Landmark Cases in Tracing

A pitch for an edited collection of in-depth case analyses

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Theme and Justification

Tracing is a process and claim used for recovering misappropriated property, mainly that originally held on trust or by a corporation. It allows claimants to recover not only the original misappropriated property, but also its substitute – what the property was exchanged for in a subsequent transaction. Since this claim is a right of property, it brings the claimant the advantage of priority over other creditors in insolvency and access to any increase in value, either in the property itself or from the substitute. If the property is passed to or from another person or, say, a shell company, the right to claim follows that property and is not left on the person. From this, it is no wonder it is popular with claimants.

However, tracing is still under-researched and under-theorised. There is little agreement as to how this claim can be justified theoretically, what its limits are and how they vary in accordance with the multitude of different facts the courts have seen and will see in the future. Academics and judges are still feeling their way around its fundamental questions. Yet not only are the answers to these theoretical questions controverted, they go to the heart of what every litigant wants to know: what may or may not be claimed? These questions are of fundamental importance on a practical basis too. An edited collection of in-depth case analyses can address them.

Academic Need

The twin objectives of this volume are understanding how and why the law of tracing was developed as it was, and its present problems. One cannot understand the latter without the former. The lack of a comprehensive doctrinal history of tracing is the immediate gap in the literature. While Aruna Nair's monograph, *Claims to Traceable Proceeds: Law, Equity, and the Control of Assets* (OUP 2018) ch 3 makes a start to remedying this, a single chapter cannot go to the same depth as the collection proposed here. Another recent monograph is Magda Raczynska's *The Law of Tracing in Commercial Transactions* (OUP 2018). Like Nair's book, it is focused on a broad general theory and less on the history of tracing and the variety of difficult fact patterns and specific issues a case-by-case analysis brings to the fore. In Australia, there is the forthcoming *The Law of Tracing* by Mohammud Jaamae Hafeez-Baig and Jordan English (Federation Press, 2021), again focused on broad general theory. The latter two authors are on the team for this proposed volume.

These books follow Lionel Smith's classic monograph *The Law of Tracing* (Clarendon 1997). What can be seen in the newer books is a change in direction and challenge to Smith's theory that one simply traces the value in the old asset and exercises the same rights as before over the new asset.[1] The newer books seek more convincing justifications for the claim. But

[1] Charles Mitchell, '*Claims to Traceable Proceeds: Law, Equity and the Control of Assets by Aruna Nair* (Oxford University Press 2018) 256 pp, ISBN 9780198813408; *The Law of Tracing in Commercial Transactions by Magda Raczynska* (Oxford University Press 2018) 304 pp, ISBN 9780198796138' (2018) 12 J Eq 123 (Book review).

what unites all these other books is a methodology that strives to find a general explanation of tracing to cover a vast range of circumstances.

This present proposed volume will make it easier to test such explanations by presenting, in greater detail and with greater analysis, those difficult fact patterns and problems and traps they set for the jurist. This is the unique viewpoint the present proposal brings. Conversely, the pressures of space mean that this level of depth is impossible under the general approach of the other books; they have different purposes. Academic researchers, students, judges and counsel will be able to combine the knowledge in the proposed volume with that in the aforementioned monographs. On a more prosaic level, this volume will also make it considerably easier to understand the cases.

Format and Marketability

The format *Landmark Cases in …* is tried and tested both academically and in terms of marketability. It therefore seems logical to adopt it. The three closest comparators are Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart 2012), Simon Douglas, Robin Hickey and Emma Waring (eds), *Landmark Cases in Property Law* (Hart 2015) and C Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart 2006).

One must note right away that there is the matter of overlap with those books, where some of the cases in this collection have already been noted and analysed. To ensure there is value in reanalysing the cases, in the second half of this document where the potential issues to be considered are listed, there are explicit comparisons with the chapters in the other books. This shows that there are indeed further issues that come out given the aims of this collection. All in all, the proposal keeps to what Derek has been informed by Kate Whetter was acceptable – a maximum of three chapters of overlap. In fact, while three chapters consider the same cases as other *Landmark Cases* volumes, only two will likely have a significant overlap in terms of the content – chapter 7 on *Re Diplock* (1948) (with *Landmark Cases in the Law of Restitution*) and chapter 11 on *Buhr v Barclays Bank Plc* (2001) (with Raczynska's book). Even so, this will be partial and the opportunities to take the analysis further are indicated below.

The primary market is university libraries and academic researchers. In terms of geography, the majority of cases are English, but the book will also be of interest in the Commonwealth and some Asian jurisdictions, particularly Canada, New Zealand, Australia, Hong Kong and Singapore, because of our shared legal heritage. Three chapters note Australian cases on the basis that they raise significant and different issues to the others, but this will no doubt increase the book's marketability overseas too. In this respect, note that chapter 4 on *Caron v Jahani (No 2)* (2020), while an Australian decision, builds on prior Canadian cases. Moreover, the Asian jurisdictions tend to follow the English and Commonwealth jurisdictions and do not appear to have generated any tracing cases as foundational as in the other jurisdictions.

The number of chapters in the series has ranged from 10 to 22 with a preference for 12 to 15. The specialism (and relatively low number of potential authors) here means 'Landmark Cases in Tracing' would fall near the lower end of that scale. There is below a list of 12 chapters. Note that sometimes a joint two-case chapter is specified because the issues in the cases are so closely related. This means that 16 cases are considered in total.

The chapters are subdivided by theme. This helps to demonstrate that tracing, while a narrow topic at first blush, does indeed contain a broad range of issues and requires an extended treatment.

Academic Specification

There will be a significant degree of interaction between the different chapters. In a typical *Landmark Cases* book, each case will tend to (but not inevitably) concern a much more separate doctrine. We will see the opposite here. The chapters will need to speak to each other to a greater extent, to identify points of disagreement and to avoid repetition where there are points of agreement.

Given the book's objectives, there is one parameter to set. Each chapter should put a spotlight on the following: the issues actually decided in the case; how they were solved; and why the particular solution was adopted with respect to the wider development of the law of tracing and the general law.

While far from mandatory, if relevant, each author may choose to consider the following research questions if they are relevant to the chapter. Is the claim – particularly on the facts of the particular case or cases – ultimately one of:

(i) The transmission of property rights;

(ii) Obligation (and, if so, which obligation or obligations); or

(iii) Restitution for unjust enrichment? and

(iv) Does the case support or oppose the proposition that the process and claim are separate?

Full academic independence will be afforded each contributor aside from the one set parameter. A diverse range of academic views should be represented in the authorship not only to attract the relevant specialisms, but also to generate more robust argument. Likewise, having the experience of different jurisdictions amongst the authorship will be valuable.

It seems prudent to leave open the option, for chapters that raise sufficiently similar themes, for the authors to write mutual responses.

Developmental Process

At the beginning, we will put together a short presentation to summarise the issues in the cases and give a history of how tracing got from its inception to its present-day position. This will give each author an initial indication of his or her chapter's position in the wider collection.

To assist with the inter-chapter interaction, a roundtable discussion is required, where authors can present provisional findings and ensure the chapters speak to each other as appropriate. It is also a useful editorial control point. This can probably be done in a single day and over videoconferencing if necessary.

