>111</sup> That the plaintiff has provided the property.

impose on non-express trustees, ranging from the full duties that we would expect from an express trustee to the obligation to restore the property if it is still in the trustee's possession. These differences in duty are not attributable to any particular label, but rather fact specific inquiries that will differ from case to case, depending on the knowledge of the trustee.

Due to the role that the trustee's knowledge plays in shaping the duties owed by the trustee, we have seen that there is an association between unconscionable behaviour and non-express trusts. However, we have concluded that unconscionability is not the best explanation of the property rights that the beneficiary gains in many situations. Although unconscionability can give rise to property rights under a trust in some limited situations,<sup>112</sup> more often the unconscionability of the defendant serves to create the personal obligations of the trustee that reinforce and protect the beneficiary's property rights. This distinction is important in the case of theft because if we were to rely on the thief's knowledge as the discriminating factor in the creation of property rights it would be all too tempting to suggest that the thief always holds property on trust. It is better to reserve the situations where wrongdoing creates property right by acting on the conscience of the wrongdoer to situations where there is a further justification beyond the wrongdoing itself in the form of a special relationship that the law seeks to protect.

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<sup>112</sup> As in *Attorney-General for Hong Kong v Reid*, above n 33.

### *Chapter III: Does a Trust Arise Over Stolen Property?*

The purpose of this chapter is to identify whether it is consistent with the conception of trusts described in chapter II to hold that whilst the thief still has the stolen asset in their possession a trust can arise for the benefit of the victim. There are several steps to this analysis. The first is to consider what property the trust would attach to where the true owner retains identifiable legal title. Given this starting point we assess whether unjust enrichment or unconscionability can provide a justification for awarding a trust in this situation. Given that they cannot, the final part of this chapter assesses the other remedies that are available.

#### *A Title Concerns*

When the thief steals property the true owner does not lose their legal title.<sup>113</sup> Given this, a common criticism is that there is no property for the trust relationship to attach to. This position was advanced by Rimer J in *Shalson v Russo*:<sup>114</sup>

If the thief has no title in the property, I cannot see how he can become a trustee of it for the true owner the owner retains the legal and beneficial title.

A contrary position has been put forward by John Tarrant<sup>115</sup> and David Fox.<sup>116</sup> Their position is that the thief obtains a possessory interest in the stolen property and it is this possessory interest that they hold on trust. The victim will have both a legal right to possession and an equitable interest in the thief's possessory title. In support of this idea Tarrant cites the case of *Amory v Delamire*,<sup>117</sup> where it was held that a finder's possessory title was good against all but the true owner. This case is authority for the contention that separate titles can exist in one piece of property, however it does not answer the question of whether a possessory title can be held on trust.

This question has been the focus of Susan Barkehall-Thomas' criticism. She argues that it is an open question whether thieves should obtain any form of title, but that even if they do obtain a possessory title that this title is only relevant in disputes with subsequent trespassers

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<sup>113</sup> See *Ilich v R* (1987) 162 CLR 110 at 127–128; see also Virgo, above n 8 at 584.

<sup>114</sup> *Shalson v Russo*, above n 2 at [110].

<sup>115</sup> John Tarrant "Theft Principle in Private Law" (2006) 80 ALJ 531 at 533; see further John Tarrant "Thieves as trustees: In defence of the theft principle" (2009) 3 J Eq 170 at 172.

<sup>116</sup> David Fox *Property Rights in Money* (Oxford University Press, Oxford, 2008) at [4.103]–[4.106].

<sup>117</sup> *Amory v Delamire* (1722) 1 Str 505 (KB); Tarrant, above n 115 at 174.



and has no relevance to a dispute between the true owner and a thief.<sup>118</sup> For her first proposition Barkehall-Thomas has to contend with *Costello v Chief Constable of Derbyshire Constabulary*, which held that an individual claiming possession through theft could rely on that title against not only subsequent wrongdoers but also against the police who had lawfully obtained possession.<sup>119</sup> Barkehall-Thomas argues that this case was wrongly decided and relies on the criticisms of several other academics.<sup>120</sup> She concludes that it would be equally possible to find that a thief obtains no property rights, or only rights against subsequent wrongdoers.<sup>121</sup> Cynthia Hawes also argues that *Costello* was wrongly decided.<sup>122</sup> Her argument aims to distinguish finders from thieves. Finders, she argues, obtain a form of possessory title by virtue of the fact that their possession evidences a right to possess and without evidence to the contrary it is to be assumed that they have a valid title.<sup>123</sup> Thieves conversely only obtain mere possession.<sup>124</sup> This in Hawes' opinion only entitles them to personal relief against subsequent wrongdoers who interfere with their possession, however, where possession is lawfully taken from them that is sufficient to extinguish any rights that they have in the property. Even if this argument is correct it does not of itself provide a reason why the thief could not also be a trustee. Even on the more limited conception of the rights obtained by the thief advanced by Hawes, the fact remains that they are still property rights. A description of them as mere possession does not change the fact that this mere possession gives the thief rights against all but the true owner to stop wrongful interference with that property. That type of right, even though narrower than the right recognised in *Costello*, is still a form of property.

Barkehall-Thomas' second argument is that even if there is a property right it is not a property right that can be held on trust. This contention has been rejected by both

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<sup>118</sup> Susan Barkehall Thomas "Thieves, owners, and the problem of title: Part 1 -- Chattels" (2011) 5 J Eq 228 at 232–239 and Susan Barkehall Thomas "Thieves as trustees: The enduring legacy of *Black v S Freedman & Co Ltd*" (2009) 3 J Eq 52 at 58–59. See also Susan Barkehall Thomas "Thieves, owners and the problem of title: Part 2 -- Money" (2012) 6 J Eq 1.

<sup>119</sup> *Costello v Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381, [2001] 1 WLR 1437.

<sup>120</sup> David Fox "Enforcing a possessory title to a stolen car" (2002) 61 CLJ 27; Cynthia Hawes "Title to Found and Stolen Goods: The Right to Sue in Conversion" (2005) 11 *Canta LR* 185; Cynthia Hawes "Tortious Interference with Goods in New Zealand: The Law of Conversion Detinue and Trespass" (PhD University of Canterbury, 2010).

<sup>121</sup> Thomas, above n 118 at 251.

<sup>122</sup> Hawes, above n 120 at 116.

<sup>123</sup> At 110–111.

<sup>124</sup> At 111.

Chambers<sup>125</sup> and Tarrant,<sup>126</sup> who suggest that the trust is a highly flexible instrument that is capable of recognising a wide variety of property rights. Barkehall-Thomas' argument is that because the title gives no rights against the true owner it cannot be held on trust for their benefit. However, one can immediately think of a number of types of property with limited rights against the true owner that are capable of being held on trust.<sup>127</sup>

There is no conceptual difficulty with the thief holding their possessory interest on trust. This possessory interest may be lesser than that of a finder and it may give no rights against the true owner, but it is still a property right and therefore capable of being held on trust. The next section of this chapter assesses whether the thief should hold property on trust based on the justifications given in chapter II.

### ***B Unjust Enrichment***

There are two questions; the first is whether the thief's possession can be an enrichment while the owner retains legal title and the second is, if it can be an enrichment, whether it is the type of unjust enrichment that should give rise to property rights.

#### *1. Is possession an enrichment?*

The argument that possession can be an unjust enrichment has been put forward forcefully by Burrows.<sup>128</sup> He argues that retention of title has no effect on whether or not there has been unjust enrichment; he sees enrichment as a factual enquiry. He argues that, "For the defendant, having stolen the claimant's £100 banknote, to be able to say, 'I am not enriched because the banknote belongs to you' would be absurd in the real world."<sup>129</sup> His position is that if the defendant makes temporary use of stolen property then they should repay the value of that use but if the defendant is treating the property "as his own and is not intending to

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<sup>125</sup> Robert Chambers "Trust and Theft" in Elise Bant and Matthew Harding (eds) *Exploring Private Law* (Cambridge University Press, Cambridge, 2010) at 229.

<sup>126</sup> Tarrant, above n 115 at 178.

<sup>127</sup> Leases seem one notable example; See further Chambers, above n 125 at 229.

