UNJUST ENRICHMENT, PROPRIETARY SUBROGATION AND UNSATISFACTORY EXPLANATIONS

While contractual subrogation is understood as a function of agreement or common intention between the relevant parties to assign rights, justifying non-contractual subrogation has proved more difficult. The dominant view appears to be that subrogation arises as a response to what would otherwise be an unjust enrichment and for which a proprietary remedy is readily available. This article argues that non-contractual subrogation gives rise to a new proprietary right in the claimant which cannot be readily justified on the basis of unjust enrichment, nor is it simply the vindication of an existing property right. Instead, consideration of how equity normally recognises property rights shows that the intention or conscience of the defendant owner must be a crucial element of the analysis.

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I. Introduction

1 Subrogation is a well-accepted doctrine of law that allows one party, *C*, to assume the rights of a third party as against another, *D*. *C* stands in the shoes of the third party and is "subrogated" to the rights of that third party. Such rights may be personal or proprietary, although commonly a claimant is seeking a proprietary remedy by means of the subrogation. There are two distinct categories of subrogation: contractual and non-contractual. Contractual subrogation concerns those situations where there has been a contractual assignment of the rights from the third party to *C*. For example, subrogation is normally stipulated in insurance contracts to enable the insurer to pursue any party who has caused loss to the insured.[1] Non-contractual subrogation, on the other hand, concerns the imposition of subrogation in certain factual contexts, most commonly where *C*'s money has been used to pay

* I am very grateful to Elise Bant, Charles Rickett and an anonymous referee for their comments on a draft version of this article. All errors remain my own.

1 Where it is not the subject of agreement, indemnity contracts are nevertheless subject to subrogation by operation of law, in which case the subrogation is non-contractual: *Castellain v Preston* (1883) 11 QB D 380; *Lord Napier and Ettrick v Hunter* [1993] AC 713; *Esso Petroleum Ltd v Hall, Russell & Co Ltd, The Esso Bernicia* [1989] AC 643.

off a creditor of *D* and that creditor has valuable security interests in *D*'s property.

2 While contractual subrogation is understood as a function of agreement or common intention between the relevant parties to assign rights, providing a justification for non-contractual subrogation has proved more difficult.[2] It is not necessarily self-evident that a person who has paid off another's debts should be entitled to assume the proprietary rights once held by the creditor and which are now discharged as between the creditor and his or her original debtor.[3] In recent times, the explanation that appears to be most favoured by the UK Supreme Court[4] and the House of Lords[5] before it is that non-contractual subrogation arises as a response to what would otherwise be an unjust enrichment and for which a proprietary remedy is readily available. The latest decision of *Bank of Cyprus UK Ltd v Menelaou*[6] ("*Menelaou*") is particularly important because in that case the proprietary remedy of subrogation was applied to reverse unjust enrichment even though the claimant was not required to, and indeed some of the judges thought was unable to, establish a prior proprietary right in the property held by the defendant. The need for a proprietary link was all but ignored by the majority.

3 The broad and flexible approach being taken in the subrogation cases has significant ramifications for both the content of unjust enrichment and the availability of proprietary restitution more generally. This article is concerned with the second of these and whether proprietary subrogation can be readily justified. Given the importance of property and property rights to our western concept of society and individual autonomy, care must be taken to determine what justifies the recognition of the claimant's security interest. It will be my argument that unjust enrichment on its own is insufficient to justify proprietary restitution. Instead, a subsisting proprietary right must have been transferred from claimant to defendant and not extinguished, or a new proprietary interest must be independently justified. In subrogation cases, tracing an existing right is not straightforward and the more promising explanation is that a new right is created; one that can, but does not necessarily have to, mirror the secured creditor's old rights.

2 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 231, *per* Lord Hoffmann.

3 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [42], *per* Lord Clarke, and [112], *per* Lord Carnwath; *Falcke v Scottish Imperial Insurance* (1886) 34 Ch D 234 at 248, *per* Bowen LJ; Charles Mitchell & Stephen Watterson, *Subrogation Law and Practice* (Oxford: Oxford University Press 2007) at paras 3.26–3.28.

4 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66.

5 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221.

6 [2015] UKSC 66.

Understanding when and how equity normally recognises new proprietary rights can bring some clarification to this difficult area.

4 Many of the points I wish to make in this article are well illustrated by *Menelaou* so I begin with an overview of the facts and decision followed by a discussion of the nature and scope of non-contractual subrogation. After showing that the concept and language of subrogation are unhelpful in the cases that have come to be considered instances of non-contractual subrogation, I proceed to evaluate the different explanations that have been proffered for the proprietary remedy given.

II. *Bank of Cyprus UK Ltd v Menelaou*

5 Melissa Menelaou's parents owned a house, which shall be referred to here as House 1, against which the Bank of Cyprus, from whom they borrowed to fund its purchase, had charges. The parents decided to sell House 1 and buy a cheaper house ("House 2"). House 2 was purchased in the name of Melissa. She was to hold it on trust for herself and her siblings. Unbeknown to Melissa, it was agreed between the bank and her parents that in return for a release of the existing charges, part of the existing debt would be repaid from the sale proceeds and a new charge would be taken by the bank over House 2. The same solicitors acted for both Melissa's parents and the bank in administering the transaction. Some two years later, following financial difficulties, the family decided to sell House 2 and Melissa discovered the charge, purportedly signed by her. Melissa claimed the charge was void and should be removed. The bank counterclaimed that it was entitled to be subrogated to an unpaid vendor's lien over House 2 because Melissa had been unjustly enriched by receiving the house free of a valid charge that should have been properly registered.[7] A vendor's lien is said to arise on the exchange of contracts between vendor and purchaser, even though the vendor still owns the house at the point, and is extinguished upon payment in full of the purchase price.

6 The charge against House 2 was held to be void. Lords Clarke and Neuberger gave judgments awarding subrogation on the basis of unjust enrichment, with which Lords Kerr and Wilson concurred. Lord Carnwath, on the other hand, did not view the unjust enrichment analysis as necessary or desirable, ruling instead that subrogation was the appropriate remedy on the basis of "a strict application of the traditional rules of subrogation".[8]

7 Melissa's solicitors accepted liability for the void charge and agreed to indemnify the bank for its losses.

8 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [107].

7 There were several issues that arose for consideration in the unjust enrichment claim. What was the enrichment that Melissa received? Was it received at the expense of the bank? And what was the unjust factor grounding the right to restitution? The enrichment was identified variously as receipt of the freehold interest in House 2 and as the receipt of that freehold unencumbered by a charge.[9] Melissa's enrichment must have been the absence of the charge. The second requirement, that the enrichment be received at the expense of the bank, was complicated by the fact that the bank had not directly transferred money for the purchase of House 2 to Melissa. However, although there was no direct transfer of value, Melissa's benefit nevertheless arose as a consequence of the bank's permission to release the charges on House 1 in exchange for a charge on House 2 that never materialised. This was accepted as giving rise to a sufficient causal nexus between the claimant's loss and the defendant's benefit.[10] In addition, it did not matter that Melissa received the property a month before the bank released the charge over House 1 and thereby incurred loss. The arrangements were said to be part of one scheme or overall transaction so that the delay between receipt and loss was irrelevant.[11] The chronological gap between the defendant's enrichment and the claimant's loss does, however, raise the question of when the cause of action in unjust enrichment crystallises. Although not significant to the facts of *Menelaou*, this has implications for the applicability of defences such as change of position.[12]

8 As for identification of the unjust factor, the judgments were, with great respect, somewhat inadequate. The unjustness of Melissa's enrichment seemed more to be declared than explained. Lord Neuberger emphasised that Melissa was a volunteer and not a purchaser so her lack of notice of the arrangement between the bank and her parents was not important,[13] but this factor is surely relevant to any defences available to an unjust enrichment claim and not to the identification of the unjust factor. If otherwise, it suggests a presumption in favour of restitution where there has been an enrichment, without requiring a positive ground to justify its reversal. Lord Clarke, on the other hand, noted that subrogation usually arises in cases of mistake or

9 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [62]–[68], *per* Lord Neuberger.

