Difficulties with tracing backwards

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Through the payment of a debt into assets: Simple explanation
1. You have a debt → You owe money to someone (a creditor).
2. You have money (which could be borrowed or meant to repay debt) → Instead of using it to pay off the debt, you use it to buy an asset.
3. You still owe the debt → Even though you now own an asset, the debt doesn't disappear. You still have to repay it unless something legally cancels it.

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*L.Q.R. 432 I. Introduction

"Tracing is the process of identifying a new asset as the substitute for the old." [1] In a simple case, this process of identification is used where a trustee (or fiduciary) wrongfully transfers trust property (for example, funds held on trust) to another in exchange for a different asset (for example, shares or land). The tracing process is a necessary prelude to the trust beneficiaries asserting proprietary claims over the substitute asset(s) [2]: it is the process by which the beneficiaries identify what has been substituted for the funds that were originally held on trust for them. But where the trustee has transferred the trust funds away in order to extinguish a debt, such as where he or she pays it into an overdrawn bank account, the beneficiaries are unable to trace the trust money into the bank account. [3] As the Court of Appeal explained in *Re Diplock*:

"[Even] the equitable remedies pre-suppose the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund. If, on the facts of any individual case, such continued existence is not established, equity is as helpless as the common law itself." [4]

When the trustee's debt is paid using trust moneys there is no fund or asset into which to trace the trust moneys: the debt is simply extinguished. The beneficiaries may, of course, be able to trace [5] the trust money into the hands of the erstwhile creditor to whom it was paid, [6] but not into the trustee's bank account. The question posed by the concept of "so-called backward tracing" [7] is whether there might be an exception to this analysis where the trust beneficiaries can show that the debt was originally incurred in order to acquire a specific and identifiable asset. The idea of tracing backwards is that the beneficiaries might, in such circumstances, ***L.Q.R. 433*** be able to trace the trust funds *through* payment of the debt *into* the asset that was acquired by means of incurring the debt, in order that they might then make some form of proprietary claim to that asset.

As is well known, Professor Lionel Smith has offered a sophisticated defence of the possibility of tracing backwards in this way, in various places. [8] Many other commentators consider that backward tracing ought to be, or even is, a recognised extension of the law of tracing, [9] although some disagree. [10] The most prominent English decision on the issue, *Bishopsgate Investment Management Ltd v Homan,* [11] is inconclusive. As all undergraduates can recount, Dillon L.J. agreed with Vinelott J. below that "it is at least arguable … that there ought to be an equitable charge" [12] where it can be "shown that there was a connection between a particular misappropriation of [trust] moneys and the acquisition by [the trustee] of a particular asset," [13] even if the asset was acquired before the trust funds were misappropriated. In contrast, Leggatt L.J. considered:

"There can be no equitable remedy against an asset acquired *before* misappropriation of money takes place, since ex hypothesi it cannot be followed into something which existed and so had been acquired before the money was received and therefore without its aid. The concept of a "composite transaction' is in my judgment fallacious." [14]

Henry L.J. simply said "I agree with both judgments", [15] which provides no basis for mediating between the divergent views of his brethren regarding the issue of backward tracing, and he must be taken as not having addressed it. [16] The point is an open one. [17]

This article argues that the law ought not to recognise the possibility of tracing backwards. Much of the argument advanced by other commentators offers very little analysis of the case law that is said to support the possibility of tracing ***L.Q.R. 434*** backwards. When the cases are examined closely, it becomes clear that the degree to which they can be treated as supporting the possibility of backward tracing is much lower than is often claimed. When that weak level of authority is coupled with weaknesses in the conceptual explanation for backward tracing and put alongside policy concerns that the idea raises, there is good reason for the law to refuse to allow it.

A. Cases cited

Smith cited a number of cases in support of his argument that "whenever value is used to discharge an obligation, it is traceable into what was acquired in exchange for incurring that obligation". [18] In particular, he relied upon *Primeau v Granfield,* [19] *Westdeutsche Landesbank Girozentrale v Islington LBC,* [20] *Agricultural Credit Corp of Saskatchewan v Pettyjohn,* [21] *Re Diplock,* [22] and *Agip (Africa) Ltd v Jackson.* [23] Subsequently, others have claimed that the decision in *Law Society v Haider* [24] is also an instance of backward tracing. [25] These cases are addressed in chronological order.

The Circuit Court decision in *Primeau v Granfield* [26] concerned the principles by which an account of trust funds should be taken. [27] Primeau gave money to Granfield to invest in mining shares. Notwithstanding his fiduciary position as Primeau's agent, Granfield withdrew this money from his bank account and used part of it (known in the case as the French Fund) to develop a goldmine claim that Granfield had leased. Hand J. considered it too difficult to determine what contribution the French Fund had made to the value of the ore that was drawn from the mine, and that in any event the rights to the ore had been obtained by virtue of Granfield's lease rather than the money spent extracting it from the mine. [28] Hand J. therefore considered that the question was whether the French Fund could be traced into the lease, on the basis that Primeau's money was part of what Granfield had paid for the lease:

"The consideration -- i.e., what he gave in exchange for that right -- consisted of certain promises upon his part and in the performance of those promises he used some of Primeau's money." [29]

This provides the basis for Smith's argument that:

*L.Q.R. 435 "Hand J. held that the plaintiff's value, which had been used to pay the defendant's obligations, was traceable into what the defendant got for incurring those obligations: namely, an interest in land including the right to extract gold ore." [30]

But the judgment is not so straightforward, for two reasons. First, while the decision can be interpreted as depending on tracing Primeau's money into the payment of obligations owed by Granfield under the lease, Hand J. seemed to think of the payments as being in the nature of rent. [31] As the Privy Council has said, "the rent is equivalent to the purchase money" [32] for a lease--in other words, "the monetary compensation payable by the tenant in consideration for the grant". [33] The lease entitled Granfield to mine for gold, but that right was dependent on his payment of a price for the right (the rent) and Primeau's money had been used to pay that price. In substance, Primeau's money had been used to acquire the rights that the lease gave to Granfield. In Hand J.'s own words:

"In my judgment, therefore, the lease was *procured* by the payments not only to open up the mine originally, but by all the royalties paid and by all the subsequent work of operation … what Granfield got was the right to take it out, and that is the right into which Primeau has traced his money." [34]

