payer received a proprietary relief. What is the justification for awarding proprietary relief to the payer by a way of subrogation,[149] as opposed to a mere personal claim to recover his payment from the enriched party? Before the House of Lords' decision in *Banque Financière de la Cité SA v Parc (Battersea) Ltd*, the right to enforce the security of the creditor for the benefit of the claimant had been rationalised, as seen above, on the basis of a fictional intent on the part of both the claimant and the creditor that the security was to be kept alive. Such recourse to fiction has no place in the law of unjust enrichment and the question arises what justifies the grant of proprietary, as opposed to personal, relief to a party claiming subrogation. It seems that the precise justification for the grant of proprietary subrogation[150] will have to await the resolution of that difficult and broader question[151] of when a successful claimant in unjust enrichment may be granted proprietary relief.

Birks noted that the existing case law suggests that a payer will be denied subrogation to the creditor's secured right, if he did not intend that his payment would be secured, and that the grant of a secured right by way of subrogation would result in his obtaining more than what he had bargained for; in other cases, the more recent case law suggests that 'so long as the claimant was not a gift-giver or a risk-taker, the claimant will be entitled to the priorities'.[152]

149 Leading writers have put forward different theories for justifying proprietary relief to a subrogatee. See Charles Mitchell, *The Law of Subrogation*, Chapter 3. For a possible application of Birks' theory, as a justification for subrogation to a secured right, based on 'an initial proprietary base' to the facts of *Banque Financière de la Cité v Parc (Battersea) Ltd*, see Sarah Worthington, 'Subrogation Claims on Insolvency' in Francis Rose (ed), *Restitution and Insolvency* (Mansfield Press, 2000), pp 75–76. It would, however, have potentially resulted in the bank achieving a more favourable position that it would have had the refinancing arrangement been effective. Professor Worthington points out at p 76 that '[t]his is not necessarily an unacceptable state of affairs—to a greater or less extent, all restitutionary claimants who can extract from losing contracts are in a similar position'.

150 As Sarah Worthington has put it in 'Subrogation Claims on Insolvency' in Francis Rose (ed), *Restitution and Insolvency* (Mansfield Press, 2000).

151 See Chapter 5.

152 Birks, *Unjust Enrichment*, p 298.

CHAPTER 5

Proprietary Restitution

A. Introduction

Where a payment is made by mistake, the payer is entitled to repayment of the mistaken payment. In other words, he is entitled to personal restitution. Should proprietary restitution also be available to the payer? When does, if at all, unjust enrichment give rise to proprietary restitution? This question has taxed both the courts and academic lawyers alike, as litigants sought, by claiming proprietary interests in the defendants' assets, to secure their claims over those of the defendants' other creditors.[1] As will be seen below, both judges and restitution scholars have sought to answer the question on a principled basis.

It is sometimes necessary to consider separately cases where property has passed and where it has not. Where, for example, a trustee misappropriates property held under an express trust, the defrauded beneficiary retains the beneficiary ownership of the misappropriated trust asset in the hands of the defaulting trustee.[2] The retention of the trust property by the trustee does not give rise to an unjust enrichment, as the beneficial ownership of the original property never left the plaintiff, so that there is no subtraction of wealth from him. By the same token the trustee is not enriched.[3]

What if, the defaulting trustee having disposed of the trust property, substitute assets or proceeds are involved? One is likely to be dealing with the court's equitable jurisdiction. This is because the common law does not recognise a *vindicatio*, so that proprietary interest is usually enforced by an order requiring the defendant to pay to the claimant the value of the substitute surviving in his hands. In equity, on the other hand, the claimant may point to the new asset in the hands of the defendant and assert beneficial ownership of it. It is clear from the case law that the plaintiff will be entitled to the beneficial ownership of the substitute asset. Does the plaintiff's entitlement to the substitute asset arise from the law of unjust enrichment, as opposed to, on one most authoritative view, the law of property?[4]

The primary question in the context of proprietary restitution is whether, where property has or would otherwise have passed, the fact of

1 A proprietary claim can be advantageous for a wide variety of reasons: see Goff & Jones, pp 85–86.

2 In such a case the source of the beneficial ownership is not unjust enrichment but the trust deed.

3 See Burrows, 'Quadrating Restitution and Unjust Enrichment: A Matter Of Principle?', [2000] RLR 257, pp 259–260. See further Birks, 'Property and Unjust Enrichment: Categorical Truths', [1997] NZLR 623.

