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Case Note

THE FATE OF PROPRIETARY RESTITUTIONARY REMEDIES IN SINGAPORE

Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd [2024] SGHC 166

Ng Chee Tian v Ng Chee Pong [2025] 3 SLR 235

Can a proprietary restitutionary remedy be awarded in response to an unjust enrichment? In *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd* [2024] SGHC 166, the court ruled that proprietary subrogation may be available to reverse unjust enrichment if there was a proprietary base and evidence of unconscionability. In light of the rejection of proprietary remedies in unjust enrichment post-*Ng Chee Tian v Ng Chee Pong* [2025] 3 SLR 235, this note argues that based on the approach it had taken and its divergence from English jurisprudence, the former case should be reinterpreted as classifying such proprietary restitutionary remedies as a case of vindication of property rights.

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I. Introduction

1 Can proprietary restitutionary remedies like subrogation be awarded in response to an unjust enrichment? Recently, the General Division of the Singapore High Court ("General Division") reopened the academic can of worms over the classification of such remedies. In *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd*[2] ("*Da Hui*"), S Mohan J accepted that proprietary subrogation operated as an equitable response to unjust enrichment. On the other hand, in *Ng Chee Tian v Ng*

1 The author is grateful to Professor Tang Hang Wu and the anonymous reviewer for the helpful comments on an earlier draft as well as Mr Jonathan Cheah for his copy-editing. All errors remain the author's own.
2 [2024] SGHC 166. Da Hui's appeal has since been dismissed on procedural grounds.

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Chee Pong[3] ("*Ng Chee Tian*"), the General Division held that proprietary remedies were unavailable in unjust enrichment due to the delineation between *in personam* and *in rem* claims. As such, claims for proprietary relief must stand by itself, outside of the law of obligations.

2 The time is nigh for a court to authoritatively settle these taxonomical issues. Notwithstanding that the respective courts' view on the fate of proprietary restitution were *obiter*, whichever side the chips fall on these esoteric questions would have ramifications on our doctrinal understanding of the relationship between restitution, unjust enrichment and property, as well as the relevant tests to satisfy for making out a claim for proprietary restitution. As such, this note proposes that the decision in *Da Hui* be interpreted as a case of vindication of property rights. That it mandated the existence of a proprietary base, in departure of English unjust enrichment jurisprudence, leaves the door open to this alternate view. The court's reliance on the equitable principle of unconscionability and its absence thereof to deny the claim, as opposed to the unjust factor framework, also points to a proprietary lens of analysis.

3 In this note, proprietary restitution refers to a restitutionary remedy where the court "declares a form of relief which gives the plaintiff priority in relation to a specific asset on the defendant's insolvency".[4] This term is intended to be used as a catch-all for any restitutionary relief understood to operate to reverse unjust enrichment, or vindicate property rights, including the remedy of subrogation discussed in *Da Hui*.

II. Facts and holding of *Da Hui*

4 In *Da Hui*, Da Hui and An Rong entered into a loan agreement with the Bank of America ("BofA"). Credit would be extended in three tranches (labelled A, B and C) and each tranche was to be used to refinance a corresponding vessel. BofA received mortgages over these three vessels. Only the vessel securing tranche A belonged to Da Hui.

5 Both parties defaulted on the loan and BofA enforced their mortgage, and all three vessels were sold to meet various debts. The sale proceeds of Da Hui's vessel was applied in full satisfaction of tranche A and another $12m was applied in part satisfaction of the outstanding amount disbursed under tranches B and C to An Rong.

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3 [2025] 3 SLR 235.
4 Tang Hang Wu, *Principles of the Law of Restitution in Singapore* (Academy Publishing, 2019) at p 381.

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6 Uncontroversially, the court found that: (a) a right of contribution existed between the parties because both Da Hui and An Rong were joint and several debtors;[5] and (b) Da Hui could claim for the excess $12m applied to partially discharge An Rong's debt because the loan agreements reflected an understanding that "the burden of meeting the obligations to BofA should be split proportionately and not equally".[6] However, since An Rong was in liquidation, a personal right of contribution was, as Mohan J put, "illusory". Thus, Da Hui argued that the BofA's mortgages over the An Rong vessels had been partially subrogated so that it could obtain a security interest and claim priority over An Rong's unsecured creditors. The subrogation was only partial as Da Hui only sought for part of BofA's mortgages up to the extent of $12m.

7 As a matter of law, the court accepted that it had the power to grant partial subrogation as a remedy,[7] classifying it as an equitable response to unjust enrichment.[8] A typical situation where subrogation of proprietary interests occurs would be where one co-debtor or surety ("A") discharges a debt owed by the other co-debtor or a principal debtor ("B") to a creditor ("C"). In return, any securities given by B to C is subrogated to A due to the "inequity in B reclaiming the unencumbered title at A's expense".[9] This applies whether the debt was partially or fully discharged.[10] This is known as "subrogation to extinguished securities", where C's security is treated as subsisting under a legal fiction so that A can succeed to it.[11] In contradistinction, subrogation can also "[involve] the succession to rights that have not been extinguished by any prior act or event",[12] which is a contractual form of subrogation typically arising in insurance contexts.[13] To follow the court, the use of the word "subrogation" shall henceforth be taken to refer to proprietary subrogation in the former sense.