It is not suggested that this interpretation of *Primeau v Granfield* is categorically inconsistent with Smith's interpretation of the case: although it was not the case historically, [35] the modern cases have treated rent as a contractual obligation, [36] so that payment of rent can be considered payment of a debt and *Primeau v Granfield* can thus be interpreted as supporting Smith's thesis. But that support is weak given that the facts of the case are also consistent with Primeau's money having been used to procure the asset that Granfield held, at least in terms of his continued holding of that asset. The interpretation offered here better reflects the way in which Hand J. himself approached the case. Treating the use of Primeau's money as payment of the rent for the goldmine lease makes *Primeau v Granfield* similar *L.Q.R. 436 to the House of Lords' decision in *Foskett v McKeown,* [37] where trust beneficiaries were able to trace into an insurance policy after the premiums were paid with trust funds. [38]

Secondly, the view of *Primeau v Granfield* presented here is also consistent with another aspect of the case, not mentioned by Smith but which should presumably have been decided differently if Smith's thesis were correct. Another part of Primeau's money (referred to as the Mortgage Fund) had been wrongfully used by Granfield to pay off a mortgage over his house. Granfield then raised a further mortgage over the house and spent the funds developing his goldmine. Primeau sought to argue that he could trace into those funds by tracing into the equity in Granfield's house (by virtue of Primeau's money having gone towards payment of the original mortgage) and thence into the funds raised on that equity by way of the subsequent mortgage. Hand J. firmly rejected this argument. He accepted that Primeau could assert rights over Granfield's house, but he emphasised that:

"Primeau's rights were wholly as a lienor, in subrogation to the original mortgage, which his money had paid. He never became a part owner in the house, or in the money which came from the house. I agree that he was entitled to a lien upon the $3,000 which Granfield got on the subsequent mortgage as well as on the equity in the house, but his rights were limited to those of a lienor. Whatever Granfield did with that money, Primeau could never become a co-owner in it, because his money had never gone into it, but into a mortgage which was an incumbrance upon it." [39]

The importance of this is that, if Smith were correct and Hand J. had adopted the idea of backward tracing in *Primeau v Granfield,* Primeau should have been able to trace the Mortgage Fund into the payment of the mortgage debt and thence into the asset for which the debt had been incurred, viz. Granfield's ownership interest in the house itself. Yet Hand J. explicitly refused to allow that. That refusal severely undermines the view that his conclusions about the possibility of tracing the French Fund into the goldmine involved application of a backward tracing principle. [40]

Re Diplock [41] involved the wrongful payment of funds from the Diplock estate to various recipients. In Smith's words:

"Money paid to the Heritage Craft Schools was used to pay a debt; the debt had been incurred to make improvements to a building. It was held that, "in substance', the money had been used to pay for the improvements. That supports the position advanced here." [42]

L.Q.R. 437 The Court of Appeal's reasoning is more confused than this suggests. [43] The court did conclude that the money paid to the Heritage Craft Schools had been used to extinguish a debt, [44] which had been incurred in order to pay for works on the land of the recipient. But the decision on this aspect of the case is not a positive finding that one can trace through the payment of a debt because the court's real concern was to indicate that the money had been lost.

The court held that the extinction of the debt meant that the plaintiffs could not be subrogated to the position of the creditor, partly it seems because the loan was unsecured. [45] Having so concluded, the court went on to hold that the plaintiffs had no proprietary claim because "in substance the Diplock money was used for the purpose of carrying out works on the land of the charity". [46] This is consistent with the analysis that Smith seeks to advance, in that it can be interpreted as the court tracing the money through the payment of a debt into the payments for improvements to the property for which the debt had been incurred. However, the court's true concern in this part of its judgment was not to trace the plaintiffs' money into the buildings but rather to explain that their money had been lost. The court held in respect of the Heritage Craft Schools claim that

"the appellants are in no better position than they are in the cases of works carried out on lands of a charity which we have already discussed". [47]

This refers back to the court's earlier conclusion that another part of the Diplock estate which had been used to pay for other building works was lost because of accession [48] such that "the money will have disappeared leaving no monetary trace behind". [49] The court could have reached its conclusion regarding the Heritage Craft Schools either by saying that the money was lost when it was used to pay a debt or that it was lost by accession in the building works. Either way, no proprietary claim was possible. What the court said can potentially be interpreted as it having adopted the second analysis, but the court did not address the question of tracing backwards directly and it seemed more concerned with making clear that there was no proprietary claim than with explaining precisely why that was the case. Taken in context, the decision provides an insubstantial foundation on which to erect the sort of analysis that Smith proposes.

Agip (Africa) Ltd v Jackson [50] concerned the tracing of money which was paid, without authorisation, by the Banque du Sud in Tunisia to Lloyds Bank in London, via Citibank in New York. The element in the case that appears to involve tracing backwards arises because of the time zone difference between New York and London, which resulted in money being credited in London before it had been received in New York. Millett J. held it impossible to trace the funds at common *L.Q.R. 438* law because of their mixture with other money, [51] but he held there was no such impediment to tracing the funds in equity. The reasoning on the ability to trace in equity was cursory, Millett J. simply asserting that:

"There is no difficulty in tracing the plaintiffs' property in equity which can follow the money as it passed through the accounts of the correspondent banks in New York or, more realistically, follow the chose in action through its transmutation as a direct result of forged instructions from a debt owed by the Banque du Sud to the plaintiffs in Tunis into a debt owed by Lloyds Bank to Baker Oil in London." [52]

Although Millett J. had earlier acknowledged that the time zone difference meant that the transaction "necessarily involved the exposure of Lloyds Bank to a delivery risk in New York", [53] that was not addressed when he considered the equitable tracing process. Similarly, the Court of Appeal merely said that "there is, in the present case, no difficulty about the mechanics of tracing in equity". [54] With Smith, one can argue that Millett J. must have accepted the ability to trace through the payment of a debt (owed in New York) into that which had been acquired in return for the debt (the credit in London). But the reasoning on the point in the decisions at both levels in *Agip* is virtually non-existent. The point about payment of a debt appears not to have been raised before Millett J., [55] nor in contention before the Court of Appeal, [56] which weakens the value of the reconstruction of analysis that is necessary to justify the conclusion.