10 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [27], *per* Lord Clarke.

11 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [25], *per* Lord Clarke, and [67] and [73], *per* Lord Neuberger.

12 Graham Virgo, "Restitution and Unjust Enrichment in the Supreme Court: Reflections on *Bank of Cyprus UK Ltd v Menelaou*" University of Cambridge Faculty of Law Research Paper No 10/2016 (28 January 2016), available at <http://ssrn.com/abstract=2724024> (accessed October 2016).

13 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [69]–[71].

failure of consideration, appearing to accept that both were present on the facts of the case without any explicit analysis of their application.[14] Failure of consideration is problematic as the unjust ground here because the basis for the bank's actions was not mutually shared by Melissa who had no knowledge of it. Mistake is more likely here: the bank was acting on the mistaken assumption that it would receive a valid security over Melissa's property, House 2.[15]

9 The majority having ruled that unjust enrichment was made out on the facts, the court held that the appropriate remedy was to subrogate the bank to a charge over House 2 by way of an unpaid vendor's lien. Subrogation in response to unjust enrichment had previously been recognised by the House of Lords in *Banque Financière de la Cité v Parc (Battersea) Ltd*[16] ("*Banque Financière*"). There the claimant ("BFC") had agreed to pay off part of the debt owed by Parc (Battersea) Ltd ("Parc") to another bank ("RTB"). As part of the arrangement, the holding company of the group to which Parc belonged undertook to grant priority to BFC ahead of any creditors within its group of companies. Parc subsequently collapsed. The creditors within the group did not know of the arrangement and were accordingly not bound to it. Hence, BFC sought subrogation to RTB's security interest but only as against a secured group creditor, OOL, who was asserting priority. Subrogation was awarded but Lord Hoffmann emphasised that the remedy was an equitable one and not available against Parc, RTB or any non-group secured creditor.[17] Lord Steyn expressly confirmed that the remedy was personal and not proprietary in that case.[18]

14 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [20]–[21].

15 Although, see doubt raised in Graham Virgo, "Restitution and Unjust Enrichment in the Supreme Court: Reflections on *Bank of Cyprus UK Ltd v Menelaou*" University of Cambridge Faculty of Law Research Paper No 10/2016 (28 January 2016), available at <http://ssrn.com/abstract=2724024> (accessed October 2016). Virgo suggests that the mistake in *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 may not qualify because it was a misprediction as to a future fact (that security would be obtained), which has been rejected by the Supreme Court in *Pitt v Holt; Futter v Futter* [2013] 2 AC 108. However, despite Lord Clarke's phrasing of the mistake (at [21]) as an assumption about what *would* happen, the obtaining of the invalid charge, about which the bank was mistaken, occurred as part of the larger arrangement or scheme identified by the court. If it were relevant in relation to establishing that the enrichment had been received at the bank's expense, it would be inconsistent to exclude it in relation to identifying an unjust factor.

16 [1999] 1 AC 221.

17 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 236–237.

18 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 228. Acknowledged in *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [40], *per* Lord Clarke.

10 The *Menelaou* decision is significant in two respects. First, it was not settled until *Menelaou*, although perhaps expected, that proprietary subrogation would be available for unjust enrichment.[19] Lord Clarke's description in *Menelaou* of the remedy in *Banque Financière* as an "attenuated" property right[20] is, with respect, an unnecessary complication given their Lordships' acknowledgement in *Banque Financière* that the remedy given there was effective only against one particular creditor. Nevertheless, *Menelaou* provides a clear recognition that the remedy can be proprietary. Secondly, there is no need for the claimant to establish any pre-existing property right in or direct link to the property received by the defendant in order to justify proprietary subrogation. Lord Clarke specifically noted that the bank retained no property interest in the proceeds of the sale of House 1 used to purchase House 2.[21] Lord Neuberger ruled that while a property claim could have been made out in the alternative, it was not necessary given the unjust enrichment analysis.[22]

11 The majority decision in *Menelaou* represents an important marker in the development of the law of unjust enrichment, allowing as it does a proprietary remedy for a personal claim. It is necessary to consider the justification for such a development. As will be discussed immediately below, the categorisation of such claims as specific instances of subrogation does not itself provide a justification. Indeed, the nomenclature of subrogation is little more than a distraction.

III. Subrogation

12 The general statement of subrogation favoured by their Lordships in *Menelaou* was as follows:[23]

> Where A's money is used to pay off the claim of B, who is a secured creditor, A is entitled to be regarded in equity as having had an assignment to him of B's rights as a secured creditor. … It finds one of its chief uses in the situation where one person advances money on the understanding that he is to have certain security for the money he has advanced, and, for one reason or another, he does not receive the

19 *Cheltenham & Gloucester plc v Appleyard* [2004] EWCA Civ 291; Charles Mitchell, Paul Mitchell & Stephen Watterson, *Goff and Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 8th Ed, 2011) ch 39; Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3rd Ed, 2015) at pp 637–638; Ian Jackman, "Restitution and Subrogation" (1999) 73 ALJ 110.

20 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [50].

21 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [13] and [50].

22 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [100]–[104].

23 *Burston Finance Ltd v Speirway Ltd* [1974] 1 WLR 1648 at 1652, *per* Walton J, cited in *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [39], *per* Lord Clarke, and [111], *per* Lord Carnwath.

> promised security. In such a case he is nevertheless to be subrogated to the rights of any other person who at the relevant time had any security over the same property and whose debts have been discharged, in whole or in part, by the money so provided by him.

This form of non-contractual subrogation arises in a range of different contexts. Sureties,[24] lenders[25] and bankers[26] are readily accepted as having rights of subrogation to a creditor's security where they have paid money to discharge a debt owed by the defendant to that creditor and such subrogation is not excluded by any contractual arrangement with the defendant. Subrogation to a vendor's lien where a claimant pays purchase moneys directly or indirectly to the vendor of the property bought by the defendant is also a common species of non-contractual subrogation.[27] A vendor's lien arises on the exchange of contracts between vendor and purchaser, even while the vendor still owns the house, and is discharged upon full payment of the purchase price.

13 Before its alignment to unjust enrichment, non-contractual subrogation had proved somewhat difficult to justify. Earlier cases had suggested an analysis based on deemed or presumed intention.[28] For example, in *Butler v Rice*,[29] the claimant had lent money to the defendant to pay off a debt owed to a bank, thus discharging the bank's security over the defendant's house, on the understanding that the claimant would receive a charge over the house. No charge was given because the house was in fact owned by the defendant's wife who refused to oblige. The claimant was held to be subrogated to the bank's charge on the basis that he must be presumed to have intended to keep the charge alive in his favour. This approach was rejected by Lord Hoffmann in *Banque Financière*[30] following the availability of subrogation in *Boscawen v Bajwa*[31] ("*Boscawen*") to a lender whose money had been paid away to a third party in breach of the lender's instructions before sale was completed such that there was intention neither to pay nor to receive any security from the defendant on the facts as they occurred. Lord Hoffmann said that to subsequently ground subrogation in intention inevitably resulted in legal fictions in cases such as *Boscawen*

24 Mercantile Law Amendment Act 1856 (c 97) (UK) s 5.
25 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221; *Butler v Rice* [1910] 2 Ch 277.
26 *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48.
27 *Paul v Spierway Ltd* [1976] Ch 220.
28 *Orakpo v Manson Investments Ltd* [1978] AC 95 at 104, *per* Lord Diplock.
29 [1910] 2 Ch 277. See also *Ghana Commercial Bank v Chandiram* [1960] AC 732 and *Cheltenham & Gloucester plc v Appleyard* [2004] EWCA Civ 291.
30 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 233.
31 [1996] 1 WLR 328.

and ought to be rejected, particularly given that unjust enrichment provided a more accurate explanation for subrogation.[32]

14 The unjust enrichment explanation of these forms of subrogation seems compelling.[33] The defendant has been enriched by the discharge from liability to the third party creditor (or vendor) without a charge or other security owing to the claimant. That enrichment may be at the expense of the claimant by virtue of its transfer of value to the third party. Receipt of the enrichment is unjust on the basis of (a) compulsion of the surety who is legally obliged to pay the third party; (b) failure of consideration of the lender who has not been repaid the loan; or (c) mistake of the lender who has paid the money in the belief that he or she would receive some security interest in return that has failed to materialise. This analysis of subrogation has been accepted by a majority of the House of Lords in *Banque Financière* and of the Supreme Court in *Menelaou*.

