Tracing at Law, the Exchange Product Theory and Ignorance as an Unjust Factor in the Law of Unjust Enrichment

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Introduction

Restitution as a remedial response to the causative event of unjust enrichment has reached the stage of development where its existence is hard to deny.[1] The basic charter of the law of restitution finds clear expression[2] in the well refined formula enunciated by Professor Peter Birks. The formula prescribes that for the plaintiff to recover there must be:

(a) unjust;
(b) enrichment;
(c) at the expense of the plaintiff:
    (i) by subtraction from the plaintiff; or
    (ii) by doing wrong to the plaintiff;
(d) where no defences are applicable.[3]

Each element is constantly being defined as the whole subject

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1 Unjust enrichment has been recognised as a causative event to which the law will respond by way of restitution in the highest courts of Australia, Canada and the United Kingdom. The scope and operation of this causative event still evokes strong disagreement.

2 Although free acceptance has been cogently criticised by Andrew Burrows and interceptive subtractive enrichment by Lionel Smith, the basic Birks formula holds popular support. Issues such as quantifying enrichment and restitution as the most appropriate response have and will continue to generate criticism of the Birks formula. Andrew Burrows recent textbook *The Law of Restitution* (Butterworths, 1993) adopts the structure of Birks' formula but the substance of Burrows' approach is in many respects different to Birks'.

3 P Birks, *An Introduction to the Law of Restitution* (OUP, 1989) Ch 1.

continues to develop. After progressive approaches to unjust enrichment in Canadian and Australian Courts, the House of Lords has now embraced the legal event of unjust enrichment.[4]

Although decisions of the House of Lords are becoming less persuasive as far as Australia is concerned, English developments in the law of restitution cannot be ignored. Apart from the courts, academics in England are constantly striving to further the understanding of unjust enrichment. The English judgments and writings give food for thought. Their wholesale adoption is not, however, warranted. As Justice Gummow recently pointed out[5] in his 'correct' interpretation of *Phillips v Homfray*,[6] care must be taken in the reinterpretation of old cases in the name of unjust enrichment. This is not to say that writings should ignore theories that law is interpretive, or that it is historically contingent, but merely to say that if old cases are used as justification for modern advances faith must be paid to their original interpretation of the law.

The purpose of this article is to explore the interpretation Lord Goff and Professor Birks place upon the old case of *Taylor v Plumer*[7] in developing their views of unjust enrichment. *Taylor* is a case vital to the understanding of tracing at law and has recently attracted attention in the landmark case of *Lipkin Gorman v Karpnale*.[8]

To appreciate fully the new and dynamic role Lord Goff and Professor Birks postulate for tracing at law in a restitutionary context it is necessary to rehearse the facts of *Lipkin Gorman* and to analyse the rationale of Lord Goff's judgment in that case. Part I outlines the facts of *Lipkin Gorman*. Part II explains the operation of the generic conception of unjust enrichment and the way Birks gives it definition in terms of the ignorance unjust factor. This part will also highlight the place of ignorance as an unjust factor within the traditional range of civil obligations protecting property. Part III describes the way in which the prerequisites for restitution (especially 'at the expense of') were satisfied in *Lipkin Gorman*. This leads to Part IV which highlights the theoretically incorrect use of *Taylor v Plumer*.

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4 *Lipkin Gorman* v *Karpnale Ltd* [1991] 3 WLR 10 was the first modern case to embrace unjust enrichment and has been followed recently by *Woolwich Equitable Building Society* v *IRC* [1992] 3 WLR 366.

5 Mr Justice Gummow, 'Unjust Enrichment, Restitution, and Proprietary Remedies' in PD Finn (ed), *Essays on Restitution* (Law Book Co., 1990).

6 (1883) 24 Ch D 439.

7 (1815) 3 M & S 562.

8 [1991] 3 WLR 10.

Part I: Lipkin Gorman in Outline

Lipkin Gorman v Karpnale[9] was a case involving a partner in a firm of solicitors whose name was Cass. Cass through misfortune had developed an addictive liking for gambling particularly at the Playboy Club (a licensed casino owned and operated by the respondent Karpnale Ltd) in Mayfair. At one stage or another Cass decided to feed his gambling habit from money in the firm's client account, no doubt because his personal reserves of money had disappeared.

Cass continued on gambling, sometimes winning, but inevitably losing a great deal of money to the Playboy Club. The firm of Lipkin Gorman of which Cass was a partner sought to recover the money Cass had taken from them. The first step was to decide who to sue; and the second what to sue for. Cass, now the proverbial man of straw, could not be pursued seriously in the civil courts as he had no means of satisfying any judgment against him.[10] The original action was brought against the bank through whose hands the money had passed and the Club. At various stages the bank was sued in contract, tort and equity (breach of trust), while the Club was sued for tort and unjust enrichment.[11] By the time the action reached the Lords the bank was no longer a respondent.

Cass had primarily taken cash from the client account. However, on one occasion he procured a bankers draft payable to the firm, which was exchanged for gambling chips at the club. A majority of the House of Lords gave judgment that the bankers draft had been converted and that damages were the appropriate remedy.[12] This aspect of the case is not central to the theme of this article and will not be explored in further detail.

The appeal to the Lords nominated the Club (its corporate identity to be exact) as the appropriate respondent. The intriguing aspect of the case was to identify the form of legal obligation between the Club and Solicitors.

The Court of Appeal had decided by majority that the Club had given consideration for the cash received and therefore the money

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9 Note 4 above.

10 Cass in fact absconded to Israel. In due course he was found and extradited to the UK where he was convicted of theft and jailed.

11 The action was one for money had and received but, as Birks has pointed out, the use of this formulation obscures the nature of the action. In modern terms the Club was sued in unjust enrichment.

12 [1991] 3 WLR 10 at 15 (per Lord Bridge), 23 (per Lord Griffiths), 23 (per Lord Ackner), 37ff (per Lord Goff).

had passed as currency.[13] The dissenting judge had held that the cash had been converted and that the Club was liable in damages for conversion. The House of Lords were unanimous in saying that no consideration had been given by the Club for the cash. The basis of such a conclusion was that the contract of gaming between Cass and the Club was void pursuant to s 18 of the *Gaming Act* 1845 (Eng). This issue of whether handing over the cash for gambling chips created a contract void by statute but not illegal, was dealt with at length by the Lords; however it is not the aim of this analysis to give further insight into that discussion.[14]

Having come to the conclusion that valuable consideration had not been given for the money and that consequently the money had not passed as currency, their Lordship's reasoning becomes very interesting indeed.

The Issues Defined

The claim by the Solicitors against the Club was for money had and received, or put in modern terminology, for restitution of the enrichment gained by the Club (at the expense of the Solicitors and in circumstances rendering it an unjust enrichment).[15]

The Lords found that an unjust enrichment had occurred but were less helpful in defining the unjust factor. If unjust enrichment is to be a workable concept it must be capable of being constrained in its application by the judiciary; it must be definable. In line with two modern writers on the philosophy of law it might be said that the interpretive community[16] or the surrounding political and legal system[17] must be capable of giving substance and constraint to the

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13 On this point see *Miller* v *Race* (1758) 1 Burr 452 where Lord Mansfield makes the classic statement that money cannot be recovered after it has been paid away 'fairly and honestly upon a valuable and bona fide consideration.' For more detail on this point see FA Mann, *The Legal Aspect of Money* (4th ed, OUP, 1982) pp 3-28. See further note 56 below, where the rationale of the bona fide purchaser defence is explained in terms of change of position: see also Birks, note 15 below, at 490-492.

14 Lord Goff's judgment contains some interesting and contentious insights on this issue: see *Lipkin Gorman*, note 8 above, at 30-32.

15 A complete analysis of *Lipkin Gorman* in terms of the Birks formula is undertaken by Birks himself in 'The English recognition of unjust enrichment' [1991] *Lloyd's Mar and Comm LQ* 473.

16 A concept developed by Stanley Fish in *Is There a Text in this Class* (Harv UP, 1980).

17 The approach of Ronald Dworkin as refined in *Law's Empire* (Fontana, 1986). The use of the word 'system' in this context has been criticised by Charles Sampford in *The Disorder of Law* (Blackwell, 1989).

term so as to prevent it from becoming an unruly horse exercisable in any shape or form. A definition constructed by academics is that unjust enrichment embodies those concepts which have been judicially recognised as justifying the recovery of the subtractive gain. Birks influenced by other supporters of unjust enrichment has led the modern development of this systematic construction. The unjust factors (ie the factors determining when the enrichment is unjust) as gleaned from the cases and employed by Birks are:

- Vitiated Transfers
  - (a) Mistake
  - (b) Compulsion
  - (c) Inequality
  - (d) Ignorance
- Qualified Transfers Failing to Meet Conditions of Transfer
  - (a) Failure of Consideration
- Free Acceptance of Enrichment
- Ultra Vires Exaction
- Policy Motivated Unjust Factors.[18]

A wrong done to a person is also an unjust factor. However, restitution for wrongs is not concerned with subtractive enrichment. *Lipkin Gorman*, as the House decided, was a subtractive enrichment case in that the Solicitors' loss was the Club's gain.

Part II: Ignorance as an Unjust Factor

Professor Birks[19] provides the explanation that vitiated transfer in the guise of ignorance was the unjust factor operating in *Lipkin Gorman*. Ignorance is a developing concept in unjust enrichment and is applicable primarily in cases where funds have been stolen or misdirected, the plaintiff being ignorant or unaware of the taking or misdirecting.[20] Birks claims that ignorance, to an even greater extent

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18 Mason CJ, Deane, Toohey, Gaudron and McHugh JJ in *David Securities P/L* v *Commonwealth Bank of Australia* (1992) 66 ALJR 768 at 777-778 have at least gone as far as recognising the sub generic unjust factors of vitiated and qualified transfer. The judgment of Deane and Dawson JJ in *Baltic Shipping* v *Dillon* (1993) 111 ALR 289 at 312-314 clearly evidences the acceptance of the law of unjust enrichment in Australia.

19 Birks, note 15 above, at 482 ff.

20 For fuller discussion see P Birks, 'Misdirected Funds: Restitution from the Recipient' [1989] *Lloyd's Mar & Comm LQ*, 296. It is interesting to note that Birks advocates the view that ignorance crosses the law and equity divide: see his analysis of *Re Diplock* [1948] Ch 465. This

than mistake, generates unjust enrichment because it vitiates the transfer between plaintiff and defendant.[21] As he suggests, there could be no better example of a transfer tarnished by vitiated intent than a transfer carried out in ignorance of the plaintiff. In many ignorance cases there will be a first recipient, usually the thief, who will pass the funds on to a second recipient.[22] Besides the issue as to whether there is subtractive enrichment, some have argued against this third party liability in unjust enrichment.[23] The cogency of this argument where a subtractive enrichment can be located is hard to defend.[24]

The argument is that the liability of the second recipient in unjust enrichment cannot always be rationalised under the sub generic principle of vitiated transfer as the first recipient more than likely passed onto the second recipient with full volition and free of vitiating circumstances. Thus, Burrows argues, one must resort to the apparently defective theory of Stoljar where one finds proprietary reasoning as a touchstone of restitution. On making such discovery, Burrows is confident in saying the second recipient should only become liable if that recipient receives funds in which the plaintiff still has a proprietary interest. Proprietary reasoning, which Burrows suggests is defective in all other respects, rises phoenix like from the ashes to impute liability instead of the non-symmetrical non-voluntary transfer principle.

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approach signals his ambition to unify law and equity where possible and to remedy unjust enrichment in law or equity. See L Smith, below note 62, at 497-500 where *Re Diplock* is analysed in terms of interceptive subtractive enrichment and Birks' analysis is criticised. The ignorance doctrine is also applicable to chattels in general but because of the way title to most chattels is transferred and of the durability of most chattels, the ignorance doctrine is not frequently invoked. However if ignorance is held to have an equitable dimension then chattels in general may be the subject of more ignorance based actions.