8 On the facts, Mohan J opined that this was not possible because BofA had already enforced the mortgages over An Rong's vessels by arresting and selling them.[14] As a consequence, the "equities of redemption were completely extinguished" and there was no "proprietary interest

5 *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd* [2024] SGHC 166 at [32]–[33].
6 *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd* [2024] SGHC 166 at [37].
7 *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd* [2024] SGHC 166 at [53].
8 *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd* [2024] SGHC 166 at [42].
9 *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd* [2024] SGHC 166 at [42].
10 *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd* [2024] SGHC 166 at [48]–[49] and [56].
11 *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd* [2024] SGHC 166 at [43].
12 *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd* [2024] SGHC 166 at [43].
13 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1998] 2 WLR 475 at 483.
14 *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd* [2024] SGHC 166 at [57].

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left to which Da Hui could succeed or be subrogated".[15] The absence of a proprietary base therefore precluded subrogation as a remedy, so there was no unconscionability in denying Da Hui subrogation.

9 In fact, providing Da Hui with a remedy would be contrary to public policy as it would allow them to "steal a march on other lower-ranking *in rem* claimants" and "been an *ex post* enlargement of the amount secured by the mortgages over the An Rong Vessels (*ie*, it would amount to the value of BofA's mortgage debt plus the value of Da Hui's claim in contribution)".[16] BofA could potentially have found itself under-secured under the agreement if this were the case. This would have reduced the pool of assets the remaining creditors were paid out of, and "fair distribution of an insolvent debtor's assets to its creditors is a matter of high public policy".[17]

10 Da Hui's appeal against the decision has since been dismissed on procedural grounds.[18] They had failed to pursue their subrogation claim over the judicial sale proceeds of a vessel arrested in admiralty proceedings "before a court seised of admiralty jurisdiction" and obtain a judgment *in rem* against the vessels.[19] In the process, the Singapore Court of Appeal did not comment on the correctness of the substantive points in Mohan J's ruling.[20]

III. Facts and holding of *Ng Chee Tian*

11 The appeal in *Ng Chee Tian* revolved around a transfer of 700,000 shares in a company called East Asia Trading Company (Pte) Ltd ("EATCO") owned by the deceased. The deceased was the father of both the claimants ("NCT") and the defendants ("NCP"). In 2014, the deceased had signed a document transferring the shares to NCP. NCT signed the same document agreeing to the share transfer seeing that the deceased had signed it and thought that the deceased knew and approved the share transfer.

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15 *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd* [2024] SGHC 166 at [63].
16 *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd* [2024] SGHC 166 at [65]–[66].
17 *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd* [2024] SGHC 166 at [66].
18 See *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd* [2025] SGCA 30.
19 *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd* [2025] SGCA 30 at [71].
20 See *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd* [2025] SGCA 30 at [80]. Even if Mohan J was incorrect, Da Hui would not be able to rely on the judgment and re-order the priorities over the sale proceeds of the vessels.

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12 According to NCT, the deceased did not know what he had signed and had felt compelled to sign the document.[21] He confronted NCP who refused to undo the transfer. NCT then brought suit in 2023, seeking to set aside the share transfer on the grounds of *non est factum*, mistake, unconscionable bargain, undue influence and lack of consent and separately, restitution of the EATCO shares and the dividends received under the EATCO shares in unjust enrichment.[22] The reversal of the transfer for the EATCO shares to be revested in the deceased's estate was characterised as a proprietary remedy.[23] In the alternative, they brought an action for an account of these dividends on the basis that the dividends were held on constructive trust for the deceased's estate. The assistant registrar struck out the claims for lack of a reasonable cause of action. The unjust enrichment action was precluded as NCT was seeking a proprietary remedy, and the remaining claims for being time-barred under the Limitation Act 1959.[24]

13 Mohamed Faizal JC took a different approach to striking out NCT's claims, holding that unjust enrichment was not a plausible cause of action in the present case. He departed from the confinement of interstitial role of unjust enrichment only to cases where lack of consent was pleaded as an unjust factor and extended its application to cover all actions in unjust enrichment, regardless of unjust factor. Hence, an action for restitution in unjust enrichment is only available where other areas of law cannot provide an avenue for recovery,[25] which NCT did in their other actions for *non est factum*, mistake, unconscionable bargain and undue influence.[26] Although these actions were time-barred, a limitation period does not substantively extinguish a cause of action and so an action in unjust enrichment was precluded.[27] These observations do not form the subject of this note.