<sup>128</sup> Burrows, above n 25 at 419 and Burrows, above n 61 at 194–198 see also James Edelman and Elise Bant *Unjust Enrichment in Australia* (Oxford University Press, Melbourne, 2006) at 102–103, Mitchell, Mitchell and Watterson, above n at [5-17]; but contrast Lord Goff and Gareth Jones *The Law of Restitution* (7th ed, Sweet and Maxwell, London, 2007) at [1-027]; and William Swadling "Ignorance and Unjust Enrichment: The Problem of Title" (2008) 28(4) *Oxford Journal of Legal Studies* 627 at 641–647.

<sup>129</sup> Burrows, above n 61 at 197; see further Robert Stevens "Three Enrichment Issues" in Andrew Burrows and Lord Rodger (eds) *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, Oxford, 2006) at 62–64.

return it, we say that, factually, the defendant has benefited by the capital value of the property.”<sup>130</sup> In the situation where the defendant has been enriched by the capital value of the property then title passes to prevent the plaintiff from getting double recovery.

In comparison Birks saw election to allow title to pass as a precondition to recovery.<sup>131</sup> He saw two methods that the common law uses to protect pre-existing property rights. The first is conversion and is based upon the true owner retaining legal title and the other is unjust enrichment where the claimant elects to allow title to pass and sues for the enrichment.<sup>132</sup> Birks’ model of election has not been without criticism.<sup>133</sup> The concept of election seems somewhat artificial and also arguably removes the unjust factor associated with the enrichment. How for instance can a plaintiff argue that the unjust factor is ignorance, if their claim is dependent on ratifying the transfer? Burrows’ model of allowing actual possession to be an enrichment seems to be preferable to the artificiality of presuming an election to allow title to pass. Particularly because Burrows’ model seems to flow naturally recognising that use can have value independent of the right to possession.

Chambers suggests that the thief’s possessory title does not arise at the expense of the true owner.<sup>134</sup> Chambers is of the view that the possessory title arises out of the act of possession itself combined with the intent to possess. If this is the case, he argues, then the possession does not arise at the expense of the true owner; the true owner’s rights are unaffected. Chambers suggests that “the fact of possession cannot be disentangled from possession itself, which is a legal right”.<sup>135</sup> Therefore there has been no unjust enrichment. However, I would suggest that there is scope to recognise that the thief does obtain a degree of use value from actual possession that can be disentangled from their right to possession. Smith’s example of the £50 note transferred under a mistake of identity is a useful one.<sup>136</sup> At first we might suggest that the use value is a claim for interest on the value of the note; the thief’s factual possession means that the original owner of the note is deprived of the ability to recover

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<sup>130</sup> Burrows, above n 61 at 195.

<sup>131</sup> Birks, above n 7 at 66–67.

<sup>132</sup> At 64–68.

<sup>133</sup> See Lionel Smith "Tracing" in Andrew Burrows and Alan Rodger (eds) *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, Oxford, 2006); Swadling, above n 128 at 651–653.

<sup>134</sup> Chambers, above n 125 at 233–234; see also Swadling, above n 128 at 650; and Birks, above n 7 at 63–69.

<sup>135</sup> Chambers, above n 125 at 234.

<sup>136</sup> See Smith, above n 133 at 120–122; and Burrows, above n 61 at 195 using a similar example.

interest and the thief obtains this enrichment.<sup>137</sup> Similarly where the stolen property is more tangible, for instance where the thief steals a car, the right that the thief has against subsequent trespassers<sup>138</sup> does not arise at the victim's expense, but the use of the car does. At a certain point however, the value of a right to possession and the use value of the possession become equivalent. It is at this point that if the plaintiff is to claim in restitution for the capital value of the stolen property, they must allow title to pass to prevent double recovery.

## 2. Does unjust enrichment by possession give rise to a property right?

Burrows' position on whether or not this form of unjust enrichment can give rise to a proprietary remedy is uncertain. Although he argues that possession is enriching for the purposes of a personal claim he seems to suggest at some points that there can be no claim to a proprietary remedy,<sup>139</sup> but at others that the plaintiff can elect to make such a proprietary claim.<sup>140</sup> When he does allude to the possibility of pursuing a proprietary remedy through claiming an equitable interest in stolen property, he states that such a claim will result in allowing title to pass to the thief.<sup>141</sup> This argument is stated to be analogous to the proposition that when the plaintiff seeks a personal remedy for unjust enrichment of the capital value of an asset the title passes to prevent double recovery. Although Burrows' analysis supports the idea that possession can be an unjust enrichment it does not give direct support for the idea that a possessory interest could be held on trust while the true owner retains legal title.

This is where Chambers' analysis of the rights of the thief is useful. The thief's possessory title does not come at the expense of the plaintiff. However, we do not need to say that there has been no unjust enrichment at the expense of the victim. Instead we could say that possession is enrichment and it can be factually at the expense of the plaintiff, but at the plaintiff's expense in the sense of at the expense of their use of, rather than their legal rights

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<sup>137</sup> Smith, above n 133 at 121 see further Birks, above n 7 at ch 4 for his concept of interceptive enrichment.

<sup>138</sup> As in *Costello v Chief Constable of Derbyshire Constabulary*, above n 119.

<sup>139</sup> Burrows, above n 61 at 432: "the owner's absence of consent means that the legal title in the property will simply not pass to the defendant so there can be no question of creating a proprietary (as opposed to personal) right for the claimant to reverse the defendant's unjust enrichment."

<sup>140</sup> At 175 n 33: "if the claimant chooses to assert an equitable proprietary interest in the original asset to reverse the defendant's unjust enrichment this presumably has the consequence that legal title in the original asset is regarded as having passed to the defendant."

<sup>141</sup> At 175 n 33.

in relation to the property. Thus the creation of an equitable interest in the thief's possessory title would not reverse the enrichment that is at the expense of the plaintiff. The enrichment that the thief enjoys is multi causal; the legal rights that the thief has do not arise at the expense of the plaintiff, they arise from possession coupled with an intent to possess.<sup>142</sup> The use and enjoyment that the thief obtains do arise at the expense of the plaintiff, but the value of this use can only be responded to by a right to personal restitution for the value of that use.

This analysis demonstrates the usefulness of an approach that modifies the proprietary base analysis to focus more specifically on whether the enrichment is property rights acquired at the expense of the plaintiff's proprietary rights. A risk of insolvency approach is difficult to apply here. Burrows suggests that the plaintiff should be able to elect to pursue a proprietary claim and thereby allow title to pass. If this is the case, when is the appropriate time to test whether the plaintiff took the risk of insolvency? At the time the property is stolen the plaintiff is not even exposed to a risk of insolvency. However, if they subsequently elect to allow title to pass in order to claim an equitable proprietary right, does this mean that they have taken the risk of insolvency, or are they allowing title to pass on the premise that they will get an equitable proprietary right? While it is conceptually possible to say that title passes following a claim for personal restitution to prevent double recovery, it seems impossible to suggest that title could pass after the beneficial equitable right to that same property had been vested in the plaintiff. Until title passes to the thief, there is nothing for that beneficial interest to attach to.<sup>143</sup>

In this section we have accepted the argument that possession can be enriching, but rejected the argument that enrichment by possession should give rise to a trust over that possessory interest. Chambers' argument that possession is not at the expense of the plaintiff was rejected for an approach that allowed the use value of the possession to be at the plaintiff's expense but not the rights acquired. This approach is justified because it recognises that defendants can be abstractly enriched at the plaintiff's expense without being at the expense

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<sup>142</sup> See *Armory v Delamirie*, above n 116; *Costello v Chief Constable of Derbyshire Constabulary*, above n 119.

<sup>143</sup> We have seen that the beneficial right *could* attach to the possessory title, but that is not the argument that Burrows makes, instead he sees the beneficial interest attaching to a full legal title before that title has passed to the thief, and then the title passing. This appears to be in stark contradiction with the idea that an owner does not have co-existent equitable and legal ownership, see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, above n 6 at 706D–G and the authorities cited therein.

of the plaintiffs rights.<sup>144</sup> Once we have accepted that possession can be an enrichment at the expense of the plaintiff it was important to assess whether it was appropriate to award proprietary relief. It is suggested that the focus should be on what the thief received at the expense of the plaintiff. Contrary to Chambers the answer is not nothing,<sup>145</sup> the answer is use rather than rights. If we then transfer this fact into a proprietary base model, it provides a better exposition of whether proprietary rights should be awarded. In this case because the enrichment was use there was no valid transfer of property and therefore nothing that the trust could attach to.

### *C Unconscionability*

In Chapter II we concluded that unconscionability was not a necessary requirement for the creation of a trust where property has come from the plaintiff, but also saw that in circumstances of breach of fiduciary duty unconscionability could be a possible explanation for the creation of proprietary rights.