21 Birks, note 20 above, at 305.

22 It is not necessary for the thief to be a recipient. The thief may simply misdirect the funds and never actually receive them. This variation has no ramifications for the general principles underlying the action; although Sir Peter Millett has used the distinction as a limitation, suggesting recovery in personam is limited to the two party situation where the thief simply misdirects: see Sir Peter Millett, 'Tracing the Proceeds of Fraud' (1991) 107 *LQ Rev* 71 at 77. Millett in line with his interpretation of *Banque Belge pour l'Etranger* v *Hambrouck* [1921] 1 KB 321 argues that the liability of the second recipient only arises where that recipient still holds some of the plaintiff's funds: see Millett J in *AGIP (Africa) Ltd* v *Jackson* [1990] Ch 265 at 287.

23 See A Burrows, 'Misdirected Funds - A Reply' (1990) 106 *LQ Rev* 20.

24 Birks, note 20 above, at 306ff.

Ignorance cases (whether you include the decisions in equity or not) will always involve the second recipient receiving funds to which the plaintiff retained some form of proprietary interest (most likely a power in rem to vest the exchange product in the plaintiff) up until receipt by the second recipient. Therefore Birks is surely correct in saying the plaintiff's intent to transfer to the defendant (second recipient) the plaintiff's object of value (proprietary interest) is vitiated by ignorance (or whatever unjust factor is involved), and thus restitution lies. If the plaintiff always retains a proprietary interest up to receipt by the second recipient then the existence of the first recipient is little more than a circumstance or indicium of ignorance. In the end these three party situations can be analysed in the same framework as two party situations. In both an enrichment flows to the final recipient at the expense of the plaintiff in circumstances where the plaintiff's vitiated intent to transfer makes the whole process unjust.[25]

If Burrows were correct, he would satisfy the 'at the expense of' and the 'unjust factor' in these two recipient ignorance cases by the same means, ie an existing proprietary interest in the plaintiff. The proprietary approach of Burrows would then lack any unique definition of the unjust factor above proprietary reasoning.[26]

Proprietary reasoning is important to the whole ambit of unjust enrichment as Stoljar once attempted to point out. It would seem that Birksian restitution is totally concerned with the right to a proprietary interest or, at a more abstract level, a right to value in an object of worth, the law of unjust enrichment being in effect a further definition of that right in that it explains the process of lawful alienation of proprietary interests or value. It would seem that Birks is right to move beyond proprietary reasoning as a basis for the law of unjust enrichment to such concepts as vitiated transfer and even value, but one should not deny that a right to hold a proprietary interest underlies the whole subject. Once one moves to Birks' level of analysis, it would seem almost irrelevant for the purpose of determining the unjust factor whether proprietary reasoning is invoked or not.

The foregoing is not meant to deny that ignorance as an unjust factor in its operation has a unique relationship with the concept of proprietary interests. The subtractive aspect of the Birks formula in ignorance situations does rely on a unique role for proprietary

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25 Burrows has recently adopted this position: A Burrows, *The Law of Restitution* (Butterworths, 1993) pp 139-150.

26 Burrows shows support for a 'retention of plaintiff's property without consent' unjust factor although this unjust factor operates to facilitate proprietary rather than personal remedies: id at pp 140-41, 362-69.

interests.

The Proprietary Aspect of Ignorance: 'at the expense of'

Ignorance as an unjust factor will sustain an action at law where a proprietary interest in the funds (or other chattel) passing to the defendant is retained/held by the plaintiff at least to the point of (or more properly immediately preceding) receipt by the defendant.[27] This is not unusual and is the standard way that one proves 'at the expense of' in all areas of unjust enrichment. After all the basis of the subject is illegitimate interference with proprietary interests. The proprietary interest involved may be what is traditionally known at law as title to the chattel or it may take the form of a *power in rem* that is a legal right to claim through a curial order title to a chattel at law. Birks equates a *power in rem* with the *mere equity* which is accorded the full status of a proprietary interest in some circumstances.[28] It is probable Birks would argue that the *power in rem* does not represent a

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27 Identifying the continued existence of a proprietary interest will be contingent upon the potential to successfully invoke tracing rules. Although we are some one hundred years beyond the administrative fusion of law and equity confusion still exists about the scope and application of tracing rules. For many, the time has come to unify and universalise the rules of tracing at law and in equity.

28 *Latec Investments Ltd* v *Hotel Terrigal Pty Ltd* (1965) 113 CLR 265 esp at 290-291; RP Meagher, WMC Gummow, and JRF Lehane., *Equity: Doctrines and Remedies* (3rd. ed, Butterworths, 1992) at paras 121-125. Birks' concern is that the 'tracing equity', unless seen as a power, will multiply into numerous equitable interests held by the plaintiff concurrently when there is only valid claim to a certain value. For example, if the 'tracing equity' gives rise to equitable interests from the start the plaintiff could theoretically hold an equitable interest in the original funds taken and their substitute now held by the thief, (although the bona fide purchaser defence will prevent this on many occasions). Birks is keen to limit tracing to the concept of tracing value as opposed to tracing proprietary interests. His view is that once the value is tracked down the plaintiff can exercise the *power in rem* and claim property in the specific item in which the value now exists. It is arguable that the same effect can be achieved by regarding the 'tracing equity' as generating equitable interests defeasible upon value being recovered, and this is more in line with Menzies J's judgment in *Latec*, above. Why change from a proprietary to a value approach? The Birks motivation is no doubt to rationalise the final power to recover a proprietary interest as a restitutionary remedy: see Birks, note 3 above, at pp 393-94. Burrows, note 25 above, at pp 68-9 suggests the *power* analysis is appropriate only in cases of substitution and not in cases of mixture.

proprietary interest in the chattel received by the defendant.[29] His

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29 Birks intimates this is his conclusion when discussing *Re Leslie* [1976] 1 WLR 292 and *Re Ffrench's Estate* (1887) 21 LR (Ir) 283: see Birks, above note 15, at 479. It should be pointed out that Porter MR in *Re Ffrench's Estate* (at 312) clearly anticipates the *power in rem* to be capable of being an equitable interest in some cases. For instance, it would seem that if the trustees went bankrupt Porter MR would have held the *power in rem* to be a security/real interest in the exchange product held by the trustees. As well, Porter MR suggests that where the priority dispute is between the *power* holder and a volunteer the *power* is accorded proprietary status. Birks' conclusion on the status of the *power* is quite alarming if one is to suggest that the whole value of the restitutionary power to vest the exchange product in the plaintiff is to avoid unsecured status in insolvency situations. In light of Birks' agreement with *Re Leslie,* above, it is arguable that Birks would see an unexercised restitutionary power as having no higher status than a right in personam in an insolvency context. Then would follow the dilemma (because this is not a *revesting* situation - see note 33 below) as to whether the power could be exercised after insolvency (retrospectively) and on what theoretical basis. The problem is that insolvency law has traditionally required creditors to share pari passu in the insolvent's estate. If the creditor holds a right in rem then the advent of insolvency is not a problem as the creditor can claim her or his proprietary interest and remove it from the insolvency context: R Goode, *Principles of Corporate Insolvency Law* (Sweet and Maxwell, 1990) pp 17-22. In Birks' scheme if the *power in rem* is to have privileged status in insolvency it must come from some notion analogous to the one that supports an approach to remedial proprietary rights based on a notion of justice: J Glover, 'Equity Restitution and Proprietary Recovery of Value' (1991) 14 *UNSWLJ* 247 at 273-280. On the problems such remedial proprietary rights can cause in an insolvency context and if they are allowable, see: R Goode, 'Property and Unjust Enrichment' in A. Burrows (ed), *Essays on the Law of Restitution* (OUP, 1990) at pp 240-244. After *Lipkin Gorman,* note 4 above, the denial of the power of a privileged status in insolvency proceedings would seem illogical. See also J Glover, 'Constructive Trusts and Insolvency' (1991) 19 *ABLR* 97 who argues that an equitable interest born of perfection of the constructive trust *equity* (cf *Re Jonton Pty Ltd* [1992] Qd R 105) is privileged in bankruptcy. Yet this conclusion is reached on the premise that the equity can be invoked retrospectively which is another way of saying a proprietary interest always existed, and even then Glover is drawn to assess the justice of such a privilege in bankruptcy. The constructive trust as traditionally known can arise in circumstances (Burrows suggests in all circumstances) where Birks' notion of proprietary base is absent. Thus the question of the justice of the proprietary remedy is readily apparent. What is being suggested here, however, is that, even with a proprietary base, Birks' reasoning still leaves the question as to how there can be the vesting of a new interest after insolvency without breaching the fundamental principle of pari passu. If the *power* is seen to be a proprietary interest this problem is avoided. If this step is not taken Birks must claim the *power* when

suggestion might be that the *power in rem* although not a proprietary interest is sufficient to prove that the value received by the defendant was subtracted from the plaintiff. Birks implies that the *power in rem* fits the subtractive proprietary paradigm yet this is hard to accept as in his scheme it is a *right in personam*: thus, in *Lipkin Gorman*, the receipt of the money by the Club could hardly be seen as subtraction of the *right in personam*. The property received was the money, not a chose in action to acquire the money. Therefore Birks' approach can be seen as based more on the passing of value (through the receipt of property in which the plaintiff has a non-proprietary claim to value) to the defendant rather than on subtractive proprietary enrichment (which means the value passing must arise from receipt of property [including services] in which the plaintiff has a proprietary interest - a proprietary claim to value). This resort to non-proprietary value (which Birks denies he is making) is necessitated by (what is perceived by some as) the law of property's failure to protect, through recognition of a proprietary interest, the holding of value in an object. It may be then that the answer in the long term should not lie in the reliance on non-proprietary value but on the reanalysis of what Birks perceives to be the traditional classification of interests by the law of property. It is arguable that in Australia such reanalysis is unnecessary as the *mere equity* is regarded as a proprietary interest. For the purposes of this article the *power in rem* is treated as a proprietary[30] interest because:

(a) to give it such status accords with what Justice Menzies said in terms of the status of the *mere equity* in *Latec Finance v Hotel Terrigal*;[31]

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exercised activates a retrospective proprietary interest, which begs the question why an interest cannot be recognised from the outset; or Birks must alternatively claim the *power* is activated prospectively and the proprietary interest legitimated in the insolvency context purely on the grounds of justice.

30 This view is open to the criticism that the power analysis then produces the same multiplication of interest that the old vested interest view created. If the power is to be privileged in status it is hard to deny it the standing of an interest. Multiplication of the interest can be countered by conditioning the exercise of the power on the recovery of value and seeing the confirmation of the proprietary interest dependent on exercise of the *power*. After all why should not the plaintiff be facilitated in recovery to the maximum of the measure of value lost? Birks and *Re Leslie* seem particularly harsh to the plaintiff's right to private property whereas the law of unjust enrichment generally facilitates such right.

