Separating Unjust Enrichment and Subrogation

Nathan Tamblyn[*]

Abstract: One prominent theory, reflected in a trio of important cases, suggests that subrogation can be a function of unjust enrichment. But that explanation faces conceptual difficulties. It also creates incoherence in the law of unjust enrichment by permitting indirect enrichment and proprietary remedies. An alternative explanation for subrogation is needed. Instead, what we see in that trio of cases, is the equitable remedy of specific performance – but in a multi-party situation.

INTRODUCTION

The ingredients of unjust enrichment as a cause of action are well settled.[1] The defendant must be enriched, at the expense of the claimant, caused by a recognised unjust factor.[2] Thereafter the defendant might have a defence. The most important defence for present purposes is change of position: it is a defence to the extent that a defendant has so changed their position as a result of what they have received that it would be inequitable to require them to make restitution.[3]

As for subrogation, in broad terms this is where A steps into the shoes of B, to take up B's rights against C. Subrogation arises in a number of contexts, as we shall see, but one context where subrogation purportedly arises is to reverse unjust enrichment. So says a trio of cases in the House of Lords and the

[*] MA (Oxford) LLM PhD (Cambridge) Barrister, SFHEA, Associate Professor of the Common Law, University of Exeter Law School. My thanks to Severine Saintier for her helpful comments on an earlier draft.

[1] *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) 227; *Benedetti v Sawiris* [2013] UKSC 50 [10]; *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66; *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29 [24]; *Shanghai Tongji Science & Technology Industrial Co Ltd v Casil Clearing Ltd* (2004) 7 HKCFAR 79 [67].

[2] On the need to prove the presence of an unjust factor, rather than relying on Birks' 'absence of basis' approach, see: *Deutsche Morgan Grenfell Group plc v IRC* [2007] 1 AC 558 (HL) [21]; *Test Claimants in the FII Group Litigation v HMRC* [2012] UKSC 19 [81], [188]; *FBC Construction Co Ltd v Ben Lee* [2014] 2 HKLRD 1054 (CA) [134]–[142]; *Big Island Construction (HK) Ltd v Wu Yi Development Co Ltd* (2015) 18 HKCFAR 364 [69]–[71].

[3] *Lipman Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL).

Supreme Court.[4] In other words, according to these cases, subrogation is a response to unjust enrichment as a cause of action. If so:

First, there are conceptual problems with seeing subrogation as a function of unjust enrichment. We shall discuss these in section 1 below.

Second, the orthodox position in unjust enrichment is that the defendant must be enriched at the direct expense of the claimant, without 'leapfrogging' any intervening parties. But subrogation countenances indirect enrichment – and that is problematic for unjust enrichment, as we shall discuss in section 2 below.

Third, there is a debate about whether unjust enrichment yields proprietary remedies. Probably it does not. But subrogation seems to offer that possibility after all – which is also problematic, as we shall see in section 3 below.

As a matter of doctrinal coherence, the law of unjust enrichment is better off without indirect enrichment or proprietary remedies. And this means excising subrogation from the law of unjust enrichment. So we need to find an alternative explanation, at least for the result in the sort of circumstances encountered by that trio of cases. The radical alternative, explained in section 4 below, is this: what we find in those cases is the equitable remedy of specific performance – but in a multi-party scenario.

I. TYPES OF SUBROGATION

In this section we shall distinguish the different contexts in which subrogation might arise. This reveals a number of preliminary conceptual objections to viewing subrogation as a function of unjust enrichment. Indeed, it reveals that subrogation can arise in different circumstances and with different rationales, not based on unjust enrichment as the cause of action after all.

Mitchell and Watterson identify three types of subrogation:[5]

(I) The first type of subrogation which they identify is so-called subrogation to extinguished rights. This is a triangular relationship. It is where D owes an obligation to a creditor. C then pays the creditor. This discharges D's obligation to the creditor. C might then be subrogated to the position of the creditor, and able to sue D.

In this situation, Mitchell and Watterson say that C will have a direct claim against D, either pursuant to a contract of indemnity, or more likely through unjust enrichment.[6] Their argument is that D is enriched, by the discharge of their liability to the creditor, at the expense of C, who paid off the creditor, through an unjust factor, foremost among which, they seem to suggest, is 'secondary liability'. Straight away this seems a strange unjust factor: whereas

---

[4] *Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1991] 2 AC 249 (HL); *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66; *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32.

[5] Mitchell and Watterson, *Subrogation: Law and Practice* (Oxford: Oxford University Press, 2007).

[6] Mitchell and Watterson, *Subrogation: Law and Practice* (Oxford: Oxford University Press, 2007) [1.05].

other unjust factors tend to start with an event (like duress or undue influence) and work through to a conclusion, secondary liability sounds like the conclusion already stated without any explanation of why or how we got there. It smacks of reverse engineering, creating an unjust factor, not for its own sake, but merely to achieve an outcome to which the authors are already committed.

To repeat, C supposedly has a direct claim against D in unjust enrichment. This is a personal claim. In addition, so it is suggested, C has a further indirect option, thanks to unjust enrichment, of being subrogated to the creditor's position, and then suing D. Mitchell and Watterson say that being subrogated to the creditor's position, if the creditor too only had a personal claim, would likely be redundant, adding nothing to C's own personal direct claim.[7] Subrogation, they say, is usually only an advantage where the creditor had a proprietary claim.

Immediately, this raises the following conceptual difficulty. C's direct claim is in unjust enrichment. By that cause of action, any unjust enrichment is reversed. And yet the indirect claim, via subrogation, is *better*, at least where it is proprietary. How can the self-same unjust enrichment provide a direct personal claim which reverses any unjust enrichment and also provide an indirect subrogated claim with an augmented outcome? If the direct claim reverses any unjust enrichment, then the augmented outcome of the indirect claim must be the reversal of any unjust enrichment *and then some*. How can there be two different outcomes when both are based on the self-same cause of action? And how can the cause of action in unjust enrichment reverse *more than* unjust enrichment?

Now, there is academic debate about whether unjust enrichment should yield proprietary remedies. We shall return to that below. But that is *not* in issue at this point. We are not discussing whether the direct claim should produce proprietary remedies. Rather, the conceptual difficulty identified here is the admission that subrogation *can* sometimes provide a better outcome than the direct claim. How can that be, when they are supposedly based on the same cause of action, and the direct claim reverses the unjust enrichment?

Of course, a proprietary remedy is more attractive to a claimant than a personal remedy where the defendant is insolvent. But, once again, that simple observation misses the point here. The direct claim says, all told, an unjust enrichment is properly remedied *this way*. Having come to that conclusion, how can that same cause of action provide an augmented outcome through subrogation?

This point is obliquely acknowledged in the case law: subrogation does not necessarily result in C getting the same rights as the creditor, because those rights

[7] Mitchell and Watterson, *Subrogation: Law and Practice* (Oxford: Oxford University Press, 2007) [3.08]. A rare exception might be where the creditor's personal rights have priority in insolvency over C's own personal rights – but even that, they admit, is contestable (pp 210–213).

can be cut down where otherwise C would obtain a windfall.[8] But this fails to take the argument all the way through: subrogation is itself a windfall, only useful when it is admittedly better than a direct claim in unjust enrichment.