Timeline, Production and Staffing

Confirmed Contributors

- Dr Derek Whayman (Newcastle) – co-editor and initial design.
- Prof Katy Barnett (Melbourne) – co-editor.
- Dr Adam Reilly (Glasgow)

- Dr Tatiana Cutts (Melbourne)
- Mr Mohammud Jaamae Hafeez-Baig (Level Twenty-Seven Chambers, Brisbane) and Mr Jordan English (St Hilda's, Oxford)
- Prof Robert Chambers (Thompson Rivers, Canada)
- Assoc Prof Ying Khai Liew (Melbourne)
- More to be appointed for the remaining unallocated chapters

Proposed Timeline

- Start: July 2021
- Presentation by editors
- 12 months research and writing
- Round-table presentations
- 6 months more research and writing
- Submission to editors
- 6 weeks editing
- Submission to publisher
- End: February 2023

Estimated Length

The aim is that each chapter should aim for the usual format for a doctrinal analysis of some 8,000–12,000 words. Cases with complex facts and the conjoined case chapters may reasonably exceed this for obvious reasons; indeed, equity and tracing tend to be inherently complex not least because of the larger number of parties in the principles and cases. Conversely, some of the cases with simpler issues might occupy less space.

In the other books in the series, authors have been encouraged to explore the facts and context in more detail, and wordcounts over 15,000 per chapter are fairly common. A reasonable low-end estimate is therefore an average of 10,000 words per chapter, plus some 5,000 words each for the introduction and the conclusion – 130,000 words in all.

Table of Chapters / Cases

Notes of the Substance of Each Chapter

The remainder of this document outlines the cases under consideration and the issues likely to be tackled in the chapter. We reiterate that each author is to have free rein in taking a standpoint and bringing in additional material, subject only to engaging with the one set parameter. Nonetheless, for the purposes of a pitch, it demonstrates that there is some substance to work with in each chapter. It also addresses the matter of the overlaps where some of the cases have previously been considered in a *Landmark Cases* book.

Sample Chapter

Derek has written chapter 6 (on *Re Tilley's Will Trusts* (1967) and *Turner v Jacob* (2006)), for review purposes and to give an indication of the kind of analysis one can expect to see. Moreover, it will give any reviewer the opportunity to assess the dual-case format specified for some of the chapters.

Biographies

Derek Whayman

Dr Derek Whayman is a lecturer in law at Newcastle University (UK). His primary research interest is equity, specifically trust and fiduciary law, and particularly how it is being

transformed in recent times. We have seen a huge number of foundational cases come before the appellate courts in the last 40 years. Contrast this with the law of contract, whose major doctrines were settled in Victorian times. His doctoral thesis focused on one aspect of this transformation and his current research is focused on others, including the nature of tracing. This research has benefited from a visiting researchership at the University of Melbourne in 2019.

Dr Whayman has wider interests in private law and has published articles on: the nature of tracing;[2] equitable doctrine's influence on contractual releases;[3] the rectification of computer-generated wills;[4] the relevance of contract law and implied terms on the contractarian theory of the firm;[5] the interaction of contractual terms with fiduciary duties;[6] the measures and allowances for disgorgement of profits for fiduciary accessories;[7] the nature of the remedy for breach of trust[8] and the nature of knowing receipt.[9] His current projects include this one and a monograph on the broader transformation of trust and fiduciary law.

Katy Barnett

Prof Katy Barnett joined Melbourne Law School in 2006 as a sessional lecturer, and was appointed to an ongoing position in 2010. In 2010, she also completed her PhD at the University of Melbourne on accounts of profit for breach of contract. Prior to commencing postgraduate study, Prof Barnett was a Research Assistant to the Court of Appeal at the Supreme Court of Victoria, completed her articles at Freehills, was an Associate to Justice Mandie at the Supreme Court of Victoria, and was a banking litigator at Russell Kennedy.

Prof Barnett has published and presented widely on Remedies Law and other related aspects of private law, including (among other things) on disgorgement of profit,[10] the calculation of

[2] Derek Whayman, 'Obligation and Property in Tracing Claims' (2018) 82 Conv 157.
[3] Derek Whayman, 'The Modern Rules of Releases' (2021) LS (accepted, in press).
[4] Derek Whayman, 'The Rectification (and Construction) of Computer-Generated Documents' (2019) 30 KLJ 489.
[5] David Gibbs-Kneller, David Gindis and Derek Whayman, 'Not by Contract Alone: The Contractarian Theory of the Corporation and the Paradox of Implied Terms' (2021) EBOR (accepted, in press).
[6] David Gibbs-Kneller and Derek Whayman, 'How Contractual Terms Determine Fiduciary Duties: A Two-Stage Process' (2019) 70 NILQ 241.
[7] Derek Whayman, 'Equitable Allowances or Restitutionary Measures for Dishonest Assistance and Knowing Receipt' (2017) 68 NILQ 181.
[8] Derek Whayman, 'More Clues as to the Nature of the Remedy for Breach of Trust: *Creggy v Barnett*' (2017) 81 Conv 139.
[9] Derek Whayman, 'Remodelling Knowing Receipt as a Gains-Based Wrong' [2016] JBL 565.
[10] Katy Barnett, *Accounting for Profit for Breach of Contract: Theory and Practice* (Hart 2012); Katy Barnett, 'The Midas Touch – Profits from the King's Gold Piano (148 Investment Group v Elvis Presley Enterprises)' (2010) 18 RLS 83; Katy Barnett, 'Substitutability and Disgorgement Damages in Contract' in E Bant and M Harding (eds), *Exploring Private Law*, (CUP 2010) 377; Katy Barnett, 'Disgorgement of Profits in Australian Private Law' in Ewoud Hondius and Andre Janssen (eds), *Disgorgement of Profits: Gain-based Remedies Throughout the World* (Series: Ius Comparatum – Global Studies in Comparative Law, Vol 8) (Springer 2015) 13; Katy Barnett, 'Gain-Based Relief for Breach of Privacy' in J N E Varuhas and N Moreham (eds), *Remedies for Breach of Privacy* (Hart 2018) 183; Katy Barnett, 'Gain-Based Damages' in D. Campbell and R. Halson (eds), *Research Handbook on Remedies in Private Law* (Edward Elgar 2019) 311; Katy Barnett, 'Restitution versus Compensation and Disgorgement' in E Bant, K Barker and S Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution*, (Edward Elgar, 2020) 456.

damages at common law and in statute,[11] the law on penalties,[12] offshore trusts[13] and proprietary remedies for breach of fiduciary duty.[14] She is recognised as a world expert on the topic of contractual remedies at common law and in equity. Her PhD was published in 2012 by Hart Publishing as a monograph entitled 'Accounting for Profit for Breach of Contract: Theory and Practice' and it has recently been cited by the Supreme Court of Canada. She has also written *Remedies in Australian Private Law* (CUP, 2018) with Dr Sirko Harder, now in its second edition. In 2013, she was a visiting scholar at Brasenose College, Oxford as part of the Melbourne-Oxford Faculty Exchange. She is a foundation editor of the Melbourne Law School blog, Opinions on High, with Professor Jeremy Gans. She and Prof Gans are writing a book about animals and the law, to be published in February 2022 by Black Inc.