14 In *obiter*, Faizal JC noted that even if a claim in unjust enrichment could be pursued, it does not recognise the existence of proprietary remedies. Previously, the General Division and the Singapore Court

21 *Ng Chee Tian v Ng Chee Pong* [2025] 3 SLR 235 at [9].
22 *Ng Chee Tian v Ng Chee Pong* [2025] 3 SLR 235 at [24].
23 *Ng Chee Tian v Ng Chee Pong* [2025] 3 SLR 235 at [23]–[24].
24 2020 Rev Ed.
25 *Ng Chee Tian v Ng Chee Pong* [2025] 3 SLR 235 at [50]–[61].
26 *Ng Chee Tian v Ng Chee Pong* [2025] 3 SLR 235 at [62]. Nevertheless, it is doubted if the authorities support a taxonomical distinction between rescission and restitution, given that rescission vests the same restitutionary rights as an unjust enrichment claim. At the same time, the separation between an unjust enrichment action and a claim for rescission is necessary post-*Ng Chee Tian*, given the proprietary consequences of rescission. See also Low Tse Loong, Ryan, Doctrinal Basis of Delay as a Bar to Equitable Rescission of Contract" (2024) 4 SLJ 118 at 148–151.
27 *Ng Chee Tian v Ng Chee Pong* [2025] 3 SLR 235 at [67].

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of Appeal implicitly affirmed the distinction between a personal claim and a proprietary one.[28] Extending proprietary remedies to unjust enrichment would undercut the interstitial status of unjust enrichment, and have ripple effects on *inter alia* issues of bankruptcy and insolvency.[29] As for the remaining issues on appeal, the actions for *non est factum* and constructive trust were respectively time-barred under ss 6 and 22 of the Limitation Act 1959.[30]

IV. Analysis

A. Requirement of proprietary base

15 Returning to *Da Hui*, requiring "proof of a 'proprietary base' or 'tracing links'" before the proprietary remedy of subrogation can be granted to Da Hui must be doctrinally correct.[31] It is common ground that the award of a proprietary remedy must necessarily be predicated upon the existence of a proprietary interest, regardless of whether the remedy operates to reverse unjust enrichment or vindicate a property right.[32] As a preliminary point, one should not think that the court was laying down a hard rule that subrogation is predicated on a proprietary right, for subrogation to personal rights (both extinguished and existing) is possible.[33] The court's statements should be read in the context of Da Hui's pleadings for subrogation of extinguished securities and their desire for security – if Da Hui had sought subrogation *in personam*, the issue of subrogation would be superfluous, given that contribution was available.[34]

16 Relaxation of this requirement of a proprietary base in the English courts has been much derided for "conflation of two alternative

28 *Ng Chee Tian v Ng Chee Pong* [2025] 3 SLR 235 at [71]–[72].
29 *Ng Chee Tian v Ng Chee Pong* [2025] 3 SLR 235 at [74]–[75].
30 For discussion on the applicability of limitation periods under s 6 of the Limitation Act 1959 (2020 Rev Ed) to claims for rescission, see Low Tse Loong, Ryan, "Doctrinal Basis of Delay as a Bar to Equitable Rescission of Contracts" (2024) 4 SLJ 118 at 126–152.
31 Stephen Watterson, "Subrogation as a Remedy for Unjust Enrichment in the Supreme Court" (2016) 75(2) CLJ 209 at 212. See also Graham Virgo, "Subrogation, Recoupment and Contribution: Principles Not Included" (2005) 64(1) CLJ 35 at 36.
32 Tang Hang Wu, *Principles of the Law of Restitution in Singapore* (Academy Publishing, 2019) at p 382; Charles Mitchell, Paul Mitchell & Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 10th Ed, 2022) at p 212.
33 For subrogation of extinguished personal rights, see *Lowick Rose LLP v Swynson Ltd* [2017] 2 WLR 1161 at [18].
34 Graham Virgo, "Subrogation, Recoupment and Contribution: Principles Not Included" (2005) 64(1) CLJ 35 at 37.

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juristic bases".[35] Thus, the insistence on a proprietary base avoids the blurring of distinctions between a personal claim in unjust enrichment and a proprietary claim in general,[36] a distinction previously emphasised by the Singapore Court of Appeal.[37]

17 Earlier in *Da Hui*, the court highlighted the legal fiction of "subrogation to extinguished securities" – that upon discharge of the debt, the security is extinguished and the court merely treats the security as subsisting so subrogation is possible.[38] This begs the question: Given the fictitious nature of a proprietary base, why could the court not keep the mortgages over An Rong's vessels alive?[39]

18 Mohan J rightly rejected this possibility. The first distinction here would be the manner in which the security over the An Rong vessels was extinguished. The securities were enforced by BofA and not extinguished through a voluntary act of discharge by Da Hui, so the partial discharge of An Rong's debt did not come from Da Hui.[40] Since the benefit of the security had been realised by BofA, An Rong was not restored to its collateral, obviating the need for the mortgages over the An Rong vessels to be kept alive through subrogation. In the absence of a reconveyance of the mortgaged vessels to establish an enrichment beyond the discharge of the debt,[41] subrogation could not be an appropriate remedy.[42] Already liable to contribution and with no vessel in its hands, An Rong did not benefit in a manner for equity to respond.[43]

35 Christopher Buckingham & Lucy Chambers, "Subrogation, the Straightjacket of Unjust Enrichment and Legal Taxonomy" (2016) 3 Conv 219 at 225; Nguyen Sinh Vuong, "Lord Reed and Unjust Enrichment: A Correct(ive) Retreat from Expansionism" (2021) HKLJ 203 at 236.