Here is a second conceptual difficulty. Subrogation is not even a proprietary *remedy*.[9] Let me explain. In this triangular relationship, supposedly C has a direct claim against D in unjust enrichment. If that cause of action is successfully made out, C gets a remedy (usually damages). This structure is orthodox. Similarly, if someone successfully proves a breach of contract, or the commission of a tort, they get a remedy. And yet, back to the triangular relationship, the self-same cause of action in unjust enrichment, if successfully made out, supposedly also allows C to be subrogated to the rights of the creditor – rights which ground a new and separate cause of action (for example, breach of contract to repay the loan), which still has to be successfully sued upon itself before we arrive at any remedy. This is highly unorthodox. It would be like saying that successfully suing in contract or tort gives no remedy in itself, but merely a chance to sue in a second (different) cause of action. How can a cause of action successfully made out produce no remedy but merely the second bite of a different cherry?

(II) The second type of subrogation identified by Mitchell and Watterson is what they call subrogation to existing rights. The most important example of this is indemnity insurance. In that context, subrogation is usually provided for explicitly by contract (so there is no need for an unjust enrichment analysis). Mitchell and Watterson acknowledge the following notable differences from the previous type of subrogation. First, the insurer cannot sue in its own name.[10] This is because it is borrowing the insured's rights, rather than new rights being created for the insurer.[11] Second, the insurer has no direct claim against the third party.[12] All of which is completely inconsistent with subrogation being a function of unjust enrichment: if the insurer obtained subrogation against the third party to stop the third party being unjust enriched at the expense of the insurer, then the insurer would have a direct claim after all, and would be able to sue in its own name. So Mitchell and Watterson stress two 'policy factors' for subrogation here (rather than any unjust factor).[13]

---

[8] *Cheltenham & Gloucester plc v Appleyard* [2004] EWCA Civ 291 [49]; *Filby v Mortgage Express (No 2) Ltd* [2004] EWCA Civ 759 [63].

[9] The description of subrogation as a remedy was doubted by Lord Neuberger in *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66 [96].

[10] Mitchell and Watterson, *Subrogation: Law and Practice* (Oxford: Oxford University Press, 2007) [9.02].

[11] Mitchell, Mitchell and Watterson, *Goff & Jones, The Law of Unjust Enrichment*, 9th edn (Sweet & Maxwell, 2016) [39–32].

[12] Mitchell and Watterson, *Subrogation: Law and Practice* (Oxford: Oxford University Press, 2007) [1.07].

[13] Mitchell and Watterson, *Subrogation: Law and Practice* (Oxford: Oxford University Press, 2007) [10.27].

First, they say, it is the third party, rather than the insurer, who is primarily liable to make good the loss suffered by the insured.[14] But why? After all, the insurer contracted, for money, to make good the loss, should it arise – and on the basis that it would keep the premium should the loss not arise. That risk was adopted by the insurer voluntarily (and profitably, given the long-term persistence of the insurance industry). That hardly seems like a morally vulnerable position in need of protection. Indeed, why should insurers keep the premium if there is no loss, but if there is a loss, keep the premium and get the loss refunded by the third party? Yes, the insurers take the risk that the third party is insolvent. But why should *the law* decide that a solvent third party must repay the insurer? Even Mitchell and Watterson accept that 'it is not always obvious that a [third party] defendant rather than an insurer ought to be the person who ends up having to pay for the insured loss'.[15]

It seems we need a better reason for granting subrogation to an insurer. So second, they suggest that an insured should not be able to recover twice over, once from the insurer, and again from the third party. The insurance was, after all, merely a contract of *indemnity*, and not a windfall. This explanation seems entirely appropriate. But it is all about preventing double recovery by *the insured*. It does not reveal any unjust factor sufficient to ground a claim in unjust enrichment by the insurer against the third party. (Which is consistent at least with the admission that the insurer does not have any direct claim in unjust enrichment against the third party.)

In similar vein, in the context of a guarantor's right to subrogation, Dieckmann says that subrogation has a functional role, rather than an independent justification. It is simply a mechanism which best supports the institution of the guarantee, by keeping it honest and incentivised.[16] In other words, it is a technical solution within the nature of the guarantee itself, and not the result of a cause of action external to the guarantee.

(III) The third type of subrogation lies in the context of specialist insolvency regimes. Mitchell and Watterson refer only to (what is now) the Third Parties (Rights against Insurers) Act 2010. That applies where a third party is injured by an insolvent insured. The insured's rights, against the insurer, under the contract of insurance, are transferred to and vest in the injured third party (s 1) – who may also enforce any shortfall against the insured (s 14). We need not dwell on this specialist regime. It is not the concern of that trio of cases in which

---

[14] Williams says that this explanation is *not* about unjust enrichment. Rather, it is simply a convenient *mechanism* for ensuring that, where multiple parties have liabilities in respect of the same obligation, each should bear their share of responsibility: Williams, 'Preventing Unjust Enrichment' [2000] RLR 492, 506.

[15] Mitchell and Watterson, *Subrogation: Law and Practice* (Oxford: Oxford University Press, 2007) [10.37].

[16] Dieckmann, 'The Province of Subrogation Determined' (2012) 20 European Review of Private Law 989.

subrogation was said to be a function of unjust enrichment. Indeed, this type of subrogation does not arise at common law under unjust enrichment, but under statute – one passed to achieve an outcome which the common law could not achieve.[17]

Let us summarize so far.

What has subrogation to do with unjust enrichment? The received position is that subrogation arises in three situations. The third one, concerned narrowly with the liability of an insolvent insured, is statutory, rather than based upon unjust enrichment. The second one, concerned with an insurer's right to subrogation, seems to be a mechanical solution to an understandable policy decision to restrict an insured to an indemnity and no more. It otherwise seems to have nothing to do with unjust enrichment of the other parties. The fact that the insurer has no direct claim against the third party in unjust enrichment is telling.

That just leaves the first one: where C discharges D's obligation to a creditor. C can be subrogated to the position of the creditor, supposedly to reverse D's unjust enrichment. C does, on this account at least, have a direct claim against D (although the nominated unjust factor of 'secondary liability' is unconvincing – it smacks of reverse engineering). But we have seen how this leads to two conceptual problems. First, subrogation is only invoked when *better* than the direct claim, which cannot be, since both subrogation and the direct claim have the same cause of action. The direct claim has already determined the proper outcome, so how can subrogation produce the proper outcome *and then some*? Second, subrogation is not an alternative *remedy* for the direct claim, but rather gives C access to rights still to be enforced. This leads to the highly unorthodox position that the underlying cause of action in unjust enrichment, if successfully made out, results in no remedy, but merely access to a different cause of action, the second bite of a different cherry.

Against this unpromising background, we turn to introduce the first of the trio of cases from the House of Lords, namely *Banque Financière de la Cité v Parc (Battersea) Ltd*,[18] which nevertheless suggests that subrogation to extinguished rights is a function of unjust enrichment.

In *Banque Financière*, Parc owed a debt to R, who had a first legal charge, and to the defendant, who had a second legal charge. Parc wanted to pay off its debt to R. It sought a loan from the claimant bank. But in order to circumvent (legally) Swiss banking law, the loan was made to H, a director of Parc's holding company, who loaned it to Parc, and who directed that the loan money be paid to R to pay off that debt. The claimant bank wanted security for its loan, so H promised that the claimant would be repaid by Parc in priority to the defendant.

---

[17] For its history, see Mitchell and Watterson, *Subrogation: Law and Practice* (Oxford: Oxford University Press, 2007) 395–397.

[18] [1999] 1 AC 221 (HL).

That promise did not bind the defendant. Then Parc became insolvent. The court held that the claimant bank could be subrogated to R's position of priority over the defendant.