[11] Katy Barnett, 'Contractual Expectations and Goods (note)' (2014) 130 LQR 387; Katy Barnett, 'Equitable Compensation and Remoteness: Not so Remote from the Common Law after all' (2014) 38 UWALR 48; Katy Barnett and Michael Bryan, 'Lord Cairns's Act: A Case Study in the Unintended Consequences of Legislation' (2015) 9 J Eq 150; Katy Barnett, 'Great Expectations: a Dissection of Expectation Damages in Contract in Australia and England' (2016) 33 JCL 1; Katy Barnett, 'Substitutive Damages and Mitigation in Contract Law: Tension between two Competing Norms' (2016) 28 S Ac LJ 795; Katy Barnett, 'A Reconsideration of Section 1324(10) of the Corporations Act 2001 (Cth): Damages in Lieu of an Injunction' (2018) 36 C & SLJ 370; Katy Barnett, 'Review Article: A Critical Consideration of Substitutive Awards in Contract Law' (2018) 81 MLR 1064; Katy Barnett, 'Mitigation and Remoteness in Contract: Policy and Principle' (2019) 36 JCL 5; Katy Barnett, 'Lord Cairns' Act and Statutory Interpretation – Give the Court an Inch and They'll Take a Mile' in P Vines and S Donald (eds), *Statutory Interpretation in Private Law* (Federation Press 2019) 207; Elise Bant, Katy Barnett and Jeannie Marie Paterson, '"Plain Sailing?": Damages for Distress and the Performance Interest in Contract' (2020) 36 JCL 272; Katy Barnett, 'The "Performance Interest" in Contract Law' in, J Eldridge and T Pilkington (eds), *Australian Contract Law in the 21st Century* (Federation Press 2021); Katy Barnett, 'Exemplary Damages in Contract Law' in E Bant, W Courtney, J Goudkamp and J M Paterson (eds), *Punishment and Private Law*, (Hart 2021, in press) 225; Katy Barnett, 'Causation, Remoteness and Calculation of Damages for Financial Mis-selling' in S Booysen (ed), *Financial Advice and Investor Protection: Comparative Law and Practice* (Edward Elgar 2021, in press); Katy Barnett, 'Inducing Breach of Contract' in C Carr, M Douglas and J Eldridge (eds), *Economic Torts* (Hart 2021, in press); Katy Barnett, 'Damages' in K V Krishnaprasad, S Swaminathan, U Varottil and V Niranjan (eds), *150 Years of the Indian Contracts Act 1872* (Hart 2022, in press).

[12] Katy Barnett, 'Corralling the Penalties Horse – *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCA 28' (2016) 170 ACLN 28; Katy Barnett 'Before the High Court, Paciocco v Australia and New Zealand Banking Group Ltd: Are Late Payment Fees on Credit Cards Enforceable?' (2015) 37 Syd LR 417; Katy Barnett and Sirko Harder, 'A Comparative Consideration of the Penalties Doctrine in England and Australia' in R L Weaver, S I Friedland, L Tranchant, and G Gil (eds), *Twenty-First Century Remedies: Comparative Perspectives Global Papers Series X* (Carolina Academic Press 2019) 115.

[13] Katy Barnett, 'Offshore Trusts in the South Pacific: How Far can the Concept of the Trust be Stretched before it Breaks?' in M. Harding and Y.K. Liew (eds), *Asia-Pacific Trusts Law: Theory and Practice in Context* (Hart 2021, in press).

[14] Katy Barnett, 'Distributive Justice and Proprietary Remedies over Bribes' (2015) 35 LS 302; Katy Barnett, 'Chasing Will-o'-the-Wisp: The English courts' Impossible Quest for Certainty in Relation to Constructive Trusts over Bribes' (2019) 25 T&T 319.

Summaries of the Chapters of the Book

Introduction

The book will begin with an introductory chapter explaining the two functions of the book (giving an account of the development of tracing across the chapters and the issues raised, solved and generated accordingly). It will summarise what each author has written about in each case and how the chapters interact.

A. Trustee Liability: Tracing Emerges from Trust and Fiduciary Law

This section shows how tracing came into being from trust law and the fiduciary obligation. The common theme here is how tracing is (or is not, or should be or should not be) related to trust and fiduciary law. They certainly grew up conjoined.

1. *Kirk v Webb* (1698)

Full citations: *Kirk v Webb* (1698) Prec Ch 84, 24 ER 41; (1698) 2 Freem Ch 229, 22 ER 1177.

This and its related cases concern property misapplied owing to a poorly drafted settlement and what would now be called a 'vigorous restitutionary campaign' against various parties by those entitled in default as a result.[15] They featured a colourful cast of post-Restoration characters including Charles Fitzroy, illegitimate son of Charles II. It involved a child marriage between him and one heiress Mary Wood, abducted after her father's death. She was 7. He was 9.

Kirk v Webb concerned a tracing claim into land purchased by the recipient of the (constructive) trust property in the form of money by the person truly entitled to the original wealth. The specific issue in the case was whether the land could be traced into; and the answer was no. The general issue raised is what the nature of tracing was at this time. It is the most detailed judgment of the era, which justifies its inclusion.

There were several explanations for the refusal. The first is that the substitution was unauthorised; equity would not override the trustee's bad intentions until *Taylor v Plumer*. The second is the relevant formalities were required under the Statute of Frauds. This was a trust, not a constructive trust, so the exception to the requirement for formalities was not engaged.[16]

One might conclude that this was scarcely tracing at all. This was simply trust management. Overreaching was engaged when an authorised transaction was concluded (it was not) and a transaction needed to satisfy the formalities before it was effective (it did not and was not). At the time, there was little notion that a constructive trust might arise to defeat trustee wrongdoing. Whatever the author concludes, this is an instance of there being just as much theory behind a 'no' as there might be behind a 'yes'.

If this is correct, it is in opposition to the claims that tracing was originally a right of property which became contaminated with trust and fiduciary law.[17] The history in Nair's monograph

[15] *Wood v Webb* (1695) Show PC 87, 1 ER 60; *Wood v Duke of Southampton* (1692) Show PC 83, 1 ER 58; *Duke of Southampton v Cranmer* (1685) 1 Vern 338, 23 ER 506.
[16] Statute of Frauds 1677 (29 Car 2 c 3) s 8. This changed in *Ryall v Ryall* (1739) 1 Atk 59, 26 ER 39; *Lane v Dighton* (1762) Amb 409, 27 ER 274.
[17] Andreas Televantos, 'Losing the Fiduciary Requirement for Equitable Tracing Claims' (2017) 133 LQR 492.

contains much of the history of this case,[18] so for originality's sake, one would expect more on the relationship with trust and fiduciary law. Particularly we might see an examination of how the fiduciary obligation – which does override a trustee's intentions – emerged after this case, starting in earnest from 1726.[19] Prior to that the courts were concerned with making the trust more proprietary, which was the first half of what tracing needed to emerge.[20]

2. *Taylor v Plumer* (1815)

Full citation: *Taylor v Plumer* (1815) 3 M & S 562, 105 ER 721.

Author: Tatiana Cutts, who has researched and published extensively on tracing, including one article in the Modern Law Review which won the 2016 Wedderburn Prize.[21]

This was the first case of successful tracing in 'abuse of trust' where the substitution was not authorised by the trust (indeed, this was apparently the issue in the case). Working out that itself is difficult since *Taylor v Plumer* is an extremely elliptical judgment, meaning little context was given to the matters around the case and the other elements of the cause of action – the analyst has to fill in these gaps herself.

Existing scholarship has conclusively determined that *Taylor v Plumer* was not a common law case; despite being decided in the Court of King's Bench, it was an equitable tracing case.[22] It may be worth adding this was a general practice not confined to tracing.[23] Working out the actual issue in the case is also difficult. Nair presents a long argument that it is authority for the proposition that tracing involves the transmission of property rights,[24] but there is a much simpler argument that it was simply the end of the rule that one could not trace into property exchanged 'in abuse of trust', as Cutts has claimed.[25] Again, this is the ingress of trust and fiduciary rules into tracing, namely the principle that the court presumes against a wrongdoing trustee that he acts *for* the trust even as he intends and does the opposite.