31 *Latec Investments Ltd* v *Hotel Terrigal Pty Ltd* (1965) 113 CLR 265 at 290-291 Cf Deane and Gaudron JJ's use of the term 'mere equity' in *Mabo v Queensland (No 2)* (1992) 107 ALR 1 at 66 which seems to refer to a purely personal equity. It is clear that Menzies J in *Latec*, above, did

(b) all that stops us according such status to the *power in rem* is our current (political)[32] conception of what is a proprietary interest;

(c) such status is apparently accorded to these interests in insolvency law;[33]

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conceive of the right to set aside as an equitable proprietary interest in all circumstances. His suggestion was that the right to set aside gave you a right to go to court and have the equitable proprietary interest 'related back' by which he appears to mean confirmed ab initio rather than created retrospectively; ie, the interest always existed but without curial confirmation was of reduced standing: id at 290-91. The enforceability of the interest is, as Menzies J highlighted, totally dependent on the successful confirmation of the right to set aside (including the notion of counter-restitution) and the setting aside of the contract: see *Daly v Sydney Stock Exchange Ltd.* (1985) 160 CLR 371 at 390 per Brennan J. With respect, Brennan J's conclusion that a trust had not arisen seems to be at odds with Menzies J's approach which suggested the trust always existed but whether it could ever be enforced depended on curial confirmation of the right to set aside an actual avoidance. For Brennan J it appeared as though no equitable interest had arisen: he thought of it simply as a right to create retrospectively through the curial process an equitable interest. It is arguable Brennan J should have seen the claim as one of an existing trust but held its enforcement dependent on Mrs Daly's ability to set aside an actual avoidance. In doing so Brennan J could have rationalised his wish to respect the contractual obligations until avoided; however to deny the existing nature of the interest in deference to the existence of the contract is to see contract trump unconscionability or unjust enrichment Surely the contract can be adequately respected by making the enforceability of the interest contingent on the avoidance of the contract. To do so, though, does not demand that the interest be denied recognition before the contract is avoided, as to do so could work a grave injustice on an ignorant claimant. It is also by seeing the interest as confirmed rather than created that the privileging of the right in insolvency is best understood. Brennan J refused to acknowledge any existing interest because for him it was yet to be retrospectively created as he indicates when talking of Patrick Partners' title to the money. In *Lonrho Plc v Fayed (No 2)* [1991] 4 All ER 961 Millett J said that fiduciary obligations could not be retrospectively imposed. In a commercial atmosphere this is understandable. But the crux of the problem which deserves close attention is whether the misconduct is adequately remediated by only allowing prospective creation of fiduciary obligations. The *power* is not contingent upon the avoidance of any contract and its proprietary base will have already dealt with that issue if necessary. Thus it is possible that the *power* represents a proprietary interest regardless of eventual exercise. The preferable view would seem to be that the *power* creates an equitable interest ab initio but that this interest is not capable of confirmation until the *power* is exercised.

32 See Macpherson, note 91 below.

33 See R Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell,

(d) Lord Goff's analysis in *Lipkin Gorman* suggests the Solicitors had 'legal property' in the money received by the Club which implies that the *power in rem* gave the Solicitors a proprietary interest in that property.[34]

In most if not all situations concerning ignorance the plaintiff will retain/hold a proprietary interest beyond the causative event and beyond receipt by the defendant; the proprietary interest only being extinguished by the inability to identify the original object of value or value surviving as an emanation of such object. This is a little unusual for actions in unjust enrichment which in many cases involve title at law passing to the defendant as a result of the causative event. Although with the rule that the intent to transfer a chattel is vitiated by fundamental mistake so preventing title from passing, retention of a proprietary interest in vitiated transfer cases is always a possibility.[35] Ignorance as an unjust factor comes closest to the Stoljar rationale for restitution, namely, that the defendant must give back what was

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1990) p 19 where a right to set aside in equity is described as 'an inherent limitation of the property acquired' which Professor Goode denies is another way of saying the creditor has a proprietary interest in the property held by the debtor. Cf *Re Leslie Engineers Co. Ltd.* [1976] 1 WLR 292 and Birks, note 3 above, at p 394 (which suggests the *power* is a right in personam). The difficulty with using the Goode approach as support is that it refers to a power to revest property transferred from the creditor to the debtor. Under the Birks scheme of tracing value and *vesting not revesting* a proprietary right in the creditor, the Goode explanation of the equity as 'an inherent limitation of the property acquired' is made redundant. It is only the case where the creditor wishes to recover the property that passed to the debtor, ie the classic setting aside of the transaction that Goode is talking about. Goode is not talking about a right to set aside title to an exchange product bestowed on the bankrupt by a third party because Goode sees such title as not voidable at law and as held on trust in equity. But as Birks equates the setting aside of a transaction with the setting aside of title to the exchange product at law through the restitutionary power to vest a proprietary interest, the only sensible conclusion is that the *power in rem* is a proprietary interest. Goode formerly expressed the view that *rights ad rem* were not 'real' rights (R Goode, 'The Right to Trace and Its Impact in Commercial Transactions' (1976) 92 *LQ Rev* 360 at 362-363), yet he has recently made it clear that a tracing equity and revesting of title under a voidable contract are real rights or rights *in rem*: Goode in Burrows (ed), note 29 above, at pp 222-223.

34 *Lipkin Gorman*, note 4 above, at 27-29 per Lord Goff. This assertion is made on the assumption that Birks is right in saying the *power* was never exercised in *Lipkin*. But if Burrows is correct in saying Lord Goff saw the *power* as having been exercised by the commencement of the litigation, the assertion made is baseless.

35 See *Ilich v The Queen* (1987) 61 ALJR 128.

received because it is the plaintiff's property.[36] The difficult point with Stoljar's view is that 'property' (if read to mean proprietary interest) more often than not passes through the causative event, and where it does not the plaintiff's title is relevant only to prove 'at the expense of', that is, it does not supply the 'unjust' factor.

The reason why a proprietary interest in some form must be retained/held by the plaintiff is that the ignorance basis of recovery would not operate if the thief or wrongdoing middle person gained an unencumbered proprietary interest (as opposed to an interest that could be set aside by curial order in favour of the plaintiff) in the object of value received or its substitution, because as between the plaintiff and the second recipient there would be no subtractive enrichment. The plaintiff, where the thief took an unencumbered proprietary interest, could bring an in personam action against the thief in unjust enrichment on the basis of ignorance, but more than likely such an action would not be worth pursuing as the thief would have disappeared or be bankrupt. If the second recipient takes an unencumbered proprietary interest in the funds then it is probable that value was given for the funds, and the change of position defence will be raised in any in personam action, and in any in rem claim competing proprietary interest (or value (?)) claims would more than likely see priority given to the bona fide purchaser,[37] who would hold the indivisible legal title.

If a proprietary interest at law is retained why is the action not conversion?

Comparing Conversion and Ignorance

The answer to this question demands confrontation of some rather complex issues. Firstly, it is necessary to clarify how a proprietary interest is asserted in an action at law. A proprietary interest is normally established through rules of the law of property. In some cases (Birks would suggest all cases)[38] the rules of tracing are needed to supplement normal principles of property law so as to identify

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36 S Stoljar, *The Law of Quasi Contract* (2nd ed, Law Book Co., 1989) p 5f.

37 Mindful of such a convoluted application of the 'at the expense of" element in ignorance cases, Birks has suggested throwing off the proprietary preconditions and reverting to an approach best described as 'enrichment caused in fact'. Such an approach basically says that if the enrichment the first recipient receives from the plaintiff *causes or motivates* the first recipient's enrichment of the second recipient then the plaintiff should be allowed to recover from the last recipient because it was the plaintiff's object of value that caused in fact the enrichment of the last recipient: Birks, note 15 above, at 481.

38 P Birks, *Restitution - The Future* (Federation Press, 1992) p 111.

value surviving in an exchange or substituted product. In other words, it is sometimes necessary to resort to tracing rules to see where the value you once held now resides; the actual turning of this value if it now exists in an exchange product into a new proprietary interest (Birks claims) is done pursuant to a restitutionary *power in rem* which is itself contingent upon the existence of a proprietary base. This *power in rem* is as has been suggested something akin to a *mere equity* in that it is regarded as a proprietary interest yet one that cannot reach full potential until the holder takes court action (or whatever is necessary) to perfect it. The *power* is a proprietary interest which, as Menzies J explained in *Latec Investments Ltd v Hotel Terrigal Pty Ltd*,[39] is chameleon-like in that the interest is not always given the full status of a proprietary interest before being exercised; for example in priorities disputes, and in facilitating/justifying the lawful and immediate right to possession of a chattel. In *Latec* the right to set aside was said to be capable of generating an equitable interest for the purpose of deviseability before exercise, yet this might be regarded as the exception rather than the rule. The suggestion being made is that the proprietary interest generated by the *power* is incapable before exercise of conferring a right to possession as it is a less than complete interest; while confirmation ab initio of the interest would not act to make the right to possession retrospective as to do so would create a surreal atmosphere. The point to note is that a complete proprietary interest when tracing value is involved does not arise until after the power is exercised (by court action?), and until this complete interest is obtained the plaintiff does not have an immediate right to possession.

For Birks proprietary restitution entails tracing or identifying or locating value surviving. The value surviving is an emanation of a proprietary interest the plaintiff retained or obtained immediately after the causative (unjust) event. Once a post-causative event proprietary interest is established and value surviving from it identified, the law of restitution provides a proprietary remedy in the sense that the value surviving is returned to the plaintiff by recognition of a proprietary interest in the plaintiff to the extent of the value surviving.[40] Birks says:

> The shortest summary of all this is that if the plaintiff wants to assert a right *in rem* in the surviving enrichment he must show not only that the enrichment originally received does at least in part survive, but also that the story of changes which have overtaken it began from matter belonging to him and passed through no events (other than natural events of intermixture and substitution) such as would by nature extinguish his title: to end with a right *in rem* he must start

39 (1965) 113 CLR 265.

40 Birks, note 3 above, at pp 377-394.

> with a right *in rem* and nothing must happen to extinguish that right *in rem*, other than loss of identity.[41]

Birks is adamant that tracing is 'an identification process and no more'.[42] He adds that 'successful identification of value at some relevant moment tells us nothing of the kind of right if any which the person tracing may be entitled to demand in respect of it. There is, in particular, no necessary link between tracing and proprietary claims.'[43] John Glover following the Birks line declares that 'annexure (identification and tracing) is a mechanical activity not of itself amounting to a cause of action'.[44]

One of the fundamental elements of an action in conversion is that the plaintiff must have actual possession or an immediate right to possession of the chattel (which includes bank notes) converted. Tracing at law, in light of *Lipkin Gorman* and Birks' construct, identifies value surviving in an exchange product (ie a value acquired by substitution of the value received (normally the plaintiff's object of value)) but a proprietary interest giving right to immediate possession arises only from the point of exercise of the power in rem. The power in rem (the restitutionary power to vest a proprietary interest in the exchange product (in which value survives) located after the tracing or identification process) does not bite and flower into a proprietary interest capable of justifying an immediate right to possession until the

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41 Id at p 380.

42 The traditional view of the 'tracing equity' (a term Birks deconstructs - cf Deane J's definition of 'an equity' in *Commonwealth v Verwayen* (1990) 95 ALR 321 at 349) is that tracing in equity is a mechanism through which the subsisting equitable interest is followed through its various configurations. Page-Wood VC, in the context of a defaulting trustee, said in *Frith* v *Cartland* (1865) 2 H & M 417 at 420: 'But so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust'. Furthermore, Lord Ellenborough in *Taylor v Plumer* (1815) 3 M & S 562 clearly envisaged that the tracing process is premised on the subsistence of the proprietary interest. The final curial order whether it be a direction to convey the title to the plaintiff or a charge over funds in favour of the plaintiff was regarded as curial protection of the proprietary interest generated from the ability to trace: *Rice* v *Rice* (1853) 2 Drew 73; *Re Diplock* [1948] 1 Ch 465 at 521 where it is said: 'The equitable remedies pre-suppose the continued existence of the money .... as latent in property acquired by means of [the mixed] fund'.

43 P Birks, 'Trusts in the Recovery of Misapplied Assets: Tracing, Trusts, and Restitution' in E McKendrick (ed) *Commercial Aspects of Trusts and Fiduciary Obligations* (OUP, 1992) pp 157-158. See further Birks, note 38 above, p 113.

44 J Glover, 'Equity Restitution and Proprietary Recovery of Value' (1991) 14 *UNSWLJ* 247 at 272.

plaintiff does something which at very least must be the commencement of legal action (although Burrows suggests the exercise of the power can be executed unilaterally and out of court). Thus if a proprietary interest in an exchange product does not reach full restoration until the action is commenced (ie the power in rem is exercised) there are big problems with satisfying the elements of conversion.

A problem arises with the temporal framework if the plaintiff wishes to sue for conversion of the substitute product. In terms of *Lipkin Gorman*, we are talking about the cash Cass received in exchange for the chose in action. Could the Solicitors sue the Club for conversion of this cash at the point of receipt? The Solicitors have a power to claim the cash as theirs but until the power is exercised they do not have an immediate right to possession. Can an immediate right to possession be retrospectively endowed? If it could, the Solicitors could have sued for conversion of the cash irrespective of whether that cash was still identifiable. The more principled approach is to say that the power can only generate an immediate right to possession prospectively and thus unless the cash or its substitute is still identifiable there will be no value surviving and nothing to possess.