The court's reasoning was as follows. The defendant was enriched, in effect because it was promoted from second to first legal charge. The unjust factor was mistake, because the claimant wrongly thought it was given priority over the defendant, which was a precondition of giving the loan. (We might now also say that the unjust factor was failure of basis, because the claimant did not get the priority it legitimately expected in return.) The enrichment was at the expense of the claimant, because it was the claimant's money which promoted the defendant.

This reasoning was followed by the subsequent two cases in the trio.[19] But the decision does not address the conceptual difficulties discussed above, which continue to loom large and unresolved. Further, it has negative consequences for the rest of the law of unjust enrichment. First, it opens up the possibility of recognising the adequacy of indirect enrichment. Second, it offers the potential for proprietary remedies. We shall take each point in turn.

II. DIRECT AND INDIRECT ENRICHMENT

In the law of unjust enrichment, must the defendant's enrichment be at the direct expense of the claimant? Or might indirect enrichment suffice? And if so, what problems does that create?

In *Parc*, Lord Hoffmann said that the defendant's enrichment was at the direct expense of the claimant bank.[20] That is not convincing. The claimant's loan was made to H, who re-loaned it to Parc, with the money directed to pay off R, resulting in the defendant's benefit. This is a four party chain of events. Not only that, but the enrichment changes character down the chain, from receipt of money (how H and Parc and R were benefited), to improved prospects of debt recovery (the defendant's benefit). If anything, this is an exaggerated case of indirect enrichment.

Lord Steyn said that it would be 'pure formalism' to allow the interposition of H to defeat the claim in unjust enrichment.[21] This too is unconvincing. H was acting as principal, not in a purely formal capacity, but in order to derive substantive benefits, that is, to circumvent Swiss banking law.[22]

Burrows says that *Parc* was really a case of indirect enrichment after all.[23] I agree. And subsequent subrogation cases have expressly acknowledged the

---

[19] *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66; *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32.
[20] [1999] 1 AC 221, 235.
[21] [1999] 1 AC 221, 227.
[22] Contrast *Chong On Mei v Han Chun* (HCA 995/2012) [2016] HKCU 2305 (CFI).
[23] Burrows, *The Law of Restitution*, 3rd edn (Oxford: Oxford University Press, 2011) 153 n 48.

possibility that unjust enrichment can be made out with indirect enrichment.[24] But indirect enrichment causes problems:

To begin, let us consider 'leapfrogging'. Suppose that A contracts with B who contracts with C. Such chain contracts are a familiar feature of commercial transactions. Goods flow down the chain. If A goes unpaid, obviously A can sue B for breach of contract. But can A leapfrog B to sue C in unjust enrichment?

Now, leapfrogging might be possible in a number of situations. First, A might be able to rely upon the laws of agency. But this can avail a claimant across a number of causes of action, and is nothing unique to unjust enrichment. Second, A might have a proprietary remedy, for example by invoking the rules of tracing. But the court has held that tracing is not part of the law of unjust enrichment.[25] Third, C might have committed some wrong against A which entitles A to sue C directly. This might allow for restitutionary remedies, but again it takes the matter outside of unjust enrichment, for example into the civil wrongs of tort or equity.

Otherwise, there is a preponderance of case law against leapfrogging in unjust enrichment, insisting that the parties must be in a direct relationship.[26] This seems fair:

For a start, why should C be liable twice over, once in contract to B, and again in unjust enrichment to A?[27] If C pays A in unjust enrichment, what defence would C have against B's claim in contract? What if C has already paid B? Must C pay a second time to A? And if C only bought the goods on the terms agreed with B, why should C be liable on potentially different terms to A?

Further, if B is insolvent, the liquidators would collect in what B is owed, including any payment due from C, and divide the sum equally between the creditors, including A. Why should A sidestep that, and by suing C directly, take

---

[24] *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66; *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32; *Lee Yuk Shing v Dianoor International Ltd* [2016] 4 HKC 535 (CA), [110]–[111]. See too the general discussion in *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29, [37]–[66].

[25] *Foskett v McKeown* [2001] 1 AC 102 (HL); *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch) [95].

[26] *Colonial Bank v Exchange Bank of Yarmouth* (1885) 11 App Cas 84, 85; *Brown and Davis v Galbraith* [1972] 1 WLR 997 (CA); *Kleinwort Benson Ltd v Birmingham City Council* [1996] 4 All ER 733 (CA) 749, on appeal at [1999] 2 AC 349 (HL); *Pan Ocean Shipping Co Ltd v Creditcorp, The Trident Beauty* [1994] 1 WLR 161 (HL); *Lloyd's Bank plc v Independent Insurance Co Ltd* [2000] QB 110 (CA); *Uren v First National Home Finance Ltd* [2005] EWHC 2529 (Ch); *MacDonald Dickens & Macklin v Costello* [2011] EWCA Civ 930; *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch) [97]; *Yew Sang Hong Ltd v Hong Kong Housing Authority* [2008] 3 HKC 290; *Yukio Takahashi v Cheng Zhen Shu* (2011) 14 HKCFAR 558.

[27] *Greatworth Industrial Ltd v Sun Fook Kong Construction Ltd* [2006] HKCU 594 (CFI) [52], upheld on appeal at [2006] HKCU 2021.

priority over other creditors and recover its whole debt, not just a fair share? What would stop every other creditor from trying to do the same?[28]

Rather than accept a rule requiring direct enrichment only, some authors seek to address the problem of leapfrogging by other means.

Mitchell and Watterson suggest that if A sues C, that should preclude B from suing C. (That would seem to require the creation of a new defence in contract law.) Instead, they say, A should share their recovery with B. They call it a reverse analogy to contribution, 'were it ever explicitly recognized'.[29] But with contribution, when a claimant pays a creditor, that discharges the defendant's obligation to pay the creditor, because the creditor is fully indemnified for the one loss. This is not analogous. Here, there are two losses, one suffered by A, one suffered by B. When the first is satisfied, the second still remains. And why should A share their recovery with B, when they were entitled to a full recovery from B anyway (but chose to sue C instead)? The only analogous point is perhaps if A sues C, and recovers in full, then A cannot sue B, because A has no outstanding loss to compensate. But this does not prevent double liability on the part of C.

An alternative approach to preclude leapfrogging points to the existence of the B / C contract. Thus Virgo would characterise that contract as a 'legally effective basis' for C's receipt, which 'bars' a claim by A in unjust enrichment.[30] For Burrows, it would be a legal entitlement to the receipt, and thus a 'qualification' such that C's enrichment is not overall unjust.[31] Tettenborn,[32] and the editors of *Goff & Jones*,[33] would identify it as 'justifying grounds' which give C a legal entitlement to keep what they have received despite unjust enrichment otherwise being made out. Similarly, Edelman and Bant would label it a 'negating juristic reason'.[34] But there are difficulties with these approaches:

First, language like 'negating juristic reason' is obscure.

Second, is a 'bar' or a 'qualification' something which the claimant bears the burden of overcoming? Or is a 'justifying ground' a defence, with the burden of proof on the defendant?

Third, and most pertinently, where have these notions come from? To repeat, it is beyond controversy that a claim in unjust enrichment requires that the defendant be enriched, at the expense of the claimant, caused by an unjust factor. If those ingredients are made out, then the claim succeeds. There is no

---

[28] *Yew Sang Hong Ltd v Hong Kong Housing Authority* [2008] 3 HKC 290; *MacDonald Dickens & Macklin v Costello* [2011] EWCA Civ 930.

[29] Mitchell and Watterson, *Subrogation: Law and Practice* (Oxford: Oxford University Press, 2007) [5.58].