Thus comparison with the emerging non-tracing fiduciary cases as well as *Kirk v Webb* is appropriate.[26] *Taylor v Plumer* was a landmark development moving away from that case in the background of the burgeoning fiduciary obligation which was being applied to more and

[18] Aruna Nair, *Claims to Traceable Proceeds: Law, Equity, and the Control of Assets* (OUP 2018) ch 3.
[19] *Keech v Sandford* (1726) Ca t King 61, 25 ER 223.
[20] E.g. Walter Banks, *Lewin's Practical Treatise on the Law of Trusts* (13th edn, Sweet & Maxwell 1928); See also George Jeremy, *A Treatise of the Equity Jurisdiction of the High Court of Chancery* (Clarke 1828) 1; D E C Yale, *Introduction to Lord Nottingham's Chancery Cases vol II* (79 Selden Society 1961) 100–108, 140–147; David Fox, 'Purchase for Value without Notice' in Paul S Davies, Simon Douglas and James Goudkamp (eds), *Defences in Equity* (Hart 2018) 64ff.
[21] T R S Cutts, 'The Role of Tracing in Claiming' (DPhil, University of Oxford 2015); Tatiana Cutts, 'Tracing, Value and Transactions' (2016) 79 MLR 381; Tatiana Cutts, 'Dummy Asset Tracing' (2019) 135 LQR 140.
[22] Salman Khurshid and Paul Matthews, 'Tracing Confusion' (1979) 95 LQR 78; Lionel D Smith, 'Tracing in *Taylor v. Plumer*: Equity in the Court of King's Bench' [1995] LMCLQ 240 accepted judicially in *Trustee of the Property of FC Jones & Sons v Jones* [1997] Ch 159 (CA) 169.
[23] Examples: *Lyall v Edwards* (1861) 6 H & N 337, 158 ER 139; *Phillips v Clagett* (1843) 11 M & W 84, 91; 152 ER 725, 728; see also Michael Lobban, 'Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part II' (2004) 22 LHR 565, 589–591. The process for allowing limited equitable pleas in the common law courts was regularised in the Common Law Procedure Act 1854 (17 & 18 Vict c 125) ss 83–86 well before fusion.
[24] Nair (n 18) 100ff.
[25] Cutts (n 21) 118ff. See also Smith (n 22) 258.
[26] Including how opinion changed and the exception for constructive trusts in the Statute of Frauds was held to apply to such transaction in breach of trust: *Ryall v Ryall* (n 16); *Lane v Dighton* (n 16).

more situations. Curiously, the Court of Chancery was the laggard here and it was the courts of common law that did more to develop this equitable rule.[27]

There is already such a chapter on this case: Lionel Smith, '*Taylor v Plumer* (1815)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart 2006). However, Smith's chapter focuses on the facts of the fraudster Walsh's history rather than the legal issues; indeed, most of it was reproduced from his article in the Journal of Legal History. Furthermore, Smith plays down the doctrinal issues in this case in his wider research.[28] There will be almost no overlap here.

B. Mixing: Even-Handed Solutions

Once mixing stopped tracing dead since it was not possible to identify, within the mixture of money, which parts were trust money and which were not. Hence only a personal claim against the trustee remained, which was useless if the trustee was bankrupt. This issue was overcome – but how and on what principles? This matters when the fund is deficient and different parties are competing over it.

We see two types of solutions. The first, considered in this section, are even-handed solutions where there is no subordination on the basis that no party is a fault vis-à-vis the others. The challenge has been to ensure a fair distribution where the fund is deficient.

N.B. Care must be taken over two things when writing and editing the cases placed in this theme. The first is not to repeat any history of the obligation to keep trust money separate. Currently this exists as a sketch in the sample chapter on *Re Tilley* and *Turner v Jacob* for review purposes, but it would probably find a better home in the chapter on *Pennell v Deffell*. The second is to coordinate the analyses of the different approaches to unmixing between chapters 3 and 4.

3. *Pennell v Deffell* (1853)

Full citation: *Pennell v Deffell* (1853) 4 De GM & G 372, 43 ER 551

There are three suggested lines of enquiry for this chapter. First, the case invites investigation of the historical context. Victorian times were reforming times; was there a desire to overcome legal and non-legal problems here? The basic facts are these. The claimant was the trustee in bankruptcy (then called an assignee in bankruptcy). The defendant was the administratrix of the estate of her father George Green; the administration led to supplemental issues including this case. Green was an official assignee in bankruptcy but had mixed up the monies of various different bankrupts. Was there a desire to clean up these practices? Was there outrage at the behaviour of assignees in bankruptcy at around this time?

[27] *Keech v Sandford* (n 19) (Lord King LC); then *Ex p Lacey* (1802) 6 Ves Jun 625, 31 ER 1228 (Lord Eldon LC); *Ex p Bennett* (1805) 10 Ves Jun 381, 32 ER 893 (Lord Eldon LC). Lord Eldon was concerned with rescission for breach of the fiduciary dealing rules. He did not develop the remedy of a proprietary constructive trust to take away gains, which, curiously, was developed in the common law courts: *A-G v Lindegren* (1819) 6 Price 287, 146 ER 811 (Coram Richards LCB, Equity in the Court of Exchequer); cf Lord Eldon's reluctance to extend the fiduciary obligation in this direction: *Phayre v Peree* (1815) 3 Dow 116, 3 ER 1008.

[28] E.g. Smith (n 22) 257.

The second is the need for the decision. The innovation in *Pennell v Deffell* is not that it was the first case of successfully tracing through mixtures.[29] It was the first where its rule survives today in the form it was laid down, namely the so-called rule in *Clayton's Case*, and it was the first where the solution did not subordinate the trustee's claim to the beneficiary's claim.

Allowing tracing through mixtures represented a significant shift in attitude. Previously, since 'money has no earmark' it could not be traced unless it had been kept separate and identified as trust property.[30] It lost its identity and the claimant was left to a personal claim against the trustee; Lord Eldon, had done little to take that remedy further.[31] This was unsatisfactory; if the trustee was insolvent the claim could be worthless. A proprietary claim into the existing trust property was necessary. There is something to be said about how this drove the need to reject the principle that money could not be traced since it had no earmark.

The third line of enquiry is the tools the Court of Chancery used. The Court considered applying the developing fiduciary obligation, but ultimately rejected that route.[32] A subordinating rule was not applied and a key aspect of the rule in *Clayton's Case* is that it does not subordinate one party to another. It is an even-handed (if often arbitrary, capricious and unfair) rule but it does not set out to favour one party over another when unmixing the mixture into trust and non-trust money and the fund is deficient. This appears to be on the basis of equal fault (or lack of it), leading to equal ranking. The rule, sometimes called 'FIFO distribution', means that the money in the bank account is considered to be a series of debits and credits flowing in order. Thus the money first withdrawn is considered linked to the money first deposited. It is a crude way of expressing the principle that the beneficiary's interest is in specific trust property and after the passage of time, the withdrawals mean that beneficiary's property cannot reasonably be said to remain in the mixed account.[33] This is also seen in *Sinclair v Brougham*, where there was apportionment *pari passu*, another even-handed rule of unmixing where one party was not subordinated to another.[34] Why this was appropriate or inappropriate on these facts and others warrants analysis.

While there is scope for particularly the reasons for adopting the rule and when it is suitable in this chapter, care must be taken not to overlap too much with chapter 4, which will be partly concerned with the rivals to FIFO distribution. Given the author of chapter 4 intends to go in a different direction, this should not be a problem.

4. *Caron v Jahani (No 2)* (2020)

Full citation: *Caron v Jahani (No 2)* [2020] NSWCA 117, (2020) 382 ALR 158.

[29] See *Pinkett v Wright* (1842) 2 Hare 120, 67 ER 50 affd *Murray v Pinkett* (1846) 12 Cl & F 784, 8 ER 1612, a prototype of *Re Hallett's Estate* (1880) 13 Ch D 696 (CA).
[30] *Taylor v Plumer* (1815) 3 M & S 562, 105 ER 721; *Scott v Surman* (1742) Willes 400, 125 ER 1235; *Whitecomb v Jacob* (1710) 1 Salk 160, 91 ER 149. See David Fox, 'Bona Fide Purchase and the Currency of Money' (1996) 55 CLJ 547 for background.
[31] See *Massey v Banner* (1820) 1 Jac & W 241, 37 ER 367 (relied on by Romilly MR at first instance to deny the proprietary claim); *Fletcher v Walker* (1818) 3 Madd 73, 56 ER 436; *Wren v Kirton* (1805) 11 Ves Jun 377, 32 ER 1133. See n 27.
[32] *Pinkett v Wright* (n 29) affd *Murray v Pinkett* (n 29).
[33] See also, e.g., *Lord Chedworth v Edwards* (1802) 8 Ves Jun 46, 32 ER 268.
[34] Note that *Sinclair v Brougham* was analysed in Eoin O'Dell, '*Sinclair v Brougham* (1914)' in C C J Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart 2006). Some of the issues are shared and may well be worth considering here.