15 Yet, some conundrums remain. It is not clear, first, that there are in fact any persisting rights to which the claimant can be subrogated, or, secondly, why the claimant should be entitled to assert proprietary rights against the defendant.

16 As to the first point, subrogation, although often described as a remedy, is more accurately understood as the mechanism by which a claimant is deemed to have access to the rights of another. It is those rights which the claimant is seeking to obtain as his or her remedy.[34] However, on payment of the debt owed to the third party creditor (or vendor), the third party's security interests are legally extinguished.[35] It is something of a misnomer then to talk of the third party's rights being assigned to or being kept alive for the surety or lender; but still, the essence of subrogation is that such rights are transferred to the claimant. In their leading book on subrogation, Mitchell and Watterson thus label this form of subrogation "subrogation to extinguished rights".[36] This difficulty has been judicially acknowledged. In *Boscawen*,

32 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 234. This will be discussed further at para 42 *ff* below.

33 Andrew Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2010) ch 7; Charles Mitchell & Stephen Watterson, *Subrogation Law and Practice* (Oxford: Oxford University Press, 2007).

34 Andrew Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2010) at p 146.

35 *Re Diplock's Estate* [1948] 1 Ch 465.

36 Charles Mitchell & Stephen Watterson, *Subrogation Law and Practice* (Oxford: Oxford University Press, 2007). See also Charles Mitchell, Paul Mitchell & Stephen Watterson, *Goff and Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 8th Ed, 2011) at para 39-12.

Millett LJ described the discharged security as being resurrected.[37] In *Banque Financière*, Lord Hoffmann stated:[38]

> [T]he phrase 'keeping the charge alive' needs to be handled with some care. It is not a literal truth but rather a metaphor or analogy: see Birks, *An Introduction to the Law of Restitution*, pp 93–97. In a case in which the whole of the secured debt is repaid, the charge is not kept alive at all. It is discharged and ceases to exist. … It is important to remember that, as Millett LJ pointed out in *Boscawen v Bajwa* [1996] 1 WLR 328, 335, subrogation is not a right or a cause of action but an equitable remedy against a party who would otherwise be unjustly enriched. It is a means by which the court regulates the legal relationships between a claimant and a defendant or defendants in order to prevent unjust enrichment. When judges say that the charge is 'kept alive' for the benefit of the claimant, what they mean is that his legal relations with a defendant who would otherwise be unjustly enriched are regulated as if the benefit of the charge had been assigned to him. It does not by any means follow that the claimant must for all purposes be treated as an actual assignee of the benefit of the charge and, in particular, that he would be so treated in relation to someone who would not be unjustly enriched.

Indeed, that the claimant is in fact not subrogated to the third party's rights is borne out in some of the cases where the claimant is given something less than the interest which the third party had on the principle that the remedy is confined by the intended arrangement between claimant and defendant. So, in *Banque Financière*, the remedy was not the charge held by the third party creditor whose debt had been discharged, but rather priority over one other particular secured creditor as that is what the claimant had mistakenly believed that it was receiving when it loaned money to pay off the debt.

17 All this suggests that what is occurring is not truly subrogation as such, but rather creation of rights in equity that reflect, but are not the same as, those rights which the third party had before the debt was extinguished. The language and thinking of subrogation has served only to confuse and conceal what is really taking place.[39] It would be best to abandon the terminology of subrogation in order to place greater emphasis on the task of identifying the explanation for the particular rights that a claimant is given in any of the cases that have traditionally

37 *Boscawen v Bajwa* [1996] 1 WLR 328 at 341.

38 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 236. See also *Menelaou v Bank of Cyprus UK Ltd* [2013] EWCA Civ 1960; [2014] 1 WLR 854 at [17], *per* Floyd LJ.

39 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [117], *per* Lord Carnwath; Peter Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, Rev Ed, 1989) at pp 93–97.

been considered to fall within the categories of non-contractual imposed subrogation.

18 As to the second point, regarding the remedy being proprietary, once a case is considered to fit within the established categories, proprietary "subrogation" seems to be the presumptive and automatic response. Again, the exception is where that would extend beyond what the claimant had otherwise intended or would have bargained for, that it is limited in some way as was the case in *Banque Financière*.

19 The question remains then: What is the justification for a proprietary remedy that generally though not always mimics the extinguished rights of a creditor whose credit has been discharged by the use of money emanating from the claimant? The question is an important one that has implications both for a range of factual scenarios sought to give rise to subrogation, as well as for our wider understanding of restitution. Is the unjust enrichment of the defendant a sufficient justification for the recognition of a property right in the claimant? The remainder of this article considers potential explanations for proprietary subrogation apparent in the cases, starting with unjust enrichment.

IV. Justifying proprietary "subrogation"

A. Unjust enrichment

20 The majority of their Lordships in *Menelaou* ruled that subrogation to proprietary rights was a justified response to the unjust enrichment of Melissa. Both Lords Clarke and Neuberger drew support for their view from earlier case law, seeking to explain past cases of subrogation as instances of unjust enrichment. Three cases, in particular, assumed importance in their Lordships' analysis.

21 First, both Lords Clarke and Neuberger quoted significantly from judgments delivered in *Orakpo v Manson Investments Ltd*[40] ("*Orakpo*"). There, the claimant moneylender had given secured loans to the defendant that were unenforceable due to failure to comply with statutory formalities requirements.[41] The House of Lords declined subrogation on the ground that it would be contrary to the terms and policy of the relevant statute. In describing subrogation, Lord Diplock said:[42]

40 [1978] AC 95.
41 Pursuant to the English Moneylenders Act 1927 (c 21).
42 *Orakpo v Manson Investments Ltd* [1978] AC 95 at 104.

> My Lords, there is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based upon the civil law. There are some circumstances in which the remedy takes the form of 'subrogation', but this expression embraces more than a single concept in English law. It is a convenient way of describing a transfer of rights from one person to another, without assignment or assent of the person from whom the rights are transferred and which takes place by operation of law in a whole variety of widely different circumstances. Some rights by subrogation are contractual in their origin, as in the case of contracts of insurance. Others, such as the right of an innocent lender to recover from a company moneys borrowed *ultra vires* to the extent that these have been expended on discharging the company's lawful debts, are in no way based on contract and appear to defeat classification except as an empirical remedy to prevent a particular kind of unjust enrichment.

22 Lords Salmon and Edmund-Davies also spoke of subrogation not being limited to categories of case that existed at that time.[43] In *Menelaou*, Lords Clarke and Neuberger relied on *Orakpo* as support for a flexible approach to proprietary subrogation that could be awarded for unjust enrichment.[44] However, the time and context of *Orakpo* must be borne in mind. Unjust enrichment was not at that stage an area of the law with any sense of boundary or structure. Indeed, Lord Diplock rejected a "general doctrine" of unjust enrichment and was instead referring to something far more ambiguous than that with which we are concerned today. The sort of judicial flexibility suggested by their Lordships in *Orakpo* is no longer appropriate in the face of a more developed law of unjust enrichment and, more importantly, when the concern is as here with affecting and effecting property rights, something for which reason principle and coherence ought to be essential guides.