While addressing *Agip,* Smith argued that the Court of Appeal had reached the same decision over a century earlier in *Baroness Wenlock v River Dee Co.* [57] That is not so. In *Wenlock,* a court order entitled the plaintiffs to be paid for any sums of their

money that had been used by a company to pay its debts or liabilities. The appearance of backward tracing arises because the company's creditors had been paid by the company's bank, and the bank subsequently used the plaintiffs' money to reduce the debt owed to it by the company. Smith relied on the case as showing that there was "no difficulty in tracing [the plaintiffs'] money to the payments received by the creditors". [58] It is true that the Court of Appeal framed the relevant question as "are the plaintiffs entitled to be subrogated to the rights of these creditors?", [59] but the court's conclusion was more subtle. Delivering the judgment of the court, Fry L.J. answered the question just posed by saying:

"It appears to us that they are entitled to be so subrogated: that the right of the bankers, which they obtained by subrogation from the creditors whom they paid, was an equitable liability of the company." [60]

L.Q.R. 439 This reveals that the decision did not depend on tracing backwards. When the bank used its own money to pay the company's original creditors, the bank was subrogated to the position of the original creditors and so the bank became a creditor of the company. [61] The bank then used the plaintiffs' money to reduce the debt that the company now owed to the bank. Use of the plaintiffs' money in that way fell within the terms of the court order, as it was a payment of a debt or liability of the company, [62] and so the plaintiffs were entitled to recover that money. There was no need for the plaintiffs to show that their money had reached the hands of the *original* creditors, because it was sufficient to show that it had reached the hands of *a* creditor--the bank--which could be achieved without needing to trace through the payment of any debt. That is quite different from the situation that arose in *Agip*. The idea of tracing backwards derives no support from *Wenlock v River Dee Co.*

On its face, the Saskatchewan Court of Appeal's decision in *Agricultural Credit Corp of Saskatchewan v Pettyjohn* [63] supports the possibility of tracing backwards. Again, however, caution is required. The defendants bought cattle in reliance on the promise of a loan from the claimant, which was later executed, and a chattel mortgage over the cattle was granted to the claimant to secure the loan. The Court of Appeal held that the mortgage constituted a purchase money security interest under Saskatchewan's Personal Property Security Act, [64] notwithstanding that the purchase had preceded the advance of the loan moneys, because the claimant's binding commitment to make the loan was itself sufficient value to satisfy the PPSA's definition of a purchase money security interest. [65] A tracing exercise then became necessary to determine whether the claimant's security interest could be asserted over the defendants' current (Watusi) cattle, as the cattle over which the mortgage had originally been granted had been sold. As the court recognised, there was a problem with tracing under "the traditional view of equity" because the proceeds of sale of the original cattle had been used to pay off debts owed to a bank. [66] Those debts had been incurred in order to purchase the new Watusi cattle. In these circumstances, the Court of Appeal held that the claimant could trace the old cattle into the Watusi cattle

"… not by reason of the form of the transactions which led from one to the other, but instead because the new Watusi cattle replaced the 1981 and 1984 cattle in the farming operations of the Pettyjohns as a matter of commercial reality". [67]

This can be understood as a case involving tracing backwards through the payment of a debt into what had been acquired in return for that debt. However, the support that the case provides to such a theory is extremely limited, because the decision was based squarely on the court's view of what was necessary for the PPSA to ***L.Q.R. 440*** operate in a sensible fashion. As Sherstobitoff J.A. emphasised, "certain *changes in the concept of tracing* will be required in the context of the PPSA" [68] and

"… to hold that a close and substantial connection established through the substance of a series of transactions through which one set of chattels replaces another of the same kind can be sufficient to found a tracing remedy irrespective of the form in which the transactions take place *is to extend the equitable concept of tracing for the purposes of the PPSA".* [69]

Saskatchewan's PPSA was modelled on art.9 of the United States Uniform Commercial Code, which

"… is a radical reform of the previous law … Any attempt to incorporate its provisions into the law of [England] would have to be done with that in mind." [70]

"It is always necessary to pay close attention to any statutory context in which [a] term is used." [71] As has been made clear, the judges expressly reached their decision in *Pettyjohn* "in light of the view we take of the tracing remedy under the PPSA". [72]

It was recognised that it was not a straightforward application of ordinary equitable tracing principles, and it courts error to conceive of the decision as such.

Westdeutsche Landesbank Girozentrale v Islington LBC [73] can be dealt with quickly. At first instance, Hobhouse J. held:

"The mere fact that a given bank account or group of bank accounts may not be in credit does not mean that the right of a beneficiary to trace through the assets of a fiduciary has been lost," [74]

which Smith submitted to be a correct decision. [75] Subsequently, in his book, Smith did not refer to Hobhouse J.'s decision in *Westdeutsche* in this context. [76] Presumably, the reason is that, in the interim, Hobhouse J.'s decision had been overturned. Lord Browne-Wilkinson explained in the House of Lords:

"The latest time at which there was any possibility of identifying the 'trust property' was the date on which the moneys in the mixed bank account of the local authority ceased to be traceable when the local authority's account went into overdraft," [77]

and "the moneys, upon the bank account going into overdraft, became untraceable". [78]

L.Q.R. 441 It having been decided after he wrote, Smith could not have cited *Law Society v Haider* [79] as an instance of backward tracing, but others have done so. For example, Professor Penner has said that "the decision is clearly inexplicable if not for backwards tracing". [80] That is not correct. The case involved a claim by the Law Society brought on behalf of clients of a law firm into the practice of which the Society had intervened. It sought to trace client trust funds which had been paid, in breach of trust, from the firm's client account to Haider. Two tracing exercises were necessary as the funds had been used in connection with two different properties.

In the first exercise, the client funds were traced into the purchase of Drive House. [81] The funds were used as part of the payment necessary for completion of the purchase, at which point title passed to Haider. In other words, the funds were not used to pay a debt owed in respect of a property which had already been acquired, but rather to acquire the property in the first place. [82] This was a straightforward case of tracing one asset (the funds) directly into the acquisition of another asset (the house). The Law Society could potentially have asserted a proportionate co-ownership interest in Drive House, [83] but instead it elected merely to seek a charge over the house to secure repayment of the funds. [84] That charge was granted without any thought apparently being given, and certainly no conscious reference being made by Richards J., to tracing backwards. The reason is that backward tracing was not relevant. [85]

The second tracing exercise concerned Haider's use of part of the client funds to redeem a mortgage over another property, 5 Riverside. 5 Riverside was subsequently sold and part of the proceeds used to buy 39 Regatta Point. Richards J. held that the Law Society could trace the client funds into 5 Riverside, through the proceeds of sale and into 39 Regatta Point. [86] As with the first exercise, the tracing process was dealt with in short order in the judgment and without any reference to tracing backwards. Again, it was unnecessary to trace backwards. It is well recognised that the payment of a mortgage debt entitles the party whose funds were used to claim a charge by way of subrogation over the land. [87] In a subrogation case, the claimant traces the payment of its money into the (notional) acquisition of the asset that the creditor had, viz. the mortgagee's rights against the mortgagor, including the mortgagee's (proprietary) security interest. This does not involve tracing through payment of the debt into ownership of the land that ***L.Q.R. 442*** was acquired with the debt. The mortgagee's proprietary rights, arising by virtue of its charge over the land, are quite distinct from the mortgagor's freehold estate in the land (which is reflected, during the mortgage, in the equity of redemption [88]). [89] The ability to assert a claim to a charge by way of subrogation involves no claim to co-ownership of the mortgagor's freehold estate. Consistently with that, the Law Society did not assert, nor was it granted, a co-ownership interest in 39 Regatta Point in *Haider*. All that the Law Society sought, and all that Richards J. granted, was a charge over 39 Regatta Point. That result is perfectly well explained without need of the concept of backward tracing. [90]

B. Other relevant authorities

In addition to these cases, there are other decisions that indicate a preference for the possibility of tracing backwards. Equally, however, there are several decisions that ought not to have been decided as they were if backward tracing were possible.