[30] Virgo, *The Principles of the Law of Restitution*, 3rd edn (Oxford: Oxford University Press, 2015) ch 7.

[31] Burrows, *The Law of Restitution*, 3rd edn (Oxford: Oxford University Press, 2011) 88–89.

[32] Tettenborn, *Law of Restitution in England and Ireland*, 3rd edn (London: Cavendish, 2002) 20–31.

[33] Mitchell, Mitchell and Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment*, 9th edn (London: Sweet & Maxwell, 2016).

[34] Edelman and Bant, *Unjust Enrichment*, 2nd edn (Oxford: Hart, 2016) ch 7.

recognised additional test of whether the claim, despite being otherwise made out, is still 'overall unjust'. At best, this looks like an attempt to sweep a number of residual problem areas into one miscellaneous group on ill-defined grounds. At worst, it looks like a final discretion on whether or not to admit the claim.

Or we might put the objection a different way: why should a contract (here B / C) trump a claim in unjust enrichment (A / C)? The answer cannot simply be 'because it does'.

Other areas in the law of obligations overlap, and it is not mere fiat that resolves any conflict. For example, a claimant might, on a given set of facts, look to sue for lack of reasonable care in either tort or contract. In such cases, the claimant is free to choose the cause of action.[35] Contract law does not have some constitutionally superior status. Now, contract might seek to exclude tortious liability. But that too is controlled, for example through the Unfair Contract Terms Act 1977,[36] or through contract law's own doctrines relating to reasonable notice and the incorporation of terms.[37] If a reasonable exclusion does pass scrutiny, it works not simply because contract law prevails. Rather, tort law itself enables that result. Any claim in tort might be met by a defence of *volenti*, on the basis that the claimant had voluntarily (contractually) assumed the risk of that harm. Or the court might find that no duty of care arose in tort after all, it not being just or reasonable to impose such a duty in tort given the pre-existing contractual relationship between the parties.[38]

In the same way, it should be the law of unjust enrichment itself which explains how leapfrogging is precluded by the B / C contract. Fortunately, there are just such principles. Recognizing these principles does two things. First, it shows that there is no need to invent an additional and novel fix to the problem of leapfrogging, because that problem is precluded from arising in the first place. Second, it reveals why any enrichment must be direct, because indirect enrichment falls foul of unjust enrichment's own internal rules.

There are three such principles to consider:

(I) C might argue (against A) that it was not enriched. (i) It received only what was already contractually due. That receipt already 'belonged' to C. There is no new enrichment beyond that previously bestowed by the contract. For example, In *Kleinwort Benson Ltd v Lincoln City Council*, the court said that a payee

---

[35] *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL).

[36] For example, liability in negligence for death or personal injury cannot be contractually excluded, while liability in negligence for other loss or damage can only be excluded if the contract term is reasonable: Unfair Contract Terms Act 1977, s 2.

[37] For example, the more onerous the exclusion of liability, the more effort must be taken to bring that term to the attention of the other party before it is deemed incorporated into the contract: *J Spurling Ltd v Bradshaw* [1956] 2 All ER 121 (CA), 125; *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 (CA).

[38] *Pacific Associates Inc v Baxter* [1990] 1 QB 993 (CA); *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1186 (Comm); *BSkyB Ltd v HP Enterprise Services UK Ltd* [2010] EWHC 86 (TCC) [538]–[543].

is not unjustly enriched if they were 'entitled to receive' the sum paid.[39] (ii) To adapt a point originally made by Edelman and Bant,[40] C merely swapped one asset (the contractual right to the receipt) for another asset (the receipt itself), leaving its net position unchanged. (iii) Any receipt, or entitlement to the receipt, is anyway cancelled out by a matching and simultaneous obligation on C to perform its side of the contract.[41] This is my preferred explanation, and it is consistent with a wealth of case law which precludes unjust enrichment on the basis that the recipient has given 'good consideration' for what it has received.[42] So for example, a bank is not enriched when it receives money for the account of one of its clients, because that receipt is matched by a contractual liability to pay the money back out to the client.[43]

(II) C might be able to invoke (against A) the defence of change of position: as a result of accepting receipt, C has paid B, or incurred a liability to pay B under the B / C contract.[44]

(III) We might say that B is an intervening party, who acts as a principal (not an intermediary), which thus breaks any link between A and C. This recognises the point that 'at the expense of' in the law of unjust enrichment does much of the work done in tort and contract by other doctrines like privity or proximity or remoteness.[45]

We can explore this third point through a further example. I give you a book for a birthday present. You do not like the book. So next week, you re-gift it, as another birthday present, to your friend. Here we have two separate transactions.

---

[39] [1999] 2 AC 349 (HL) 408. See too: *Yew Sang Hong Ltd v Hong Kong Housing Authority* [2008] 3 HKC 290.

[40] Edelman and Bant, *Unjust Enrichment in Australia* (Melbourne: Oxford University Press, 2006) 345.

[41] No argument can be made that the matching obligation is worth less than the receipt. This is because contract law does not permit inquiry into the adequacy of consideration: *Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87 (HL).

[42] *Barclays Bank Ltd v WJ Simms, Son and Cooke (Southern) Ltd* [1980] QB 677 (QBD) 695; *Yukio Takahashi v Cheng Zhen Shu* (2011) 14 HKCFAR 558 [38]–[39]; *Lloyd's Bank plc v Independent Insurance Co Ltd* [2000] QB 110 (CA) 130, 132; *Jones v Churcher* [2009] EWHC 722 (QB) [41]–[42], [48]. See too *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29, [52], where it was said that receiving good consideration precluded the claimant from suffering any loss. For there to be a claim in unjust enrichment, the claimant must suffer a loss corresponding to the defendant's gain: [51]–[58]. On the correspondence principle, see Virgo, *The Principles of the Law of Restitution*, 3rd edn (Oxford: Oxford University Press, 2015) 116-118.

[43] *Jeremy D Stone Consultants Ltd v National Westminster Bank plc* [2013] EWHC 208 (Ch); *Challinor v Juliet Bellis & Co* [2015] EWCA Civ 59.

[44] *Yukio Takahashi v Cheng Zhen Shu* (2011) 14 HKCFAR 558 [38]–[40]; *Lloyd's Bank plc v Independent Insurance Co Ltd* [2000] QB 110 (CA) 126.

[45] The authors of *Goff & Jones* suggest that concerns about the multiplication of ever more peripheral claimants and defendants might be met by ruling that gains made by some parties are too remote—although they concede that an independent and explicit remoteness rule has not yet emerged from the cases: Mitchell, Mitchell and Watterson, *Goff & Jones, The Law of Unjust Enrichment*, 9th edn (Sweet & Maxwell, 2016) [6–23]. My point here is that remoteness is already bundled up with the concept of 'at the expense of'.

You are clearly acting as a principal. The gift to your friend is from you. Now if instead I give you a book, as a birthday present for your friend, asking you to pass it on to her, and you do, you are clearly acting as an intermediary. The gift to your friend is from me.

Thus, if X sends Y a cheque through the post, it is surely a direct payment, even if the letter goes through the Post Office, and any number of intermediaries handle it. So too if X transfers money to Y, albeit via a series of bank accounts.[46] In other words, for a claim in unjust enrichment, there must be a transfer of value from the claimant to the defendant. This will continue to be the case even where the claimant effects that transfer through intermediaries. It will cease to be the case where there is an intervening party acting as a principal.[47]

Let us draw this all together:

Indirect enrichment is a bad thing to the extent that it raises the possibility of A leapfrogging B to sue C in unjust enrichment. This is undesirable because it exposes C to double liability, and it risks subverting the insolvency regime. Novel, supplementary fixes to the problem of leapfrogging are not convincing. Fortunately, there are techniques within the law of unjust enrichment which prevent leapfrogging – and thus reveal why indirect enrichment is conceptually incompatible with a claim in unjust enrichment. In particular, C can say that they were not enriched, because any gain (from B) was matched by a simultaneous liability (to perform C's part of the B / C contract); or by acknowledging that 'at the expense of' is defeated when an intervening party (here B) acts as principal.