23 Support was also drawn from Lord Hoffmann's approach in *Banque Financière* which anchored non-contractual subrogation to the law of unjust enrichment. But, again, caution must be exercised. As pointed out above, the remedy awarded in *Banque Financière*, although labelled as subrogation, was a personal remedy moulded by the expectations of the claimant and defendant when the claimant paid away its money on behalf of the defendant. The case is authority neither for nor against the availability of proprietary subrogation for unjust enrichment.

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43 *Orakpo v Manson Investments Ltd* [1978] AC 95 at 110, *per* Lord Salmon, and 112, *per* Lord Edmund-Davies.

44 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [49] and [50], *per* Lord Clarke, and [86]–[91], *per* Lord Neuberger.

24 The third case of importance was *Boscawen*. Their Lordships sought to limit the scope of Millett LJ's analysis of subrogation in *Boscawen* that relied on pre-existing property rights. In *Boscawen*, the claimant lender transferred money to the purchaser's solicitor to be used for the purchase of a property. The purchase was not completed but the purchaser's solicitor had already passed the funds to the vendor's solicitor who had applied them to discharge the vendor's mortgage. Both solicitors had acted contrary to instructions, albeit not dishonestly. When the vendor's creditors sought possession and sale of the property, the lender asserted a right to be subrogated to the security of the mortgagee. The Court of Appeal held that both solicitors held the funds as fiduciaries and had acted in breach of trust. The lender was entitled to trace the funds and assert a security interest in the property of the vendor.

25 Millett LJ explained "in instructive detail"[45] the relationship between tracing and subrogation.[46] Tracing is not an alternative or distinct claim – it is the process by which the money used to discharge the security is identified as belonging to the claimant that leads to a subrogation remedy. His Lordship did, at several points, refer to unjust enrichment but it is nevertheless clear that while a personal remedy is generally available, a proprietary remedy is usually only appropriate when the claimant can "prove that the property to which he lays claim is still in the ownership of the defendant".[47]

26 In *Foskett v McKeown*,[48] Lord Millett later expressed most clearly his view that there is a strong distinction between proprietary claims and unjust enrichment claims. For example, he said:[49]

> A claimant who brings an action in unjust enrichment must show that the defendant has been enriched at the claimant's expense, for he cannot have been unjustly enriched if he has not been enriched at all. But the claimant is not concerned to show that the defendant is in receipt of property belonging beneficially to the claimant or its traceable proceeds. The fact that the beneficial ownership of the property has passed to the defendant provides no defence; indeed, it is usually the very fact which founds the claim. Conversely, a claimant who brings an action like the present must show that the defendant is in receipt of property which belongs beneficially to him or its traceable proceeds, but he need not show that the defendant has been enriched by its receipt. He may, for example, have paid full value for the

45 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [96], *per* Lord Neuberger.
46 *Boscawen v Bajwa* [1996] 1 WLR 328 at 334–337.
47 *Boscawen v Bajwa* [1996] 1 WLR 328 at 334.
48 [2001] 1 AC 102.
49 *Foskett v McKeown* [2001] 1 AC 102 at 129.

> property, but he is still required to disgorge it if he received it with notice of the claimant's interest.

In discussing Lord Millett's approach in *Boscawen* and *Foskett v McKeown*, both Lords Clarke and Neuberger in *Menelaou* interpreted his comments as being concerned only with subrogation for proprietary claims such that they did not prevent subrogation being applied to remedy a personal claim, even where no property chain can be shown.[50] With respect, these readings of Lord Millett's views are less than persuasive. Proprietary remedies are available in response to claims based on pre-existing proprietary rights. The claim and the remedy both operate to vindicate the claimant's property right. A personal claim does not generally give rise to proprietary remedies. It is in this way that Lord Millett explained the remedy of proprietary subrogation and the role of tracing in locating the property to which the claimant claims rights.

27 Past subrogation authorities, particularly *Banque Financière*, then do not provide sufficient justification. Even if they were clear examples of proprietary subrogation for unjust enrichment, it would still be important to understand why. This was acknowledged by Lord Neuberger, who accepted that "a principled case to support such a conclusion has to be shown",[51] one that extends beyond merely meeting the requirements of a claim in unjust enrichment. In application to the facts of *Menelaou*, his Lordship went on to identify these relevant features:[52]

> [I]t appears to me that the following five points, when taken together, establish the Bank's subrogation claim. (i) The freehold was acquired by being purchased through [the solicitors] for £875,000; (ii) £875,000 was a sum which the Bank could have demanded from [the solicitors], and it only agreed to its being used to purchase the freehold if the Bank was granted a Charge; (iii) without that agreement, there would have been no £875,000 to purchase the freehold, (iv) owing to an oversight, the Bank was not granted a valid Charge; (v) the payment of £875,000 to purchase the freehold discharged the Lien.

28 Yet, with respect, these points seem to amount to no more than a restatement of the elements of unjust enrichment. It could be said that the additional aspect underlying these points is that there is common identifiable property (£875,000) running through the transaction. This would be consistent with the view espoused by some unjust enrichment scholars that a "proprietary base" or "tracing link" between the

50 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [38], *per* Lord Clarke, and [96]–[98], *per* Lord Neuberger.

51 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [94].

52 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [95].

enrichment received and any substitute asset held by the defendant to which a right is being claimed ought to be present.[53] Yet, if that is right, it suggests the concern is really with identifying property in which the claimant can show an existing interest and in relation to which establishing an unjust enrichment adds nothing. The response may be that the concern is to identify value that has been the subject of unjust enrichment and not necessarily property itself moving from claimant to defendant. But if that is so, then Lord Neuberger's five points collapse into the assertion that unjust enrichment is enough in itself to justify a proprietary remedy, something that is inconsistent with Lord Neuberger's prior concession that unjust enrichment on its own is insufficient to justify proprietary restitution.

29 Lord Clarke, on the other hand, rejected any continuing property right on the facts of *Menelaou*. His Lordship said:[54]

> There is no reason why, on the facts of this case, the remedy should not be subrogation …, even if the Bank did not retain a property interest in the proceeds of sale of [House 1]. The remedy simply reverses the unjust enrichment which Melissa would otherwise enjoy by ensuring that the Bank not only has a personal claim against her but also has an equitable interest in [House 2], as it would have had if the scheme had gone through in accordance with the agreement of the Bank and the Menelaou parents. Moreover, but for the proposed remedy the Bank would lose the benefit it was to receive from the scheme, namely a charge on [House 2] to replace the charges it had on [House 1].

If we are to reject unjust enrichment as a sufficient explanation on its own for proprietary restitution, then the suggestion here seems to be that a proprietary remedy is appropriate because that is what the parties had intended and what the bank would have had but for the mistake. Yet, Lord Clarke seemed earlier to have adopted Lord Hoffmann's rejection of the relevance of intention.[55]

30 The majority judgments in *Menelaou* thus fail to provide a persuasive account for the availability of proprietary restitution as a response to unjust enrichment. As with the enforcement of other civil obligations, unjust enrichment is not usually remedied by proprietary restitution. A claim to reverse unjust enrichment is not a claim to vindicate property rights but to remedy a defective transfer of value. It is also not a claim to give effect to a promise or agreement, albeit that in

53 Charles Mitchell, Paul Mitchell & Stephen Watterson, *Goff and Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 8th Ed, 2011) ch 7.

54 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [50], *per* Lord Clarke.

55 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [45]–[46].

some instances that may be an indirect outcome. As Lord Millett, writing extra-judicially, has said:[56]

> By itself notice of the existence of a ground of restitution is obviously insufficient to found a proprietary remedy; it is merely notice of a personal right to an account and payment. It cannot constitute notice of an adverse proprietary interest if there is none.