36 Christopher Buckingham & Lucy Chambers, "Subrogation, the Straightjacket of Unjust Enrichment and Legal Taxonomy" (2016) 3 Conv 219 at 227; Stephen Watterson, "Subrogation as a Remedy for Unjust Enrichment in the Supreme Court" (2016) 75(2) CLJ 209 at 212.

37 See *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 at [48] and *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [215]–[241].

38 *Bank of Cyprus UK Limited v Menelaou* [2015] 3 WLR 1334 at [42]–[43].

39 See *Re Areckdyne* (1883) 24 Ch D 709, where the life insurance policies taken out by the creditor as security were assigned to meet claims of contribution only after the principal debtor had passed.

40 *Dawson v Bankers and Traders Insurance Co Ltd* [1957] VR 491 at 503.

41 *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd* [2024] SGHC 166 at [63], as title had passed to the buyers.

42 *Bank of Cyprus UK Limited v Menelaou* [2015] 3 WLR 1334 at [24]; Graham Virgo, "Subrogation, Recoupment and Contribution: Principles Not Included" (2005) 64(1) CLJ 35 at 37.

43 *Lowick Rose LLP v Swynson Ltd* [2017] 2 WLR 1161 at [64].

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19 That BofA had realised the security is insufficient in and of itself to deny Da Hui subrogation. Indeed, in *Bofinger v Kingsway Group Ltd*,[44] the court accepted that a guarantor still has a right to subrogation even where the creditor enforces upon his security. One possible circumstance is where the guarantor discharged part of the debt before the security was enforced (giving rise to a right of contribution), entitling him to an account of any excess sales proceeds of the secured asset by the creditor.[45] Da Hui's claim is fundamentally different as their right of contribution arose in the reverse order. It was only upon BofA's application of the excess sales proceeds following the realisation of security that they were entitled to make a claim for contribution. The requisite tracing links cannot be established.

20 The second point of difference is that Da Hui and An Rong were jointly and severally liable for the debt. Subrogation could only have been possible where the debt had been paid off using Da Hui's own money,[46] so that the requisite tracing links can be established. Otherwise, no nexus can be "established between the claimant's own money and the payment used to discharge the security",[47] or if an unjust enrichment analysis is preferred, An Rong's enrichment (if any) would not come "at Da Hui's expense". Given their joint and several liability, the application of the proceeds from the sale of Da Hui's vessel would not have been accountable to Da Hui as mortgagor, but automatically applied to the other tranches. Otherwise, the contractual allocation of risks would be upset if BofA was taken to be a constructive trustee for the surplus sale proceeds from the Da Hui vessel securing tranche A.[48] While the tranches were segregated for the purpose of contribution, segregating them to provide for subrogation would defeat the existence of joint and several liability, and undercut security arrangements from BofA's perspective. The existence of co-ordinate liabilities providing for a right of contribution could, by itself, prevent subrogation from ever being awarded as a remedy.[49]

44 [2009] HCA 44.
45 *Bofinger v Kingsway Group Ltd* [2009] HCA 44 at [4] and [99]. Although the court referred to the creditor as holding the excess sales proceeds on constructive trust, the court did not have to decide if the creditor's accounting obligation has a proprietary effect since the parties were solvent: see Matthew Conaglen & Peter Turner, "Subrogation, Accounting and Unjust Enrichment" (2010) 69(1) CLJ 30 at 31.
46 *Bank of Cyprus UK Limited v Menelaou* [2015] 3 WLR 1334 at [118].
47 *Boscawen v Bajwa* [1996] 1 WLR 328 at 334–335. Although the language of tracing was used in this case, tracing is also not the most appropriate explanation in subrogation situations due to the fiction of an extinguished security being re-created.
48 Compare *Bofinger v Kingsway Group Ltd* [2009] HCA 44 at [9] and [49].
49 David Wright, "The Rise of Non-consensual Subrogation" (1999) Conv 113 at 121–122.

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B. *Consequences of* Ng Chee Tian*'s* in personam–in rem *distinction*

21 To borrow from Prof Birks' work, a remedy is a response to a causative event.[50] To Birks, restitution is the remedial response to unjust enrichment and can be proprietary or personal in nature.[51] Prof Virgo, however, argues that restitution as a remedy can operate to reverse unjust enrichment, or vindicate property rights,[52] which are two distinct causative events. The difficulties with reconciling *Da Hui* and *Ng Chee Tian* flows from the former's misapprehension of the relevant causative event for subrogation as one of unjust enrichment. If subrogation can be understood to be situated outside the realm of unjust enrichment and as a vindication of property rights, then the decision in *Da Hui* would be consistent with *Ng Chee Tian*'s rejection of proprietary remedies in unjust enrichment. All of this presupposes that vindication of property rights can operate as a causative event for a remedial response to arise in the first place,[53] an assumption embodied in the *in personam–in rem* distinction in *Ng Chee Tian* and the line of authorities before it.