But subrogation cases like *Parc* threaten to sidestep those controls. In *Parc*, H was acting as a principal, in order to circumvent Swiss banking laws. The defendant's enrichment, at the end of a four party chain of events, was indirect. If the result in *Parc* is to be defended, we need to find an alternative explanation for subrogation which does not risk the jeopardy of indirect enrichment in the law of unjust enrichment.

III. PROPRIETARY REMEDIES

Should the law of unjust enrichment ever provide proprietary remedies? Does subrogation countenance that possibility?

To repeat, subrogation is where A steps into B's shoes to take up B's rights against C. If B's rights against C provide only personal remedies, then

---

[46] *Shanghai Tongji Science and Technology Industrial Co Ltd v Casil Clearing Ltd* (2004) 7 HKCFAR 79. This is also the better explanation of *Relfo Ltd v Varsani* [2014] EWCA Civ 360; *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29 [48].

[47] That seems to be the approach in *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29. There, A paid VAT to B, who paid it to HMRC. The court held that HMRC were not enriched at the expense of A, since B was acting, not as an intermediary, but in their own capacity.

subrogation will provide only personal remedies.[48] Which is to admit that subrogation is not necessarily synonymous with proprietary remedies.

In *Parc*, the claimant was subrogated to R's position of priority over the defendant. The court did indicate that this was a personal priority over the defendant. The claimant did not gain a first legal charge, good against all the world. However, other subrogation cases have not been so cautious.

The second in the trio of cases is *Bank of Cyprus UK Ltd v Menelaou*.[49] In that case, a bank lent money to parents, secured by a charge on their house. The parents later sold their house. Thus the proceeds of sale should have gone to the bank to repay the loan. Instead, the parents wanted to use some of that money to buy another house for their daughter. The bank said that this was acceptable, as long as it got a replacement charge on the daughter's house. And indeed a charge was registered. But the daughter said subsequently that she knew nothing of this arrangement, and sought to have the charge cancelled, so that she would own the house outright. Because of her ignorance, the charge over her house was indeed invalid. But the court provided the bank with a remedy, and seemingly a proprietary one.

The reasoning was as follows. The daughter was enriched (by getting a house she did not pay for). This enrichment was at the expense of the bank, whose money made the purchase possible. The unjust factor was either mistake or failure of basis (the bank advanced money but did not get the valid security it expected in return). The bank could get a proprietary remedy as follows. The vendor of the daughter's house had an unpaid vendor's lien, covering the period between selling the house and being paid for it. The vendor was paid for it, but by the bank's money. Thus the bank's money paid off the vendor, allowing the bank to be subrogated to the vendor's position, and the lien.[50]

This suggests that subrogation may well provide proprietary remedies after all. Indeed, in the third case in the trio, *Swynson Ltd v Lowick Rose LLP*,[51] Lord Sumption said that 'subrogation is a remedy available to give effect to a proprietary right or in some cases to a cause of action'.

It is hotly contested in academic writing whether or not unjust enrichment should yield proprietary remedies. Here are my reasons against proprietary remedies:

First, it risks conceptual confusion. Property law starts with a *thing*, and then considers what happens when other people interact with it. Whereas unjust enrichment starts with a *person* enriched. It is difficult to see why unjust

---

[48] *Filby v Mortgage Express (No 2) Ltd* [2004] EWCA Civ 759; *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 2)* [2004] EWCA Civ 487; *Re Beppler & Jacobson Ltd* [2016] EWHC 20 (Ch).

[49] [2015] UKSC 66.

[50] Lord Carnwarth got to the same result by an alternative route using a *Quistclose* trust. As to which, see *Quistclose Investments Ltd v Rolls Razor Ltd* [1970] AC 567 (HL).

[51] [2017] UKSC 32 [18].

enrichment could ever have proprietary remedies when it is concerned with personal enrichment.

Second, recognizing proprietary remedies across the board in unjust enrichment would, once again, subvert the insolvency regime.

For example, if a claimant loans money, unsecured, to the defendant, who fails to repay it, the claimant might well have a cause of action in unjust enrichment, the unjust factor being failure of basis (the loan is not repaid), or perhaps mistake (as to the debtor's *current* solvency). In which case, the claimant might well have a personal remedy. If instead they get a proprietary remedy, that would convert them into a secured creditor. As Burrows says, that would destroy the law of insolvency at a stroke.[52]

Nevertheless, Burrows is perhaps the leading proponent of allowing proprietary remedies – but only sometimes. Proprietary restitution, he says, should only arise when the unjust factor operates from the beginning of the transaction, so that the defendant only ever obtains the property 'conditionally'. (This, he says, will be the case with transactions tainted by mistake or duress.) If instead the defendant obtains any property unconditionally, and the injustice arises later (for example, the defendant subsequently fails to perform their side of the bargain), then no proprietary remedy should be available. This is because, in the latter case, the claimant allowed the defendant to obtain the property unconditionally, and thereby took the risk of those 'unjust' circumstances arising later, and of the defendant's insolvency. The claimant should only be able to get a proprietary remedy, Burrows says, and so be treated as if a secured creditor, where they have not taken the risk of the defendant's insolvency.[53]

However, this approach is problematic. Assume, for example, that the claimant sells their car to the defendant, but now wants their car back. If the claimant seeks to sue in unjust enrichment, they must first set aside the contract of sale. Otherwise, for example, the defendant would be able to argue that they were not enriched, because they received the car with a matching obligation to pay for it (as we discussed above). So in what circumstances might the contract of sale be set aside?

If the contract is tainted by mistake, the only type of mistake which can set aside a contract does so by rendering the contract void. In which case, the contract never existed, and title never passed. The defendant did not gain 'conditional' title, but no title at all, which stayed at all times with the claimant. The claimant can recover the car, because it remains, and always was, their car.[54] This is a matter of property law.

---

[52] Burrows, *The Law of Restitution*, 3rd edn (Oxford: Oxford University Press, 2011) 174.

[53] Burrows, *The Law of Restitution*, 3rd edn (Oxford: Oxford University Press, 2011) 174–179. This approach is endorsed in Mitchell and Watterson, *Subrogation: Law and Practice* (Oxford: Oxford University Press, 2007) 213–215.

[54] *Cundy v Lindsay* (1878) 3 App Cas 459, 466.

If the contract of sale is tainted by duress (not mistake), this renders a contract voidable. (So too with misrepresentation, undue influence, and unconscionable conduct.) And 'full' title does pass. The defendant can deal with the car as their own, and even pass full title onto a third party, until the contract is rescinded, if at all (it might instead be affirmed). But if the contract is rescinded, it is cancelled, both future rights and past rights, as if the contract never existed. This reveals and restores an underlying previous state of affairs in property. In other words, title re-vests in the transferor, as if it had been there all along.[55] At least, that is so for common law rescission (e.g. for duress). With equitable rescission (e.g. for undue influence or unconscionable conduct), the property might now be held on constructive trust.[56] But either way, rescinding the contract automatically produces a proprietary interest.[57] Again, this is a matter of property law.