31 While unjust enrichment as a broad notion may be employed to explain the position of claimant and defendant in cases of non-contractual subrogation, it is not sufficiently particular to provide a test for proprietary liability.[57] But the two alternative suggestions rejected by the majority in *Menelaou* deserve their own more focused consideration: the vindication of the claimant's subsisting property right and the intention of the parties that the claimant would otherwise have received a property interest.

B. Vindication of an existing property right

32 It has been accepted that pre-existing property rights can be vindicated directly in equity without resort to any notion of unjust enrichment, where such rights can be shown to have survived despite the property to which they attach having changed hands or form.[58] It is in this way that Millett LJ explained proprietary remedies in *Boscawen*:[59]

> The claimant will generally be entitled to a personal remedy; if he seeks a proprietary remedy he must usually prove that the property to which he lays claim is still in the ownership of the defendant.

However, the analysis is not altogether free from complications in the typical subrogation claim. The claimant must show that property emanating from him or her can be traced into a creditor's security interest. The issue here is with the tracing exercise itself. The claimant's money is used to discharge a debt and traditionally tracing is said to be frustrated by the payment of a debt because a debt is not an asset in the hands of the debtor.[60]

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56 Peter Millett, "Restitution and Constructive Trusts" (1998) 114 LQR 399 at 413.

57 *Bofinger v Kingsway Group Ltd* [2009] HCA 44; (2009) 239 CLR 269 at [85]–[98]; Matthew Conaglen & Peter Turner, "Subrogation, Accounting and Unjust Enrichment" (2010) 69 Camb LJ 30; Pauline Ridge, "Equitable Subrogation" (2010) 126 LQR 189.

58 *Foskett v McKeown* [2001] 1 AC 102; *Caltong (Australia) Pty Ltd v Tong Tien See Construction Pte Ltd* [2002] 2 SLR(R) 94.

59 *Boscawen v Bajwa* [1996] 1 WLR 328 at 335.

60 *Re Diplock's Estate* [1948] Ch 465 at 549.

33 Whether or not money should be traceable through a debt has been controversial.[61] And even if it could, it is unclear how it can then be traced into the creditor's security interest, rather than directly into the defendant's property. In *Boscawen*, Millett LJ effectively avoided the problem by focusing instead on the benefit received by the defendant in relation to the property. Having noted that ordinarily a constructive trust arises where a claimant can show a persisting property right, his Lordship continued:[62]

> But this is only one of the proprietary remedies which are available to a court of equity. If the claimant's money has been applied by the defendant, for example, not in the acquisition of a landed property but in its improvement, then the court may treat the land as charged with the payment to the claimant of a sum representing the amount by which the value of the defendant's land has been enhanced by the use of the claimant's money. *And if the claimant's money has been used to discharge a mortgage on the defendant's land, then the court may achieve a similar result by treating the land as subject to a charge by way of subrogation in favour of the claimant.* [emphasis added]

34 In awarding subrogation in *Menelaou*, Lord Carnwath adopted Millett LJ's approach, referring to it as "a relatively narrow ground" in contrast to the unjust enrichment approach of the majority which his Lordship rejected.[63] In *Menelaou*, the tracing process was further complicated because the bank did not pay the vendor but instead allowed proceeds of sale from House 1 to be used to pay the vendor of House 2. Referring to the "Quistclose principle",[64] his Lordship held that the sale proceeds were held by the solicitor on trust for the bank given the bank's existing loan and charges against House 1 but subject to a power of the parents to apply the proceeds to the purchase of House 2 on condition of a charge in favour of the bank.[65] The bank was able to trace its interest in the sale proceeds to the vendor's lien. Lord Neuberger also expressed some sympathy for a proprietary claim, suggesting that the sale proceeds could be analysed either as Lord Carnwath did or as subject to an express trust for the parents with conditions that the proceeds be applied either to the purchase of

61 Peter Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, Rev Ed, 1989); Lionel Smith, "Tracing into the Payment of a Debt" (1995) 54 Camb LJ 290; Matthew Conaglen, "Difficulties with Tracing Backwards" (2011) 127 LQR 432.

62 *Boscawen v Bajwa* [1996] 1 WLR 328 at 335. This idea of "backward tracing" has also been applied to the contractual payment of unsecured debts: *Bishopsgate Investment Management Ltd v Homan* [1995] Ch 211 at 216–217, *per* Dillon LJ.

63 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [131] and [140].

64 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [135], referring to *Quistclose Investments Ltd v Rolls Razor Ltd* [1970] AC 567 and *Twinsectra Ltd v Yardley* [2002] 2 AC 164.

65 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [134] and [137]–[139].

House 2 and a charge given to the bank, or to reduction of the debt owing to the bank.[66]

35 Justifying proprietary subrogation on the basis of vindication of an existing property right may perhaps appear more restrained than the unjust enrichment analysis of the majority. However, the process of converting a property right in money to a once-extinguished but now resurrected charge remains in need of some justification. Lord Carnwath's explanation of tracing in subrogation cases is illustrative:[67]

> In the context of subrogation, tracing was not about identifying a particular asset in the hands of the defendant, as belonging notionally to the claimant; but rather as providing the necessary link with the payments made to discharge the relevant mortgage.

36 Is the identification of a mere link sufficient? It may be that this broader approach to recognising property rights is entirely consistent with recent developments in the law of tracing which suggest that tracing is to be better understood not as concerned with the notion of formal substitution of value but rather with identifying causal connections between transactions.[68] While once tracing may have been perceived as a set of strict rules pertaining to the following of specific assets into substitute assets, recent cases show that the courts are more accepting of an understanding of tracing as a policy decision to recognise causal links in some situations and not in others.[69] In *Federal Republic of Brazil v Durant*,[70] the Privy Council allowed tracing of payments through debt into property where the incurring of the debt had been for the acquisition of the property. The case concerned the payment of bribes to a public official that were then dispersed through a web of companies and bank accounts. At some points, money to which tracing was sought had been paid out of an account before funds resulting from the bribes had been received. As long as there could be said to be a co-ordinated scheme of transactional connections, tracing was held to be possible. Of course, if courts become more willing to allow backward tracing in subrogation cases to property acquired by the

66 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [100]–[104]. Doubt about this second analysis has been expressed by Virgo because essentially it involves founding the bank's property rights from its contractual arrangements: Graham Virgo, "Restitution and Unjust Enrichment in the Supreme Court: Reflections on *Bank of Cyprus UK Ltd v Menelaou*" University of Cambridge Faculty of Law Research Paper No 10/2016 (28 January 2016) at p 20, available at <http://ssrn.com/abstract=2724024> (accessed October 2016).

67 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [128].

68 James Edelman, "Understanding Tracing Rules" (2016) 16 QUTLR 1.

69 *Relfo Ltd v Varsani* [2014] EWCA Civ 360. This was likely always Lord Millett's approach: *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717; *Foskett v McKeown* [2001] 1 AC 102 at 127–128.

70 *Federal Republic of Brazil v Durant* [2015] UKPC 35.

debtor prior to the payment of the debt, there will be very little need for real subrogation at all. The claimant will have its own right directly in the defendant's property without needing to resort to claiming the creditor's rights. However, Lord Toulson, giving the advice of the board, made it clear the proposition was not a statement of general application but depended on policy factors. There, it was considered significant that the payments were undertaken as part of a money laundering scheme where the various transactions were being used deliberately or as an incident of the banking system to deny the claimant's interest.[71] His Lordship noted that, in other cases, the presence of unsecured creditors with competing interests could be a limiting factor.[72] In most subrogation cases, there is usually sufficient connection between the defendant's property, the debt with which it was acquired and the claimant's later payment to discharge the debt, to enable this broader notion of tracing to the claimant's property without needing to rely on subrogation to the creditor's security interest. It remains to be seen whether a policy factor in favour of this broader notion of tracing will first be needed.