4 See *Foskett v McKeown* [2001] 1 AC 102.

unjust enrichment should give rise to an equitable interest, in favour of the party at whose expense the other party has been enriched, in the asset identifiable in the hands of the enriched party. This chapter, after drawing attention to, it is respectfully submitted, the pertinent academic criticisms of the House of Lords decision in *Foskett v McKeown*,[5] will turn to the leading approaches and theses which have been adopted by the courts or advocated by scholars to tackle or aimed at tackling the difficult question of proprietary restitution. The final section appears almost as an addendum, and concerns the following question: where the plaintiff retains the equitable title in the original or substitute property, does he have a personal right to require the defendant to account to him for the value of the property, namely, to give personal restitution, based on the law of unjust enrichment? The issue may, indeed more aptly, be addressed and will be discussed further in the chapter on ignorance, but is dealt with here on the basis that one of the decisions considered by Birks, namely, *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)*[6] is discussed at some length in the first part of this chapter. The decision was, as will be seen, also used by Birks to illustrate his thesis on taxonomy.

B. Pure proprietary claims

Both Goff and Jones[7] and Birks[8] observed that where one brings an action to seek to recover an original asset, and property in that asset has not passed to the defendant, his action is concerned with restoring the original property to his own possession and does not concern the law of unjust enrichment. It is a 'pure proprietary claim'.[9] It is therefore not a case of proprietary restitution, the distinguishing factor being that whereas a pure proprietary claim is about enforcing a pre-existing title, proprietary restitution creates a new property right in favour of the claimant to reverse unjust enrichment. The question as to whether such new property right should be allowed, and on a principled basis, has been the most difficult question for restitution lawyers.

Burrows initially took a different view.[10] He took the view that even where the defendant was in possession of an original asset whose title remained with the plaintiff, his action to recover it could be seen as restitutionary in nature and based on the principle of unjust enrichment, the ground for restitution being 'retention of the plaintiff's property without his consent'.[11] He argued that 'this unjust factor solely triggers proprietary remedies'.[12] Burrows has since adopted the views of Goff and

5 [2001] 1 AC 102.
6 [1996] 1 WLR 387.
7 Goff & Jones, 3rd ed, p 60. Cf 7th ed, p 12.
8 Birks, *An Introduction to The Law of Restitution*, pp 49–73.
9 Goff & Jones, 3rd ed, p 60.
10 See *The Law of Restitution* (Butterworths, 1993), Chapter 13.
11 Ibid.
12 Ibid, p 362.

Jones and Birks on this issue, accepting that where a claimant seeks the return of his original property, on the basis of his pre-existing title, the action is not based on the law of unjust enrichment. It follows that the change of position defence will not be available to the defendant.

C. Substitute assets

What if the original property has been exchanged or sold, giving rise to a substitute asset? The House of Lords in *Foskett v McKeown*[13] has now held that the law of property, as opposed to the law of unjust enrichment, explains a claimant's proprietary right in the substitute asset. It is not easy to reconcile this aspect of the House of Lords' decision with its earlier decision in *Lipkin Gorman v Karpnale Ltd*,[14] where the claim to trace legal property into the hands of defendant was, whilst of a personal nature and based on the common law, otherwise similar to that in *Foskett v McKeown*. Despite the fact that different jurisdictions were involved, the tracing processes undertaken in both cases are the same. Both had as their first step the identification of the claimant's interest to be traced. Both cases involved tracing through choses in action as exchange products representing, respectively, money paid into a bank account and premiums paid in exchange for rights under a life insurance policy. In *Lipkin Gorman*, the successful claim was held to be founded upon the principle of unjust enrichment. In *Foskett v McKeown*, on the other hand, the House of Lords held that the plaintiff's claim had nothing to do with the law of unjust enrichment but had been made to vindicate 'hard-nosed property rights'.[15] Lord Millett observes:

> 'The transmission of a claimant's property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment. There is no "unjust factor" to justify restitution (unless "want of title" be one, which makes the point). The claimant succeeds if at all by virtue of his own title, not to reverse unjust enrichment. Property rights are determined by fixed rules and settled principles.'[16]

The House of Lords decision in *Foskett v McKeown* thus refuted the approach of Birks and Burrows, who had both argued that where proprietary rights are held to exist in a substitute property following tracing, those rights are restitutionary in nature and are granted to reverse unjust enrichment.

In *Foskett v McKeown*, pursuant to a trust deed between the plaintiff purchasers and Mr Murphy's companies, the plaintiffs provided funds for the purchase of plots of land to be developed by Mr Murphy's companies. The money was misappropriated by Mr Murphy, and was used instead to pay premiums due under his life insurance policy. The original property to be traced was the purchasers' beneficial interest in the trust fund

13 [2000] 2 WLR 1299.
14 [1991] 2 AC 548.
15 Per Lord Brown-Wilkinson, [2000] 2 WLR 1299 at p 1305.
16 Ibid, p 1322.

constituted under the trust deed. Such beneficial interest arose from an express trust. This beneficial interest was held to persist in its substitutes: first, the premiums paid, then the chose in action representing the bundle of rights under the policy and, finally, the insurance pay-out. Yet surely the trust deed contemplated none of these permutations and manifestations; still less did it contemplate an interest which might take the form of a proportionate share of the insurance pay-out or an equitable lien over the same. That the law should hold that beneficial ownership of these substitutes belongs to the purchasers calls for an explanation. Unjust enrichment, both Birks and Burrows argue, provides that explanation. Burrows argues that to say that somehow the original property subsists and continues its existence in the substitute property is to indulge in fiction.[17]