Virgo discusses Lord-Browne Wilkinson's suggestion that stolen money is held on constructive trust<sup>146</sup> and concludes that a constructive trust should not arise in such a situation because title has not passed to the thief.<sup>147</sup> This ignores the possibility of the thief obtaining a possessory title which could be held on trust.<sup>148</sup> Therefore, a possible use of the unconscionability reasoning could be to say that the thief who obtains possessory title of stolen property in a situation where he is acting unconscionably,<sup>149</sup> is deemed to hold the possessory interest on trust.<sup>150</sup> This reasoning demonstrates the problem with an unconscionability approach, it is all too attractive to declare that the thief has acted unconscionably or fraudulently and therefore relief should be granted against him. On closer inspection we realise that the thief's possessory rights do not come at the expense of the plaintiff. This is relevant because it alerts us to the relevant factors in the assessment of

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<sup>144</sup> Restitutionary damages for trespass is an example of such a situation. See Sarah Worthington "Reconsidering Disgorgement for Wrongs" (1999) 62 MLR 218 at 227–228.

<sup>145</sup> See Chambers, above n 125 at 233–234.

<sup>146</sup> *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, above n 6 at 609.

<sup>147</sup> Virgo, above n 8 at 609–610 citing *Shalson v Russo*, above n 2, we have dispensed with this argument in ch III A.

<sup>148</sup> Virgo discusses Burrows model of election, and concludes that it is artificial, but not Tarrant and Fox's suggestion that the possessory title could be held on trust.

<sup>149</sup> Sometimes the term fraudulently is used, see Fox, above n 116 at [4.98]–[4.100]. This term is as difficult to pin down as unconscionability see McGhee, above n 17 at [8-001].

<sup>150</sup> See Fox, above n 116 at [4.93]–[4.100].

unconscionability. If the thief's rights didn't arise at the expense of the plaintiff, why should we say that it is then unconscionable for the thief to have those rights? In the case of a bribe taking fiduciary we can explain giving the beneficiary property rights on the basis of protecting the relationship, but in the case of the thief there is no relationship to protect. Further, in the case of a bribe taking fiduciary, the fiduciary gains property rights in the bribe that are not subservient to the principal's legal rights. At the point the thief has stolen property any property rights they have are subservient to the rights of the true owner. Equity acts to moderate the common law, but when the common law is to the true owner's advantage there seems no need for equity's intervention.

### ***D Common Law Remedies***

So far we have concluded there is no justification in unjust enrichment for the creation of a trust. We have also concluded that there is not be a justification based on the unconscionability or fraud of the thief. Part of this justification was on the basis that there was no need for equity's assistance in the case where the plaintiff's stolen property remains identifiable in the hands of the defendant.<sup>151</sup> To further this argument it is important to detail what remedies the plaintiff has. It is implicit in the argument presented so far that we accept that the plaintiff has a personal claim in unjust enrichment,<sup>152</sup> but they will also have a claim in conversion that could give rise to a restitutionary remedy.<sup>153</sup>

#### *1. Remedies on insolvency*

If the thief steals a victim's property and then becomes insolvent the victim is in no worse position. This is because although their personal claim in conversion against the insolvent thief is subject to defeat by other creditors, the victim retains their legal title to the stolen property.<sup>154</sup> This means that they can sue the Official Assignee in conversion if they purport to treat the plaintiff's property as if it is part of the bankrupt estate; all that passes to the

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<sup>151</sup> Contrast Fox, above n 116 at [4.106] who argues that the reason for recognising the trust is a purely pragmatic way of getting around the limitations of common law tracing. I suggest that this may be an argument for recognising a trust over the traceable proceeds in the next chapter, but for present purposes the trust is unnecessary as the property has not been exchanged or mixed in any way by assumption.

<sup>152</sup> See above III B 1. This analysis is not uncontroversial see Swadling, above n 128; and Charles Rickett and Ross Grantham *Enrichment and Restitution in New Zealand* (Hart Publishing, Oxford, 2000) at 37–41.

<sup>153</sup> See *United Australia Ltd v Barclays Bank Ltd* above n 99.

<sup>154</sup> *Ilich v R*, above n 113 at 127–128.

Official Assignee is the thief's possessory interest.<sup>155</sup> If the thief was a trustee the same result would occur, the property would not pass to the Official Assignee and therefore would not be available for distribution amongst the general creditors.<sup>156</sup>

## 2. *Claims to specific restitution*

The common law is not incapable of giving specific restitution of property. In England s 3(2)(a) of the Torts (Interference with Goods) Act 1977 allows for an order for specific restitution of property where a defendant is in wrongful possession of goods. Although in New Zealand we do not have an equivalent Act we still have the possibility of a claim in detinue. In both cases the order for specific restitution is discretionary.<sup>157</sup> So specific recovery will generally not be ordered where the defendant has added value to the property,<sup>158</sup> or where the goods are ordinary articles of commerce.<sup>159</sup> The first of those exceptions would seem to apply to innocent improvers.<sup>160</sup> In comparison, if the thief was held to hold the possessory title to the stolen property on trust, this may potentially provide an avenue for an order of specific recovery. However, equity can make allowances for increases in value that can be attributed to the efforts of the trustee, and it would seem the same principles of allowances would be applied in both cases.<sup>161</sup>

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<sup>155</sup> See Insolvency Act 2006 (NZ), ss 3 and 101; Insolvency Act 1986 (UK), s 283(1); Michael Bridge *Personal Property Law* (3rd ed, Oxford University Press, Oxford, 2002) at 13; and Chambers, above n 125 at 231. The terms Official Assignee and trustee in bankruptcy are used interchangeably depending on the jurisdictional context in this dissertation.

<sup>156</sup> Insolvency Act 2006 (NZ), s 104; and Insolvency Act 1986 (UK), s 283(3)(a).

<sup>157</sup> Torts (Interference with Goods) Act 1977 (UK), s 3(a); *Nash v Barnes* [1922] NZLR 303 (SC) at 309.

<sup>158</sup> *Nash v Barnes*, above n 157; but see *Greenwood v Bennet* [1973] 1 QB 195 (CA) at 202C, for the proposition that a defendant cannot claim counter restitution where the defendant knows the property is not his.

<sup>159</sup> *Whiteley v Hilt* [1918] 2 KB 808 (CA); see generally Michael A Jones (ed) *Clerk and Lindsell on Torts* (Sweet and Maxwell, London, 2010) at [17-88]–[17-89].

<sup>160</sup> See *Greenwood v Bennet*, above n 158 at 202C.

<sup>161</sup> See generally *Boardman v Phipps* [1967] 2 AC 46; Torts (Interference with Goods) Act 1977 (UK), s3; See further Lord Millet "Jones v Jones: Property or Unjust Enrichment?" in Andrew Burrows and Lord Rodger of Earlsferry (eds) *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, Oxford, 2006) at 269 for a discussion of how allowances may be awarded at common law in cases where the defendant only had possession.



### 3. Claims to changes in value<sup>162</sup>

The usual measure of damages in conversion is the value of the property at the time of the first conversion.<sup>163</sup> Thus it may appear that having a claim that the property is held on trust may allow the plaintiff to claim greater compensation if the stolen item subsequently increases in value and the plaintiff demands return of the property at a later date. However, claims at common law may allow for an increase in value.

(a) Where the increase in value can be called consequential loss

In some situations the courts have awarded claims to subsequent increases in value of converted property on the basis of consequential loss. A recent example of the application of this method of reasoning is *Scheps v Fine Art Logistic Ltd* where that plaintiff was able to recover the foreseeable increase in value of a sculpture that had been destroyed as consequential loss.<sup>164</sup>

(b) Where the plaintiff can claim the thief was unjustly enriched

The notion of waiving the tort and claiming the gains made from conversion can be categorised as one for unjust enrichment.<sup>165</sup> This approach to restitution for the protection of property rights supposes that the waiver of tort is real in the sense that the plaintiff is not choosing between alternative remedies for conversion but instead is choosing between alternative causes of action. Take the following example:<sup>166</sup>

If A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to

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<sup>162</sup> In this part we are concerned with the initial property stolen by the thief, so claims for profits from investment, or other situations where the increase in value is attributable to a traceable proceed of the stolen property rather than the property itself are excluded. See chapter IV for a discussion of profits in the case of traceable proceeds.