22 Recognising the cleavage between *in personam* and *in rem* remedies is predicated upon "whether it is logically and conceptually possible to say that a right *in rem* is an event that gives rise to or generates other rights … or whether a right *in rem* can only ever arise as itself a response to other events".[54] By expressly rejecting Birks,[55] the taxonomical effects implicit in *Ng Chee Tian*'s preclusion of a proprietary remedy in unjust enrichment is the adoption of the former view, that a vindication of pre-existing property rights can itself exist as a causative event. Where the *in personam–in rem* distinction is adopted in relation to remedies,[56] it purports to confine the role of the remaining causative events (consent, wrongs, unjust enrichments or other events) as explanations for how *in personam* remedies arise in the law of obligations.

50 See generally, Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" [1996] 26 UWALR 2.
51 Peter Birks, *Unjust Enrichment* (Clarendon Press, 2nd Ed, 2004) at p 20.
52 Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 4th Ed, 2024) at p 8.
53 See Tang Hang Wu, *Principles of the Law of Restitution in Singapore* (Academy Publishing, 2019) at pp 165–166.
54 Ross Grantham & Charles Rickett, "Property Rights as a Legally Significant Event" (2003) 62 CLJ 717 at 718.
55 *Ng Chee Tian v Ng Chee Pong* [2025] 3 SLR 235 at [75].
56 Ross Grantham & Charles Rickett "Property Rights as a Legally Significant Event" (2003) 62 CLJ 717 at 740.

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23 The combination of a property right and a separate interference with said property right justifies the existence of a restitutionary remedy.[57] The latter is seen as a standalone causative event giving rise to a remedy *in rem*, but the existence of the property right itself explains why an interference is deserving of a remedy.[58] To borrow Hohfeldian language, where there is a proprietary interest, there is an underlying and extant claim-right-duty jural relation between the holder of the asset and the rest of the world.[59] Emanating from this claim-right is the power to sue or otherwise fully vindicate his right *in rem* upon an interference with his property right. As a claimant's Hohfeldian power is correlative to a defendant's liability, there is a secondary or consequential *in personam* obligation of the defendant to provide restitution of the asset.[60] The owner of property is entitled to non-interference with his rights and the rest of the world is subject to a correlative duty not to interfere with these rights. This builds on the prior distinction between a claim to vindicate property rights and an unjust enrichment claim for lack of consent drawn in *Esben Finance Ltd v Wong Hou-Lianq Neil*[61] ("*Esben Finance*").

24 Even when the asset lost and what is sought to be restored are different, the same analysis continues to apply. A claimant's right to lay claim to the substituted product is derivative of its original property right, in so far as he is entitled to the proceeds of his property.[62] No new jural relation arises between the defendant, who now possesses the substituted asset, and the claimant.[63] This is because the defendant always had the same liability to make restitution, and relatedly, the claimant is exercising the same power he would exercise if he were seeking to recover the original asset. Tracing is "no more than a process of identification, neutral as to rights".[64]

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57 Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 4th Ed, 2024) at p 17.

58 Ross Grantham & Charles Rickett, "Property Rights as a Legally Significant Event" (2003) 62 CLJ 717 at 732–734. Interestingly, Birks was cognisant of this distinction when he framed a breach of contract as a wrong entitling a secondary obligation to pay damages, classifying the formation of contract and the primary obligations thereunder as part of the causative event of consent: See Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26(1) UWALR 1 at 10–11.

59 Ross Grantham & Charles Rickett, "Property Rights as a Legally Significant Event" (2003) 62 CLJ 717 at 729.

60 Ross Grantham & Charles Rickett, "Property Rights as a Legally Significant Event" (2003) 62 CLJ 717 at 732.

61 [2022] 1 SLR 136 at [226].

62 *Foskett v McKeown* [2001] 1 AC 102 at 128.

63 Ross Grantham & Charles Rickett, "Property Rights as a Legally Significant Event" (2003) 62 CLJ 717 at 745–748.

64 Peter Birks, "Property, Unjust Enrichment and Tracing" (2001) 54(1) *Current Legal Problems* 231 at 253.

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25 The practical significance of the Singapore courts' treatment of a right *in rem* as a source of other rights lies in its future treatment of cases where the original property transferred by the claimant has been substituted in the defendant's hands,[65] or where property has validly passed under a voidable contract,[66] such that the plaintiff no longer has legal title and only an innominate or residual right to ownership.[67] The right to a remedy would be premised solely on the existence of a proprietary right.

26 On the other hand, if the unjust enrichment perspective is adopted, the additional requirements of an unjust factor,[68] or an enrichment of the defendant,[69] are now foisted on the claimant. These may prove to be rather insurmountable burdens due to the three-party factual matrix where proprietary remedies are sought.[70] The debtor's or other creditors' change of position and public policy considerations may also gain relevance.[71]

C. Subrogation and unjust enrichment

27 In light of *Ng Chee Tian*, it is submitted that Mohan J's reliance on *Banque Financière de la Cité v Parc (Battersea) Ltd*[72] ("*Banque Financière*") for the proposition that subrogation operates as a reversal of unjust enrichment cannot stand. The better view is that post-*Ng Chee Tian*, subrogation is a remedy which vindicates property rights, and this is not inconsistent with Mohan J's analysis, given that his rejection of subrogation was predicated on the equitable principle of unconscionability.[73]

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65 Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 4th Ed, 2024) at pp 613–615.