An alternative approach in unjust enrichment is redundant, and it is difficult to see how it would work anyway. How is the defendant enriched by the possession of a car which remains or reverts to being the property of the claimant?[58]

The principal argument, from various authors, seems to be that the defendant is enriched by the fact of possession: they could use the car; and factual possession gives them a legal right to defend that possession, against anyone except the true owner.[59] However:

First, if the defendant does actually use the car, then yes, they *might* get a benefit,[60] and that might be something which yields a restitutionary remedy: the defendant might have to disgorge their profitable (because free) use of the car by paying hire. But (i) this is restitution, not based on unjust enrichment, but on equitable or tortious wrongdoing (i.e. interference with another's property);[61] and

---

[55] *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525 (CA).

[56] *National Crime Agency v Robb* [2014] EWHC 4384 (Ch).

[57] Rescission will not re-vest title if, in the interim, a third party has acquired rights, being a good faith purchaser for value without notice. But, further proving the dichotomy between property law and unjust enrichment, that defence is again only applicable in property law, and is not available against a claim in unjust enrichment: *Foskett v McKeown* [2001] 1 AC 102 (HL) 129. See too: Virgo, *The Principles of the Law of Restitution*, 3rd edn (Oxford: Oxford University Press, 2015) 656.

[58] Swadling, 'Ignorance and Unjust Enrichment: The Problem of Title' (2008) 28 OJLS 627.

[59] Mitchell, Mitchell and Watterson, *Goff & Jones: The Law of Unjust Enrichment*, 9th edn (London: Sweet & Maxwell, 2016): [5–32]; Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Oxford: Hart, 2012) 93-95; Edelman and Bant, *Unjust Enrichment*, 2nd edn (Oxford: Hart, 2016) 58–59.

[60] However, in *Rowland v Divall* [1923] 2 KB 500 (CA), a claimant bought a car, and used it, only to find that they did not obtain title after all. The court held that there had been a total failure of basis sufficient to enable the claimant to recover the purchase price. In other words, the court felt able to overlook the use as a benefit, and say that it was title only which really mattered. See too: *Barber v NWS Bank plc* [1996] 1 All ER 906 (CA).

[61] *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 (CA); *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd's Rep 359 (QBD); *Ministry of Defence v Ashman* (1993) 66 P & CR 195 (CA).

(ii) this is a personal remedy (i.e. money to pay for the use of the car), not a proprietary one (i.e. return of the car).

Second, as to the legal right to defend possession: (i) the abstract right to defend goods in one's possession is something which the defendant already possessed anyway: it is a tortious right we all have. There is no new enrichment here. (ii) Gaining a legal right to sue in a specific instance in tort is not necessarily an enrichment either. For example, a person is surely not enriched by their neighbour's nuisance, even though they can now sue. (iii) It is difficult to see why a defendant would incur the cost of defending possession if they were not going to use the car – which simply takes us back to the point that use is different from mere (unused) possession. (iv) Grantham and Rickett suggest that any tortious right to defend possession is anyway cancelled out (so no enrichment) by the tortious liability to return possession to the true owner.[62]

At which point, once again, how is the defendant enriched by the mere unused possession of something which is the claimant's property? To press the point further, imagine that the claimant parks their car on the defendant's property, and the defendant does not know. Surely the defendant is not enriched by the mere (unused) presence of the car on their property.

Let us summarise the argument of this section so far:

Proprietary remedies in the law of unjust enrichment would be a bad thing. They are conceptually incompatible, because property law starts with a thing, whereas unjust enrichment starts with a person enriched. And they risk subverting the insolvency regime, by converting unsecured creditors into secured creditors through a personal cause of action. Further, they are not needed. This is because, when a transaction which transfers property is tainted, and so void or rescinded, property law already provides a proprietary remedy, by re-vesting title in the claimant. Which makes it redundant to seek the same outcome in unjust enrichment. Further still, with title re-vested, a defendant is anyway not enriched by the mere receipt (without title or use) of another's property.

Virgo says that no case has recognised that unjust enrichment gives rise to proprietary remedies. Instead, he says, unjust enrichment only leads to personal remedies.[63] This is also the tidier view.[64] It aligns the denial of proprietary remedies with the denial that tracing has anything to do with unjust enrichment.[65] And it is consistent with the dichotomy, noted above, that

---

[62] Grantham and Rickett, *Enrichment and Restitution in New Zealand* (Oxford: Hart, 2000) 40, 272–274. And again, see *Rowland v Divall* [1923] 2 KB 500 (CA).

[63] Virgo, *The Principles of the Law of Restitution*, 3rd edn (Oxford: Oxford University Press, 2015) 9, 11–12, 15–16, 559–560.

[64] Hong Kong case law also denies any proprietary remedy: *Top One International (China) Property Group Co Ltd v Top One Property Group Ltd* [2011] HKCU 1745 (CFI) [63]; *Sacmi Cooperative Meccanici Imola v Tam Chi Kok* [2005] HKCU 392 (CFI) [62].

[65] *Foskett v McKeown* [2001] 1 AC 102 (HL); *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch) [95].

leapfrogging is not available in the law of unjust enrichment, but might be available in property law.

And yet cases like *Menelaou* raise the spectre of proprietary remedies being available after all. Once more, if we support the outcome in cases like *Menelaou*, then we need to explain subrogation on a basis which avoids allowing proprietary remedies into the law of unjust enrichment.

However, before me move on, there is one final phenomenon which we need to address in this section: the constructive trust.

A. Constructive trusts and unjust enrichment

There is some suggestion in the case law that circumstances giving rise to a claim in unjust enrichment can lead to the proprietary remedy of a constructive trust.

In *Allcard v Skinner*,[66] the claimant made gifts to her mother superior when she became an initiate. When she later left the order, she sought to recover her gifts. The court said that she had left it too late; the gifts had been affirmed. But the court seemed to assume that, otherwise, the gifts would have been clothed with a constructive trust.

The case of *Allcard v Skinner* is often taken as supportive of the notion that a claimant can obtain a restitutionary remedy, in principle, by pleading undue influence. Unjust enrichment was not a recognised cause of action when that case was decided, but if the facts were to repeat, then it does seem that such a claimant could recover a personal restitutionary remedy (i.e. money to repay the value of the gifts). So where does the constructive trust come from?

The constructive trust arises because the facts of that case otherwise fit a well-entrenched principle of equity: where a gift is received by someone, to their personal advantage, who stands in a fiduciary relationship of influence as regards the donor, the recipient holds the gift on constructive trust.[67] It is not the cause of action in unjust enrichment which gives rise to the constructive trust. Rather, the constructive trust is a remedy provided for an equitable wrong. A claimant in a similar position to *Allcard v Skinner* has a choice between suing in unjust enrichment or claiming a constructive trust in equity.

Given that undue influence requires the defendant to hold a position of trust and confidence over the claimant, it may well be that, in many cases of undue influence, the alternative remedy of constructive trust is available. But it does not follow that a constructive trust will arise in respect of every other unjust factor. After all, mistake, duress, and failure of basis are all possible without the defendant being in a fiduciary position.

---

[66] (1887) LR 36 Ch D 145.

[67] *Re Biss* [1903] 2 Ch 40, 58; Martin, *Modern Equity*, 19th edn (London: Sweet & Maxwell, 2012) [12–009]; Virgo, *The Principles of the Law of Restitution*, 3rd edn (Oxford: Oxford University Press, 2015) 502–504.

And yet, in *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*,[68] it was held that money paid by mistake from one bank to another was also held on constructive trust, even though the recipient bank stood in no fiduciary relationship to the transferor.