<sup>163</sup> *Nash v Barnes*, above n 157 at 311.

<sup>164</sup> *Scheps v Fine Art Logistic Ltd* [2007] EWHC 541 at [43]–[47]. The plaintiff's sculpture had been destroyed by the storage company that was looking after it. Between the time of the destruction and the judgement date the value of the sculpture had increased two to three times. The court found that the plaintiff could recover the value of the sculpture at the time of destruction plus consequential damages for the increase in value that would have occurred; See further Jones, above n 159 at [17-94]. A full discussion of causation and remoteness of damage is beyond the scope of this work, the point to realise is that even if one is unwilling to accept that there should be restitution for wrongs, or unjust enrichment where the plaintiff retains title there is still an avenue to claim increases in value.

<sup>165</sup> *Worthington*, above n 144 at 228.

<sup>166</sup> *Watson, Laidlaw and Co Ltd v Potts, Cassels and Williamson* [1914] SC(HL) 18 at 31.

say: ' Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise.

In such a case we say that A is entitled to the reasonable price of hire of the horse. We can say this because B is enriched by the use of the horse, the value of the use of the horse is assessed with reference to the market value of that use, the reasonable hire charge.<sup>167</sup> The enrichment was at the expense of the plaintiff because the enrichment came from the plaintiff.<sup>168</sup> Another way of conceptualising of this is that the defendant's enrichment deprived the plaintiff of the possible use of the horse that they should be compensated for. The reason that the unjust enrichment analysis produces a different outcome to a compensation analysis is that an unjust enrichment analysis is not immediately concerned with the value of that possible use to the plaintiff. Therefore demonstrating that the liveryman would not have used the horse during that time may weaken a claim for compensation but it does not weaken a claim for unjust enrichment.<sup>169</sup> .

The question then is what is the value of the enrichment? Burrows argues that where the defendant is denying the plaintiff's title to the asset the value of the enrichment is the capital value.<sup>170</sup> But at what time is this capital value to be assessed? If it is the capital value at the time the property was stolen then this would seem to limit the recovery to the same value as compensatory damages for conversion. However, there is some suggestion that where the stolen property has increased in value the defendant should be required to pay this higher value.<sup>171</sup> A possible rationalisation of a claim to a subsequent increase in value to stolen goods could be taken from the reasoning of the Court of Appeal in *Cressman v Coys of Kensington (Sales) Ltd.*<sup>172</sup> Although that case did not concern a change in value, the Court

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<sup>167</sup> There may be an argument for subjective devaluation if such a claim is based on unjust enrichment, see further Worthington, above n 144 at 229.

<sup>168</sup> At 226.

<sup>169</sup> See at 228, Worthington's argument is that unjust enrichment is the only explanation of such awards, although she concedes that proof of this assertion is impossible; compare Birks, above n 7 at 83–84 where unjust enrichment is described as an alternative route to restitution, rather than the only route.

<sup>170</sup> Burrows, above n 61 at 195.

<sup>171</sup> This argument is usually made in the situation where the defendant has subsequently sold the stolen property at a higher price than the value of the good when it was received. See Goff and Jones, above n 128 at [36-011]; See also the discussion ch IV on traceable products of stolen property.

<sup>172</sup> *Cressman v Coys of Kensington (Sales) Ltd* [2004] EWCA Civ 47, [2004] 1 WLR 2775: The defendant had obtained a personalised registration plate when he had bought a car at auction. When he had viewed the car it was made clear that the sale was without the personalised plate and that a standard plate would be provided. However, when the change in ownership was registered the defendant obtained the right to use the personalised plate as the registration was completed using the

held that where the benefit is readily returnable and the defendant chooses to retain it, then the defendant should pay the value of the benefit.<sup>173</sup> This reasoning was tied to the idea that the defendant who chooses to retain an enrichment is maintaining “the possibility of realising its monetary value in the longer term.”<sup>174</sup> If this accurately characterises the value of the enrichment then it would seem that the value of the benefit could be ascertained at the later time of bringing the action rather than at the time of the receipt of the benefit. Where the thief retains possession of stolen property that subsequently increase in value, by refusing to return the stolen property the thief is enriched by the current value of that stolen property.<sup>175</sup>

(c) Where the plaintiff is able to claim restitution for the wrong

The appropriate rationale for restitution for wrongs is much disputed.<sup>176</sup> In the case of proprietary torts I support the unjust enrichment analysis presented above, but even if one is unwilling to accept that categorisation,<sup>177</sup> there remains authority for restitution as an alternative remedy for wrongdoing.<sup>178</sup>

### ***E Conclusion***

A trust should not arise over stolen property because the thief is not unjustly enriched in the relevant sense by possession of the plaintiff’s property. Although possession can be enriching it does not come at the expense of the true owner’s rights and therefore remedies for unjust enrichment should be limited to personal claims. It has been demonstrated that the unjust enrichment approach provides a clear analysis of when property rights should be

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personalised registration number. Held that the defendant had been unjustly enriched by the value of the personalised plate and that the defendant could have no defence of subjective devaluation where the property was readily returnable.

<sup>173</sup> At [37]–[38]. This formulation bears striking resemblance to the formulation of the remedy in detinue and perhaps suggests that in the same way a plaintiff can waive the tort of conversion and sue for the enrichment, one could also waive the tort of detinue and sue for the unjust enrichment.

<sup>174</sup> At [38].

<sup>175</sup> It may seem that if this remedy is available then it would completely erode conversion, however there are several provisos. Where the property decreases in value it will still be of use to a plaintiff to be able to sue for the value at the time of conversion. Also the remedy only applies in situations where the property is still in the hands of the wrongdoer, and where the increase in value is not attributable to the bona fide efforts of the defendant.

<sup>176</sup> See Sirko Harder *Measuring Damages in the Law of Obligations: The Search for Harmonised Principles* (Hart Publishing, Oxford, 2010) at 209–215 for a brief summary of some of the competing approaches.

<sup>177</sup> For example by saying that the thief is not enriched at the plaintiff’s expense because no property has passed. See Swadling, above n 128.

<sup>178</sup> *United Australia Ltd v Barclays Bank Ltd* above n 99; see also Birks, above n 7 at 15-16 and 83–85.

created. We have seen that there is no detriment to the plaintiff in not being able to bring an equitable claim for a beneficial interest under a trust. The common law remedies are generous when the stolen property remains identifiable in the hands of the thief and therefore no additional benefits would accrue to a plaintiff in having a remedy under a trust. Therefore we must conclude that the obiter of Lord Browne-Wilkinson and the statements of John Tarrant and others are too broadly expressed; the thief does not hold stolen property in trust.

## *Chapter IV: Does a trust arise over the traceable proceeds of stolen property?*

We now move from assessing whether the stolen property itself is held on trust to the situation where that property is sold or exchanged for other property.<sup>179</sup> The first three sections of this chapter will look at situations where the thief exchanges stolen property for other property without mixing. The last section will address situations where the stolen property is mixed with that of another.

### *A The Thief Steals my Chattel and Sells it*

In this situation the victim has a personal claim in conversion against the thief,<sup>180</sup> and they also have a claim in conversion against the purchaser based on retention of title.<sup>181</sup> We also know that they can waive the tort and sue for the proceeds of the sale.<sup>182</sup> The question is what kind of interest do they have in these proceeds? This question can have serious consequences. Consider the situation where the thief has sold a stolen chattel and subsequently become insolvent. The purchaser is nowhere to be found and so the victim cannot rely on any claim in conversion against them. Can the victim claim the proceeds are held on trust for their benefit? If so then the victim will be able to obtain priority on insolvency.

#### *1. Creak v James Moore*

It has been suggested that a possible implication of *Creak v James Moore & Sons Pty Ltd*<sup>183</sup> is that the thief holds the proceeds of stolen property on constructive trust.<sup>184</sup> In *Creak* an employee (Watson) stole money and iron from their employer (James Moore). Watson then sold some of the iron to Creak. The proceeds of this sale were paid into Watson's bank

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<sup>179</sup> Excluded is a discussion of interests in land, the varying statutory indefeasibility controls and constraints can lead to different outcomes.

<sup>180</sup> See generally Jones, above n 159 at [17-15]–[17-16]; and Hawes, above n 120 at 64–66.