The problem can be followed further to a scenario where the second recipient/defendant substitutes the product received - eg, the cash for another product. Can the Solicitors claim conversion of that substitute product even though it is no longer identifiable? The point being made is that although the second recipient may no longer hold traceable value surviving this is not to say that the recipient never held value surviving (in a product exchanged for that received) and if value surviving was held at point X (ie, a point after receipt) then the restitutionary power in rem would have application at that point.[45] Now, what stops the plaintiff suing for conversion of the substitute product taking point X as the temporal setting for the causative event? The short answer is that the plaintiff has at point X a power in rem to vest a complete proprietary interest in herself or himself; however, at point X (as has been suggested), the power is unexercised and fails to facilitate conversion because it does not provide (unexercised) an immediate right to possession. Therefore the plaintiff must exercise the power to found an action in conversion. In most cases the plaintiff can only exercise the power from a point later in time to point X. Let us call the later point, point Y. At point Y the funds are unidentifiable and thus possession impossible. Thus the exercise of the power at point Y does not facilitate conversion at point X; in essence there is no

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45 Birks possibly has a problem dealing with this scenario as the presence of a proprietary base which is a precondition to the creation of a *power in rem* is not easy to find.

power at this point because there is no value surviving. An immediate response might be that there is a power at Y created by the circumstances at X and that the exercise of the power at Y acts retrospectively and thus at X the plaintiff had an immediate right to possession and thus conversion is available. The law of torts has yet to confront this issue. However, it is fair comment to say that the rationale of conversion (namely, protection of possession) is being stretched in this instance. For at point X the defendant has an immediate right to possession and deals with the chattels accordingly. To say, retrospectively, that possession of the defendant at X was not lawful is extremely unfair especially if the defendant is an innocent volunteer.[46] The approach adopted by the law of unjust enrichment through the ignorance unjust factor is, theoretically, more pure in attaching liability to the value received.

The law of unjust enrichment where there are two recipients will need in many cases to resort to second measure principles to found the first measure or value received claim. For example, it is necessary to determine value surviving with Cass before enrichment of the Club so as to facilitate value received. This is all a little artificial and creates a few problems with the temporal framework. A pure second measure claim is made for value surviving at the time of the litigation. However where second measure principles are used to facilitate value received (or possibly a retrospective conversion claim) the value surviving is quantified at various points, eg before Cass enriches the Club, or in order to found a retrospective conversion action (if that is possible) at a time immediately prior to loss of identification. Such consideration may lead to the conclusion that a third category exists in the law of unjust enrichment, namely, value held in the interim. [47]

In the end it can be said that conversion and unjust enrichment in the guise of ignorance are distinct theoretical concepts, yet the valley between them will not always be easy to charter.

It is arguable that in *Lipkin Gorman* the funds may have still been capable of identification and/or possession when the *power in rem* was exercised (point Y) and thus conversion possible in a prospective sense; however, the parties never sought to raise this issue.[48] The Club would, more than likely, have mixed the funds after receipt, making identification and consequently the exercise of the power in rem an impossibility in the future, as the present rules for identifying value surviving at law could not trace through the mixing

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46 See Burrows, note 25 above, at p 68; *Lipkin Gorman*, note 4 above, at 28 per Lord Goff.

47 Cf Burrows, note 25 above, at pp 373-4.

48 *Lipkin Gorman*, note 4 above, at 27-28 per Lord Goff.

of funds.

The complexity of all this can be diluted to some extent by examples.

Example A: Where a thief steals P's cash and gives it to D who supplies no consideration and keeps the cash separate and identifiable, P has a remedy in conversion as title to the notes (the chattels) has not yet passed to the volunteer D.

Example B: Where a thief steals P's dollars and exchanges them for pounds which are given to the volunteer D who exchanges them for yen, and where P has begun suit and D continues to refuse to give the yen back, P arguably has an action in conversion, as upon commencing the action against D, P exercises the restitutionary power in rem identified in *Lipkin Gorman* and gains an immediate right to possession to the yen (assuming they still exist).

Example C: Where a thief steals P's dollars and exchanges them for francs which are given to the volunteer D who exchanges them for punts and subsequently spends the punts in Ireland on food which is consumed, P has a remedy in unjust enrichment as defined by ignorance.

In this last example the action at law will become one in unjust enrichment because the tracing process will have failed to identify value surviving at point Y which could, if a proprietary base existed, found a proprietary interest and thus possession prospectively. Unless tracing were to be regarded as a purely causative concept (ie by asking what value the punts caused D's estate to increase), the process breaks down when the punts are spent on food which is consumed. The change of position defence might be raised but would have little chance of success.[49]

Similar problems will arise with detinue which requires an actual or immediate right to possession when a demand is made for the return of a chattel. It is arguable that if one cannot claim a right to possession of a chattel until after the chattel disappeared, a claim in detinue is not conceptually pure as the interference with possession was caused at a time before possession occurred. It is not impossible that a court may discover a retrospective action for detinue; however, as things stand, unjust enrichment (value received) based on ignorance is a more principled cause of action in such instance.

In summary, the situation at law is that conversion will be the cause of action where an immediate right to or actual possession can be proved. Unjust enrichment in the guise of ignorance will

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49 Id at 35 per Lord Goff.

supplement the protection of proprietary interest/value where the original chattel or its substitute (exchange product) is no longer capable through the process of tracing of being identified as value surviving in the hands of the defendant. The important criterion is that the value received although it may no longer be identifiable must have been gained by subtraction from the plaintiff. The ignorance action at law where it distinguishes itself from conversion is more than likely to be an in personam action in the first measure as such an action in the second measure could only succeed if value surviving could be identified. If value surviving could be identified and a proprietary base existed (which more than likely it would) the power in rem could be exercised and the interference with possession of the chattel remedied by a compensatory damages award for conversion. Theoretically, the conversion and unjust enrichment as defined by ignorance actions overlap,[50] but the humble approach of the unjust enrichment advocates is to defer to the established action. For the practitioner the initial step is to map out the prominent features of each action.

If the action is one in the equitable jurisdiction of the courts, then the contrast with conversion is not necessary and thus the ignorance based action has scope for a wider development in equity, the action having possible application in the first and second measure (including proprietary claims). Thus if the action in *Lipkin Gorman* had been for recovery of value surviving, the ignorance action would have had to be based in equity, as if it were based at law (assuming tracing could have done its job at law) conversion would have been the logical action by reason of tradition but the power in rem would have to be exercised to vest a complete proprietary interest in the chattel. Whether a litigant could prefer ignorance by refusing to exercise the power is open to debate.

Equity and Ignorance

If a thief mixes funds so as to prevent tracing value at law,[51] then the plaintiff in order to prove subtractive enrichment of the defendant is left with the tracing value in equity, and the theoretical question of whether a fiduciary duty is necessary to support tracing of value in equity of a proprietary base founded at law.[52] This would also

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50 It must be remembered that unjust enrichment requires the defendant be enriched through acquisition of value, not necessarily a proprietary interest and thus conversion and ignorance can overlap - ie title can be retained in both scenarios.

51 On the general principles of tracing at law and the effect of mixing, see RP Meagher and WMC Gummow, *Jacob's Law of Trusts*, (5th ed, Butterworths, 1986), at pp 684-85.

52 Cf Birks, note 3 above, at p 378ff; Gummow, note 5 above. In a nutshell

change the action from one at law to one in equity. *Lipkin Gorman*, it should be remembered, was an action at law.

Equity has a unique role to play here as well. Due to the fact that conversion relates to possession, it has no real connection with equitable interests (although the holder of an equitable interest in possession could sue for conversion).[53] Therefore, misuses of equitable interests have been protected by a variety of personal and proprietary remedies in equity.[54] Birks suggests these equitable actions can be rationalised in terms of unjust enrichment as defined by ignorance.[55] Discussion of this idea is beyond the scope of this article. However, it is vital to keep in mind the role equity plays in the overall scheme of ignorance as an unjust factor.

Birks says proprietary base replaces the need for a fiduciary duty. Justice Gummow says the fiduciary requirement is needed only when tracing in equity value emanating from a proprietary interest founded at law (so as to raise an equity and avoid fusion fallacy), while such fiduciary duty is not required when tracing in equity value emanating from an equitable interest in equity. Birks gives *Chase Manhattan Bank NA* v *Israel-British Bank (London) Ltd* [1981] Ch 105 as an example of tracing in equity value emanating from a proprietary base founded in law. The proprietary interest at law was the interest retained and not transferred due to fundamental mistake vitiating the transfer. Justice Gummow seems to see the case as one where title at law passed through the causative event and the tracing was of value emanating from an equitable interest (proprietary base) created by the mistaken transfer. The fiduciary requirement is said to cause problems for tracing funds which are stolen by a non-fiduciary: see E McKendrick, 'Tracing Misdirected Funds' [1991] *Lloyd's Mar and Comm LQ* 378 at 387. Cf *Black* v *Freedman & Co* (1910) 12 CLR 105.

53 See *Healey v Healey* [1915] 1 KB 938.

54 For a discussion of these remedies, see Meagher and Gummow, note 51 above, at pp 650-53, 684ff. Cf *Re Diplock* [1948] 1 Ch 465.

55 Birks, note 20 above. Birks also discusses the issue of strict liability as opposed to fault based liability (the approach apparent in the in personam action in equity). If the equitable actions could be explained in terms of ignorance and the liability of the recipient said to be strict, then the ignorance based action as defined in the previous section would alter. It would no longer be simply an action based on the retention of title at law. It could theoretically be based on the situations where title passed at law but an equitable interest arose, or where there was an equitable interest in the classic sense held by the plaintiff from the start, or where on the title at law becoming unidentifiable an equitable interest arises. If this became the law the ignorance based action would be said to arise whenever title at law or an equitable interest is identifiable in the plaintiff up to and including the moment of receipt of the chattel by the defendant. If an equitable interest needs to be relied on to found the action, the tort of conversion would have little

Transferring Chattels

The difference in the way (normal) chattels and money (itself a chattel) are transferred should also be noted. Money can pass as currency regardless of whether the giver has title. The important point to determine is whether the recipient gave value.[56] Transfer of other chattels is different.[57] The general rule (to which there are exceptions)[58] is that the giver cannot bestow a better title than they possess: *nemo dat quod non habet*.[59] Therefore the owner of stolen chattels normally finds solace in damages for conversion, because title has not passed nor value surviving become unidentifiable in the case of substitutions. With money though title passes or identification of value surviving problems arise and conversion becomes difficult to prove. Ignorance in accord with the principles of unjust enrichment in general (and especially the *power in rem*) is an answer to these difficulties and roughly does the job conversion fails to do where money is concerned; and in respect of personal property which cannot be converted such as a chose in action against a bank.

Part III: Lord Goff and Subtractive Enrichment in Lipkin Gorman

After having taken a necessary yet difficult trek through the general requirements of ignorance as an unjust factor, it is time to look at how the requirements for restitution (especially the 'at the expense of' element) were satisfied in *Lipkin Gorman*.

The enrichment of the Club was not controversial as it had received money. Money is the perfect example of enrichment as its

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scope for application.

56 If the last recipient is a bona fide purchaser for value then as regards currency that recipient takes title to the funds. But as has been pointed out an action in unjust enrichment is not dependent on title being retained by the plaintiff. As a consequence of this a bona fide purchaser who does take title cannot raise that title as a defence. What the bona fide purchaser can raise as a defence is that he or she changed their position because of the enrichment, ie enrichment causes outlay. This argument is constructed by Birks, note 15 above, at 486-492. On the passing of currency, see Mann, note 13 above, at pp 9-10. On change of position see: *Lipkin Gorman*, note 4 above, at 34-35. The High Court has recognised the defence of change of position in *David Securities*, note 18 above, at 780.