However, that result was subsequently explained as follows. In *Westdeutsche Landesbank Girozentrale v Islington LBC*,[69] Lord Wilberforce said that the constructive trust arose as a result of it being unconscionable for the recipient bank to retain the second payment once it realized the mistake. In other words, the constructive trust did not arise to reverse any unjust enrichment. Rather, it arose in response to a separate equitable wrong of unconscionable retention.[70]

In short, a given set of facts might give rise to a claim in unjust enrichment for a personal restitutionary remedy, or to an equitable wrong which yields a constructive trust. They are alternative causes of action arising from the same facts. We should not blur them. Constructive trusts are not available in unjust enrichment. Which is a good thing, because of the problems which proprietary remedies would cause in the law of unjust enrichment.

IV. EXPLAINING SUBROGATION

In Australia, unjust enrichment has not been accepted as a cause of action, and has been rejected as an explanation for subrogation. Rather, subrogation is 'applicable to a variety of circumstances', governed by well-settled equitable principles, without any 'need of the imposition of the top-down reasoning which is characteristic of some all-embracing theories of unjust enrichment'.[71] We have already noted, in section 1 above, how subrogation might arise in different circumstances and upon different rationales.

Tettenborn also has reservations about whether subrogation should be part of the law of unjust enrichment.[72] Lord Carnwarth in *Menelaou* was 'less convinced' that subrogation ought to be explained through the prism of unjust enrichment, rather than property law.[73] Lord Neuberger expressed similar sentiments.[74]

---

[68] [1981] Ch 105.

[69] [1996] AC 669, 715.

[70] Glister and Lee, *Modern Equity*, 20th edn (London: Sweet & Maxwell, 2015) [26–011]; Virgo, *The Principles of the Law of Restitution*, 3rd edn (Oxford: Oxford University Press, 2015) 598-600. On the availability of a *Westdeutsche* constructive trust, see: *Chan Lap Kit v Yushun Technology Ltd* (DCCJ 130/2016) [2017] HKCU 212 (DC). It may be that, on a given set of facts, a claimant enjoys a choice between a claim in unjust enrichment, or a *Westdeutsche* constructive trust (just as undue influence can lead to a choice of claims) – see: *Guaranty Bank and Trust Co v Zzzik Inc Ltd* (HCA 1139/2016) [2016] HKCU 1679 (CFI).

[71] *Bofinger v Kingsway Group Ltd* [2009] HCA 44 [90].

[72] Tettenborn, *Law of Restitution in England and Ireland*, 3rd edn (London: Cavendish, 2002) 63–64.

[73] [2015] UKSC 66 [108].

[74] [2015] UKSC 66 [100] and following.

Virgo suggests that subrogation vindicates the claimant's equitable property rights.[75] But Virgo also says that subrogation arises when the ability to trace has been lost. In which case, it seems odd to characterise subrogation as vindicating the claimant's equitable rights, when those have been lost – and by subrogating the claimant to someone else's rights.

Instead, Palmer says that subrogation creates new equitable rights.[76] She says that this is equity giving effect to the intention of the property owner to grant the claimant a proprietary interest. Where that intention is not realised – for example, because some additional formality has not been complied with – then equity steps in, because it treats as done that which ought to be done.

However, this explanation does not easily fit the facts. In *Parc*, it was H who made the promise, but Parc against whom the debt was secured, with a priority over the defendant. In *Menelaou*, it was the parents who made the promise, but the daughter against whom the lien was effected. Certainly the daughter never intended the claimant to have a charge over her property. That was precisely why the registered charge was removed.

So cases like *Parc* and *Menelaou* still need to be explained on an alternative basis. My suggestion is this. What we are actually observing in those sort of cases is the equitable remedy of specific performance, but in a multi-party (rather than two-party) situation.

Specific performance is also an equitable remedy, whereby the court orders the party in default to perform their contract as promised. This is how it is described in *Chitty on Contracts*:[77]

> The historical foundation of the equitable jurisdiction to order specific performance of a contract is that the claimant cannot obtain a sufficient remedy by the common law judgment for damages.[78] Hence the traditional view was that specific performance would not be ordered where damages were an 'adequate' remedy.[79] …Later again, the courts have asked whether specific performance was the most *appropriate* remedy in the circumstances of each case,[80] and whether specific

[75] Virgo, *The Principles of the Law of Restitution*, 3rd edn (Oxford: Oxford University Press, 2015) 638–639. Watterson too considers the possibility of a property law approach, but ultimately rejects it: Watterson, 'Subrogation', in Virgo and Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge: Cambridge University Press, 2017) 455–457.

[76] Palmer, 'Unjust Enrichment, Proprietary Subrogation and Unsatisfactory Explanations' (2016) 28 Singapore Academy of Law Journal 955.

[77] *Chitty on Contracts*, 32nd edn (London: Sweet & Maxwell, 2016) [27–005]. Footnotes in the quotation have been streamlined to give the leading case only. This paragraph in *Chitty* was endorsed in *Araci v Fallon* [2011] EWCA Civ 668 [42].

[78] *Harnett v Yielding* (1805) 2 Sch & Lef 549, 553.

[79] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 (HL) 11.

[80] *Beswick v Beswick* [1968] AC 58 (HL), 88, 90-91, 102.

> performance will 'do more perfect and complete justice than an award of damages'.[81] The point was well put in a case in which an interim injunction was sought: 'The standard question… "Are damages an adequate remedy?" might perhaps, in the light of the authorities in recent years, be rewritten: "Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?".'[82]

It is interesting to note that, in Canada, it has been said that subrogation is a discretionary remedy, not available where the claimant has other appropriate remedies.[83] This suggests a further similarity between subrogation and specific performance. Palmer also acknowledges the 'analogy' with specific performance for breach of contract.[84] And Watterson, while he subscribes to the theory that subrogation is a function of unjust enrichment, nevertheless rejects the notion that subrogation is an entitlement which arises as of right. He says that the defendant incurs a liability to be subjected to subrogation 'if this is needed'.[85] This too hints at parallels with specific performance, which tends to be ordered when other remedies are inadequate.

How does a specific performance analysis work in cases like *Parc* and *Menelaou*?

In *Parc*, the claimant was promised by H repayment by Parc in priority over the defendant. But H did not fulfil the promise. Specific performance would, in effect, make good on H's promise, and provide the claimant with priority over the defendant after all.

In *Menelaou*, the bank was promised by the parents a charge over the daughter's house. The attempt to charge the house was not successful. Again, specific performance would, in effect, make good on the parents' promise, and attach the house as security for the loan.

Specific performance is ordinarily a two party phenomenon. It might be available in three party cases, where X compels Y to perform the X / Y contract in order to benefit Z.[86] But more problematic is where performance of the X / Y contract has the potential to negatively impact Z. In *Parc*, it was H's promise, but fulfilling it had an impact on the defendant creditor. In *Menelaou*, it was the parents' promise, but fulfilling it affected the daughter. Subrogation avoids these negative consequences, as follows.

---

[81] *Tito v Waddell (No.2)* [1977] Ch 106 (ChD) 322.
[82] *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 WLR 349 (CA) 379.
[83] *Armatage Motors Ltd v Royal Trust Corp of Canada* [1997] OJ No 3259 (Ontario CA), [22]–[23], [33].
[84] Palmer, 'Unjust Enrichment, Proprietary Subrogation and Unsatisfactory Explanations' (2016) 28 Singapore Academy of Law Journal 955 [56].
[85] Watterson, 'Modelling Subrogation as an Equitable Remedy' (2016) 2 Can J Comp & Contemp L 609.
[86] *Beswick v Beswick* [1968] AC 58 (HL).