<sup>181</sup> Such a claim may not be available in jurisdictions that preserve the market overt doctrine if the sale occurs in a situation where that doctrine would be applicable to give the purchaser good title. In such a situation the conclusions of this section may have to be revisited and it is suggested that perhaps the analysis presented in the next section on purchasing a good with stolen money may provide an appropriate analysis in these situations as the title that the thief gains to the purchase money will be at the expense of the victim's legal title to the good. Put simply the market overt doctrine acts in a similar fashion to the currency exception and therefore the consequences should be similar.

<sup>182</sup> See *United Australia Ltd v Barclays Bank Ltd* above n 99; see further Jones, above n at [28-152]–[28-153].

<sup>183</sup> *Creak v James Moore & Sons Pty Ltd* (1912) 15 CLR 426.

<sup>184</sup> Tarrant, above n 115 at 533–535.

account. The police recovered the proceeds from Watson’s bank account and paid them to James Moore. The case concerned whether James Moore could bring a claim against the Creak for conversion, relying on their continuing title to the iron. James Moore argued that they had received the money in payment of Watson’s other debts to them (the money embezzled), rather than as the payment for the stolen iron. By majority the High Court concluded that James Moore could not recover, and that by taking the money from the police they had affirmed the sale to Creak. Griffith CJ stated:<sup>185</sup>

The question is whether they can set up a better title to the money than as such owners. The title set up is that they received the money as part payment of a debt and in ignorance of their *independent equitable title to it*. If they so received it, they in fact came into possession of a sum of money to which they were already entitled, although they did not then know it. (Emphasis added)

This suggests that whilst James Moore retained a legal title to the iron they also had an independent equitable title to the proceeds. It was this independent equitable title that prevented James Moore from claiming that they were entitled to the money as payment of other debts. This has been taken by some to suggest that proceeds of the sale were trust property for the benefit of James Moore.<sup>186</sup>

But why should James Moore have an “independent equitable title” to the proceeds? Tarrant has argued this as a natural extension of the principle in *Black*<sup>187</sup> and that the money should be seen as the traceable proceed of James Moore’s equitable interest in the possession of the iron.<sup>188</sup> But Barton J seemed to put the case in another way:<sup>189</sup>

Either the respondents have adopted the sale to the appellant and accepted the proceeds pro tanto, or, if they have disaffirmed that sale, *the sum of £31 is not their money*. (Emphasis added)

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<sup>185</sup> *Creak v James Moore & Sons Pty Ltd*, above n 183 at 432.

<sup>186</sup> Tarrant, above n 115 at 533–534.

<sup>187</sup> *Black v S Freedman & Co Ltd*, above n 4.

<sup>188</sup> We have concluded above that no such equitable interest in possession arises, see above ch III. Although Tarrant asserts that *Black* is authority for the proposition that the thief holds the possessory title to stolen property on trust, on the facts of *Black* money was stolen and paid into the thief’s bank account. Thus *Black* was actually a claim to the traceable proceeds of stolen property, rather than a claim to the stolen property itself, see further at Chapter IV C below and Chambers, above n 125 at 225.

<sup>189</sup> *Creak v James Moore & Sons Pty Ltd*, above n 183 at 436.

This would suggest that instead of having a pre-existing independent equitable title to the money, James Moore's right to the money could only arise through the adoption of the sale. If James Moore wished to sue Creak in conversion, then Creak should be allowed to rescind the transaction and claim the purchase money. This analysis seems to treat Creak rather than James Moore as having some continuing interest in the money.<sup>190</sup>

The majority seem to have been motivated by the fact that at the time of bringing the action against Creak, James Moore was aware that the money they had received was the direct proceed of the sale of their iron. In order for this to have been the case the court must have found that Creak continued to have some interest in the purchase price of the iron<sup>191</sup> and that James Moore had not innocently changed their position when they received the money.<sup>192</sup>

Rather than this case being authority for the proposition that the proceeds of stolen property are held on trust for the true owner, it seems to be authority for the ability of a party to a voidable transaction to be able to trace the money paid under that contract to subsequent recipients, where that subsequent recipient has not innocently changed their position or paid good consideration.

## *2. The relationship between restitution for wrongs and for unjust enrichment*

But should a plaintiff be allowed to obtain priority over other creditors of the thief by waiving the tort and attempting to recover the proceeds as trust money without relying on some pre-existing equitable title? Goff and Jones suggest that this may be a possibility where the tort involves interference with property rights.<sup>193</sup> The authority they cite for this proposition is *Potton Ltd v Yorkclose Ltd*,<sup>194</sup> a case which concerned the infringement of intellectual property rights. However, the case itself contains no discussion of proprietary remedies. The closest Millet J came to a conclusion that there was a proprietary remedy was by stating "the profits made thereby belong in equity to the plaintiffs".<sup>195</sup> Whilst such a statement may carry

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<sup>190</sup> This is where the dissent of Isaacs J focused. At 438, his Honour found that Creak's contract with the thief was good until avoided and therefore because the money had been seized by the police and given to James Moore before this occurred, Creak could have no continuing claim to the money they paid.

<sup>191</sup> *Creak v James Moore & Sons Pty Ltd*, above n 183 at 432 per Griffith CJ and at 436 per Barton J.

<sup>192</sup> At 434 per Griffith CJ and 436 per Barton J but see at 440 per Isaacs J.

<sup>193</sup> Goff and Jones, above n 128 at [36-018].

<sup>194</sup> *Potton Ltd v Yorkclose Ltd* [1990] FSR 11 (Ch).

<sup>195</sup> At 18.

connotations of the type of equitable ownership that a beneficiary has under a constructive trust, the award in the case was an account of profits and not a constructive trust of profits.<sup>196</sup>

A better way of conceptualising restitutionary awards for proprietary torts is by considering them as based on a parallel claim in unjust enrichment.<sup>197</sup> The question would then be whether the unjust enrichment was of the right kind to generate a proprietary remedy.<sup>198</sup> Worthington notes that a proprietary remedy may be available:<sup>199</sup>

where the defendant has made unauthorised use of the plaintiff's asset by *exchanging* it for other assets. But this argument is not so easy where the defendant has simply *used* the plaintiff's asset, say by hiring it out. (italics original, underling added)

Worthington's emphasis on exchange and use, ignores what the defendant is exchanging. The exchange of stolen property for money or some other asset is still an "unauthorised use" by the defendant; the rights that they exchange with the purchaser of the stolen property are not rights that they obtain at the expense of the true owner. Therefore an approach that recognises the importance of assessing what kind of enrichment the defendant obtains at the plaintiff's expense demonstrates that such an enrichment can never be one that gives rise to a proprietary right.<sup>200</sup> The enrichment that the defendant gains when he sells stolen property is a property right, but it came at the expense of the true owner's use, not their property right. Therefore the creation of an equitable proprietary right to reverse the unjust enrichment is not justified.

The correct analysis is to say that the thief obtains valuable use of the plaintiff's property while they possess it when they sell it. The money that the thief receives from the sale is an enrichment and it comes from the use of the chattel which is at the plaintiff's expense. However, because the plaintiff retains title to the sold assets by virtue of *nemo dat*, the enrichment is not at the expense of the plaintiff's rights. Why then does the law extinguish the plaintiff's title to the stolen goods when they claim the proceeds of the sale? It is my suggestion that the law does this not on the basis of election by the plaintiff, but to prevent the unjust enrichment of the plaintiff. The plaintiff has a right to sue for the enrichment of

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<sup>196</sup>At 18–19. Similar concerns arise here to those expressed by the English Court of Appeal dealing with equitable rather than legal wrongs in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in administration)* [2011] EWCA Civ 347, [2011] 3 WLR 1153 (CA) at [79].

<sup>197</sup> See above at ch III D and Worthington, above n 144.

<sup>198</sup> See above at ch II B 2.

<sup>199</sup> Worthington, above n 144 at 233.

<sup>200</sup> Contrast Birks, above n 88 at 393–394.



the thief that is at his expense; the use value of the asset. When the asset is sold the use value becomes the purchase price, but because the purchase price comes from another party, the plaintiff cannot be heard to disclaim the third party's interest in the purchase funds.<sup>201</sup>

The result is that although we can recognise that the purchase money does represent an unjust enrichment at the expense of the true owner, it is not one that a property right should attach to. The reason for this is that it is not at the expense of the true owner's rights to the original property, instead it is just at the expense of their use.