66 Peter Birks, *Unjust Enrichment* (Clarendon Press, 2nd Ed, 2004) at p 37.

67 "Theory of Ownership and Possession in relation to Personalty" in *Crossley Vaines' Personal Property* (ELG Tyler & NE Palmer eds) (Butterworths, 5th Ed, 1973) at 50; Lionel Smith, "Simplifying Claims to Traceable Proceeds" (2009) 125 LQR 338 at 339.

68 Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 4th Ed, 2024) at p 610.

69 *Foskett v McKeown* [2000] 2 WLR 1299 at 1324–1325.

70 Rachel Leow & Timothy Leow, "Unjust Enrichment and Restitution in Singapore: Where Now and Where Next?" (2013) SJLS 331 at 340–344.

71 Charles Mitchell & Stephen Watterson, *Subrogation: Law and Practice* (Oxford University Press, 2007) at p 209; *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 at [121].

72 [1998] 2 WLR 475.

73 *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd* [2024] SGHC 166 at [60].

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28 *Banque Financière* itself does not support the existence of a proprietary remedy in unjust enrichment. It was not a "usual case of subrogation to security rights *in rem* and *in personam*",[74] which goes to show that subrogation in unjust enrichment is not limited to property rights.[75] In that case, the plaintiff bank advanced sums to the debtor to discharge a third party's security on an unsecured basis. These advances were made on the condition that they would receive "a negative form of protection … in the form of an undertaking" that the defendant (who was part of the same group of companies as the debtor) would not enforce the charge it had in priority to the plaintiff.[76] The defendant was unaware of the enrichment but was held to have been unjustly enriched by the plaintiff's discharge of the third party's security. Consistent with the unjust enrichment analysis,[77] the plaintiff only obtained a personal remedy in the negative form of protection it had bargained for. This is distinct from the type of subrogation envisioned in *Da Hui*, which Mohan J was at pains to point out.[78]

29 Although Virgo has noted that subrogation has been accorded a special status as the only proprietary remedy awarded to reverse unjust enrichment, he recognises that such an exception is unprincipled.[79] In *Da Hui*, the intention-based justification for subrogation, that a co-debtor who discharges a secured debt owed does so with the intention of keeping the security alive for his own benefit, was rejected,[80] in favour of the unjust enrichment justification. Yet, no consideration was given to the existence of an unjust factor. At the same time, a broader taxonomical view of unjust enrichment as a unifying legal concept recognising a variety of different cases,[81] cannot be taken to explain the operation of subrogation, because there can be no proprietary remedial response to unjust enrichment following *Ng Chee Tian*. This also forecloses the possibility of subrogation being a remedy issued in the court's concurrent equitable jurisdiction to an unjust enrichment action at law.

30 Mohan J's failure to identify an unjust factor strongly suggests that subrogation was not seen as a remedial response to An Rong's

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74 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1998] 2 WLR 475 at 480.
75 *Lowick Rose LLP v Swynson Ltd* [2017] 2 WLR 1161 at [18].
76 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1998] 2 WLR 475 at 481.
77 Graham Virgo, "Restitution and Unjust Enrichment in the Supreme Court: Reflections on *Bank of Cyprus UK Ltd v Menelaou*" (2016) University of Cambridge Faculty of Law Research Paper No 10/2016 at p 15.
78 *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd* [2024] SGHC 166 at [40].
79 Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 4th Ed, 2024) at p 614.
80 *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd* [2024] SGHC 166 at [51].
81 Kit Barker, "Unjust Enrichment in Australia: What is(n't) it? Implications for Legal Reasoning and Practice" (2020) 43(3) MLR at pp 8–9.

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alleged unjust enrichment. Unlike in England, the requirements within the unjust factor approach in Singapore are not mere "signposts towards areas of inquiry involving a number of distinct legal requirements".[82] Although the Singapore courts have followed the English courts and similarly treated the law of unjust enrichment as a distinct branch of the law of obligations,[83] in substance, their approach steers closer to the approach taken by the Australian courts, which views unjust enrichment as a narrower legal category with a particular vitiating feature to be established.[84] An abstract, freestanding approach to unjust enrichment has been rejected by the Singapore courts,[85] which indicates that the courts are not free to dispense with the application of the unjust factor framework, even in cases of subrogation. The broad brush of unjust enrichment reasoning which the English courts use to paint cases of normatively defective transfers,[86] cannot be used in Singapore without regard for the unjust factor framework.