37 This expansion of tracing illustrates that it is nothing more than a procedural mechanism for locating value. The mere fact that value can be traced does not justify a property right at the end of the tracing process. Indeed, Cutts argues that the concept of tracing is misleading: "The translation of value into exchange potential tells us nothing new; certainly, it tells us nothing about the way in which we might prove that such an exchange has indeed taken place."[73] To claim that the lender's property in money can be traced from the payment of the debt to the creditor's security interest is to state a conclusion, not a justification for proprietary subrogation. A normative basis must be identified.

38 Even if the broader approach to tracing is to be preferred, this proprietary analysis continues to perpetuate the fiction that the creditor's security interest has passed to the lender when those rights were in fact extinguished on payment of the debt. It also fails to explain why the rights to which a lender is said to be subrogated in equity are often circumscribed by the particular circumstances of the case. The legal fiction of subrogation explained as an exercise of tracing an earlier property right only serves to obscure both what is really happening and the reasons for it. A new equitable proprietary right is created in the claimant that looks like but is not the same as the creditor's right.[74]

71 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [38].
72 *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66 at [33].
73 Tatiana Cutts, "Tracing, Value and Transactions" (2016) 79 MLR 381 at 396.
74 *In re Diplock* [1948] Ch 465 at 549.

C. Creation of a new property right

39 It seems to this author that the better explanation of proprietary restitution arising in non-contractual "subrogation" cases is that the claimant's security right is *created* by equity. The right has not been assigned to the claimant, nor has the claimant traced it from money belonging to the claimant that has been applied to a debt in relation to which the creditor had security rights. The discharge of the creditor's security may be a precondition to the creation of the claimant's security right. But it is not the justification.[75]

40 The creation of a proprietary interest, albeit an equitable one, ought to rest on some substantive and convincing principle that justifies interfering with the defendant's otherwise absolute legal title. It cannot merely be a remedy available at the discretion of the court without further explication. The English courts' rejection of remedial constructive trusts for this reason is well known.[76] In Australia, where such trusts are accepted, the courts nevertheless seek to offer a principled explanation,[77] as also appears to be the case in Singapore.[78] The same must apply to proprietary subrogation. I turn then to possible explanations.

(1) Preventing unconscionability

41 Equity's creation of property rights, whether in the form of constructive trusts, liens or charges, is often said to be on the basis of preventing or correcting unconscionability.[79] In *Boscawen*, Millett LJ described it thus:[80]

> Equity lawyers speak of a right of subrogation, or of an equity of subrogation, but this merely reflects the fact that it is not a remedy which the court has a general discretion to impose whenever it thinks it just to do so. The equity arises from the conduct of the parties on

75 *Boscawen v Bajwa* [1996] 1 WLR 328 at 340, *per* Millett LJ.

76 *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250 at [47], *per* Lord Neuberger; *Re Polly Peck International (No 2)* [1998] 2 BCLC 185; [1998] 3 All ER 812; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 714–716, *per* Lord Browne-Wilkinson; *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717.

77 *Muschinski v Dodds* (1985) 160 CLR 583; *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6; [2012] FCR 296. There are signs of its acceptance in New Zealand: *Commonwealth Reserves I, LC v Chodar* [2001] 2 NZLR 374; *Regal Castings Ltd v Lightbody* [2008] NZSC 87; [2009] 2 NZLR 433.

78 *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801; *Koh Cheong Heng v Ho Yee Fong* [2011] 3 SLR 125. See also Man Yip, "Singapore's Remedial Constructive Trust: Lessons from Australia?" (2014) 8 J Eq 77.

79 *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400; *Baumgartner v Baumgartner* (1987) 164 CLR 137.

80 *Boscawen v Bajwa* [1996] 1 WLR 328 at 335.

> well settled principles and in defined circumstances which make it unconscionable for the defendant to deny the proprietary interest claimed by the claimant. A constructive trust arises in the same way. Once the equity is established the court satisfies it by declaring that the property in question is subject to a charge by way of subrogation in the one case or a constructive trust in the other.

However, unconscionability alone is an unhelpful test with some significant problems. First, it is ambiguous. As with other vague concepts such as justice and fairness, the prevention of unconscionability is an admirable end goal for a legal system but it ought not to be considered a first-order principle that can be applied directly to a case to determine its outcome. Just as a legally enforceable agreement at common law is not determined solely by the gauge of what is "just",[81] nor should the creation of equitable property rights be determined solely by an abstract notion of unconscionability without reference to something of more meaningful content. To resort simply to vague notions of justice, fairness and prevention of unconscionability at an abstract level is particularly inappropriate when dealing with property rights and fundamental values of certainty and security of receipt inherent in such rights. The second weakness of the unconscionability mantra is that it is somewhat circular and results in question begging: the claimant has an equitable property right because it would be unconscionable for the defendant legal owner to deny the claimant's beneficial interest.

42 This is not to deny the relevance of unconscionability altogether. It is acknowledged that in some areas of the law perhaps, the absence of determinate principles and a resulting discretion may not necessarily be a bad thing. As Harding argues, the court can tolerate indeterminacy by the "sincere and impartial evaluation of relevant reason".[82] But it is important to remember that legal concepts serve different kinds of functions. So, in the context of creating equitable property rights, while the notion of unconscionability is an appropriate purposive or expressive function of the law, it should not be understood as fulfilling the necessary performative or operative function.[83] In other words, it is the ultimate purpose and the expressed function of equity to prevent unconscionability but that is not enough to detail how proprietary restitution performs or operates in the relevant cases. How the law performs is the very concern of lawyers and judges and substance is needed for the law to apply effectively. Unconscionability

81 Instead, one must look for evidence of an intention to be legally bound to another, which is often further guided by contractual concepts of offer, acceptance and consideration.

82 Matthew Harding, "Equity and the Rule of Law" (2016) 132 LQR 278 at 291.

83 Allan Beever, "The Law's Function and the Judicial Function" (2003) 20 NZULR 299; Matthew Harding, "Equity and the Rule of Law" (2016) 132 LQR 278 at 286.

cannot, without greater exposition, provide the test for liability.[84] Indeed, even in Australia where some would say that unconscionability is looked on far more favourably as an explanatory concept, the High Court of Australia has rejected reliance on unconscionability as the test for subrogation.[85]

43 Were unconscionability to have been applied to the facts of *Menelaou*, it quickly becomes apparent that the concept is too ambiguous. It could be argued that because Melissa had no knowledge or notice of the bank's arrangement with the parents, she was not acting unconscionably in denying the bank an equitable security interest. Or perhaps it was objectively unconscionable of Melissa to receive the land unencumbered given the bank had fairly and reasonably intended to take a security interest. Both explanations emphasise the role played by intention but the notion of unconscionability does little to illuminate which, if either, is right.

(2) Giving effect to intention

44 It remains then to elucidate what should be meant by unconscionability in the context of the creation of property rights. Ordinarily property rights ought not to be recognised but for the intention of the legal owner. Leaving aside exceptional instances of compulsory acquisition and other state-directed transfers of property, a necessary element of any legitimate property transfer is the intention of the original owner to transfer his or her title. There may, in addition, be varying rules of formality at law; nevertheless, all transfers must be accompanied by the relevant intention of the transferor.[86] In the event that any additional rules have not been complied with such that the relevant legal property right in the transferee has not been created but an intention to transfer property nevertheless existed, equity acts to supplement the common law by giving effect to the intention through its employment of the concept of equitable title. The important point is that, ordinarily, the intention of the transferor to transfer property and thereby create new property rights in others is essential to the creation of such rights. Where it is clear that such rights were intended, equity will consider done that which ought to be done and recognise equitable property rights in the transferee. Equity's concern is to prevent the defendant acting unconscionably by denying the intended transfer and the rights of the intended transferee. Equitable property rights should be understood as arising in response to the owner's intention, whether that

84 *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at [20].

85 *Bofinger v Kingsway Group Ltd* [2009] HCA 44; (2009) 239 CLR 269 at [82] and [94].