### ***B The Thief Steals my Money and Buys Something with it***

In this situation the victim initially retains legal title to the notes and coins stolen, however, unlike in the above example, when the thief buys a chattel with stolen money the seller gains good title to the money.<sup>202</sup> Therefore the victim's claims are limited to claims against the thief.<sup>203</sup> Should the thief hold this newly acquired property on trust for the victim, or is the victim limited to personal claims? This distinction is of importance if the thief subsequently becomes insolvent and also if the proceeds of the stolen money subsequently increase in value.

Chambers has argued that in this situation the proceeds are held on trust for the victim.<sup>204</sup> The thief is unjustly enriched at the expense of the plaintiff and the law responds by creating an equitable interest in the proceeds.<sup>205</sup> This is because the thief's title to the chattel came at the expense of the plaintiff's title to property.<sup>206</sup> My modification on this approach is to focus on in what sense the enrichment is at the expense of the plaintiff. Here we can be clear that the title that the thief receives to the proceeds of the sale comes at the expense of the true owner's title to the stolen funds. This means that not only was there an unjust enrichment, but that the necessary proprietary base was established because the enrichment was in the form of and at the expense of property rights.

The essential point that differentiates this situation from the situation where the thief sells a stolen chattel is that by using the stolen money as currency the thief extinguishes the true

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<sup>201</sup> *Creak v James Moore & Sons Pty Ltd*, above n 183 at 433.

<sup>202</sup> *Miller v Race* (1758) 1 Burr 452; 97 ER 398 (KB) at 457.

<sup>203</sup> Unless the seller was not a bona fide purchaser.

<sup>204</sup> Chambers, above n 16 at 117–118.

<sup>205</sup> Chambers, above n 125 at 232 and 237–238.

<sup>206</sup> Chambers, above n 16 at 117.

owner's legal title to the money. Thus the enrichment to the thief is at the expense of the true owner's property rights and therefore it is appropriate that the law responds by creating a right to beneficial ownership.<sup>207</sup>

What does this property right entitle the victim to? The two concerns are where the thief subsequently becomes insolvent or the chattel bought by the thief subsequently increases in value.

### *1. Insolvency*

When the thief becomes insolvent if the chattel is held on trust it will not pass to the Official Assignee.<sup>208</sup> This means that the victim of the theft obtains a priority on insolvency. In the previous situation, where the thief stole a chattel and sold it we concluded that the purchase money was not held on trust and therefore the victim would not obtain priority on the thief's insolvency. Can these two conclusions be rationalised? The short answer would say that the inability to claim priority in the former situation is made up for by a strict liability claim in conversion against the purchaser and indeed any subsequent purchaser. Smith argues whilst the victim may remain the owner of the stolen property that ownership is not of a lot of use if that property is at the bottom of a river.<sup>209</sup> While this is true, the law does need to draw a line at some point, the law provides extensive strict liability in conversion when chattels are stolen, such protection does not exist for money, which justifies the additional equitable liability.

### *2. Changes in value*

On the basis that the law is not interested in the value of the right where the unjust enrichment is in the form of assignable rights rather than value the victim should be able to claim a subsequent increase in value. Such an outcome is justified on two grounds. First if the increase in value is attributable to a change in the market value of the asset there seems to be no reason to allow the thief any claim to this gain. Second, even if the increase in value is

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<sup>207</sup> There is also some suggestion that the victim of the theft may obtain a full legal title to the newly acquired asset. Such an approach was arguably taken by the court in *Taylor v Plumer* (1813) 1 M&S 583, 105 ER 218 (CA). However, this approach has subsequently been reinterpreted and Lionel Smith "Tracing in Taylor v Plumer: Equity in the Court of King's Bench" [1995] LMCLQ 240 has suggested that the case is better analysed as one where the plaintiff was able to assert equitable rather than common law proprietary rights to the traceable proceeds.

<sup>208</sup> Insolvency Act 2006 (NZ), s 104; Insolvency Act 1986 (UK), s 238(3)(a).

<sup>209</sup> Lionel D Smith *The Law of Tracing* (Oxford University Press, Oxford, 1997) at 322.

attributable to some effort on the part of the thief, the thief should have no claim to the increase in value. The thief's knowledge that the property is not his prevents the ability of the thief to claim that the true owner has been unjustly enriched at his expense.<sup>210</sup>

### ***C The Thief Steals my Money and Pays it into a Bank Account***

What type of interest does the victim of the theft have in the thief's chose in action against the bank? The first point to note is that any interest that the victim had in the stolen notes and coins is extinguished as soon as they are paid into a bank account.<sup>211</sup> This is the same as where the thief buys any other asset with stolen funds; the currency exception prevents the victim from being able to continue to assert a proprietary right in that specific property.<sup>212</sup> It is also important to note that the nature of the banking contract means that the bank owes a legal obligation to the thief to repay the value of this money.<sup>213</sup> The payment of money into the thief's bank account will make the thief personally liable in money had and received,<sup>214</sup> but does the victim have some form of property right to the thief's chose in action against the bank? This becomes important in a number of different situations, for instance, where the thief subsequently transfers money without consideration to a third party,<sup>215</sup> or if the thief buys an asset with the funds, or if the thief becomes insolvent.

Two early cases demonstrate how both common law and equity have responded to the problem of stolen money paid into a bank account. In *Black*, Mr Black stole money from his employer and paid some of it into his own bank account.<sup>216</sup> Mr Black drew on his account and paid money into his wife's savings account. The case concerned the liability of the wife to repay money to her husband's former employer. The case proceeds on the basis that "where money has been stolen, it is trust money in the hands of the thief, and he cannot divest it of that character".<sup>217</sup> Therefore when the money is paid to the wife otherwise than bona

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<sup>210</sup> See *Greenwood v Bennet*, above n at 202C.

<sup>211</sup> *Foley v Hill* (1848) 2 HLC 27, 9 ER 1002 (HL) at 1005; see further Fox, above n 116 at [1.39]–[1.42].

<sup>212</sup> *Foley v Hill*, above n 211 at 36, 1005.

<sup>213</sup> See Fox, above n 116 at [5.74]–[5.76] and [9.28].

<sup>214</sup> *Agip (Africa) Ltd v Jackson* [1990] 1 Ch 265 (Ch) at 285G–H, affirmed in *Agip (Africa) Ltd v Jackson* [1991] Ch 547 (CA) at 564–566.

<sup>215</sup> See *Banque Belge pour L'Etranger v Hambrouck* [1921] 1 KB 321 (CA); *Black v S Freedman & Co Ltd*, above n 4; *Lipkin Gorman v Karpnale* above n 5; and *Trustee of FC Jones & Sons v Jones*, above n 8.

<sup>216</sup> *Black v S Freedman & Co Ltd*, above n 4.

<sup>217</sup> At 110.

fide for value without notice, then the true owner's beneficial interest is not destroyed and they can claim against the wife for the return of the property.

*Banque Belge pour L'Etranger v Hambrouck*<sup>218</sup> is a similar case. A clerk fraudulently obtained cheques from his employer and paid them into his own account, he then proceeded to draw cheques against his account for the benefit of a woman he was living with (Mlle Spanoghe). She paid these cheques into her account. The question for the court was whether Banque Belge<sup>219</sup> could recover from Spanoghe. The Court of Appeal held that the bank could recover, as any title that Hambrouck obtained to the funds was voidable and his gift to Spanoghe was insufficient to clear Banque Belge's right to rescind the transaction.

The material facts of these two cases are the same; an employee steals money from his employer, pays it into his own bank account and then transfers money to a third party otherwise than bona fide for valuable consideration. In *Black* the court proceeded by way of trust, whereas in *Banque Belge* the court proceeded by way of a common law action for money had and received. Should we favour one approach over the other, or are they simply alternative ways of approaching the same problem?<sup>220</sup> The cases that have adopted a common law rather than equitable approach have framed the type of interest that the plaintiff has in different ways; in *Banque Belge* the thief had a voidable title,<sup>221</sup> whereas in *Trustee of FC Jones & Sons v Jones* the money "belonged to the trustee" in bankruptcy.<sup>222</sup> Similarly in *Lipkin Gorman*, "the money so obtained by Cass was *their property* at common law".<sup>223</sup> This type of language is deceptive. As we have noted the bank has a contract of debt with the thief. Whatever rights the victim has against the thief, the contractual debt is owed to the thief.<sup>224</sup>

A suggested method to get around this inaccuracy is to describe the plaintiff as having a power to crystallise legal title to the chose in action.<sup>225</sup> The nature of this power and what exactly it entitles the plaintiff to are somewhat uncertain. Fox suggests it acts indirectly, it

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<sup>218</sup> *Banque Belge pour L'Etranger v Hambrouck*, above n 215.