57 Although bills of exchange and cheques are primarily contingent upon rules of negotiability.

58 KCT Sutton, *Sales and Consumer Law* (3rd ed, Law Book Co., 1983) Part III.

59 *Rowland* v *Divall* [1923] 2 KB 500.

value is rarely open to subjective evaluation.[60] The 'unjust' nature of the receipt was said, by Lords Templeman and Goff, to lie in the fact that it was the Solicitor's 'property' that the Club received and that the Solicitors retained title after the causative event, therefore the Club should give it back. This has led some to suggest the 'unjust factor' in *Lipkin Gorman* was (Stoljar inspired?) 'property'. Birks is critical of such an approach saying that little definition is given to the causative event and the remedial response if the simple term 'property' is invoked. As was suggested earlier in this article, it is preferable to follow the abstract right to private property into a more concrete formulation such as the plaintiff's capacity to alienate a proprietary interest, and thus Birks' analysis of the situation in terms of ignorance is convincing.[61] The controversial issue was as to how the element of 'at the expense of' was satisfied.[62]

Cass has Title

Lord Goff held that Cass had received a proprietary interest at law (hereinafter referred to as 'title') to the funds when he withdrew them from the client account. This point could be developed further in a debate as to who should have gained title; however, for the purpose of this article, it will be taken as settled that Cass took title to the funds.[63]

The decision that Cass had title makes the Birks formula a little difficult to apply, for where is the subtraction from the Solicitors if Cass gained title? What Lord Goff means (as he later explains) when he says Cass received title is that Cass gained a proprietary interest which was encumbered by a *power* in the Solicitors to vest Cass' proprietary interest in them.

Tracing Through Cass' Title

Lord Goff started with the proposition that the Solicitors held title at law to a form of property immediately prior to Cass' fraudulent act.

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60 Birks, note 3 above, at p 109.

61 Birks, note 15 above, at 482-3.

62 A problem which was not present in *Lipkin Gorman*, note 4 above, but which must always be considered when talking of 'at the expense of', arises where the wrongdoer forges the plaintiffs mandate to the bank and redirects funds: see the facts of *Agip (Africa) Ltd* v *Jackson* [1990] 1 Ch 264. Should the bank be regarded as having used its own funds as it acted on a void mandate? And should the bank sue in unjust enrichment and not the plaintiff? An excellent yet contentious analysis of this issue is presented by L Smith, 'Three Party Restitution' (1990) 11 *Oxf J Leg Stud* 481 at 497-504.

63 For further discussion of this point see *Lipkin Gorman*, note 4 above, at 27-28 and 37-42 (the banker's draft) per Lord Goff.

That property[64] was a chose in action against the bank, the Solicitors being creditors and the bank the debtors.[65] When Cass drew the funds from the bank the chose in action disappeared, and a new form of property was created. Lord Goff realised that the nature of the original property worked an injustice because a chose in action is obliterated by a fraudulent taking from a bank account. He ingeniously resolved the problem by equating the intangible chose with tangibles like bank notes or the cow Daisy.

Lord Goff's reasoning is not as explicit as one may have hoped. However, Birks has alleviated the problem by giving us a more expanded analysis.[66] The Goff and Birks approach may be better explained in light of the following examples (which consider actions at law other than detinue). If the Solicitors had owned the cow Daisy and Cass had in their ignorance stolen Daisy and swapped the cow for a car and given the car to D then:

(a) title to Daisy would be retained by the solicitors;

(b) the Solicitors could sue the present and past holders of Daisy in conversion;[67]

(c) the Solicitors could elect to sue in conversion if a chattel for which Daisy was swapped is identifiable in the hands of any recipient, provided that the Solicitors have a *power* to claim title to the substitute;

(d) if a chattel for which Daisy was swapped is not identifiable in the hands of any recipient then the Solicitors could elect to pursue an action in unjust enrichment as defined by ignorance against that recipient, provided that in the case of the substitute the Solicitors have a *power* to claim title to the substitute at the time of receipt;

(e) the Solicitors could elect to claim the car as theirs and sue D in conversion;

(f) or if the car or its substitute were unidentifiable the Solicitors could elect to sue in unjust enrichment provided the Solicitors have a *power* to claim the car up to the point of its receipt by D.

Another example to make the reasoning clearer is as follows. If the Solicitors kept $20 in a draw and Cass stole the $20 and exchanged it for £10 giving the pounds to D, then:

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64 As Birks points out 'property' here means 'thing' as opposed to 'proprietary interest in a thing': Birks, above note 15, at 478 n 28.

65 Whether an overdrawn account with a bank represents property of the account holder is a contentious issue: see Birks, above note 15, at 478.

66 Birks, note 15 above, at 480.

67 See *Rowland* v *Divall* [1923] 2 KB 500.

(a) title to the $20 would be retained (giving the basis for a conversion action against the thief) by the Solicitors up to the point where value was given for it by the supplier of the pounds; at which point title to the $20 goes to the supplier of the pounds, but leaving the Solicitors with the choice of claiming title to the substitute (namely, the pounds);

(b) if title to the pounds is claimed, then if the pounds or their substitute are still identifiable an action in conversion will lie;

(c) if the pounds or their substitute are no longer identifiable, a claim in unjust enrichment will lie against any recipient of the pounds or their substitute who received the items whilst the Solicitors have a *power* to claim title to the chattels.

Lord Goff, having these scenarios in mind, could see that if he did not equate the chose in action to property which was not extinguished on use, the symmetry of the law would be lost. For, as the examples show, where a tangible is involved the original property subsists after the exchange product is substituted along with a proprietary interest in the giver of the exchange product. Where a chose in action against a debtor is involved, the original property (or at very least the worth of the property) is extinguished at the point of satisfaction of the debt (the point of substitution(?) and receipt of the exchange product) and the debtor is not regarded as gaining a proprietary interest in the chose in action.[67a]

If the original property does not survive the substitution then it is theoretically difficult to label the cash an exchange product. The question arises, 'for what property that survived the substitution was the cash given in exchange?' The answer most apparent is that as the chose has not survived the substitution process the cash can only be seen as a new object of value which is in no sense an exchange product. To make the point a little stronger: normally after a substitution there are two pieces of property in existence, if there is not you have a problem proving the single item of property existing has been substituted for other property.

In *Lipkin Gorman* it may have been possible to argue that as the cash arose out of the ashes of the chose there was not a case of substitution but a case of bestowing property upon Cass as a consequence or reaction to the right to sue the bank as debtor. That is not what one might conventionally call a substitution. However, if we accept the fiction that Lord Goff and Birks must necessarily posit that

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67a *Mutual Pools and Staff Pty Ltd v Commonwealth* (High Court of Australia, 9 March 1994, unreported) per Dawson and Toohey JJ. Cf Deane and Gaudron JJ who say at 24: 'depending upon the circumstances, the extinguishment of the chose in action could assume the substance of an acquisition of the chose in action by the obligee'.

the chose somehow continued to exist - the Bank taking a fictionally subsisting chose in action against itself although maybe not title to the chose - and was the subject of a substitution, then the symmetry of the law between tangibles and intangibles is maintained. There are doubts though as to how far the giving of property to one person as a consequence of a chose enforceable against you is properly categorised as a substitution of property. That seems very much a fictional construction. Such a construction definitely does not accord with the reality of the situation which sees the debtor in one process being relieved of a liability (and that is not property) and in another process giving cash to Cass. Where is the substitution? For the sake of the symmetry of the law, the fiction might seem inevitable but we must acknowledge it as a fiction and assess its fit within the text of the common law. It could be suggested that such a fiction supports a claim in conversion against the bank for interference with the chose, title to which is fictionally retained by the Solicitors.

To make the argument more graphic one could say the Goff and Birks view envisages Cass stealing a chose in action and then walking up to the bank with it in hand. He gives it to the bank who give him cash in return and then take the chose in action and put it in a vault. If we do not create this 'invisible person' type fiction of the chose remaining, the description of the process as a substitution of property is incoherent. Even if one resorts to the language of value it is difficult to sheet value back to the Solicitors if the fiction of a subsisting chose is not created. How can the new product (the cash) evidence old value if old value never survived the event of payment of the cash? There is no exchange of value. The Bank in the end have satisfied the debt and hold the value of such an action but that is not easily described as the same or original value which the Solicitors held, and if that original value cannot be located after the substitution the whole idea of tracing value and vesting a proprietary interest falls down. The argument put here is very technical. However, it is raised not so much against the fiction created but against an ignorance of its actual creation. If these fictions arise so we might better understand and use the chose in action in our legal rhetoric, then we must acknowledge them as constructions and pinpoint why they are persuasive in this instance.

Lord Goff, as interpreted by Birks,[68] then, solves the problem by pretending the chose in action does not disappear, and subsequently concluding that the cash withdrawn by Cass is the traceable substitute of the retained title (or, in Birksian terms, the traceable value surviving and capable on the exercise of a restitutionary *power* to be vested by way of proprietary interest in the

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68 Birks, note 15 above, at 480 where the case is rationalised in terms of a proprietary base.

plaintiff). Instead of saying the chose in action disappears on use, Lord Goff says the chose remains in some fictional sense and that its value can be followed into the cash substitute, ie the cash withdrawn by Cass, and thus a *power in rem* arises. All of this is fine in purpose, but the use of fictions in a subject only just liberating itself from fictions is questionable. Will the next step be to say that a provider of services performed under circumstances of mistake retains title to those services and can subsequently trace the value of those services and recoup value surviving through a *power in rem*?

Once it could be shown that the Solicitors retained title it was possible for Lord Goff to apply *Taylor* v *Plumer* and trace at law[69] the value emanating from the title retained at law. Once applied the doctrine of *Taylor* v *Plumer* allowed Lord Goff to find a *power in rem* in the Solicitors to vest in themselves title to the cash received by the Club. It was the value of the property (the cash) in which the Solicitors had a proprietary interest (this power to vest the cash) that was subtracted from the Solicitors by the Club upon receipt. The 'at the expense of' issue then seemed easily solved. A problem arises though if, as suggested here, the use of *Taylor v Plumer* was an abuse of precedent; an unacceptable interpretation, bearing in mind Stanley Fish's injunction that an interpretation unpersuasive to the interpretive community is simply not law.

Applying Taylor v Plumer

Is the application of *Taylor v Plumer* advocated by Lord Goff persuasive? The answer to this question is constructed in Part IV. However, before embarking on that inquiry, it is appropriate to examine how *Taylor* rhetoric was utilised in *Lipkin Gorman*.

Taylor v Plumer is said to be the locus classicus on common law tracing This case is said to contain the proposition that title at law could be traced through a substitution. An example will help illustrate the theory:

> If a thief steals P's $20 without P's knowledge and buys a bike with it, then P is said, on the authority of *Taylor*, to be able to trace and claim title to the bike even though the thief has apparently gained lawful title to the bike.

The example need only be rehearsed once to realise the awkward results tracing produces for title at law.[70] Lord Goff and

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69 No argument was put forward that the funds had been mixed or that tracing at law was impossible: *Lipkin Gorman*, note 4 above, at 28 per Lord Goff.

70 On the indivisibility of title at law and the way it has been traditionally approached see: R Goode, *Commercial Law* (Penguin, 1982), at p 53 n 20

Birks are supporters of the supposed *Taylor* rhetoric and see little problem with tossing aside apparently good title (including in Birks' scheme legitimate value received) at law. The reason for recognising the ability to trace and avoiding apparently good title (and legitimate value received) in the thief is understandable, but it is theoretically damaging to a system of title by transfer at law. Birks provides the analogy of setting aside title at law for fraudulent misrepresentation; however, this concept could be limited to setting aside the title transferred because of the vitiation of intent to transfer. That is a long way short of setting aside a title (or value) bestowed on the thief by a third party.

Nevertheless in *Lipkin Gorman* this notion of common law tracing was invoked to show that the Solicitors could claim the substitute of their chose in action, namely the cash to which Cass took title. Birks suggests the cash was able to be vested pursuant to a power in the Solicitors but never was, while Burrows suggests the cash was retrospectively vested in the Solicitors when they exercised the power in rem by commencing litigation.