31 Even if an unjust factor was identified, the governing rules differ in cases of subrogation.[87] Mistake and failure of consideration have been proposed as the relevant unjust factors.[88] In *Lowick Rose LLP v Swynson Ltd*,[89] the court expanded the basis of subrogation to "the defeat of an expectation of benefit which was the basis of the payer's consent to the payment of the money for the relevant purpose".[90] This would encompass mispredictions, mistaken assumptions about future events, ignorance and want of authority,[91] all of which are not recognised as a causative

82 *The Commissioners for Her Majesty's Revenue and Customs v The Investment Trust Companies* [2017] 2 WLR 1200 at [41]. Compare *Attorney General of Trinidad and Tobago v Trinsalvage Enterprises Ltd* [2023] 1 WLR 4045 at [18], where Lord Burrows described the elements of the unjust factor framework as things which "the claimant must prove". His Lordship has previously criticised any departure from the unjust factor framework: Andrew Burrows, "The Australian Law of Restitution: Has the High Court Lost Its Way" in *Exploring Private Law* (Elise Bant & Matthew Harding eds) (Cambridge University Press, 2010) at p 84.
83 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at [181].
84 See Mark Leeming, "Subrogation, Equity and Unjust Enrichment" in *Fault Lines in Equity* (Jamie Glister & Pauline Ridge eds) (Hart Publishing, 2012) at p 31.
85 *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 at [130]–[134].
86 Andrew Burrows, "The Australian Law of Restitution: Has the High Court Lost its Way" in *Exploring Private Law* (Elise Bant & Matthew Harding eds) (Cambridge University Press, 2010) at p 85; *Lowick Rose LLP v Swynson Ltd* [2017] 2 WLR 1161 at [30].
87 Rory Gregson, "Is Subrogation a Remedy for Unjust Enrichment" (2020) 136 LQR 481 at 487–488.
88 *Bank of Cyprus UK Limited v Menelaou* [2015] 3 WLR 1334 at [21], citing *Cheltenham & Gloucester plc v Appleyard* [2004] EWCA Civ 291 at [35]–[36].
89 [2017] 2 WLR 1161.
90 *Lowick Rose LLP v Swynson Ltd* [2017] 2 WLR 1161 at [30].
91 Rory Gregson, "Is Subrogation a Remedy for Unjust Enrichment" (2020) 136 LQR 481 at 488.

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mistake in a typical action in unjust enrichment,[92] and abrogate from the need for a shared basis between the parties in establishing failure of consideration.[93] In the context of rescission for mistake, the requirement for a sufficiently serious mistake would also be abated.[94] Where there is a causative mistake which can be established, the defendant's knowledge of the mistake, irrelevant in unjust enrichment, is a key factor justifying equity's intervention through subrogation.[95] As the rules on unjust factors differ for subrogation, subrogation cases should therefore be treated as a *sui generis* situation.[96] But if that is the case, subrogation cannot be regarded as a remedial response to unjust enrichment.

32 Finally, even if post-*Esben Finance*, "lack of consent" is an applicable unjust factor, its interstitial role means that there is no practical use in framing a claim for subrogation as one in unjust enrichment.[97] The requirement of a proprietary base would be common to an action in unjust enrichment and for vindication of property rights,[98] so one would prefer to base their claim in the latter to avoid having to scale the "enrichment" or "unjust factor" hurdles.[99] If *Ng Chee Tian* is followed to confine unjust enrichment to an interstitial role, the same analysis would also apply regardless of unjust factor.

33 That Mohan J's attention was directed to the existence of unconscionability suggests *Da Hui* is better understood as a vindication of property rights.[100] After all, usage of the principle of unconscionability is better suited at establishing the availability of a proprietary remedy, which is within the "sole province of equity".[101] At the same time, subrogation is awarded where it is unconscionable for the defendant to retain the

92 Rory Gregson, "Is Subrogation a Remedy For Unjust Enrichment" (2020) 136 LQR 481 at 488. See also *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 at [29] (misprediction); *Pitt v Holt* [2013] 2 WLR 1200 at [105]–[113] (misprediction, mistaken assumptions about future events, ignorance); and *Alwie Handoyo v Tjong Very Sumito* [2013] 4 SLR 308 at [111] (want of authority).

93 Nguyen Sinh Vuong, "Lord Reed and Unjust Enrichment: A Correct(ive) Retreat from Expansionism" (2021) HKLJ 203 at 238.

94 Sarah Worthington, "Subrogation Claims on Insolvency" in *Restitution and Insolvency* (Francis Rose ed) (Routledge, 2000) at p 71.

95 Dyson Heydon, Mark Leeming & Peter Tuner, *Meagher, Gummow & Lehane's Equity Doctrines & Remedies* (LexisNexis, 5th Ed, 2015) at para 9-110.

96 *Lowick Rose LLP v Swynson Ltd* [2017] 2 WLR 1161 at [30].

97 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [251].

98 Tang Hang Wu, *Principles of the Law of Restitution in Singapore* (Academy Publishing, 2019) at p 381.

99 See para 25 above.

100 *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd* [2024] SGHC 166 at [60].

101 Tang Hang Wu, *Principles of the Law of Restitution in Singapore* (Academy Publishing, 2019) at pp 382 and 414; Lionel Smith, "Simplifying Claims to Traceable Proceeds" (2009) 125 LQR 338 at 346–348.