<sup>219</sup> Who by this stage was bringing the claim as the employer's banker.

<sup>220</sup> *Lipkin Gorman v Karpnale* above n 5 at 566A suggests that perhaps they are.

<sup>221</sup> *Banque Belge pour L'Etranger v Hambrouck*, above n 215 at 325.

<sup>222</sup> *Trustee of FC Jones & Sons v Jones*, above n 8 at 166H. (Emphasis added).

<sup>223</sup> *Lipkin Gorman v Karpnale* above n 5 at 574B. (Emphasis added).

<sup>224</sup> See Fox, above n 116 at [1.123]–[1.124] criticising the suggestion of Millet LJ in *Trustee of FC Jones & Sons v Jones*, above n 8 at 167 that Mrs Jones was in only in "possession" of the money represented by her account.

<sup>225</sup> See Birks, above n 88 at 393–394; and Fox, above n 116 at [5.96]–[5.106].

does not alter the banks obligation to repay the thief but instead operates on the relationship between the thief and the plaintiff.<sup>226</sup> To Fox's mind the right that the plaintiff would gain by exercising this legal power would be similar to the right of an equitable claimant.<sup>227</sup> It could be asked if the right is so similar why we should bother having two different models, the following two sections assess whether there would be any difference between the two models in two key areas: insolvency and profits.<sup>228</sup>

### *1. Insolvency*

On the approach in *Banque Belge*, Hambrouck obtained a voidable title to the proceeds of the cheques.<sup>229</sup> In the event of his insolvency title to these proceeds would pass to the Official Assignee, however it would remain subject to Banque Belge's right to rescind the transaction.<sup>230</sup> Therefore, on a common law approach the victim of the theft retains priority.

On the approach in *Black*, if the thief holds the proceeds of the stolen money on trust, then this fund will not pass to the Official Assignee.<sup>231</sup> This means that funds will not be available for distribution and the victim will again obtain priority on insolvency.

There is a difference between these two approaches, although at both allow the victim of the theft to obtain some form of priority on the thief's insolvency, under the common law approach the title does pass to the Official Assignee, whereas under the trust approach it does not. This may mean that the liability of the Official Assignee for distributing the funds may vary. Further it would seem that at the point that the Official Assignee paid the money into a mixed account the claim may switch from being one of being entitled to void the Official Assignee's title and therefore claim priority for the whole sum, to being a personal claim for

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<sup>226</sup> Alternative models are suggested by Smith, above n 209 at 323–325; and Birks, above n 88 at 394.

<sup>227</sup> Fox, above n 116 at [5.103]–[5.104].

<sup>228</sup> There are consequences beyond these two areas, in particular in relation to whether there is a difference between a claim for knowing receipt of trust property and a common law claim against a third party recipient. The level of knowledge required to found a claim for knowing receipt, may be different to the level of knowledge required to prevent a reliance on a good faith change of position defence. A primary difference would appear to be that knowledge is a prerequisite for personal liability for knowing receipt, whereas a common law claim establishes prima facie strict liability subject to a defence of change of position. Even if the level of knowledge is the same, this would at least seem to alter the evidential burden in these cases. See further Lionel Smith "Unjust enrichment, property and the structure of trusts" (2000) 116 LQR 412 at 429–436.

<sup>229</sup> *Banque Belge pour L'Etranger v Hambrouck*, above n 215 at 325.

<sup>230</sup> See Fox, above n 116 at [5.103]; Insolvency Act 1986 (UK), s 283(5).

<sup>231</sup> See Insolvency Act 2006 (NZ), s 104; Insolvency Act 1986 (UK), s 283(3)(a).

money had and received.<sup>232</sup> Conversely if the Official Assignee claimed funds, which were held on trust, and then paid them into a mixed bank account, the victim of the theft may continue to have priority.

## 2. Profits

Now instead of the thief becoming bankrupt they invest the money and make a profit. Is there a difference between an approach that treats the thief as a trustee and one which treats the victim as having a continued legal interest to the funds.

In *Jones*<sup>233</sup> Millet LJ used the common law to achieve a claim to profits. The plaintiff was the trustee in bankruptcy of a firm of potato growers. Between the act of bankruptcy and being adjudicated bankrupt one of the partners drew cheques totalling £11,700 on the firm's joint account.<sup>234</sup> These cheques were paid into his wife's account with a commodity broker. The brokers speculated and ultimately Mrs Jones received £50,760, which she paid into a bank account. The trustee in bankruptcy claimed what remained of these funds as part of the bankrupt firm's assets.

The trial judge found that Mrs Jones held the money on constructive trust.<sup>235</sup> Millet LJ rejected this, he found that Mr Jones had no title to transfer and therefore the payment of the cheques into Mrs Jones account was ineffective to pass legal title to the funds.<sup>236</sup> Millet LJ therefore held that the chose in action that Mrs Jones had against her bank "belonged to the trustee".<sup>237</sup> This entitled the trustee in bankruptcy to claim whatever balance existed in Mrs Jones account.

It is correct to say that Mr Jones could not pass legal title to his wife; but that is not what he did. He did not purport to assign the chose in action against the bank to his wife; instead he reduced the value of his chose in action against the bank by paying a cheque to his wife's

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<sup>232</sup> However, such a claim may be of the same effect as a priority as it would lie against the Official Assignee rather than being a personal claim against the insolvent thief, compare the analysis of a claim against Official Assignee for conversion above at ch III D 1.

<sup>233</sup> *Trustee of FC Jones & Sons v Jones*, above n 8.

<sup>234</sup> The relevant statute at the time was the Bankruptcy Act 1914 (UK). Section 37 provided that the bankruptcy was deemed to relate back to the first act of bankruptcy, therefore the property available to the bankrupt at the time of the first act of bankruptcy vested in the trustee in bankruptcy retrospectively.

<sup>235</sup> *Trustee of FC Jones & Sons v Jones*, above n 8 at 164D.

<sup>236</sup> At 167D–E.

<sup>237</sup> At 170D–E.

account. The payment of money from one account to another does not assign one party's chose in action against their bank to another. Instead through a series of contractual relationships the respective values of each party's chose is adjusted.<sup>238</sup>

This does not mean that the law is devoid of remedy when money is transferred between accounts, it simply means that it is incorrect to describe such a payment as a transfer of title. The distinction can be explained by a more familiar situation. It is accepted that a mistake of identity is a fundamental mistake that means that legal title will not pass.<sup>239</sup> So if A transfers her bike to B, thinking that B is in fact C, B obtains no legal title to the bike.<sup>240</sup> The bike continues to be the property of A. However, if A transfers \$100 from her bank account to B's bank account thinking that B is in fact C, it is incorrect to say that title to the funds in the bank account never passed to B.<sup>241</sup> Instead we have come to conclude that the correct explanation is that B is unjustly enriched at A's expense and therefore has a personal obligation to repay the value of the money received.<sup>242</sup> On the argument advanced in this dissertation, A would also have a beneficial interest under a resulting trust for the proportion of B's account that represents the value of A's contribution.

Commentators have attempted to uphold *Jones* on the basis of a power to compel Mrs Jones to transfer the specific proceeds of her chose in action, which arises to reverse unjust enrichment.<sup>243</sup> This analysis holds that when Mrs Jones paid the cheques into her account with the commodity brokers she obtained a chose in action against the commodity brokers at the expense of the trustee in bankruptcy. In order to reverse this unjust enrichment the law grants the trustee a power to compel Mrs Jones to pay the proceeds of her chose in action against the commodity brokers to the trustee.<sup>244</sup> When Mrs Jones paid the cheque from the commodity brokers into her bank account again she was unjustly enriched at the expense of

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<sup>238</sup> See generally Mark Hapgood (ed) *Paget's Law of Banking* (LexisNexis Butterworths, London, 2007) at ch 17; and see also *Dovey v Bank of New Zealand* [2000] 3 NZLR 641 (CA) at [22] for a simple description.

<sup>239</sup> See *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670 at 696; *Virgo*, above n 8 at 586.

<sup>240</sup> More correctly he obtains a possessory title, distinct from A's full legal title, see the discussion in Ch III A above.

<sup>241</sup> Contrast *Birks*, above n 15 at 648 where he describes the trustee as the legal owner of the money in the defendant's hands. See further *Trustee of FC Jones & Sons v Jones*, above n 8 at 170 G–E, implying the trustee had legal title to the chose in action.