It is appropriate at this point to consider what has been the role of tracing in actions at law. Michael Scott in his thought-provoking article explains that tracing at law has always been an identification process laying the foundation for an in personam action such as conversion.[71] He explains an action in rem has no place at law; however certain in rem 'effects' can be produced as a result of the personal action.[72] Scott suggests that the law could recognise a vested right in rem to a particular piece of property (including an exchange or substitute product) and that this was evident in the process of tracing title at law.[73] Birks' new restitutionary agenda completely redefines the notion of tracing. In Birks' scheme tracing is of value while vesting of tile in an exchange product is done pursuant to a restitutionary power. The new approach which Birks advocates does not alter the gist of the analysis that follows; all that is needed is that as well as asking why the title (to the exchange product) received by someone like Cass can be claimed by the plaintiff, one must also ask why the plaintiff is allowed to claim value (emanating from the plaintiff's original object of value) surviving in the exchange product.

Why was tracing important in *Lipkin Gorman* which was an in personam claim? If an unjust enrichment action is in personam, it can

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and pp 54-55. Cf the idea of possession as the foundation title and actions at law: id at pp 61ff.

71 M Scott, 'The Right To "Trace" At Common Law' (1966) 7 *UWAL Rev* 463.

72 Id at 480 and 489.

73 Id at 478.

be commenced at law or in equity. The exercise (or to some the potential of exercise) after tracing of the power in rem is needed at law in *Lipkin* style situations to facilitate the in personam claim, which is a claim to remedy interference with a proprietary interest. If a plaintiff desires a 'proprietary remedy' for interference with a proprietary interest rather than merely damages, then the plaintiff would bring an in rem claim in equity which acts so as to direct a particular person to fulfil fiduciary and trust obligations regarding the proprietary interest originally created by the restitutionary power. One therefore sees the role of tracing and the power is very much to create the proprietary right which is then protected in a variety of ways by law and equity. It is imperative that the remedies for interference with the proprietary interest not be seen as bestowing proprietary rights even though we call them in equity in rem actions. The difference between law and equity in this context is in the way the defendant is obligated. At law the obligation arises from tort and is protected in damages or from unjust enrichment and restitution, while in equity the existing equitable interest generates fiduciary obligations which are remedied upon breach. In equity, then, the interference with the proprietary interest is remedied by enforcing fiduciary obligations which arise from the traced and vested equitable interest and in this sense the proprietary interest is protected by a proprietary remedy, but nowhere along the line is a new proprietary interest created - at least in equity.

The following table helps one visualise the situation regarding a traced and vested proprietary interest in existing personal property:

interest type	**cause**	**curial response**
interest(law)	interference	damages for tortious interference; restitution for unjust enriching interference.
interest(equity)	interference	directions to the fiduciary on how to fulfil the fiduciary obligation which has arisen from the proprietary interest.

The existing proprietary interest is protected in equity by a fiduciary obligation arising from such interest, while at law the proprietary interest is protected purely on the basis of its proprietary qualities. The fiduciary obligation makes the equitable response seem much more proprietary as it can facilitate directions on how the fiduciary (the person more than likely controlling the property) should act as regards the interest, whereas the response at law can only direct the relevant person to pay damages and says nothing (directly) of personal dealings with the interest. The suggestion, which due to its

novelty must be tentative, is that the claims remedying interference with an existing interest, at both law and equity are in personam claims (although, admittedly, the equitable action does have more proprietary effect in some cases due to the fiduciary obligation); they concern the furtherance of the proprietary interest rather than a claim against it. The fiduciary is merely told what to do and that is not an in rem affair. The in rem part of the story occurs when the restitutionary power has potential for being or is exercised, and is common to both law and equity. Full protection of the in rem interest would require exercise of the power in the sense that conversion cannot protect it until exercised while one could not take a transfer of a proportionate share until the power had been exercised. A *complete or full* proprietary interest then does not arise until the power is exercised. It is probable that until exercised the *power* would not be seen to have generated a proprietary interest ab initio; however such confirmation could be seen as an aspect of the primary (protective) action.[74]

Likewise the constructive trust (whether that be regarded as restitutionary or not) which we are told by case law generates a proprietary interest prior to curial intervention,[75] suggests that the curial response is aimed more at confirming the interest exists and directing the fiduciary on how to fulfil the trust than creating a proprietary interest. A proprietary interest, it is suggested, arises when the restitutionary power has the potential for being or is exercised (which is judicially confirmed in the curial process) while notions such as the equitable charge (some use the word 'lien') and

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74 See note 31. In light of *Latec*, note 31 above, and *Daly*, note 31 above, it would seem that the power could not generate fiduciary obligations until exercised. The question may also arise as to whether the fiduciary obligations are 'related back' although if the property still exists this may not be to point. As *Daly*, above, and *Lonrho Plc*, note 31 above, concern setting aside (which is a proprietary base issue) the situation here is slightly different. As a proprietary base is needed before one can trace, the *Daly* and *Lonrho* issues would be disposed of by the time one gains the *power*. While there are no problems concerning an existing contract evident in this vesting scenario, the analogy with setting aside is appropriate and issues of when a proprietary interest arises and when fiduciary obligations arise are in need of attention. The rider then is that protection of the *power* is more complex, especially with the need to enforce fiduciary obligations to make the equitable response attractive. The short answer is to exercise the *power* to alleviate doubts as to protective options.

75 *Muschinski v Dodds* (1986) 160 CLR 583 at 613-14; *Re Jonton Pty Ltd* [1992] Qd R 105. In some cases, as Deane J. pointed out in *Muschinski*, competing common law or equitable claims may demand the interest be seen as arising from the date of judgment rather than any earlier point of time. In this instance it still seems appropriate to say the circumstances create the interest rather than the curial order.

proportionate share remedy merely direct how the interest should be protected by giving directions to the fiduciary.[76] Obviously where an equitable charge or lien creates the equitable interest the situation is different and thus terminology will be apt to confuse. In the restitutionary context, though, the position (it is suggested) should be as the foregoing reasoning describes, with the notion of an in rem remedy arising at law and equity when the Birksian power is ready for or is exercised. The notion of an in rem claim or action or remedy or right becomes something common to law and equity, with the only difference being the way in which law and equity respond to interference with such proprietary interest: at law someone is told to replace your proprietary interest with a monetary obligation, while in equity the someone is a fiduciary who is told to look after the proprietary interest for you. In an insolvency context, the proprietary interest is not the key (although a prerequisite), but rather your ability to control the proprietary interest through enforcement of the fiduciary obligation - as opposed to a claim to enforce a monetary obligation substituted for your original interest. At law there is little scope for telling anyone how to deal with your proprietary interest in personal property (save to a qualified extent through the order of 'delivery up of goods') and therefore you are forced back to the ranks of an unsecured creditor. For clarity of discussion the order of 'delivery up of chattels' which is usually associated with an action for

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76 The equitable charge/lien is said to represent a proprietary interest yet it does not create a trust of property and does not obligate any one person as a trustee, yet the proportionate share remedy may create a trust and a trustee with a fiduciary obligation. However, the fiduciary obligation is generated when the proprietary interest arises and the charge/lien in this instance appears to represent little more than directions on how to execute that duty, remembering the charge is to protect a restitutionary interest and the person to whom it is applicable will either have notice of the unjust enrichment or be a volunteer. The fiduciary obligation then arises not out of the charge or trust but out of the existence of the equitable proprietary interest in this restitutionary context: see G Palmer, *The Law of Restitution* (Little Brown and Co., 1978), Volume 1 para 1.5, Volume 2 pp 519-521; D Waters, *The Law of Trusts in Canada* (Carswell, 1974) pp 336-338; *Mabo v Queensland* (1992) 175 CLR 1 at 199-205, especially at 200 where Toohey J. says: '... it is ... the power to affect the interests of a person adversely which gives rise to a duty to act in the interests of that person; the very vulnerability gives rise to the need for the application of equitable principles.' In time, the lien and proportionate share remedies instead of being seen as proprietary remedies as Burrows suggests may come to be seen as restitutionary obligations (as opposed to fiduciary obligations arising from the restitutionary power in rem). The focus would then be on how the proprietary interest is protected through personal obligation which would allow consistency of approach at law and in equity.

detinue has been avoided.[77] Where this order is available, and the circumstances of its operation are both vague and dependent on an action of detinue, the consequences of insolvency could be defeated at law. The inadequate tracing rules at law and the exclusion of the chose in action from the delivery up order mean its importance to commercial law is reduced; yet if those two things were to be addressed, it could become very important. Alternatively, if one could ever conceive of a fiduciary obligation arising at law then the responses at law and in equity may become uniform.

The foregoing analysis is necessary to the understanding of the function tracing actually performs at law and to the understanding of *Lipkin Gorman* and its in personam nature.

The other major query with the Birksian analysis of *Lipkin Gorman* is that to set up subtractive enrichment one has to prove a right to claim a proprietary interest in the exchange product. Although the action was in personam and in the first measure, the Solicitors had to prove that they lost something of value to the Club; this in essence came down to the claim that they lost the value of their (the Solicitors') power in rem to vest the substitute product Cass acquired to the Club.[78] To be able to claim a power to vest the exchange product in themselves the Solicitors needed to prove, in accordance with Birks' self-imposed limitation on such an action, the presence of a proprietary base immediately after the causative event. A proprietary base is a proprietary interest in the property in question retained or obtained by the plaintiff immediately following the causative event. Where is it in *Lipkin Gorman*? Birks says it is found in the title fictionally retained in the chose in action. This is no problem where a claim against the second recipient is for value received; however, if the claim were to be one for conversion or an in rem

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77 For a discussion of delivery up see *Gollan v Nugent* (1988) 166 CLR 18 at 24-26 per Brennan J.

78 Does the fact that what is received as enrichment by the defendant (the money) is not subject to a proprietary interest in the plaintiff distort the subtractive loss/gain principle of unjust enrichment? What is happening in this case according to Birks is that the subtractive element is satisfied by subtraction of an object of value in which the plaintiff holds less than a proprietary right. Burrows, note 25 above, at p 67 is mindful of this in arguing that the *power* was retrospectively exercised and thus a proprietary interest existed at the point of subtraction. Burrows claims Birks does not permit the retrospective operation of the *power*. Perhaps Birks is just avoiding the surreal atmosphere suggested by the claim that the *power* could be exercised retrospectively. It would be more convincing to say that the *power* must be exercised before a proprietary interest can be confirmed to have existed ab initio, so as to allow the issue of subtraction in this scenario a place (beyond doubt) within the subtractive proprietary paradigm.

remedy in equity based on traceable value surviving, the issue of proprietary base may cause problems. For in those situations the proprietary base would not be fictionally or otherwise received by the defendant, and surely it is integral to Birks' thesis about the proprietary base that the proprietary base (or more properly the property in which it inheres) be received by the defendant so as to justify creation of the power in rem. In *Lipkin Gorman,* it could be argued that the chose in action (the property in which the proprietary base inhered) was fictionally received by Cass as part of Lord Goff's overall fictional enterprise of pretending the chose in action did not disappear.

Let us return now to the issue of whether *Taylor v Plumer* is given a persuasive interpretation in *Lipkin Gorman.*

Part IV: Exploding the Myth

In a seminal article Salman Khurshid and Paul Matthews[79] explain that *Taylor v Plumer*[80] has nothing whatsoever to do with tracing title at law. They show that the case was all about tracing an equitable interest in equity.

The case involved the situation where the defendant gave his stockbroker a bankers draft to buy exchequer bills but the stockbroker misapplied part of the proceeds of the draft and bought bullion and securities for himself. The defendant caught the stockbroker and recaptured the securities and bullion; by this time, however, the stockbroker was bankrupt and his assignees in bankruptcy claimed to have a better right to possession. The assignees sued the defendant in trover. Lord Ellenborough had this to say:[81]

> [I]t should seem that if property in its original state and form was covered with a trust in favour of the principal, no change of that state and form can divest it of such trust, or give to the factor, or those who represent him in right, any other more valid claim in respect to it, than they respectively had before such change.