(i) Cases favouring backward tracing

In the first category, of cases supporting the idea of tracing backwards, one can include Rimer J.'s statement in *Shalson v Russo* that "I too respectfully prefer Dillon L.J.'s approach [in *Bishopsgate v Homan* [91]]", [92] but the comment was no more than obiter as the facts did not support the application of the concept "even if it is well founded." [93] Similarly, in *Foskett v McKeown,* Scott V.-C. made it clear that he considered it possible to trace backwards through the payment of a debt into an asset paid for by assuming the debt if "it can be shown that it was always the intention to use the trust money to acquire the asset". [94] However, in the same case Hobhouse L.J. disagreed with that view, saying that "the doctrine of tracing does not extend to following value into a previously acquired asset", [95] and Morritt L.J. preferred the analysis that Leggatt L.J. had advanced in *Homan.* [96]

Professor Simon Evans appears also to have treated Kearney J.'s decision in *Hagan v Waterhouse* [97] as having involved the tracing of trust assets through an overdrawn bank account (and hence through repayment of a debt) into assets which were bought using the overdraft facility. [98] However, this case is not really an instance of the court tracing backwards. First, contrary to what Evans says, the trust assets in *Hagan* were not "deposited" into the overdrawn account, but rather were charged so as to secure, and thereby maintain, the overdraft facility. The ***L.Q.R. 443*** charge was granted in breach of trust, which Kearney J. held entitled the trust beneficiaries to claim any profits which the trustees earned from money withdrawn from the account. Rather than being a case of tracing the trust assets through the overdrawn bank account, the case seems more accurately described as having involved the stripping of profits that a fiduciary made in his personal capacity by using the trust assets to ensure the continued availability of his overdraft. Secondly, the original trust assets had not themselves been lost as they had not been used to repay the debt. Thirdly, the assets into which the trust claimants could trace were acquired *after* that had happened, not *before* the trust money became connected with the overdrawn account.

(ii) Cases against backward tracing

The second category of cases demonstrates that the traffic is not all in one direction. There are numerous instances of courts reaching decisions which ought to have been different, or at least reasoned differently, if backward tracing were a concept recognised in the case law.

For example, the Court of Appeal's judgment in *Serious Fraud Office v Lexi Holdings Plc* contains a strong re-statement of the traditional position that:

"If all the misappropriated funds in any given case are paid into an account which was and remains overdrawn then the proprietary remedy is lost: for there are no identifiable assets left in existence, deriving from the misappropriated trust funds, to which a constructive trust or an equitable charge could attach." [99]

Similarly, in *Re BA Peters Plc,* Lord Neuberger rejected a claim based on tracing on the basis that:

"… because the money in issue was paid by the company into the current account (which was always in debit), it was effectively used to reduce the company's liability with the bank and it effectively disappeared so that there was never any fund on which a proprietary claim could operate". [100]

The same analysis can be found in numerous other decisions: "equitable tracing, though devised for the protection of trust moneys misapplied, cannot be pursued through an overdrawn and therefore non-existent fund". [101] Lionel Smith would dismiss such cases as simply instances where it was not clear what had been acquired with the debts that were discharged, so that it was only evidential difficulties that stopped the tracing process at the overdrawn bank account. [102] That may be so as a matter of fact, [103] and the facts are clearly important when interpreting cases. [104] But it is also important to look to the reasoning process that the court ***L.Q.R. 444*** offered to justify its decision, and the reasons offered in these cases were not limited to overdrawn accounts where the debt could not be matched with an asset. It must also be accepted, however, that the point about evidence does mean that these cases cannot be treated as a categorical rejection of the possibility of tracing backwards.

Related to the cases that have refused to allow tracing through overdrawn accounts are cases where the courts have refused to allow the claimant to trace through the payment of a debt into the asset that was acquired in return for assumption of the debt. For example, in *Denton v Davies,* [105] a trustee of settled land borrowed money in order to buy land in the Vale of Clwyd. When the settled assets were subsequently sold and the proceeds used to pay the debt, Grant M.R. held that the plaintiffs, who were entitled under the settlements, could not trace the settled assets into the Clwyd land. Smith suggests that the decision ought to have been that the plaintiffs could trace but not make a claim to the Clwyd land, [106] but the decision was not reasoned in that fashion, and Smith offers no reason for denying the claim if the plaintiffs had successfully traced into the Clwyd land.

Similarly, in *Moffatt v Crawford,* [107] a trustee bought a piano on credit. Title to the piano passed to the trustee on delivery, [108] and the piano was then given by the trustee to his wife for Christmas. Subsequently, the trustee paid the vendor for the piano using trust funds. Lukin J. said:

"Can it be said the trust was impressed on that first payment -- that is to say, not only after it had become his property, but also after the property therein had passed to his wife? I think not. Trust money is not here followed in property in which it has been invested or into which it has been converted. The trust money at the most had been used to pay a past debt that no doubt originally became due in consequence of such purchase, but I do not think the principle of following trust property has been, or could from its nature be, extended to property acquired by a past transaction." [109]

On appeal to the Full Court, McCawley C.J. held:

"I can see no reason for disagreeing from the judgment of Lukin J. that the trust money cannot be traced into the piano which had been purchased by [the trustee] and disposed of by him before any payment therefor was made out of trust funds." [110]

This points to a potential weakness in *Moffatt v Crawford* 's rejection of backward tracing, in that the trustee's lack of legal title to the piano at the time the trust funds were applied to payment of the debt could be taken as the reason why it was not possible to trace backwards into the piano. However, although that point was no ***L.Q.R. 445*** doubt present in Lukin J.'s mind, his statement of principle is broader than that and is entirely consistent with what Leggatt L.J. said in *Bishopsgate v Homan.* [111]

Further, in *Re Goode,* White J. appeared to adopt as correct the statement in the 26th edition of *Snell's Equity* that:

"… even if the recipient has used the trust money to pay off secured or unsecured loans or other *Identifiable* debts, there can be no tracing; for the payment purchases no asset, but merely extinguishes the debt and there is no equity to revive it or create a new debt in its place". [112]

The latter part of this statement does not accurately reflect the present law of subrogation, [113] but the earlier part of the statement is consistent with the traditional way of thinking about tracing, and inconsistent with the idea of tracing backwards through the payment of debts.