Author: Adam Reilly, who has published equity papers on related matters and has highly applicable knowledge in jurisprudential approaches relevant to this case.[35]

This case, building on previous Canadian and Australian (and some English) authority, has sufficient sophistication of analysis and greater complexity of facts than the other rolling charge cases[36] to justify its place as a brand-new leading case. The main question this case raises – but does not fully answer – is how we deal with having different classes of claimants where some outrank the others, but none are trustees or fiduciaries. This is rare; in the cases we typically see mixtures of funds belonging to equally ranked beneficiaries[37] or where a wrongdoing trustee has mixed his or her money with a beneficiary's.[38] Such novel facts will illuminate difficulties with existing principles and drive the debate forward.

Caron (No 2) had three classes of claimants, those who had made: (i) deposits before the fraudster's account was frozen; (ii) deposits on the day of the freezing order; and (iii) deposits thereafter. The New South Wales Court of Appeal decided that class (iii) outranked class (ii) which in turn outranked class (i). The Court further considered the principles which applied within each class – rejecting the rule in *Clayton's Case* in favour of, where appropriate, the 'rolling charge' method (also known as the 'North American method' or the 'Lowest Intermediate Balance method').

Adam's preliminary view is that the vagueness surrounding the 'rules' determining which method applies in disputes concerning such mixed funds (*Clayton's Case*, the rolling charge, or *pari passu*) needs attention. These 'rules' operate at an intersection between evidence, property law, judicial 'remedy' and priority dispute. His aim is to disentangle the various approaches and try and provide a framework in which they might make better sense. Mat Campbell's work on subsidiarity (i.e. the 'secondary' rules that determine if and when one primary rule and not another applies to resolve a particular dispute) is relevant here.[39] This is an utterly different approach to that in English and Hafeez-Baig's short article, the only commentary on this case thus far.[40]

C. Mixing: Subordinating Solutions

As noted, when the competition over a deficient fund is between trustee and beneficiary, a wrongdoing trustee is subordinated to and outranked by the beneficiary. The cases turn on to what extent and on what conditions this subordination occurs. In concrete terms, the questions

[35] Adam Reilly, 'Does "Equity's Darling" need a Legal Title? Reassessing *Pilcher v Rawlins*' (2016) 10 J Eq 89; Adam Reilly, 'Is the "Mere Equity" to Rescind a Legal Power? Unpacking Hohfeld's Concept of "Volitional Control"' (2019) 39 OJLS 779.

[36] *Pars Ram Brothers (Pte) Ltd v Australian & New Zealand Banking Group Ltd* [2018] SGHC 60, [2018] 4 SLR 1404; *Boughner v Greyhawk Equity Partners Ltd Partnership (Millenium)* [2012] ONSC 3185, (2012) 111 OR (3d) 700; *Re French Caledonia Travel Service Pty Ltd* [2003] NSWSC 1008, (2003) 59 NSWLR 361; *Law Society of Upper Canada v Toronto-Dominion Bank* (1998) 169 DLR (4th) 353, 42 OR (3d) 257 (Ontario Court of Appeal); *Ontario (Securities Commission) v Greymac Credit Corp* (1986) 30 DLR (4th) 1, (1986) 55 OR (2d) 673 affd *Greymac Trust Co v Ontario* [1988] 2 SCR 172; *Re Walter J Schmidt & Co* 298 F 314 (1923).

[37] *Pennell v Deffell* (1853) 4 De GM & G 372, 43 ER 551; *Barlow Clowes International Ltd v Vaughan* [1992] 4 All ER 22 (CA); *Russell-Cooke Trust Co v Prentis* [2002] EWHC 2227 (Ch), [2003] 2 All ER 478; *Ontario v Greymac (CA)* (n 36).

[38] *Re Hallett* (n 29); *Re Oatway* [1903] 2 Ch 356 (Ch).

[39] Mat Campbell, 'Subsidiarity in Private Law?' (2020) 24 Edin LR 1.

[40] Jordan English and Mohammud Jaamae Hafeez-Baig, 'Tracing, Mixing, and Innocent Claimants' (2021) MLR ADV.

are whether the beneficiary can take an increase in value in the property and the degree of wrongdoing necessary.

5. *Re Hallett's Estate* (1880) and *Re Oatway* (1903)

Full citations: *Re Hallett's Estate* (1880) 13 Ch D 696 (CA); *Re Oatway* [1903] 2 Ch 356 (Ch).

Authors: Mohammud Jaamae Hafeez-Baig and Jordan English who, jointly, have published on tracing and have a forthcoming book on tracing.[41]

Re Hallett was another case of mixing and a successful claim through the mixture. It is momentous in that it was the first case to allow an irrebuttable presumption against the trustee in a mixing case; the trustee's intentions were subordinated to the beneficiary's. The trustee intended the withdrawal to be trust money so he could benefit from what was left, but equity overrode this intention. The converse was held to follow in *Re Oatway*; the trustee intended to spend his own money in purchasing the appreciating investments, but this was held to be trust property. *Re Hallett* thus went further than *Pennell v Deffell* and, unlike in that case, subordinated the wrongdoing trustee to the beneficiary with the fiduciary obligation justifying this. These two cases are assigned to the same chapter since little was added in *Re Oatway*.[42]

Once again, how the court got there in its reasoning is vital to understanding these cases. It was apparently an application of the fiduciary no-profit principle.[43] A trustee must not profit by his trust, and instituting this subordinating rule was how that would be prevented. This and a critique could occupy most of the chapter; can this be justified? Up to what limits? What are the exceptions? There is disquiet over the extent of this ability to 'cherry-pick' the best exchanges.[44] A concrete argument over some specific limits is made in the next chapter where the facts demand it, but there is space for making general points here.

There is already a chapter elsewhere on this case: Graham Virgo, '*Re Hallett's Estate* (1879–80)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart 2012). Virgo gives a very in-depth look at the facts and tackles some of the fundamentals, such as why a constructive trust would be imposed over a client's property in the hands of a solicitor, and some of the policy issues. But he does not consider the reception of fiduciary principles nor focuses on the extent of the remedy. It is thus possible to bring new issues to the table and write an original piece.

6. *Re Tilley's Will Trusts* (1967) and *Turner v Jacob* (2006)

Full citations: *Re Tilley's Will Trusts* [1967] Ch 1179 (Ch) and *Turner v Jacob* [2006] EWHC 1317 (Ch).

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[41] Mohammud Jaamae Hafeez-Baig and Jordan English, 'Common Law Tracing: The Emperor's New Clothes' (2018) 12 J Eq 260; English and Hafeez-Baig (n 40); Mohammud Jaamae Hafeez-Baig and Jordan English, *The Law of Tracing* (Federation Press, forthcoming 2021).

[42] It made an implicit exception explicit: if the trustee repaid the lost trust money, tracing would be refused; this is implicit in the then-restriction that the remedy would be limited to a lien rather than the assertion of equitable ownership in proportion.

[43] Via *Frith v Cartland* (1865) 2 Hem & M 417, 71 ER 525; and see a rebuttable version of *Re Hallett* in *Pinkett v Wright* (n 29) affd *Murray v Pinkett* (n 29). The first non-mixing tracing case we see the irrebuttable presumption is *Taylor v Plumer* (n 30).