Subrogation looks at the picture before the broken promise. In *Parc*, the defendant's debt was a second legal charge, subordinate to R's first legal charge. In *Menelaou*, there was a time when the daughter's house was subject to the unpaid vendor's lien. If the claimant can replace R or the unpaid vendor, then the picture after specific performance is structurally unchanged. The defendant still has a second legal charge. The daughter's house is still subject to a lien. They are no worse off. They are unaffected. Further, by allowing the claimant to replace R or the unpaid vendor, the claimant's expectations are fulfilled, by obtaining priority as H promised, or securing the loan against the house as the parents promised.

Thus subrogation does two things at once. (1) It looks for a position to which a claimant can be subrogated, which would fulfil the claimant's expectations by providing it with what it had been promised by its counter-party. (2) At the same time, by slotting the claimant into that other position, the overall picture remains structurally undisturbed, so that third parties are unaffected.

Further, these two events are causatively related: the vacation of the slot (for the claimant to assume) is attributable to the claimant's performance of its side of the contract; taking up that slot provides the claimant with the expected counter-performance.

This explanation finds support in an alternative reading of the final case in the trio, *Swynson Ltd v Lowick Rose LLP*.[87]

As for the facts, Co 1 made a loan to Co 2 to enable it to buy Co 3. But first, Co 1 and Co 2 instructed the defendant accountants to report on Co 3's financial position. The defendant failed to notice problems with Co 3's finances. So when Co 2 bought Co 3, it was not the anticipated success, and Co 2 was unable to pay back the loan to Co 1. So the claimant, the owner of Co 1, made a personal loan to Co 2, which Co 2 had to use to repay Co 1. This was done because it produced certain fiscal benefits for Co 1. Co 1 sought to sue the defendant accountants. The defendant conceded liability, but denied causing any loss, because, in the end, Co 2 had repaid the loan to Co 1. So the claimant sought to be subrogated to Co 1's position. This was rejected by the court.

Now, it is true that *Swynson* purported to acknowledge that subrogation was a function of the law of unjust enrichment. But subrogation was denied. And hints at an alternative approach can be found. For example, Lord Sumption, for the majority, said that subrogation 'operates to specifically enforce [the claimant's] defeated expectation'.[88] Lord Mance said that 'subrogation can redress the position where a claimant has bargained for a benefit which does not materialise, by putting the claimant in the position which he expected'.[89]

---

[87] [2017] UKSC 32.
[88] [2017] UKSC 32 [30].
[89] [2017] UKSC 32 [86].

Further, it is notable that Lord Mance and Lord Neuberger both accepted that the claimant in *Swynson* was acting under a mistake. (The claimant thought that, by providing his loan to Co 2, to repay Co 1, this would not affect the ultimate liability of the defendant to pay.) Nevertheless, they both said that this was insufficient to provide a subrogation remedy. This was because the claimant got what he bargained for in the loan transaction: repayment by Co 2 of the loan from Co 1; and a separate debt from Co 2 to the claimant, secured by fixed and floating charges over Co 2's assets. Thus there was no defeated contractual expectation. (Lord Sumption also highlighted the difference between a defeated expectation, and mistake.)

Now, there is no doubt that mistake is a recognised unjust factor which gives rise to claims in unjust enrichment. And there was admittedly a mistake in *Swynson*. Yet subrogation was still denied. Which suggests that a claim in unjust enrichment does not ground subrogation. Instead, *Swynson* explains that subrogation was refused because there was no defeated contractual expectation. And that is consistent with subrogation being an aspect of contractual specific performance: no subrogation, because the claimant got what they contractually bargained for. (Whereas in contrast, both *Parc* and *Menelaou* were cases of defeated expectations.)

CONCLUSION

One prominent theory is that subrogation arises to reverse unjust enrichment. A closer inspection suggests that subrogation arises in a variety of circumstances upon a variety of rationales. But might one of them be based on unjust enrichment? A trio of cases in the House of Lords and Supreme Court seem to suggest as much. The context is so-called subrogation to extinguished rights. It is where C pays D's creditor, thereby discharging D's obligation to the creditor. This is said to enrich D, at the expense of C, who has a direct claim against D in unjust enrichment. This direct claim can be supplemented by subrogation to the creditor's rights.

However, viewing subrogation this way creates conceptual difficulties. First, subrogation is admittedly only invoked when *better* than the direct claim, which surely cannot be. How can the self-same cause of action reverse an unjust enrichment in the direct claim, and in the indirect claim reverse it *and then some*? How can a claim in unjust enrichment do more than reverse an unjust enrichment? Second, subrogation is not an alternative *remedy* for the direct claim, but rather gives C access to the creditor's rights, which are still to be enforced. In other words, successfully pleading an underlying cause of action in unjust enrichment results in no remedy, but merely access to a different cause of action, which still needs to be made out in turn. This is highly unorthodox, that a successful cause of action gives no remedy, but merely a second bite of a different cherry.

Further, seeing subrogation as a function of unjust enrichment creates incoherence for the law of unjust enrichment, in two ways:

First, the subrogation cases are explicit that indirect enrichment might suffice. But indirect enrichment distorts the concept of 'at the expense of', whose role in unjust enrichment is akin to privity or proximity or remoteness in tort and contract. In so doing, it opens the possibility of leapfrogging, that is, where A leapfrogs B to sue C. That in turn is bad because it exposes a would-be defendant (here C) to the possibility of double liability (to A in unjust enrichment, and to B in contract), and because it risks subverting the insolvency regime. Fortunately, a proper understanding reveals that leapfrogging, and indirect enrichment, are already precluded in unjust enrichment, through principles internal to the law of unjust enrichment. So if subrogation is dependent on indirect enrichment, and indirect enrichment is incompatible with the underlying principles of unjust enrichment, then subrogation in such cases must be explained on an alternative basis.

Second, the subrogation cases raise the possibility of proprietary remedies. These are otherwise not available in unjust enrichment. (In particular, cases giving rise to constructive trusts can be explained as founded upon equitable wrongs.) And indeed, proprietary remedies should not be available. They sit ill conceptually with unjust enrichment's focus on the personal enrichment of a defendant. And again they risk subverting the insolvency regime. Nor are they needed. Title which has not been transferred can be vindicated in property law. And when title has been transferred, a tainted contract can be rescinded, restoring the previous state of affairs, and re-vesting title, making any proprietary claim in unjust enrichment redundant. And not just redundant, but conceptually impossible, since a defendant is not enriched by the mere receipt (without title or use) of another's property. And yet the subrogation cases risk upsetting this order.

If subrogation is not part of the law of unjust enrichment, then its results can be preserved, but without the damage. Subrogation, at least in that trio of cases, can be explained on an alternative basis. What we see there is the application of a similar equitable remedy, namely specific performance – but unusually in multi-party (rather than two-party) situations.

Specific performance is usually a two party remedy. When third parties are involved, any solution needs to provide the claimant with what they were promised, without negatively impacting on third parties not privy to that promise. Subrogation achieves just that:

Subrogation looks for a position to which a claimant can be subrogated. This position will have been vacated as a result of the claimant's performance of its side of the contract. This position will also fulfil the claimant's expectations of counter-performance, by providing it with what it had been promised by its counter-party. And by slotting the claimant into that position, the overall picture

after specific performance remains structurally undisturbed compared to the picture before specific performance, so that third parties are unaffected.