Also relevant in the present context are the cases concerning the effect of paying mortgage instalments on a property where the mortgage debt is owed by another. As Peter Gibson L.J. said in *Curley v Parkes*:

"[S]ubsequent payments of the mortgage instalments are not part of the purchase price already paid to the vendor, but are sums paid for discharging the mortgagor's obligations under the mortgage." [114]

If it were possible to trace backwards then one would expect these cases to hold that the payments which reduce the mortgage debt can be traced into the asset that was acquired with the assistance of the mortgage finance, viz. the property. Yet that is not so. In *Calverley v Green,* [115] for example, a de facto couple jointly borrowed mortgage finance to buy a house in their joint names. The court held that a presumed resulting trust arose, whereby the legal title was held by the couple on trust for themselves as equal tenants in common in equity. Importantly, the defendant's payment of all the mortgage instalments was held not to affect this presumed resulting trust, [116] notwithstanding that those payments clearly repaid the debt that had been incurred to acquire the house. As O'Bryan J. said in *Ingram v Ingram,* under a resulting trust

"… the fact that after the date of the transfer the wife paid all the interest falling due under the mortgages, paid for all rates and repairs and made such repayment of principal moneys as was made in reduction of the mortgage debts, cannot affect the equitable estates created at the time of the conveyance". [117]

*L.Q.R. 446 Such payments can, of course, affect the beneficial ownership of the property, if they provide a sufficient "basis from which to infer a common intention to share the property beneficially". [118] However, a heavy burden of proof to that effect must be met where the legal title was transferred to the two parties jointly, [119] and the common intention constructive trust approach is only applied in domestic contexts. [120] Most importantly, in cases where it is applied, the juristic basis of the constructive trust is the parties' common intention to share beneficial ownership of property coupled with detrimental reliance by one party on that common intention. In such cases, the court infers that the parties have agreed to alter their property rights. [121] That conceptual underpinning is very different from the mechanical identification of property rights, based on substitution of one form of property for another, which characterises the law of tracing and the doctrine of presumed resulting trusts.

It is, however, important to emphasise that the point of this section of the article is not to argue that there is no support in the case law for the idea of tracing backwards through debts. Rather, the burden of the section has been to highlight that the support for that idea is not as strong as might be thought from the way in which the argument is presented in some quarters, and that there is authority which points distinctly in the opposite direction. In other words, the authority in favour of the idea is very thin, rather than non-existent.

表明這是對原則的無可挑剔的邏輯應用

III. Weaknesses in the Conceptual Justifications

The weaknesses in the authority cited as supporting the idea of tracing backwards might not matter if the conceptual justification for the idea showed it to be an unassailably logical application of principles recognised within the law of tracing, as indeed some appear to consider it. [122] But that is not so: there are flaws in the justifications that have been offered for tracing backwards. Again, as with the weaknesses in the authorities, these weaknesses do not mean that backward tracing is conceptually impossible. Rather, the concern is that the conceptual arguments that have been offered to justify the possibility of tracing backwards are far from conclusive. The question therefore becomes, not whether the law *could* recognise the possibility of backward tracing, but whether it *should* recognise that possibility. That is a question of legal policy rather than principle, which will be addressed in the next section of the article, but it is necessary first to identify the flaws in the arguments that have been advanced in support of backward tracing as a principle.

透過向汽車支付債務來追溯資金是一個自然推論，即汽車供應商"L.Q.R. 447可以將汽車追溯到債務中，然後追溯到償還債務時接受的錢

Again, the most sophisticated analysis is offered by Lionel Smith. It is useful to have in mind the example that Smith posits, of a car being bought on credit, and the debt subsequently being paid with money that has been stolen (or paid away in breach of trust). Smith argues that tracing the money backwards through payment of the debt into the car is a natural corollary of the fact that the vendor of the car *L.Q.R. 447 can trace the car into the debt and thence into the money that is accepted in payment of the debt. [123] Smith describes the debt as a "red herring in the tracing exercise". [124]

Beguilingly simple as it is, the difficulty with this argument is that it is not the case, to use Smith's words, that:

"… if from one perspective the money is the proceeds of the car, it follows that from the other perspective, the car is the proceeds of the money". [125]

The trust beneficiaries' rights to the car (if any) derive from those of the buyer, rather than the seller, and there is no reason why a transaction of this sort must have symmetrical effects for buyer and seller alike. There is no doubt that, on the seller's side, the car can easily be traced into the asset that the seller acquires in return for parting with title to the car (viz. the debt), which in turn can be traced into the money that is paid to satisfy the debt. But that is because "tracing is a process whereby assets are identified" [126] and, at each stage, there is an asset that the seller can claim as the substitute for the asset that he or she had at the outset of the process. The same cannot be said of the buyer's side of the transaction. The buyer begins with an original asset (for example, trust money) but that money is retained by the buyer when he acquires the car. Thus, the buyer acquires a new asset (the car) but the buyer also assumes a liability (the debt). It is that liability that is later discharged by payment of the money to the seller, at which stage the buyer is left with the new asset (the car).

The reason the two sides of the transaction are not simply mirror images of one another is that the debt has a different juristic characteristic on each side of the transaction: the debt is an asset in the hands of the creditor (the seller), and so it can provide a basis for traditional tracing, but the debt is a liability--the opposite of an asset--in the hands of the debtor (the buyer). As Smith says, "the thief parts with money in exchange for a release from a liability". [127] That is not the same thing as the acquisition of an asset. Indeed, an important part of the point of debt finance, from the borrower's perspective, is to enable him or her to make money by acquiring assets without paying for them until later, so that the assets can in turn be used to generate funds with which to pay the debt, ordinarily because the borrower does not, at the time of acquisition, either have or want to lay out sufficient funds to pay for the assets. [128] Thus, in a credit sale transaction, the seller gives up an asset *in return* for another asset (the benefit of the debt) whereas the buyer acquires an asset *alongside* a liability (the burden of the debt). The two sides of the transaction are different, and so there is no reason why the same rules must apply to each side.

Smith attempts to elide the difference between acquiring the debt as an asset and extinguishing the debt as a liability by arguing that:

L.Q.R. 448 "… the incurring of the debt is the means of acquisition of [the car], and the money being traced is the means of "acquisition' or extinguishment of the debt". [129]

But the acquisition and extinguishment of debts are two very different things. There is no doubt that a debt can be acquired from the creditor, who holds it as an asset. But when the debt is paid, the debt is not being acquired from the creditor--it is being destroyed.