<sup>242</sup> *Lipkin Gorman v Karpnale* above n 5 at 572E.

<sup>243</sup> See *Fox*, above n 116 at [5.103] and [9.38]–[9.42].

<sup>244</sup> This explanation is inconsistent with Millet LJ's statement that the trustee could give good receipt to the bank. See *Trustee of FC Jones & Sons v Jones*, above n 8 at 170G–H, see further Millet, above n 161 at 273.

the trustee, by reducing her chose in action against the commodity brokers and increasing her chose in action against the bank she had been enriched at the expense of the trustee's power. Therefore the law created a similar power to compel the transfer of the proceeds of the chose in action against the bank to the trustee.

Fox described this power as similar to the right of an equitable claimant. Is there any difference between describing the right that the victim would have as a power to demand payment of the money in the account or the beneficial interest under a non-express trust?

The trust analysis is clear, an immediately vested beneficial right under a trust entitles the beneficiary to claim increases in value of the asset.<sup>245</sup> This seems desirable, particularly where the property is unmixed. Any accumulated interest would automatically be the beneficial property of the victim. This also appears consistent with the majority's decision in *Foskett*, where the right to a proportionate share arose from the time of the misappropriation.<sup>246</sup> Fox's power model would appear to achieve a similar outcome.<sup>247</sup> However there have been suggestions that the plaintiff should be limited to a lien for the value of their loss.<sup>248</sup> The trust analysis is preferable because it recognises the kind of enrichment that the thief has received. By paying stolen money into a bank account the thief has gained an enrichment at the expense of the plaintiff's rights. If it wasn't for the act of paying the stolen money into the account the victim would have retained legal title. If the account representing the proceeds of this stolen money has increased in value the thief cannot be heard to disclaim that the entire enrichment received was at the expense of the victim's rights, therefore the victim should have a claim to all of the profits. This is most easily achieved by the trust analysis, and whilst the power analysis could be capable of achieving a similar result, the disagreement over the nature of the power means that the law should make use of the tool it has in the form of the trust to give the victim a right to the profits.

### ***D Mixing***

It is often said that the common law is unable to trace through mixtures of money; that once money is mixed in an account it becomes unidentifiable by the common law.<sup>249</sup> Many have

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<sup>245</sup> See analogously above ch IV B 2.

<sup>246</sup> *Foskett v McKeown*, above n 1 at 111C; see further the discussion at ch II B above.

<sup>247</sup> See Fox above n 116 at [5.104]

<sup>248</sup> See Worthington, above n 144 at 231–232.

<sup>249</sup> See *Agip (Africa) Ltd v Jackson*, above n 214 at 564–566; see further *Agip (Africa) Ltd v Jackson*, above n 214 at 285–286.



suggested that this is undesirable and we should instead have one uniform set of tracing rules.<sup>250</sup> However, as Fox notes, the problem is not only the tracing rules.<sup>251</sup> Even if we were to accept that the common law could trace through a mixed bank account it is unclear what type of claim that would give the plaintiff. The thief incurs personal liability as soon as they pay the money into the bank account,<sup>252</sup> but what type of proprietary claim could the plaintiff have to the mixed asset? If the common law could identify the relevant proportions of the account, an approach that treated the victim as having power to reconstitute the title, or regarded the funds as belonging to the plaintiff would be inhibited by the fact that the law does not allow for ownership in common of choses in action.<sup>253</sup> This, on Fox's account, is a further reason for supporting his conception of the power model where the plaintiff can compel the thief to pay over the proportion of the account balance attributable to their contribution.

But Fox's power model is not the only power model advocated. When Häcker discusses powers he analogises them to the power to rescind a contract.<sup>254</sup> In his article, which is directed at impaired consent rather than theft, he describes powers as being more susceptible to defeat by bona fide purchase.<sup>255</sup> He also describes legal powers in rem as operating to reconstitute legal title and the equitable power in rem operating to create a trust.<sup>256</sup> The problem with this legal power has already been canvassed, in the case of bank accounts it would mean that the victim co-owned the chose in action against the bank. Whilst there are rules for the co-ownership of other fungibles that may solve problems between co-owners,<sup>257</sup> the problem with co-ownership of a chose in action is it creates problems not between the co-owners, but between the individual owners and the bank. Because the chose in action represents a unitary debt owed by the bank to its customer it is impossible to say by paying one owner that the bank has satisfied its debt to one of the co-owners but not the other. If instead we adopted the equitable power to rescind the right becomes more vulnerable. In the case of theft it would seem that the victim should not need to manifest an intention to exercise some power to

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<sup>250</sup> See *Foskett v McKeown*, above n 1 at 128G per Lord Millet; *Smith*, above n 209 at 120–130; *Virgo*, above n 8 at 234–235.

<sup>251</sup> Fox, above n 116 at [5.106].

<sup>252</sup> *Agip (Africa) Ltd v Jackson*, above n 214 at 566A–B; and *Agip (Africa) Ltd v Jackson*, above n 214 285G–H.

<sup>253</sup> See Fox, above n 116 at [7.52].

<sup>254</sup> Häcker, above n 7 at 329–330

<sup>255</sup> At 351.

<sup>256</sup> At 330.

<sup>257</sup> See generally *Indian Oil Corporation Ltd v Greenstone Shipping SA (Panama)* [1988] 1 QB 345 (QB).

recover their property, if it was not for the thief's actions in paying the money into a mixed account the victim would be able to claim the stolen property.<sup>258</sup>

Therefore the best answer is that the account is immediately held on trust in proportion to the contribution made by the victim's money. We could conceptualise of this as using Fox's power analysis, but it seems that because the nature of the power is contentious and could lead to misconceptions about the nature of bank accounts it is better to use the trust analysis.<sup>259</sup>

### ***E Conclusion***

This chapter has found a role for trusts over the proceeds of stolen property. Where the victim's legal title is destroyed by an exception to nemo dat, the property that the thief receives will be held on trust for the victim. The main situation this will occur in is where money is stolen. The trust analysis is better suited to the situation of theft, because it allows for an immediately vested interest in the property. Immediate vesting is desirable because it preserves an analogy with the rules to the passing of common law title.

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<sup>258</sup> See *Halley v Law Society* [2003] EWCA Civ 97 at [48]

<sup>259</sup> For instance that they could be possessed, or owned in common.

## *Chapter V: Conclusion*

This dissertation aimed to answer one question; is the thief a trustee? The answer, like most answers in the law, is: it depends. It depends on what we mean by trustee and it depends on what the thief does with the stolen property.

Chapter II defined the roles of unconscionability and unjust enrichment in finding a trust. This was important because it defined the appropriate role of knowledge in the creation of property rights. Without exploring this issue it would be difficult to differentiate between different types of wrongdoing. We concluded that knowledge is not a prerequisite for the creation of property rights. Rather unjust enrichment where the enrichment is in the form of assignable rights that come at the expense of the victims assignable rights is a better justification for the creation of property rights. The role of knowledge is therefore confined to more specific areas: the creation of property rights in response to wrongdoing where the property does not come at the expense of the plaintiff, the availability of defences and parallel personal liability.

Chapter III then applied this general approach to the case of theft. The objections around what property the trust would attach to were discussed and it was concluded that a trust relationship could attach to a possessory interest. However, there was no justification for the creation of a trust because the property rights that the thief obtained were not at the expense of the victim. This conclusion does not require the conclusion that the thief obtained nothing at the expense of the victim, we can still hold the thief personally liable in unjust enrichment by focusing on the abstract value that the thief obtains at the expense of the victim. Without the trust remedy the victim is not unduly prejudiced. Common law remedies have the effect of giving the victim priority on insolvency, they also allow the victim to claim increases in value.

Chapter IV applied the general approach to the proceeds of theft. Here we did see a role for the trust, where the stolen property was money and it was either paid into a bank account or exchanged for other property. This demonstrated the usefulness of an approach that focused on the kind of enrichment received. The trust was desirable because of the uncertainty with the different types of power analysis that exist.

Overall, this dissertation has demonstrated the importance of understanding the roles of unconscionability and unjust enrichment in proprietary restitutionary remedies. When knowledge is forced to do all of the work the proprietary consequences of wrongdoing become uncertain and ambiguous. A better approach sees unjust enrichment as the explanation of the proprietary rights that arise under a trust and knowledge controlling defences and personal liability. This approach works to justify proprietary consequences in the case of theft and provides a useful starting point for analysis of other situations.

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