86 See further Ernest Weinrib "The Normative Structure of Unjust Enrichment" in *Structure and Justification in Private Law: Essays for Peter Birks* (Charles Rickett & Ross Grantham eds) (Oxford: Hart Publishing, 2008) ch 3.

intention be subjectively held or more commonly objectively inferred by the law as a matter of good conscience to have been appropriate in the circumstances,[87] that the claimant would have an equitable interest in the property.

45 It will be recalled that earlier cases of non-contractual subrogation were often explained in terms of actual or presumed intention, although whose intention was relevant was not always consistently identified. Sometimes, the parties' mutual understanding as to the purpose of the loan or the expectation of security has been noted.[88] In other cases, courts have referred to the understanding or intention of the claimant in making the payment as important to the availability or otherwise of subrogation. For example, in *Ghana Commercial Bank v Chandiram*,[89] Lord Jenkins said:[90]

> It is not open to doubt that where a [lender] pays off a mortgage he is presumed, unless the contrary appears, to intend that the mortgage shall be kept alive for his own benefit.

Lord Hoffmann's rejection of the necessity of intention in *Banque Financière* was made in response to authorities which his Lordship explained as being cases of subrogation despite an absence of intention that a security interest would arise. In *Chetwynd v Allen*[91] ("*Chetwynd*") and *Butler v Rice*[92] ("*Butler*"), subrogation was awarded against the property owner whose husband had arranged a loan from the claimant to pay off an existing debt secured against the property, promising a mortgage in return. In both cases, the wife knew nothing of the arrangement and refused to execute the mortgage although the court referred to the claimant's intention to keep the original security alive in his favour. In *Boscawen*, it shall be remembered, the claimant's money had been used to discharge the vendor's mortgage as part of an intended sale to a purchaser against whom the claimant was to receive a charge. The purchase fell through and the claimant subsequently sought from the vendor subrogation to the security interests of the vendor's mortgagee. An issue in the judgment was whether the claimant's lack of intention to take a charge against the vendor prevented subrogation.

87 David Hayton, "The Development of Equity and the 'Good Person' Philosophy in Common Law Systems" [2012] Conv 263.

88 *Paul v Spierway* [1976] Ch 220 at 232, *per* Oliver J; *Orakpo v Manson Investments Ltd* [1978] AC 95 at 105, *per* Lord Diplock.

89 [1960] AC 732.

90 *Ghana Commercial Bank v Chandiram* [1960] AC 732 at 745.

91 [1899] 1 Ch 353.

92 [1910] 2 Ch 277.

The Court of Appeal held it did not[93] and this was relied upon by Lord Hoffmann to reject intention in the round.[94]

46 However, a re-examination of Millett LJ's judgment in *Boscawen* shows that his concern was not to displace intention altogether but rather to clarify *whose* intention mattered. His Lordship made clear that the intention of neither the claimant lender nor the creditor were relevant:[95]

> If *Butler v Rice* and similar cases are relied upon to support the proposition that there can be no subrogation unless the claimant intended to keep the original security alive for its own benefit save in so far as it was replaced by a new and effective security, with the result that the remedy is not available where the claimant had no direct dealings with the creditor and did not intend his money to be used at all, then I respectfully dissent from that proposition. I prefer the view … that in some situations the doctrine of subrogation is capable of applying even though it is impossible to infer a mutual intention to this effect in the part of the creditor and the person claiming to be subrogated to the creditor's security.

Instead, the intention that mattered was that of the vendor's solicitors who held the claimant's money as fiduciaries and of the vendor who continued to own the property in which the security interest was claimed:[96]

> [The vendors' solicitors] knew that the money was trust money held to [the purchaser's solicitors'] order pending completion and that it would become available for use on behalf of their client only on completion. They were manifestly fiduciaries. [The vendor] who was plainly intending to redeem the [creditor's] mortgage out of the proceeds of the sale of the property, must be taken to have known that any money which his solicitors might receive from the purchasers or their mortgagees would represent the balance of the proceeds of sale due on completion and that, since he had made no arrangement with the purchasers to be advanced any part of that amount before completion, it would be available to him only on completion. He cannot possibly have thought that he could keep both the property and the proceeds of sale. Had he thought about the matter at all, he would have realized that the money was not his to mix with his own and dispose of as he saw fit.

Given his Lordship's view discussed above that subrogation in these cases involved the vindication of an existing property right, the intention of the solicitors was an important step in the ability to trace

93 *Boscawen v Bajwa* [1996] 1 WLR 328 at 339.
94 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 at 233–234.
95 *Boscawen v Bajwa* [1996] 1 WLR 328 at 339.
96 *Boscawen v Bajwa* [1996] 1 WLR 328 at 337.

the money through the solicitors and to the vendor.[97] However, if it is accepted, as argued in this article, that non-contractual subrogation is concerned with the recognition of a new right, the tracing process is not needed. The security right is being granted by the owner of the relevant property. It is the unconscionability and therefore the intention of only the owner who is denying a security interest that is the central inquiry. Does good conscience require that in the circumstances he or she should be understood to have intended to grant a security interest? Lord Hoffmann's rejection of the lender's intention as a *condition* of proprietary subrogation is appropriate but the same cannot be said in relation to a rejection of that of the property owner, who is usually but not always also the debtor.

47 Three important points must be noted about the theory presented here. The first relates to the quality of the intention. As should now be clear, equity will not be limited only to actual or express intention. Equity requires of all parties that they act in good conscience. It may therefore deem a party to have a certain intention. It may be said in response that if intention is so broadly construed, then the approach being advocated here is not so significant. If equity may deem an appropriate intention in the particular circumstances, is this not simply judicial discretion disguised in the language of intention? Considerable flexibility remains which is none too far removed from the approach of the majority in *Menelaou*. But the claim here is different in two ways. The need for judgment in applying a legal test or principle should not be confused with flexibility and unconstrained discretion. To determine whether the owner intended or should have intended to grant a security interest is a question of informed judgment. And, in addition, what cannot be done is to grant a charge to the lender on the basis that the lender intended such a charge. I cannot will from you an interest in your property and expect that equity will therefore give effect to my will.

48 Some may object that this approach merely replaces one fiction, that of subrogation, with another, that of deemed intention. I am not disclaiming the use of legal fictions *per se*. Legal fictions can be useful, as many would undoubtedly say of corporate legal personality, for example. The argument made in this article is that legal fictions should only be employed when they aid analysis and encourage certainty. The mechanism of objective inferred intention is used throughout the private law and, while it might appear to be a fiction because it is not at times consistent with the relevant party's subjective intention, it is nevertheless not only helpful but also necessary to enable the law to give effect to and protect private ordering by individual citizens. It is usefully employed in the "subrogation" cases because it

97 *Boscawen v Bajwa* [1996] 1 WLR 328 at 335 and 339.

justifies the awarding of a proprietary right to the claimant in a way that is readily understandable and predictable. The fiction of non-contractual subrogation, on the other hand, asserts the assignment of an extinguished property right without clear explanation.

49 Secondly, the focus on the intention of the owner and not the lender serves to protect the interests of other secured creditors because those interests must feature in the consideration of what the owner in good conscience can give to the claimant lender. It is not unconscionable of a debtor to grant similar rights to the lender who discharges the debt of a secured creditor. This does not place the remaining secured creditors in any worse position. Indeed, their position is unchanged. But the debtor cannot grant to a lender a new security interest that would undermine or contradict interests already held by existing secured creditors without the latter's consent. The debtor, in good conscience, cannot have intended as much. This point also reveals that the role played by the original secured creditor to whom the claimant is apparently subrogated is evidentiary. The presence of a creditor whose security has been discharged by the lender's funds will usually establish that security was intended and the likely content of that new security.