This explains why subrogation makes perfect sense in this context and why it does not depend on tracing backwards. In a case of the sort under discussion, if trust (or stolen) money is used to pay the debt that was incurred to acquire the car, the trust beneficiaries can claim to be subrogated to the position of the creditor, because equity holds that although the debt has been extinguished by the payment the beneficiaries are entitled (in simple terms) to be treated as if it had been kept alive for their benefit.

"When judges say that the charge is "kept alive' for the benefit of the plaintiff, what they mean is that his legal relations with a defendant who would otherwise be unjustly enriched are regulated *as if* the benefit of the charge had been assigned to him." [130]

In other words, there is a substitution of one asset for another asset. That is not so where one seeks to trace money (or other valuable property) into the repayment of a debt on the debtor's side of the credit relationship.

This point can also be made by reference to the analysis of tracing that Lord Millett adopted in *Foskett v McKeown*: "what [a claimant] traces, therefore, is not the physical asset itself but the value inherent in it". [131] When trust money is used to pay the debt, there is no *value* inherent in the debt which is capable of being acquired because the debt is a *liability.* This further fits with the general nature of tracing, particularly tracing in equity, which

"… is dependent on the power of the court of equity to charge a mixed fund with the repayment of trust moneys [although] the charge itself is entirely notional." [132]

Equity's notional charge might be considered "fertile and almost magical", [133] but it is not so magical as to be able to explain the idea of a charge, even a notional one, over a liability. [134]

Smith seeks to strengthen his argument by arguing that even a "cash sale" of specific goods, in which tracing the money paid into the goods would ordinarily ***L.Q.R. 449*** present no difficulty, actually involves a credit period and so involves tracing backwards. [135] Again, that is not compelling. No doubt, property in specific goods is statutorily presumed to pass at the time of contract, but that is only so "unless a different intention appears", [136] because

"… where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred". [137]

In the case of a transaction that the parties are agreed is a "cash sale", it is at least arguable that the parties can be taken to have intended that property will pass when the cash is provided. Certainly, the substance of the transaction seems unlikely to suffice for the court to consider it a credit transaction such as would be regulated under the Consumer Credit Act 1974. [138] Nor is there any reason why equity must treat it as such.

Again, this does not mean that tracing backwards is conceptually impossible. The point being made in this section of the article is that the conceptual justifications that Smith has offered, in an attempt to make backward tracing appear to be a mere application of ordinary tracing principles, are not convincing. But that does not mean that the courts cannot adopt a rule allowing trust beneficiaries to trace backwards. The concept of backward tracing is not itself incoherent, but its adoption by the courts would mark a significant departure from, or addition to, the traditional principles of the law of tracing.

Professor Virgo also, it seems, favours the idea of tracing backwards. Following the lead of Rimer J.'s stated preference for backward tracing in *Shalson v Russo,* [139] he has identified a more pragmatic approach in recent cases, pointing to the fact that:

"… the emphasis on attribution rather than causation in *Foskett v McKeown,* [[140]] is further evidence of pragmatism in the interpretation and application of tracing rules". [141]

In fact, the idea that tracing is concerned with attribution is of much longer standing, [142] and so that ought not to provide any new justification for tracing backwards. But the most important point about Virgo's observation is that the idea that tracing is concerned with attribution is insufficient, on its own, to provide a compelling justification for tracing backwards. The question that it leaves unanswered is the question of policy that was identified earlier: *by what rule* should the issue of attribution be approached in the present context? In other words, should the rule of attribution be formulated along the lines suggested by Lionel Smith, such that it is possible to trace backwards through the payment of a debt, or should ***L.Q.R. 450*** the rule of attribution remain as it has traditionally been, so that tracing remains concerned with the substitution of one asset for another asset? None of the cases said to support the possibility of tracing backwards offers any real explanation as to what moral principle justifies the rule of attribution for which Smith has argued.

Nor is that policy question answered by arguing that one can trace backwards because, irrespective of the form of the transaction, "in substance" the money has been used to pay for whatever was acquired in return for the debt being taken on originally. [143] This is because, as Gummow J. has identified extra-curially, where a court relies on the substance of a transaction over its form:

"… it may be surmised that policy choices are made. But frequently what is not found is the articulation of the reasons supporting one such choice rather than another." [144]

IV. Policy Considerations

The primary justification, in terms of legal policy, for recognising the possibility of tracing backwards is that it involves the "use [or development of] tracing rules to secure what is perceived to be a just result". [145] The justice, or fairness, of the case is strongest on the side of the trust beneficiaries who seek to trace the trust assets through the payment of a debt into the asset that was acquired by incurring the debt. One can readily understand the intuitive impulse to say that the trust beneficiaries' money has been used to "acquire" an asset when it is used to pay off the debt in return for which the asset was first acquired. In a sense, the trust beneficiaries' money has been used to pay the price of the asset.

However, that intuitive impulse can provide no more than a very rough guide as to how the law ought to approach the question of attribution, because it ignores the legal mechanism by which the trustee acquired the asset over which the trust beneficiaries now seek to make a claim. When the trustee uses trust funds to pay the debt, the beneficiaries' money has been used to pay the price of the asset only in a loose sense. In return for the asset, the vendor accepted the debtor's obligation to pay the debt: the vendor determined that the purchaser was sufficiently creditworthy that the vendor was prepared to agree to pass title in return for acquiring the benefit of a debt obligation rather than cash. The asset that the vendor accepted in return for agreeing to pass title in the goods to the purchaser was the benefit of the debt, not cash. The debt may later be realised by the payment of cash, but that cash may not come directly from the purchaser, as where the vendor factors the debt. [146] And even where the cash does come from the purchaser, that is satisfaction of the debt rather than payment of the consideration for which the asset was acquired.

Furthermore, the alleged "fairness" to the trust beneficiaries of being able to trace backwards is not the complete picture. In particular, it fails to take account of the claims that other creditors of the trustee, especially unsecured creditors, may wish to make over the trustee's assets. Lionel Smith's response to this policy concern is to argue that the unsecured creditors have essentially chosen to take the ***L.Q.R. 451*** risk of not being paid by failing to bargain for any security interest over the debtor's assets. [147] That is true for voluntary unsecured creditors, [148] and does differentiate such creditors from the trust beneficiaries who had proprietary interests in the trust assets in addition to their personal claims against the trustee. But the response does not deal with the policy objection completely: assuming that the trust beneficiaries are unable to trace their beneficial proprietary interests into the trustee's pre-acquired assets using ordinary tracing principles, the trust beneficiaries are effectively unsecured creditors unless the courts are prepared to treat (or "attribute") the use of trust funds to pay off the debt as use of trust funds to acquire the property that was bought with the debt in the first place. In other words, in dealing with the issue of policy, one must start from the premise that the trust beneficiaries do not automatically have a right to trace into the pre-acquired assets and then ask whether they should be able to do so. Viewed from this perspective, the trust beneficiaries are in a position not dissimilar from the other unsecured creditors. The question is whether the courts should alter that position.