[44] Lynton Tucker, Nicholas Le Poidevin and James Brightwell, *Lewin on Trusts* (20th edn, Thomson Reuters 2020) paras 44–082 to 44–083.

Author: This chapter has already been written by Derek Whayman as a sample for the pitch.[45]

This is a joint chapter since almost identical issues are raised. The main issue is whether we can still trace and obtain both the increase in value and priority in insolvency where the trustee had actually preserved the trust fund at all times, despite the mixing being in breach of trust. The question for the courts was whether the rules of subordination from *Re Hallett* and *Re Oatway* applied on the basis of this wrongdoing. Both courts said no. Justifying this is difficult.

Close examination of how the judges avoided these authorities is required. There is an exception in those cases, which the judges in *Re Tilley* and *Turner v Jacob* applied – if the trust fund is preserved despite the mixing, tracing will be denied. But this is not necessarily a good rule on first principles. How should we determine when subordinating and non-subordinating rules for mixtures should apply? These trustees were less as fault than those in *Re Hallett* and *Re Oatway*. How relevant is fault and what kind of fault?

More generally, it is arguable that the relevance of fault means that these cases see tracing as a function of trust and fiduciary obligations rather than a roving right of property, since the latter would be insensitive to the fault of the exchanger.

D. Recipient Liability: Fault, Innocence, Unjust Enrichment and Constructive Trusteeship

Recipients are not exactly like trustees and fiduciaries. Yet tracing is plainly available against them, even if they are innocent, as in *Re Diplock*. And it is here where the bold newcomer, unjust enrichment, has the greatest claim to not just relevance, but best fit. The *Grimaldi* chapter considers recipients at fault, which brings different considerations. In this section we see tracing begin to move away from its origins in trustee liability.

7. *Re Diplock* (1948)

Full citation: *Re Diplock* [1948] 1 Ch 465 (CA).

Author: Robert Chambers, who has written extensively on recipient liability and has advanced, with a co-author, one of the most sophisticated unjust enrichment analyses on the applicable unjust factor.[46]

This was the first case of allowing a claim over a substitute where an innocent recipient made the substitution (following the original property into third party hands is uncontroversial). The key issue was enunciated in the case itself: how can the conscience of the recipient be affected if he or she is innocent? The answer seems to have been to transform tracing into a right of property. The claim over the substitute no longer came from the trust and fiduciary obligations, but by the right of property attached to the original, and consequently, its substitute. Then, the (absence of) fault then becomes less, or not, relevant. The innocent recipient becomes a constructive trustee and is treated as though a true trustee.

[45] Relevant work: Whayman, 'Obligation and Property in Tracing Claims' (n 2); Whayman, 'More Clues as to the Nature of the Remedy for Breach of Trust: *Creggy v Barnett*' (n 8); Whayman, 'Remodelling Knowing Receipt as a Gains-Based Wrong' (n 9).

[46] Robert Chambers, 'Knowing Receipt: Frozen in Australia' (2007) 2 J Eq 41; Robert Chambers, 'The End of Knowing Receipt' (2016) 2 CJCCL 1; Robert Chambers and James Penner, 'Ignorance' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Lawbook Co 2008).

But taking away the fruits of the labour of an innocent third party plainly might be unjust and contrary to the general principle of law that there must be some defence. The Court of Appeal in *Re Diplock* left a discretionary safety value to deal with this issue: tracing would be refused if allowing it would be inequitable. This is arguably a cover for more precise principles, such as *bona fide* change of position, which in turn suggests unjust enrichment has a role to play. Moreover, unjust enrichment has its own justifications for recovery against innocent persons outside of property and obligation which may be more satisfactory.

The elephant in the room that there is a chapter on this case already, written by Tim Akkouh and Sarah Worthington, '*Re Diplock* (1948)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Restitution* (Hart 2006). Half of it concerns the *Re Diplock* personal claim, which is not relevant to this book. The other half concerns tracing, which plainly is. It tackles these issues:

(i) The exception where tracing would be denied if it would be inequitable to trace, which appears to be a prototype change of position defence;

(ii) measuring, in money terms, non-monetary inputs (labour, skill, chance, etc);

(iii) the application of the mixing rules and;

(iv) the nature of the remedy, lien/charge or ownership.

There are also very good analyses of these issues in *Goff & Jones* and *Lewin on Trusts.*[47]

This covers much of the material to be analysed. What is left is mainly two things. The first is a closer examination of the *development* of tracing in this case and how it was cast as right of property and how this clashes with the principles of tracing as seen in other cases.[48] At the time, one big influence was the tendency to see constructive trustees, such as recipients, as true trustees with the same liabilities,[49] a tendency that no longer exists.[50] The other is that unjust enrichment was still not properly accepted as a branch of English law.[51]

The second is that Akkouh and Worthington pose questions on how the claim might be recast as unjust enrichment and how change of position might work, but, considering the law as it is rather than how it should be, do not go as far as is possible in answering those questions. Given the author has, outside of the tracing context, gone quite some way past Akkouh and Worthington in answering these questions, applying that learning in the tracing is one clear way of creating original content.[52]

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[47] C C J Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) para 7–40ff; *Lewin* (n 44) para 44–044ff.

[48] Fox, 'Purchase for Value without Notice' (n 20) 77 speaks briefly of this.

[49] This has something of a tangled history, but it can be seen clearly in cases such as *John v Dodwell & Co Ltd* [1918] AC 563 (PC); *British American Elevator Co v Bank of Bank of North America* [1919] AC 658 (PC). It is bound up with the late-Victorian and early twentieth-century limitation cases such as *Soar v Ashwell* [1893] 2 QB 390 (CA); *Re Dixon* [1900] 2 Ch 561 (CA); *Re Eyre-Williams* [1923] 2 Ch 533 (Ch).

[50] See *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189 and *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400 (CA) in the context of limitation and *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] QB 499 in the context of liability for gain-based remedies.

[51] Until *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL).

[52] Chambers and Penner (n 46) arguing the unjust factor is want of authority; cf Peter Birks, *An Introduction to the Law of Restitution* (Clarendon 1989) 140 (ignorance); Andrew Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 LQR 412, 413 (from 'retention of the plaintiff's property without the owner's consent' to ignorance). Burrows has further suggested the possibilities that: the payment increased the value of the relevant asset; and that the claimant did not take on the risk of the defendant's insolvency: *Bank of Cyprus UK*

8. *Grimaldi v Chameleon Mining NL (No 2)* (2012)

Full citation: *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6, (2012) 200 FCR 296.

Author: Ying Khai Liew, who has written much on constructive trusts, albeit not in the context of tracing. His rigorous approach, seen particularly in his monograph, will find a good application to a case concerning the intersection of constructive trusts and tracing.[53]

The Australian context is often different to the English. In *Grimaldi*, rather than financial services and property investment, it is mining. It also brings in different law. The Australian constructive trust is discretionary.[54] A great many issues flow from this that can be explored in the context of this case. Moreover, there does not seem to be a full-length treatment of the tracing-related issues of this case, looking past the significant, though not material for present purposes, issue of fixing the defendant Grimaldi with fiduciary duties as a *de facto* director.

More specifically, the material factual difference to *Re Diplock* is that *Grimaldi* is a case of a recipient at fault, namely the corporate entity Winterfall/Murchison. The original breaches of fiduciary duty were: (i) the receipt of shares as a secret commission; and (ii) the straightforward misappropriation of corporate funds in the form of cheques. These were combined to assist the recipient Winterfall purchase land for mining. The claimant, Chameleon Mining, to whom the fiduciary duties were owed, wished to trace from these breaches of fiduciary duty into a proportionate share in the mining venture via intermediate steps. This was complicated by the mixing of 'clean' money with this 'dirty' money. Thus the matter of subordination and ranking is in play again, but with a recipient who is at fault this time.