50 Thirdly, the intention justification for proprietary restitution is not limited to cases of subrogation. Rather, it is how equity does and should recognise property rights in a range of different contexts. Equity's concern with the property owner's intention is evident, for example, in trusts. Express and resulting trusts are readily accepted as arising on the basis of intention: express, implied or presumed. In previous work,[98] I have argued that cases of institutional constructive trusts which are commonly said to arise by operation of law can all be shown to arise by reference to the intention of the legal owner. Of course, most constructive trust claims inevitably involve a legal owner insisting that his or her actual intention was not to transfer the beneficial title to the claimant; thus, it is thought constructive trusts surely cannot be based on intention because they appear to be contrary to it. Yet, a closer analysis of the established constructive trust cases reveals that an intention to vest beneficial interest in the claimant did once exist or ought to have existed given that equity presumes the owner to be a person of good conscience. Equity will require effect be given to that intention. Equitable leases and restrictive covenants arising where the requisite legal instruments are defective or limited are further examples. What is relevant is the intention at the time the equitable interest was said to arise and from which it is then unconscionable later to resile.

98 Jessica Palmer, "Attempting Clarification of Constructive Trusts" (2010) 24 NZULR 113.

51 On the approach proposed here, the most straightforward case for subrogation is the advance of money to discharge a debt where the property owner intended that a security would be given to the lender but for some reason, the security is unenforceable. Subrogation in this instance is acting similarly to a constructive trust that arises in response to defective formalities.[99] That intention may be expressed or inferred from the arrangement. In the absence of specific evidence of the terms of the security, the extinguished security interest of the owner's creditor (or vendor) serves as a proxy for what the owner would have agreed to give and it is in this sense that the notion of subrogation to the creditor's security came to be applied. *Orakpo* is a case falling in this category, although there subrogation was refused on the ground that the equitable remedy of subrogation would undermine the policy of the statute by which the legal security was rendered unenforceable.[100]

52 Proprietary subrogation will also be available where equity deems the property owner to have an intention to grant an interest to the lender in the particular circumstances despite the owner's protestations. *Boscawen* is an example of this. Although the vendor-owner there never intended that the claimant would have a charge on his property had the transaction as planned been implemented, in the circumstances that did occur, the vendor must in good conscience be taken to have intended to grant a security to the lender. He could not intend both to have the property unencumbered and the debt discharged. Again, the extinguished security interest of the owner's initial creditor serves as a useful evidential proxy for what the owner should have agreed to give the lender. It was neither fatal nor relevant that the lender never subjectively intended either to pay the money or to secure an interest in the way that occurred.

53 The significance of the approach advocated here shows itself most clearly in cases where the property owner had no intention to grant a security interest and had acted in good conscience. *Chetwynd* and *Butler* may both fall into this category, and to the extent that they do, a proprietary remedy was inappropriate. That is not to say that in these cases, the lender is without remedy. An *in personam* remedy remains available for any established unjust enrichment, liability for which is strict. Indeed, in *Boscawen*, Millett LJ commented that in *Re Diplock*,[101] where subrogation had been denied where the defendant debtor was a volunteer with no knowledge of the defective grounds of the claimant's payment, a remedy should nevertheless have been made

99 *Re Rose* [1952] Ch 499; *Pennington v Waine* [2002] 1 WLR 2075.

100 Andrew Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2010) at pp 157–158.

101 *Re Diplock* [1948] Ch 465.

available once the defendant "had had a reasonable opportunity to obtain a fresh advance on suitable terms from a willing lender, perhaps from the bank which had held the original security".[102] In *Menelaou*, it was accepted on the face of the facts that Melissa had no knowledge of the financing arrangements between her parents and the bank, and was not expected to. In such circumstances, it is difficult to see what justification there was for requiring her to recognise a security interest for the benefit of the bank. It is true that as a volunteer, she would have no defence to the tracing of a prior property interest but, as I have argued above, a property claim relying on tracing to a creditor's charge faces real difficulties. However, where a new property right is concerned, her position as a *bona fide* volunteer should not threaten the sanctity of her own existing property rights.

54 And what of *Banque Financière*? It was simply not a case of subrogation to a creditor's security interests in a defendant owner's property. Although the claim was initially constructed in subrogation, by the time it reached the House of Lords, it was not a claim against the debtor or the owner of the relevant property, but a claim against another creditor for a personal remedy. The case was very significant (some would say, unfortunately so) for the law of unjust enrichment but its intrusion in to the law of non-contractual subrogation was unnecessary and, as argued above, ultimately detrimental.

(3) Alternative explanations

55 Some unjust enrichment scholars have pointed to other factors that might justify a proprietary response to unjust enrichment. Burrows has suggested that the availability of proprietary restitution in subrogation cases should be determined by whether the claimant lender has taken the risk of the defendant's insolvency.[103] Priority over unsecured creditors is not merited when the lender chooses to loan money to another without arranging some sort of security. Yet, that security can only be available at the consent of the property owner. Were risk to be the deciding factor, the enquiry would still ultimately focus on the intention of the property owner to grant an interest to the lender.

56 Edelman and Bant suggest that while often relief for unjust enrichment will be personal, proprietary restitution should be granted where personal relief is inadequate, such as when the benefit received is unique or special to the claimant in some way.[104] Examples may include

102 *Boscawen v Bajwa* [1996] 1 WLR 328 at 341.

103 Andrew Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2010) at p 167.

104 James Edelman & Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd Ed, 2016) at p 39, but see also pp 44–45.

land, personal shares, art and heirlooms. The analogy here with specific performance for breach of contract is important. Equity intervenes in contract law to enforce the performance of the contract where the usual remedy of monetary compensation will not remedy the harm caused by the breach given that the subject matter of the contract is unique. In the same way, it is suggested that equity may intervene to require proprietary restitution of unique benefits received. But it must not be overlooked that the primary duty being enforced by the order of specific performance in contract cases is a duty to transfer the relevant property, as was agreed to by the contracting parties. In other words, intention on the part of the owner to transfer the property is clearly present and does not need to be established. It is the uniqueness of the property coupled with the original intention to transfer the property that together justify equity's intervention to recognise a property right on the part of the claimant in a contract action.

57 In an unjust enrichment claim, the relevant duty is to restore (or not to retain) a benefit that unjustly enriches the duty-holder. Unlike the contractual obligation, it is not a voluntarily assumed duty and so an intention to transfer the property (back) to the claimant cannot be automatically presumed. If the property is unique, this may lead to the conclusion that a recipient acting in good conscience would intend to give the property back *in specie*. But factors additional to the nature of the property will be relevant to the objective intention of the defendant. Was the uniqueness of the property evident to the recipient? Was the unjust factor giving rise to the duty to make restitution evident to the recipient?

58 Even if inadequacy of personal relief were to be accepted as a sufficient criterion for proprietary relief in unjust enrichment, it is unlikely to be met in subrogation cases whether the benefit is taken to be the money transferred from the lender or the benefit received by the claimant in the form of discharge of a debt or unencumbered property. While in some cases, the property subject to the now discharged security may be unique, it is not unique or special *to the claimant lender*.

V. Conclusion

59 The challenge to which this article has sought to respond is the identification of a conceptually sound justification for the awarding of property rights in non-contractual subrogation cases. The modern cases accept that the third party creditor's rights are not in fact being assigned to the claimant lender, but rather that the claimant is recognised as having rights in equity as though they had been subrogated. Recent judicial decisions contain competing explanations of unjust enrichment and the vindication of pre-existing property rights. I have argued that

neither is persuasive and that the better understanding of the property right that arises where subrogation is ordered is that it is in fact a new right. As such, and like equity's recognition of property rights in other contexts, its recognition ought to be dependent on the conscience of the owner of the property to which the security interest will attach.

60 Sometimes legal fictions are useful and sometimes they are not. Where a fiction is leading to development of the law in a way that is problematic or that lacks substantive justification, it needs to be corrected. Non-contractual subrogation is, in the opinion of this author, an unhelpful fiction that is producing unsatisfactory legal reasoning.