One of the primary reasons for trust beneficiaries wanting to be able to trace backwards is in order to improve their recovery rate in the event of the trustee being made bankrupt. As the Court of Appeal held in *Re BA Peters Plc,* the fact that the plaintiffs in that case

"… appear to have a good claim against the company for breach of trust for not having paid the money in question into the client account … does not mean that they have a proprietary or any other sort of equitable interest or right over that account". [149]

Importantly, given the context of the present discussion, Lord Neuberger (with whom Dyson and Jacob L.JJ. agreed) added:

"In my view, the court should not be too ready to extend the circumstances in which proprietary or other equitable claims can be made in insolvent situations, bearing in mind the consequences to unsecured creditors. To raise those in the commercial world, it must sometimes seem almost a matter of happenstance as to whether or not a particular creditor, with no formal security, has a proprietary or equitable claim. However, the fact is that every time such a claim is held to exist in the case of an insolvent debtor, the consequence is that one commercial creditor gets paid in full to the detriment of all the other commercial creditors, who also have no formal security, but are found to have no proprietary claim." [150]

The same policy concern can be seen in Briggs J.'s observation, in *Re Lehman Brothers International (Europe)*:

"There is in any event good reason for caution before embarking upon an extension of the settled principles of tracing, where the corollary is to cut down the claims against an insolvent firm of its unsecured creditors." [151]

L.Q.R. 452 The concern is not a new one. As Professor Maitland said:

"It may be hard that a *cestui que trust* should not have "his' property, but it is also hard that the creditors should go unpaid." [152]

In 1888, discussing what would now be described as a "swollen assets" [153] type of proprietary argument, Professor Williston wrote:

"If, for instance, the trustee pays his private debts with the money of the *cestui que trust,* it cannot give a lien on the trustee's estate. To allow this would be injustice to the simple creditors, as may easily be seen by taking a concrete example. A is trustee of $10,000 for B. He has $20,000 of property of his own, and is indebted $30,000. He takes the trust money, and with it reduces his indebtedness to $20,000. Now if B is allowed a lien on A's private property there will be but $10,000 left for the other creditors, from which they will get fifty cents on the dollar, whereas, if A had not touched the trust money, there would have been $20,000 to pay $30,000 debts, or sixty-six cents on the dollar." [154]

Seeking to defend the "swollen assets" analysis against this sort of critique, Simon Evans has argued that Williston's analysis is to be doubted because it fails to take account of the ability of the trustee's trustee in bankruptcy to recover the money that has been paid to creditors as a preference:

"Once the general creditors through T's liquidator or trustee in bankruptcy exercise their right to recover preferential payments, their position is unaffected by admitting a proprietary remedy for B." [155]

Evans' defence of "swollen assets" theory was based on the idea that tracing is concerned with reversing unjust enrichment, rather than with transactional links, and so it cannot survive *Foskett v McKeown.* [156] However, the aspect that matters for present purposes is that his point about preferences does not avoid the policy concern, because it is highly unlikely that the trustee in bankruptcy will want, and perhaps even be able, to recover as a voidable preference trust funds paid over to a creditor in this sort of situation. This is so for a number of reasons.

First, the preferential payment will only be recoverable if it was given as a result of the payer having been influenced by a desire to improve the recipient's position as a creditor in the event of the payer's insolvency, [157] which may well not be the case where it was made in response to pressure brought to bear by the creditor who was paid. [158] Such pressure will often (albeit not exclusively) be what causes a trustee to raid the trust fund.

L.Q.R. 453 Secondly, even assuming a payment that is preferential in that sense, it is not clear that the trustee in bankruptcy has standing to recover such preferential payments, because the preferred creditor has been preferred at the expense of the trust beneficiaries rather than at the expense of creditors who would otherwise be unsecured. [159] The transfer of trust funds to the preferred creditor is neutral so far as the unsecured creditors are concerned, because it simply replaces one unsecured creditor (the creditor who has been paid) with a new unsecured creditor (the trust beneficiaries).

However, even if that second point is not accepted, [160] the court's power to order restoration of the preferential payment is only a power to

"… make such order as it thinks fit for *restoring the position* to what it would have been if that individual had not given that preference". [161]

In the situation under discussion, the recovered money should go back into the trust fund, [162] where it will still not be available for distribution amongst the general creditors. [163] This highlights the doubt as to whether the trustee in bankruptcy has standing to bring the claim, given the trustee in bankruptcy acts on behalf of the general creditors, but it is also where the point about the neutral effect of recovery becomes most important. That is because the trustee in bankruptcy has no incentive (even assuming it has standing) to seek to recover the funds for the trust beneficiaries, because it leaves the unsecured creditors in no better position overall: the trust beneficiaries are no longer unsecured creditors, but the preferred creditor regains its status as an unsecured creditor who must prove in the insolvency. In fact, to the contrary, the trustee in bankruptcy has a strong incentive *not* to bring such proceedings, because the neutral result for the general creditors means that the costs of the proceedings are wasted money which only further reduces the overall payout that the general creditors can expect.

It is acknowledged that trust beneficiaries are in a different (and weaker) position when they seek to rely on a "swollen assets" argument than when they seek to rely on backward tracing: in the swollen assets situation the beneficiaries can show no transactional connection between their money and the assets over which they claim a proprietary remedy, whereas that can potentially be done, in the way Smith has argued, in the backward tracing scenario. But the points made in response to Evans' argument about preference law also matter in the backward tracing scenario, because they show that preference law does not eradicate the policy concern about trust beneficiaries being given favourable treatment when compared with the other unsecured creditors.