That Lord Ellenborough decided the case in terms of trust property is beyond doubt,[82] although prior to the Khurshid and Matthews article this point was largely overlooked. Judges and academics alike cited the case as authority for the principles of tracing

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79 'Tracing Confusion' (1979) 95 *LQ Rev* 78.

80 (1815) 3 M & S 562.

81 Id at 574.

82 Id at 579 where Lord Ellenborough says of the bullion and securities: ' ... it was trust property of the defendant, which, as such, did not pass to them [the assignees] under the commission'.

at law. This, arguably, is a non permissible interpretation.

Most people now admit the oversight yet still continue to cite *Taylor v Plumer* as an authority on tracing at law. Lord Goff does just this in *Lipkin Gorman*. What Lord Goff and Birks attempt to extract from *Taylor* is the proposition that the original title holder can trace and claim the exchange product or value surviving in the product held by the thief. The exchange product is the property the thief acquired in his or her name with the funds stolen from the plaintiff. Title to the exchange product is acquired by the thief who either still retains the property (as in *Taylor*) or who has passed it on as a gift (as in *Lipkin*).[83]

But *Taylor v Plumer* is not authority for the wide-ranging proposition advocated by Lord Goff and by Birks.[84] All *Taylor* decided was that an equitable interest (or value emanating from it) can be traced through substitutions; it said nothing about tracing through exchange products at law. One reason why it is important to highlight the ability to trace through title to the exchange product at law is the tradition of the common law in regarding title at law as one indivisible concept.[85] Of course, title at law could be divided through the operation of equitable doctrines but at law the tradition remained that one who held title through a valid transfer held a complete title at law subject to no other encumbrances. The claim that *Taylor* supports tracing through the exchange product is remarkable in that it suggests that title at law is divisible and perhaps signals the end of the need to divide title through equitable doctrines. No justification is given of this exchange product theory; although both Lord Goff and Birks

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83 For further on the notion of the exchange product see Khurshid and Matthews, note 79 above, at 79 where cases purporting to follow the exchange product theory are rationalised. It is not the purpose of this article to rehearse the arguments they put forward, other than to say they convincingly destroy any cogent support for the exchange product theory. The thief will not in every case take title to the exchange product. There may be cases where the supplier of the exchange product intends to pass title to the plaintiff and not the thief or where the thief specifically appropriates the property to the plaintiff, pursuant to a contract between principal and agent, or by delivery: Khurshid and Matthews, above, at 87-88. In the case of a thief these exceptions to the rule are unlikely to occur. The doctrine of ratification will also be of no help in attacking the completeness of the thief's title. For the plaintiff to be able to ratify the thief's acquisition of the property as his or her agent it must be shown that the thief purported to enter the transaction on behalf of the plaintiff: *Keighley Maxsted & Co* v *Durant* [1901] AC 240. And see Khurshid and Matthews, above, at 88-91.

84 Id at 98. It is important to note that the misinterpretation of *Taylor* has been accepted in Australia: see *Brady* v *Stapleton* (1952) 88 CLR 322.

85 Goode, note 70 above.

would no doubt seek to use the power analysis as a way around dividing title at law. But this in no way goes towards explaining why the otherwise valid title at law is avoided.[86]

The effect of accepting the misinterpretation of *Taylor v Plumer*[87] is a failure to appreciate that tracing through the exchange product indicates that Cass held title to the cash substitutes concurrently with the Solicitors who had some trust-like proprietary interest in the substitutes. Unless one takes this step and explains the avoiding of title at law the doctrine of title by transfer is questioned for it would seem the common law has traditionally seen title which is legitimately bestowed as not open to avoidance. What Lord Goff and Birks are advocating is a notion of avoidance of title (and value) legitimately bestowed because the recipient of the title used some other person's money to buy the exchange product. That seems very much like a trust at law of the proprietary interest legitimately acquired and should be acknowledged as such.[88]

The reason for Lord Goff's and Birks' faith in the misinterpretation of *Taylor* is found in this confusing statement of

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86 The situation where the consideration for the exchange product is property in which title is retained by the plaintiff adds another dimension to the argument; however, it would seem that even though the consideration is not legitimate the title to the exchange product bestowed on the thief is valid until set aside. Normally in situations where chattels other than money are concerned, the giver of the exchange product will be liable in conversion to the plaintiff if title has not passed. The *Lipkin Gorman* scenario is different in that title was retained (the proprietary base) to something that was not capable of conversion, and so the situation is analogous to that where money is involved. The giver of the exchange product is able to rely on change of position to repel unjust enrichment claims and thus title to the exchange product will not often be avoided, and in the case of money could not be avoided anyway.

87 Professor Goode had drawn attention to the exchange product fallacy back in 1976: R Goode, 'The Right to Trace and Its Impact in Commercial Transactions' (1976) 92 *LQ Rev* 360 at 367 note 27. Once Goode had rejected the exchange product theory he was forced to adopt a complex and convoluted role for tracing within a notion of duty to account. Unfortunately Goode's approach is hard to accept as it fails to address the Birksian notion of restitution for unjust enrichment which of course was still developing in 1976.

88 For the purpose of this article it is sufficient to talk of acquisition of chattels at law in terms of transfer as this is the most common form of acquiring such items. Real property which can be divided into different legal estates is not meant to be covered by the discussion: see Goode, note 70 above, at pp 54-57.

Lord Ellenborough's:[89]

> [T]he right [to trace and claim the substitute] only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description.

As Sir George Jessel pointed out[90] Lord Ellenborough was here talking about tracing in equity. Unfortunately his misunderstanding of tracing in equity has led many to believe that he was talking about tracing at law.

The time has come to recognise that *Taylor* has nothing to do with tracing at law; in fact such a recognition should already be in place considering the excellent work of Khurshid and Matthews. Of course, it is possible that the misinterpretation has generated an approach which may now hold the status of law. The point being made here is that the misinterpretation needs to be examined openly if the step forward that Birks advocates (ie, the right to restitution for the loss of the power in rem) is to be taken and if we are better to understand the vagaries of title at law. It is theoretically impure for lawyers to continue to misuse and misunderstand precedent especially where they are breaking new ground.

Does the Answer Lie in Tracing Value?

Birks might now argue that his concept of tracing value and vesting title pursuant to a restitutionary *power* avoids this problem with title to the exchange product, for unjust enrichment becomes the criterion of vesting the title to the exchange product in the plaintiff. The query still remains, though, that the thief gives away the plaintiff's value and in return receives value legitimately and consciously bestowed upon the thief. This analysis might be said to confuse the concept of value and to be trying to equate it with title. The point remains: what allows us to say the value surviving is the plaintiff's?

In our quest to define a proprietary interest,[91] we have to make a political decision to say that the value surviving in the hands of the thief is the plaintiff's - in essence, this is a policy choice. For it is just as easy to say in *Lipkin Gorman* that the plaintiff's value went to the bank; that the bank bestowed legitimate value on Cass; and, thus,

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89 (1815) 3 M & S 562 at 575.

90 *Re Hallett's Estate* (1879) 13 ChD 696 at 717. See Khurshid and Matthews, above note 79, at 81-82 which provides an excellent analysis of this point.

91 On this notion see C Macpherson, 'The Meaning of Property' in C Macpherson (ed), *Property Mainstream and Critical Perspective* (University of Toronto Press, 1978).

that the action to revest a proprietary interest should have been against the bank who would have raised the change of position defence. The fact that the change of position defence could be raised in nearly all cases forces our political decision deeming that value surviving with the thief emanates from the plaintiff.

In fact tracing becomes more than an identification process. It becomes a substantive doctrine which converts value held by the thief into value emanating from the plaintiff primarily to frustrate the actions of the wrongdoer. Tracing becomes a doctrine concerned with causation. The value surviving in the hands of the thief is deemed to have emanated from the plaintiff because the value received by the thief from the plaintiff caused the acquisition by the thief of the value surviving. Value received may have caused acquisition of value surviving. But what makes the value surviving necessarily referable to the plaintiff? Cause is not enough. Tracing is not simply a search for what caused the thief to hold the value surviving. Tracing is a substantive doctrine that remedies unconscionability[92] or interceptive unjust enrichment by sheeting value surviving back to the plaintiff. Tracing asks what caused the accrual of value surviving (and this process is contrived by the existing rules of tracing which represent a political decision on the scope of proprietary interests),[93] and then tracing as substantive doctrine remedies the unconscionability[94] or (where an interceptive subtraction[95] of value can be shown) the unjust enrichment of the thief, if the value surviving is caused by value received, by giving the plaintiff an entitlement to value surviving. Simply to assume value surviving emanates from the plaintiff is in essence the same mistake people make when interpreting *Taylor v Plumer*.[96] That is why it is suggested the Birks approach does not alter the criticism of using *Taylor* in this context. Furthermore even if value were seen to be surviving without any reference to unconscionability, Birks would still be stuck with justifying the awkward fit of the power

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92 Unconscionable in the sense that the thief will claim formal legal entitlement to the value to take advantage of the plaintiff's misadventure or vulnerability in a way that is unreasonable and oppressive to an extent that affronts ordinary minimum standards of fair dealing: see *Cth v Verwayen*, note 42 above, at 353.

93 See note 91.

94 Using unconscionability as the touchstone for determining value surviving accords with the theory put forward by D Osterle, 'Deficiencies in the Restitutionary Right to Trace' 68 *Cornell L Rev* 172 (1983), that traceable value surviving should only be that which it would be unconscionable for the thief to claim as his or her own.

95 Birks, note 3 above, at pp 133ff. Cf Smith, above note 62.

96 Burrows, note 25 above, at p 374 appears concerned about this issue when he says: 'It is also unclear how Birks relates value surviving to the various unjust factors'.

in rem into the arena of the transfer of property at law. The criticisms then are at two levels and suggest that Birks has not adequately explained nor addressed issues pertaining to the exchange product (title) or exchange value theories.

This raises the question as to whether it is unconscionability or unjust enrichment that governs the whole process. The conclusion put forward here is that both doctrines work hand in hand to define the legal consequences. The location of the plaintiff's value through tracing is guided by unconscionability, while the vesting of the proprietary interest is a restitutionary measure based on unjust enrichment and the original causative event and unjust factor. What confuses the issue is that traditionally the tracing equity has purported to vest interests in each and every exchange product in the plaintiff, thus leading to the assumption that unconscionability governed the vesting of the proprietary interest. It is suggested that Birks' notion of tracing value leading to restitution better informs this legal process. For, even under the traditional vested interest approach, the tracing of value on the guidance of unconscionability and the vesting of it in a restitutionary and proprietary form were still apparent. Simply to say that the traced interest vested on the basis of unconscionability would deny the loss/gain aspect of the situation. Therefore the conclusion put here is that tracing is a substantive doctrine founded in notions of unconscionability which locates (exchange) value surviving and sheets its back to the plaintiff. Restitution as a response to unjust enrichment enters the picture once the value surviving has been located to vest a proprietary interest (justified by a proprietary base). The temporal vesting of that interest whether it be immediate, delayed or retrospective is a moot point but such form of vesting should not be used to deny the loss/gain event at play here. However, if the proprietary interest is not seen as vesting in some form at the time of acquisition of the exchange product by the thief, then much difficulty arises in reconciling undivided title at law with the restitutionary remedy because the title legitimately bestowed is taken away. This, as the law stands, represents doctrinal impurity; the taking away of legitimately bestowed title. For some unconscionability may represent the touchstone, although (as suggested here) to separate tracing value from the vesting of the interest is much more definitive. This places the spotlight on the notion of proprietary base as the justification for the vesting of a proprietary interest. The notion of proprietary base is in many respects inadequate and although the matter is beyond the scope of discussion in this article it is important to note its vital yet questioned role. It in essence justifies the proprietary nature of the restitutionary remedy.