Untangling and simplifying the complex facts of the case is the first job. This includes identifying precisely the following and tracing steps through the substitutions, company takeovers and mixing in the case. This will allow the second – more substantial – job, dealing with the issues, to be done on a secure footing. There are at least these:

First, how does the discretionary nature of the underlying property right this interact with the subsequent tracing of it? Do the worries around the subordinating aspects of the mixing rules (see, e.g., the chapters on *Re Tilley* and *Turner v Jacob* and on *Re Diplock*) fall away as a result, since the Australian judge can simply use her discretion in the occasional difficult case rather than have to apply strict rules which may result in unjust outcomes? Would the English approach work or fail in these circumstances? Will different mixing rules be required as a result of this? Furthermore, at which points in the tracing exercise does the discretion apply; which parts, if any, are non-discretionary?

The second issue concerns apportionment. There was a great deal of discussion of non-monetary inputs (i.e. work, care and skill, chance and speculation). How does this change between proprietary and non-proprietary claims; how does this change if the recipient is not a

Ltd v Menelaou [2015] UKSC 66, [2016] AC 176 [130]. Similarly it might be, applying Chambers and Penner's approach, 'loss of priority' by way of the recipient destroying the beneficiary's claim when the property is sold on to a *bona fide* purchaser or simply making it practically harder to claim. This justifies the restitution of what has enriched the recipient and her creditors – priority over the beneficiary – by way of a lien over the substitute property.

[53] Ying Khai Liew, *Rationalising Constructive Trusts* (Hart 2017); Ying Khai Liew, 'Reanalysing Institutional and Remedial Constructive Trusts' (2016) 75 CLJ 528.

[54] *Muschinski v Dodds* (1985) 160 CLR 583 (HCA); *Bathurst City Council v PWC Properties Pty Ltd* [1998] HCA 95, (1998) 195 CLR 566.

fiduciary;[55] are the tracing rules the same; should they be? This issue is shared with *Re Diplock* to an extent.

The third issue is the distinction between the transmission of property rights through tracing, the creation of property rights *de novo* through the constructive trust remedy for breach of fiduciary duty, and personal liability under *Barnes v Addy*.[56] The first two of these were run close together in the High Court case of *Scott v Scott*,[57] but the Federal Court in *Grimaldi* considered that they needed to be treated separately.[58] This needs to be reconciled and clarified; and one might note that this matter interfaces with the first and second issues.

E. Traceable Property and Transmissible Property Rights; Rights *ad rem* or rights *in rem*

This section concerns the facets of tracing that, following *Re Diplock*, further feed its characterisation as a property right, namely the need for form-to-form tracing and its indifference to fault; property rights are determined by strict rules, not what is 'fair, just and reasonable'.

9. *Federal Republic of Brazil v Durant International Corporation* (2015) and *James Roscoe (Bolton), Ltd v Winder* (1914)

Full citations: *Federal Republic of Brazil v Durant International Corporation* [2015] UKPC 35, [2016] AC 297; *James Roscoe (Bolton), Ltd v Winder* [1915] 1 Ch 62 (Ch).

'Swollen asset tracing' is not permitted; tracing is form-to-form. That is, there must be a forward-in-time transactional link between original and substitute property, meaning the substitute property is claimable only if exchanged for the original in a linked transaction. Buying a 'substitute' from a different source of value merely by reason of having received the original property is not enough. But the strictness of this requirement has been diluted. How this has been done has consequences for how tracing is characterised.

Roscoe v Winder is authority that tracing claims must have extant property to attach to; it is at least a right *ad rem* (and perhaps even a right of property – a right *in rem*).[59] In the cases of a bank account containing a mixture of trust money and non-trust money, if the balance account falls below *x*, any trust tracing claim can never be to more than *x* even if more non-trust money is been deposited later, because only *x* could possibly represent the trust money. This is the 'lowest intermediate balance' rule. Trusts need specific property to attach to and thus can only attach to property transactionally linked forward-in-time from the original.

However, this rule has been at least partly abrogated in the 'backwards tracing' cases, most notably *Durant* but also *Relfo Ltd v Varsani* and *Boscawen v Bajwa*.[60] Backwards tracing is where the substitute is purchased before the original is sold, but there is a closer connection than the substitute being obtained merely by reason of the original receipt. Usually, this situation arises as the result of a quirk of an interbank exchange, or where the received trust

[55] Liability is different in England: *Novoship* (n 50).
[56] (1874) 9 LR Ch App 244 (CA Ch).
[57] (1963) 109 CLR 649 (HCA).
[58] [2012] FCAFC 6, (2012) 200 FCR 296 [697]ff.
[59] Right *ad rem* is term popularised by R M Goode, 'The Right to Trace and its Impact in Commercial Transactions – I' (1976) 92 LQR 360; Roy Goode, 'Property and Unjust Enrichment' in Andrew Burrows (ed), *Essays on the Law of Restitution* (Clarendon 1991).
[60] *Relfo Ltd v Varsani* [2014] EWCA Civ 360, [2015] 1 BCLC 14; *Boscawen v Bajwa* [1996] WLR 328 (CA).

property was used to pay off a loan that had earlier been used to buy the 'substitute'. This exception requires a 'coordination' of deposits and withdrawals. This rule has not been explored terribly well. Neither has the relevance of the intention of the mixer, which was raised explicitly in *Relfo v Varsani* but not in *Durant*.

All these matters go to the heart of the two competing elements in the trust – its obligations and its proprietary characteristics. The complex interplay and the principles of liability, explored in the articles, is yet to be developed in the contract of tracing.[61]

10. *Foskett v McKeown* (2000)

Full citation: *Foskett v McKeown* [2001] 1 AC 102 (HL).

Remarkably, there has apparently not been a full-length consideration of this case published anywhere (though Ridge's article considers some of the consequences of the decision).[62] The issue in the case was quite simple. A bare majority removed the restriction on the remedy, which was no longer to be limited to a mere lien for the value of the original property when it had been mixed with non-trust property. Now, a proportionate interest in the substitute (worth considerably more on the facts) could be claimed.

The more significant controversy is this. Extensive *obiter dicta* were made characterising tracing as property right not subject to principles of obligation were uttered: tracing was a right *in rem*, not so strongly linked to the obligations of trust and fiduciary law (one might compare this with tracing's origins in *Kirk v Webb* and *Taylor v Plumer*). It follows that the rules of tracing, the process, were rules of property, not so linked to the cause of action and thus should not vary between different claims. So the common law rules of tracing should be the same as the equitable rules of tracing, even though the claims are different.

Foskett thus contained two *rationes decidendi* expounded in Lord Millett's leading speech. The narrow *ratio* holds simply that a trustee who wrongfully mixes trust property is entitled to a lien or to claim a proportionate share in the substitute. Lord Millett expressly based this on the fiduciary no-profit rule,[63] which suggests that fiduciary and non-fiduciary breaches can treated differently. Lord Millett secured a bare majority for this *ratio*.

The wide *ratio* is that tracing is a mere process and the claim involved the 'transmission … of property rights'.[64] This would sideline fault, since property rights are not subject to what is 'fair, just and reasonable'. One traces the 'value' into the substitute and claims according to

[61] Outside tracing: Sinéad Agnew and Ben McFarlane, 'The Paradox of the Equitable Proprietary Claim' in Ben McFarlane and Sinéad Agnew (eds), *Modern Studies in Property Law*, vol 10 (Hart 2019); Richard Nolan, 'Understanding the Limits of Equitable Property' (2006) 1 J Eq 27; Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4 J Eq 32; Tatiana Cutts, 'The Nature of "Equitable Property": A Functional Analysis' (2012) 6 J Eq 35; Peter Jaffey, 'Explaining the Trust' (2015) 131 LQR 377.