D. Unjust enrichment and property

The decision in *Foskett v McKeown* gives great support to the thesis put forward by Virgo, first in an essay entitled 'Reconstructing the Law of Restitution'[18] and subsequently in his leading textbook, *The Principles of the Law of Restitution*,[19] that the case of *Lipkin Gorman*, whilst formally incorporating the principle of unjust enrichment into English law, may not in fact be about unjust enrichment. Virgo holds that the claim there upheld was in truth a property claim, based on the solicitors' legal property which the rogue partner Cass had misappropriated. Such legal property was represented by the chose in action arising from the solicitors' relationship with their banker, which chose in action could be traced into the cash withdrawn from the bank account by Cass. The defendant casino was never enriched. At all material times the solicitors retained a propriety interest in the cash, the exchange product of their chose in action. The solicitors' action was to vindicate that proprietary interest, although, at common law, once the cash was received by the casino and ceased to be identifiable, property in the cash passed and the solicitors could only raise a personal claim. This, however, Virgo argues, does not change the fact that the solicitors' cause of action remains 'founded on the fact that at the time of receipt by the defendant the plaintiffs had retained proprietary

17 See 'Proprietary Restitution: Unmasking Unjust Enrichment', (2001) 117 LQR 412, p 418. See also, in Hong Kong, *Chan Chun Chung Wyman v PBM (Hong Kong Ltd)* (2004) 7 HKCFAR 178, in regard to which Dr TM Yeo observes that the Court of Final Appeal 'proceeded on the basis of a proprietary claim, thus implicitly following the majority reasoning in *Foskett v McKeown* ... that tracing is purely identification of property': [2005] RLR 122. It is noted, however, that it was unnecessary for the court, in the brief judgment, to express any view on the juridical basis of the proprietary claim in question. The court's decision can readily be explained in unjust enrichment terms. The facts of the litigation in *Chan Chun Chung* are described in Chapter 3, at pp 117–121 above.

18 (1996) 10 TLI 20.

19 Clarendon Press Oxford, 1999.

interest'.[20] The action therefore vindicated the solicitors' legal title to the cash. It was unnecessary to have recourse to the principle of unjust enrichment; 'the fact that the defendant had received money in which the plaintiff had retained a proprietary interest should itself be sufficient justification for the award of restitution'.[21]

Virgo refers also to the Court of Appeal decision in *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)*.[22] Robert Maxwell of the former Maxwell Communication Corporation was found to have helped himself to shares belonging in equity to the plaintiff and used them to secure loans from the defendant banks for his private business. The plaintiff was a Delware Corporation. The shares in question were brought to London from the United States where they were used to secure loans owed by Maxwell's private companies. In order to facilitate the borrowing process, the shares were later deposited with a paperless transfer system in New York, before they were ultimately employed as security for loans from the defendant banks. After the collapse of the Maxwell business empire, the plaintiff sought the return of the shares from the banks, claiming that it had a continuing equitable interest in the shares. The plaintiff sought a declaration that the banks held the shares on constructive trusts.

A preliminary issue arose as to the *lex causae*, namely, the law which governed the dispute between the parties. The first step in resolving that issue was to characterise the dispute. The plaintiff argued that their claims were restitutionary in nature, so that, as affirmed in the then Rule 201 in Dicey and Morris,[23] the governing law was 'the law of the country where the enrichment occurs' which, the plaintiff argued, was England, being the place where the misappropriated shares were first received. Compared to English law, New York law had a more lenient concept of *bona fide* purchase, which excludes the application of constructive notice and was therefore more favourable to the defendant banks. Naturally the defendant banks, contending that they were good faith purchasers, sought to argue that New York law applied. In the event, both at first instance and before the Court of Appeal it was held that the relevant issue was not whether the plaintiff's claim was restitutionary. Millett J at first instance held that the issue concerned priority. Aldous LJ held that the issue was one of priority of title to the shares in Berlitz,[24] whilst both Staughton LJ and Auld LJ said that the issue was whether the defendant banks were bona fide purchasers.[25] Virgo therefore argued that since unjust enrichment did not underline the plaintiff's claim in Macmillan, their claim could only have been based on 'the vindication of property rights':

20 Virgo, 'Restructuring the Law of Restitution (*Macmillan Inc v Bishopsgate*)', (1996) 10 TLI 20, 23.

21 Ibid.

22 [1996] 1 All ER 585, [1996] 1 WLR 387.

23 Now Rule 230; see Dicey, Morris & Collins, *The Conflict of Laws* (Sweet & Maxwell, 2006).

24 [1996] 1 WLR 387, pp 417H–418C.

25 Ibid, pp 398–399A, pp 417H–418C.