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proprietary interest claimed by the plaintiff.[102] While it is contended that the creation of property rights (via the fiction that is subrogation) cannot be analysed as a case of *vindicatio*,[103] conversely, warnings have been issued about allowing "all-embracing theories of unjust enrichment" disturb settled equitable principles.[104] As subrogation is awarded in a variety of factual situations,[105] it seems that a categorical approach has greater organisational force than the unjust factor framework.[106] The General Division's recourse to the concept of unconscionability over the unjust factor framework suggests that the warnings have been heeded.

34 The fiction of treating an extinguished security as subsisting also cannot be explained by restitutionary logic. An equitable proprietary interest is being created, notwithstanding the fact that legal ownership of the asset has revested in the mortgagor. As this is ultimately a different right from what was held by the creditor,[107] and the moneys repaid may vary from the actual value of the security, there is no strict correspondence between the claimant's loss and the defendant's security.[108] Further, it results in an asymmetric application of corrective justice, only the defendant is restored to the position which he assumed prior to the claimant's payment; the claimant gains an additional right as a secured creditor.

35 Notwithstanding the repudiation of intention-based justifications for subrogation, unconscionability cannot exist in a vacuum. It has been proposed elsewhere that unconscionability in the law of subrogation is based on the intention of the debtor-asset owner acting in good conscience (*ie*, their unconscientious retention of security).[109] The parties' expectations remain a key factor, as seen in the weight accorded to the fact that the BofA would not have agreed to dilute their entitlement to recover out of the sale proceeds of the An Rong vessels;[110] at least not where there were other parties for whom default judgments had been

102 *Boscawen v Bajwa* [1996] 1 WLR 328 at 335.
103 Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) at p 122.
104 *Bofinger v Kingsway Group Ltd* [2009] HCA 44 at [91].
105 *Boscawen v Bajwa* [1996] 1 WLR 328 at 335.
106 See Dyson Heydon, Mark Leeming & Peter Tuner, *Meagher, Gummow & Lehane's Equity Doctrines & Remedies* (LexisNexis, 5th Ed, 2015) at para 9-015.
107 Jessica Palmer, "Unjust Enrichment Proprietary Subrogation and Unsatisfactory Explanations" (2016) 28 SAcLJ 955 at 972.
108 *The Commissioners for Her Majesty's Revenue and Customs v The Investment Trust Companies* [2017] 2 WLR 1200 at [43].
109 Jessica Palmer, "Unjust Enrichment Proprietary Subrogation and Unsatisfactory Explanations" (2016) 28 SAcLJ 955 at 975–981.
110 *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd* [2024] SGHC 166 at [65].

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entered in their *in rem* actions against the same vessel.[111] A common limitation imposed on the availability of the remedy is that subrogation "cannot improve a lender's position, by giving him more than he expected to get".[112] As such, recourse to equitable principles and the discretionary powers of the courts of Chancery is fundamentally incongruent with the rights-based nature law of unjust enrichment.[113] Restitutionary liability in unjust enrichment is strict, and exists independently of the defendant's conscience.[114] That the law on unjust enrichment was originally influenced by equitable notions, involving the recovery of money "which ought not in justice to be kept",[115] is of no rescue as it has been rejected as satisfactory justification for modern unjust enrichment actions.[116] Notions of unconscionability or unconscionable retention have been criticised for imprecision.[117] Instead, liability in unjust enrichment arises from the normatively defective nature of the transfer,[118] and not the defendant's state of mind or retention of the security or enrichment. But without an unjust factor capable of explaining the cases on subrogation, the good work of restitution scholars at explaining the old forms of action through unjust enrichment cannot be transposed here.

V. Conclusion

36 The decision in *Da Hui* puts the law on proprietary restitution on the right track, with its emphasis on the importance of a proprietary base. However, its characterisation of subrogation as a remedy for unjust enrichment should be re-evaluated post-*Ng Chee Tian*, with Mohan J's references to *Banque Financière* to be given less weight in light of the diverging views between the English and Singapore courts on the nature of subrogation. The approach taken in *Da Hui* better coheres with the Singaporean perspective that proprietary restitutionary remedies like subrogation vindicates property rights, as the inquiry was properly directed not at the existence of an unjust factor, but at the existence of unconscionable circumstances justifying equitable intervention. At the same time, the gaps in restitutionary logic at explaining the subrogation

111 *Da Hui Shipping (Pte) Ltd v An Rong Shipping Pte Ltd* [2024] SGHC 166 at [21].
112 *Lowick Rose LLP v Swynson Ltd* [2017] 2 WLR 1161 at [86].
113 Mitchell Cleaver, "Equitable Subrogation in Australia and England" (2018) 29 JBFLP 34 at 52.
114 *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 at [172].
115 *Moses v Macferlan* (1760) 2 Burr 1005 at 1011–1012.
116 *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 at [103].
117 Andrew Burrows, "The Australian Law of Restitution: Has the High Court Lost its Way" in *Exploring Private Law* (Elise Bant & Matthew Harding eds) (Cambridge University Press, 2010) at pp 75–76.
118 *The Commissioners for Her Majesty's Revenue and Customs v The Investment Trust Companies* [2017] 2 WLR 1200 at [42].

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cases, like the absence of an unjust factor and correspondence between gain and loss, are avoided.

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