[62] Pauline Ridge, 'Tracing and Associated Claims in Australian Law' (2020) 14 J Eq 32.

[63] *Foskett v McKeown* [2001] 1 AC 102 (HL) 130ff via the argument of Samuel Williston, 'The Right to Follow Trust Property when Confused with other Property' (1888) 2 Harv L Rev 28, 29.

[64] *Foskett* (n 63) 127; and that this was not a fiction: Peter Millett, 'Proprietary Restitution' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005) 315; cf Peter Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 198 arguing it is a fiction. See also Ross Grantham and Charles Rickett, 'Tracing and Property Rights: The Categorical Truth' (2000) 63 MLR 905; Cutts, 'Dummy Asset Tracing' (n 21).

the appropriate cause of action, and for the equitable proprietary claim, for trusts and constructive trust, that is a vindication of one's property rights.[65]

This needs untangling; Lord Millett in fact relied on fiduciary principles even as he declared tracing to be independent of them.[66] He also did not secure a majority for the wide *ratio*. *Foskett v McKeown* was a very close-run case and was decided by a bare majority, and then, only after Lord Millett had persuaded Lord Browne-Wilkinson to change his vote (and Lord Browne-Wilkinson expressly preserved the *Re Diplock* discretion, meaning tracing did to some extent depend on whether it would be 'fair, just and reasonable'). The remarkably long 14-month delay between hearing and judgment in the House of Lords may well have been down to this.

The case also represented a change of opinion in Lord Millett. Once, he saw unjust enrichment, with its defence of change of position as vital to tracing: 'the absence of the defence may have led judges to distort basic principles in order to avoid injustice to the defendant.'[67] He saw *bona fide* purchase as 'a paradigm change of position defence'.[68] However, he changed his mind, after being persuaded by Swadling that *bona fide* purchase was not an instance of change of position, and was instead concerned with cleaning title.[69] There seems a clear, albeit tacit, connection to *Foskett* here.

F. Non-Trust Tracing

Has tracing broken away from trust and fiduciary law such that it has applications outside its origins? Undoubtedly yes, but there are not terribly many cases. Here we examine the most significant and ask how tracing can be justified in these circumstances.

11. *Buhr v Barclays Bank Plc* (2001)

Full citation: *Buhr v Barclays Bank Plc* [2001] EWCA Civ 1223, [2002] BPIR 25.

The scenario in *Buhr* was a successful attempt to trace from a second mortgagee's interest in the mortgaged land into the proceeds of sale. Ordinarily tracing would not be necessary, but here the second mortgagee had failed to register their interest on the land charges register properly.[70] The mortgagors then granted an option to purchase, which was then exercised. On Mr Buhr's bankruptcy, the second mortgagee asserted a proprietary interest in the proceeds, which would give it priority in the insolvency – provided it could successfully trace.

The principles upon which this is possible need to be examined and justified. Was this an instance of tracing as a right of property? Or are the principles in *Buhr* limited to the field of secured credit? What is the nature of the 'mortgagee's right to accretions' as Arden LJ described it?

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[65] *Foskett* (n 63). Williston (n 63) 39: tracing 'simply asserts the right of the true owner to his own property'; *Goff & Jones* (n 47) para 7–26; cf Cutts, 'Tracing, Value and Transactions' (n 21).

[66] Whayman, 'Obligation and Property in Tracing Claims' (n 2). See *Lewin* (n 44) paras 44–053 to 44–055 for a comparison of these two routes to liability.

[67] *Boscawen v Bajwa* (n 60) 334.

[68] P J Millett, 'Restitution and Constructive Trusts' (1998) 114 LQR 399 n 39; P J Millett, 'Tracing the Proceeds of Fraud' (1991) 107 LQR 71, 82.

[69] William Swadling, 'Restitution and *Bona Fide* Purchase' in William Swadling (ed), *The Limits of Restitutionary Claims: A Comparative Analysis* (UKNCCL 1997) 79.

[70] The technical issue was that that the sale was by the mortgagor, not the mortgagee (and unauthorised), so the statutory trust (Law of Property Act 1925, s 105) did not apply.

An alternative, 'historic', approach would go in a different direction to Raczynska's thorough look at the foregoing questions. It would ask what the differences are between this kind of tracing, where there are no 'ordinary' fiduciary or trust duties owed, with 'conventional' trust tracing. Particularly, one part of Arden LJ's judgment notes that equity, historically, treated mortgagors as fiduciaries, i.e. as quasi-trustees. Is this 'new' right to a substitute in fact an old one? In any event, the historic authorities and secondary sources[71] will be a rich seam for materials to assist an argument for why chargees and mortgagees may be able to benefit from this right.

12. *Black v Freedman & Co* (1910) and *Trustee of the Property of FC Jones & Sons v Jones* (1996)

Full citations: *Black v Freedman & Co* (1910) 12 CLR 105 (HCA) and *Trustee of the Property of FC Jones & Sons v Jones* [1997] Ch 159 (CA).

A dual note seems appropriate since the cases are united in the same difficulty of applying a trust analysis. Moreover, they do not share the special features of *Buhr*, which warrants a separate chapter. *Black v Freedman* concerned a thief. First, a thief is said to obtain title at all.[72] Second, the victim does not repose trust and confidence in a thief. There are no constructive fiduciaries.[73] So how could there be a trust, as the High Court of Australia held? *Jones*, on the other hand, did not concern a trust at all. Money was taken where, owing to bankruptcy, the recipient likewise obtained no title at all. Yet legal title was traced. Lionel Smith has remarked that 'the nature of this interest is something of a mystery'.[74] It may be possible – or impossible – to apply the same legal analysis to these two different scenarios.

An analysis of how the High Court got to the conclusion that a thief is a trustee is probably necessary.[75] This appears to be a case of instrumental constructive trusteeship, reasoning back from the desired conclusion.[76] Is this satisfactory? After all, not all fictions are bad. If even innocent fiduciaries can be disgorged, why not villains? In terms of the details, how close would this thief-trusteeship be to ordinary trusteeship must be determined. This brings in the jurisprudence on recipients. Should victims of theft be able to trace into increases in value and further substitutes given this appears to be justified, in cases of ordinary trusteeship, by the trust relationship and fiduciary principles? How else could this be justified?

Or is this all complicated nonsense and the right ultimately one of transmitted property? If we are to have such a claim, is this not the simplest and best explanation of it, applying Occam's Razor? Are we simply worrying too much about doctrinal niceties?

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[71] See particularly R W Turner, *The Equity of Redemption: Its Nature, History and Connection with Equitable Estates Generally* (CUP 1931) ch 8.

[72] Relativity of title may play a part. See the discussion in Susan Barkehall Thomas, 'Thieves, Owners, and the Problem of Title: Part 1 – Chattels' (2011) 5 J Eq 228; Susan Barkehall Thomas, 'Thieves, Owners and the Problem of Title: Part 2 – Money' (2012) 6 J Eq 1; Susan Barkehall Thomas, 'Thieves as Trustees: The Enduring Legacy of *Black v S Freedman & Co Ltd*' (2009) 3 J Eq 52; John Tarrant, 'Thieves as Trustees: In Defence of the Theft Principle' (2009) 3 J Eq 170.

[73] Lionel Smith, 'Constructive Fiduciaries?' in Peter Birks (ed), *Privacy and Loyalty* (Clarendon 1997).

[74] Lionel Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Texas L Rev 2115, 2168.

[75] The House of Lords made brief remarks suggesting this was possible: *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) 715–716.

[76] As in *A-G v Goddard* (1929) 28 LJKB 743 (KB) and *Reading v A-G* [1951] AC 507 (HL). See the comments of La Forest J in *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, 61 DLR (4th) 14 (SCC) 30.

Conclusion

The editors will sum up the debate and to what extent the questions posed in the introduction have been answered.