Although *Lipkin Gorman* was an in personam claim for restitution of value received, it was necessary to trace value and notionally vest the exchange value surviving in the Solicitors to prove subtractive enrichment. This tracing process required the court to

determine what value survived (and was referrable to the Solicitors) with Cass so as to establish a power in rem in the Solicitors to vest the value in the form of a proprietary interest in themselves. Once the existence of the power in rem inhering in the Solicitors was established, it was possible for the Solicitors to make an in personam claim against the Club for value received, namely, the value of the power in rem. In effect *Lipkin*-style three party scenarios will require a location of value surviving with the first recipient immediately prior to disposition of property to the second recipient so as to quantify value received and referable to the plaintiff.[97] That is why it is so important to realise in a case like *Lipkin Gorman* that exchange value surviving must be referable through some substantive doctrine to the value received.

Burrows Innovation?

Burrows has recently floated the view that the law of unjust enrichment contains an unjust factor known as 'retention of the plaintiff's property without consent'.[98] Burrows sees this unjust factor as breaking down the divide between the laws of property and restitution, for it can be generated by the scenario in which the plaintiff still holds title to the real or personal property.[99] Having introduced this unjust factor into his conceptual framework Burrows finds an interesting and new approach to proprietary restitution. Burrows sees tracing as a *technique* which allows one to achieve proprietary restitution.[100] In Burrows scheme, being able to trace your original property into a substitute allows you the liberty of choosing to transfer retrospectively title in your property to title in the exchange product.[101] Once you have title to the exchange product, the unjust factor of 'retention of property without consent' operates to allow, amongst others, the equitable remedy of 'proportionate share' which demands that a proportionate share of the fund of money to which the plaintiff has title be transferred to the plaintiff.

Burrows seems to separate out the notion of title from legal worth. The plaintiff can trace title to the $1000 the defendant retains, but for such title to have worth to the plaintiff in an insolvency context there must exist a remedial proprietary right. Burrows says the remedial proprietary right to protect title to funds is generated by his new 'property' unjust factor, although it seems that title traced solely

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97 Id at p 58.

98 Id Chapter 13.

99 Id at pp 362-371. The defendants gain is said to be the plaintiff's loss of that property: id at p 362.

100 Id at p 57.

101 Id at pp 58, 65-66.

at law is not protected by Burrows' remedial proprietary right, and would have to rely on an in personam action in conversion to protect it in an insolvency context. Title in equity then is protected by allowing the plaintiff a right to have the Courts impose an equitable lien (or more correctly, a charge) or order a transfer (at law) of a 'proportionate share of the property'. In essence, Burrows is saying that the title right produced from tracing is not a remedy, but rather the further right to protect the traced proprietary right is the proprietary remedy. The fact that the right being protected is already proprietary in nature prompts the question as to whether the equitable lien and proportionate share remedies in Burrows scheme are proprietary remedies or merely procedures of a more personal kind aimed at *further* protection of the right in rem. Are the remedies Burrows refers to any more than personal directions to the fiduciary regarding the pre-existing proprietary right? For this author, the proprietary remedy is generated by the 'tracing equity' or Birks' power in rem; the equitable charge (or as Burrows calls it, lien) and the proportionate share remedy being personal obligations incurred by the fiduciary. It looks as though Burrows has redefined the term 'proprietary remedy' to mean something done to protect your pre-existing proprietary right (which something could be personal directions to a fiduciary) rather than the traditional definition meaning the remedy which provides a right against the res. The Burrows approach may in some eyes have merit but still it fails to adequately address the issue of the avoidance of title in the exchange product.

Burrows appears to say that the title to the exchange property following the tracing process is something that can be retrospectively vested at and by the election of the plaintiff. He cites the concept of the voidable title in support of his argument. However it is important to note that in voidable title cases the transfer to be avoided is of the title from plaintiff to defendant. In exchange product situations the title to be avoided is one legitimately conferred by a third party. Burrows seems ignorant of the fact that the title to the exchange product is legitimately vested in the thief. In the case of voidable title it is arguable that the transfer of title has not been perfected and the election to revest title is really part of the initial transfer process. With the exchange product, though, the thief has obtained an otherwise valid title unless we are to say some form of trust at law exists. Vesting such a title in the plaintiff is a curious legal phenomenon.

The question remains; what is the rationale and scope of tracing at law? Should the exchange product/value theory prevail?

Conclusion : Challenging The Anti Fusionists

The exchange product theory can be seen as operating at two levels. Firstly it suggests exchange value surviving needs to be sheeted home

to the plaintiff through the notion of unconscionability as it is not per se the plaintiff's. Secondly the theory explains that title to an exchange product is legitimately bestowed upon the recipient and, if that title is to be avoided, something akin to a trust must arise to facilitate that avoidance at least at law. The first aspect of the theory is inextricably concerned with tracing, while the second level of the theory is solely concerned with the restitutionary proprietary remedy and its legitimacy in the face of apparently good title. Traditionally both exchange value and title have been analysed under the rubric of tracing; it is in large part Birks who has challenged us to rethink this approach. As the focus of this conclusion is on the second aspect of the exchange product theory, 'tracing' where referred to in the following paragraphs is meant to connote tracing as traditionally conceived; that is as the location of value and the vesting of a proprietary interest. Resort to the traditional conceptualising of tracing is invoked because it assists in highlighting the lack of understanding of the exchange product theory.

In equity the doctrine of tracing (as traditionally envisaged) has always been capable of tracing through the thief's or whoever's title (which traditionally subsumes the notion of value) in the exchange product. Tracing in equity has traditionally been a *substantive or remedial* response. Thus, its formulation as the 'tracing equity'.

At law, according to Professor Goode, the position should have been that tracing (in the traditional sense) represents a *technique or procedure* through which to identify your own property but not one available to trace through exchange title.[102] This approach did not leave Professor Goode lost at sea without the proverbial paddle because he went on to show in brilliant fashion how the common law could provide for possessory based actions as a product of the 'duty to account'. Unfortunately, Professor Goode failed to adequately address the concept of unjust enrichment which was only just (re)emerging when he was writing.

Thus the advocate of unjust enrichment in ignorance situations is left with the task of rationalising the Goode approach with the approach actually taken by Lord Goff and Birks. It is apparent that the notion of tracing (as traditionally known) through title in the exchange product is a sensible and necessary way to solve problems concerning unjust enrichment. However invocation of a *substantive or remedial* notion of tracing at law demands that we rationalise how the process relates to the holding of title at law.

Birks or Burrows might argue that the title in the exchange

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102 Note 87 above.

product is simply transferred to the plaintiff on exercise of the *power* which Burrows suggests can be done unilaterally and outside the court process. The response put here and inspired by the writings of Goode and Khurshid and Matthews is that once the title legitimately vests in the thief then no one has a legal right to divest that title in or out of court. The unlawful aspect of the thief's actions is not the taking of the transfer of value or title but the holding of that title as though it were his or her own. The transfer is perfectly valid and our formalistic approach to title by transfer at law means the thief must have valid title. How can the situation be rectified?

We could return to Professor Goode's 'duty to account' thesis which would cause theoretical problems for the restitution lawyers, or we could accept the notion of the common law trust in which title acquired by the thief and retained is said to be held on trust at law pursuant to the workings of the doctrines of unconscionability (defining value surviving in exchange value situations) and unjust enrichment (vesting the proprietary interest). Furthermore if my suggestions about the problem of seeing the *power* as purely an *in personam* right in an insolvency context are accepted, then there are strong grounds for saying the *power* must represent a proprietary interest and that a common law trust or at least division of title at law does exist when the exchange product is received by the thief. It seems the practice of law has gone too far towards division of title at law to accept Professor Goode's 'duty to account' approach. However, in practising law judges must supply arguments that are persuasive to the interpretive community or else they may fail to practise law.[103] This article is designed to divert the practice of law from unpersuasive rhetoric to persuasive law.

To accept the forgoing approach of recognising divided title at law is in many ways to break down the equity/law divide by mirroring the capability of the tracing equity at law. This is not to say tracing at law equals the *scope* of tracing in equity (ie through mixtures), but rather to say that where tracing (as traditionally understood) at law operates it does so in a *substantive or remedial* fashion just like in equity. The flexibility equity held over the indivisible title at law is incorporated into the notion of title at law to create a notion of divided or trust type title at law.

Lipkin Gorman and Birks' analysis of that case suggest that the exchange product theory in terms of title is being ignored in the practice of law and the principles of law and equity unified. It is fair to say that tracing at law was/is theoretically and awkwardly limited by the concept of indivisibility of title at law and formalism in general.

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103 S Fish, *Doing What Comes Naturally* (OUP, 1989).

Some Australians have objected vehemently to the fusing of law and equity. Such an attitude although understandable in a historical context should not be seen as a barricade preventing future initiatives. The equity/law divide in many ways mirrors the literal/interpretive divide in adjudication theory.[104] Equity in many regards has been perpetuating an interpretive approach to law through the guise of its open textured principles.[105] Law on the other hand has maintained (especially in the area of property law) a very legalistic and anti-humanist approach. Perhaps times have changed sufficiently for many of us to see that the law/equity divide is in need of overhaul.[106] As the law becomes less literalist and more purposive and interpretive the need to marginalise the human face of law to the depths of equity is questioned.[107]

Professor Birks has in certain areas anticipated the disintegration of the law/equity divide.[108] In many instances his reasons for abolishing the divide come from his grand vision to see the generic conception of unjust enrichment rise to fully fledged status in the law of obligations (and property?). Birks is right to question why law cannot have the human face of equity and why we continue to perpetuate an outdated divide.

The approach of Lord Goff and Birks to ignore the exchange product theory is an oversight that should be remedied. The reliance by Lord Goff on *Taylor v Plumer* is questionable. As it underpins *Lipkin Gorman* it would be much clearer for future legal argument if this matter were openly addressed.

It is hoped that if Australian Courts are to tread this path they field argument on the legitimate use of *Taylor v Plumer* by the English restitution lawyers. There is no doubt growing support for the view that the law of restitution should recognise a right to claim a

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104 K Henly, 'Abstract Principles, Mid-level Principles, and the Rule of Law' 12 *Law and Philosophy* 121 at 127-132 (1993).

105 The human face of equity has been acknowledged since Roman times: see J Kelly, *A Short History of Western Legal Theory* (OUP, 1992) at pp 28-9, 153-4, 189-91.

106 M Tilbury, M Noone and B Kercher, *Remedies: Commentary and Materials* (2nd ed, Law Book Co, 1993) pp 12-14.

107 Justice Deane's judgment in *Verwayen*, note 42 above, is a classic example of a change in feeling towards a strict law/equity divide.

108 Cf R Pound, 'The Decadence of Equity' 5 *Colum L Rev* 20 (1905), where the dying tradition of equity is lamented.

proprietary interest in the exchange product but let us openly acknowledge why that decision is being made, and begin to explore the consequences[109] this might have on the traditional indivisibility of title at law and the law/equity divide.[110]

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109 It may lead to the notion of a fiduciary obligation at law which could then alter our perception of the range of responses to the protection of proprietary interests at law so as to be more in tune with equitable responses.

110 This article has dealt with the civil remedies relating to what in many instances will be proceeds of crime. A vast amount of legislation exists in Australia under which persons convicted of crimes forfeit tainted property to the State. The operation of such procedures for forfeiture and the ignorance doctrine in fraud or theft cases will in some cases be overlapping. Writers (eg B Fisse, 'Confiscation of Proceeds of Crime' in B Fisse, D Fraser and G Coss (eds) *The Money Trail* (Law Book Co, 1992) pp 75, 80, 81-84) in the proceeds of crime field use the term 'unjust enrichment'; however the relationship between the State and the defendant is hardly a loss/gain relationship vitiated by an unjust factor, although in some cases the semblance of a loss/gain scenario might arise. It might be said criminals are enriched at the expense of the people of the relevant polities yet this is stretching the analysis. Perhaps the better approach is to regard proceeds of crime as enrichment through a wrong; the wrong being perpetrated on society as a whole. Even though this proceeds of crime movement relates to a slightly different set of relations it is important to take note of the flexible causative approach the proceeds of crime legislation takes to tracing: B Fisse et al, above, at pp 1-2. On the use of unjust enrichment in proceeds of crime prevention see: P Loughlan, 'Equity and the Proceeds of Crime' in B Fisse et al (eds), above, at p 150.