In *Re Lehman Brothers v International (Europe),* Briggs J. described the principles of tracing as

L.Q.R. 454 "… represent[ing] the fruits of equity judges' and lawyers' endeavours over very many years to find and refine techniques of identifying and recovering trust property, in circumstances where the common law has failed to assist. The purpose of the process has been to help beneficiaries rather than to hinder them, and the techniques are only constrained by the unavoidable requirement to identify property to which it is appropriate to attach a proprietary claim." [164]

The equitable principles regarding tracing and claiming are already very "helpful" to trust beneficiaries. The beneficiaries, for example, can trace through mixtures in circumstances where the common law is, it seems, helpless. [165] Further, where the

trustee has withdrawn money from a mixed pool (of trust funds and his or her own personal funds), the beneficiaries are entitled to engage in "a "cherry-picking' exercise" [166] whereby they can elect between treating the withdrawn funds as trust funds or treating the trust funds as having been left in the account, whichever is more advantageous to them. [167]

There are, however, limits to the degree to which equity has been prepared to help beneficiaries. Thus, for example, even the favourable tracing principles just mentioned are

"… only applied to such an amount of the balance ultimately standing to the credit of the trustee as did not exceed the lowest balance of the account during the intervening period". [168]

This is so unless "the monies subsequently paid into the account … were intended to replace the claimant's money", [169] in which case there is effectively a fresh declaration of trust. [170] This has been considered a fair balance between trust beneficiaries and unsecured creditors for over a century. [171] Similarly, the inability to trace through the payment of a debt holds a fair balance between the rights of trust beneficiaries and of unsecured creditors who share the common misfortune of facing the bankruptcy of a defaulting trustee. Another observation offered by Briggs J. in his judgment in *Lehman Brothers* is noteworthy in this context:

"I reject the suggestion implicit in most of the submissions to the contrary, that the tracing principles to which I have referred are old-fashioned, unduly restrictive and therefore inappropriate for the protection of investors in the modern world." [172]

法院透過支付債務將信託基金追溯到受託人在付款前透過承擔債務義務獲得的資產，這在概念上沒有什麼是不可能的。

V. Conclusions

There is nothing conceptually impossible about the courts tracing trust funds through the payment of a debt into assets that the trustee had acquired, before the payment was made, by taking on the debt obligation. However, the preceding analysis has shown that the case law support for this idea is weaker than has been suggested by others. Further, the arguments that others have made, seeking to present backward tracing as an application of tracing principles already recognised in the case law, overstate the position. In those circumstances, the question becomes one of legal policy. In other words, the question is not whether the law could allow backward tracing, but rather whether it ought to do so. When the already precarious position of unsecured creditors is weighed against the concomitantly far better protected position of trust beneficiaries, it is suggested that the law ought not to recognise the possibility of tracing backwards. The unsecured creditors should not have their position worsened further by effectively making them insurers for the beneficiaries against trustee defalcations. Trust beneficiaries whose money has been wrongly applied in satisfaction of a debt can stand in the position of the satisfied creditor (by subrogation), but it is a step too far, in policy terms, to allow them to stand in the position of the debtor and act as owners of property that the trustee acquired before the debt was paid.

Alternatively, if backward tracing is to be allowed, then the policy concerns that have been highlighted above suggest that the extent to which payment of the debt is considered attributable to acquisition of the asset should perhaps be limited in some way, such as by reference to whether the trustee intended at the time the asset was acquired to (mis)use trust funds to pay for it. [173] While

"… the tracing rules are not generally concerned with a defendant's intentions, but with establishing transactional links between assets in order to identify the current whereabouts of the value which was formerly in the claimant's property", [174]

that does not mean that such considerations cannot be called into account if they will provide an appropriate means of limiting trust beneficiaries' claims in order to maintain a fair balance between trust beneficiaries and unsecured creditors. That would be consistent with equity's traditional concern for substance--meaning intention [175] --over form. [176] However, the evidential difficulties inherent in a test that is focused on the defalcating trustee's intentions provide yet further reason for concluding that the balance is appropriately struck by refusing to recognise backward tracing. [177]

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Footnotes

1 *Foskett v McKeown* [2001] 1 A.C. 102 HL at 127.

2 D.J. Hayton, P. Matthews and C. Mitchell, *Underhill and Hayton's Law of Trusts and Trustees,* 18th edn (London: LexisNexis, 2010), at para.90.4.

3 *Bishopsgate Investment Management Ltd v Homan* [1995] Ch. 211 CA; *Re Goldcorp* [1995] 1 A.C. 74 PC at 104-105.

4 *Re Diplock* [1948] Ch. 465 CA at 521. See also *Frith v Cartland* (1865) 2 Hem. & M. 417 at 420; 71 E.R. 525. This article focuses on tracing in equity, not because the idea of tracing backwards is necessarily inapplicable in transactions concerning legal title but because when debts are paid it will ordinarily be with money withdrawn from a bank account which in turn will ordinarily mean there has been a mixture of assets through which it will be difficult to trace at law: see, e.g. *Agip (Africa) Ltd v Jackson* [1990] Ch. 265 Ch D at 285-286.

5 One must trace, rather than follow, trust money when it is transferred between bank accounts: D. Fox, *Property Rights in Money* (OUP, 2008), at para.7.57.

6 Unless the creditor took title to the trust money bona fide and without notice of the breach of trust: the discharge of the debt then provides the value necessary for the creditor to claim equity's protection against the trust beneficiaries.

7 *Re Lewis's of Leicester Ltd* [1995] 1 B.C.L.C. 428 Ch D at 433.

8 L.D. Smith, "Tracing, "swollen assets' and the lowest intermediate balance: Bishopsgate Investment Management Ltd v Homan" (1994) 8 Tru. L.I. 102 at 104; L.D. Smith, "Tracing into the Payment of a Debt" (1995) 54 C.L.J. 290; L.D. Smith, *The Law of Tracing* (OUP, 1997), at pp.146-152 and 215-217.

9 See, e.g. D.J. Hayton, "Equity's Identification Rules" in P. Birks (ed.), *Laundering and Tracing* (OUP, 1995), at pp.16-19; G.J. Virgo, *The Principles of the Law of Restitution,* 2nd edn (OUP, 2006), at pp.633-634; R. Goff and G. Jones, *The Law of Restitution,* 7th edn (London: Sweet and Maxwell, 2007), at para.2-046; J. Mowbray et al., *Lewin on Trusts,* 18th edn (London: Sweet and Maxwell, 2007), at para.41-109; B. McFarlane, *The Structure of Property Law* (Oxford: Hart Publishing, 2008), at p.760; J. Penner, "Value, Property, and Unjust Enrichment: Trusts of Traceable Proceeds" in R. Chambers, C. Mitchell and J. Penner (eds.), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP, 2009), at pp.316-320; J.E. Penner, *The Law of Trusts,* 7th edn (OUP, 2010), at paras 11.110-11.115; C. Mitchell, *Hayton and Mitchell's Commentary and Cases on the Law of Trusts and Equitable Remedies,* 13th edn (London: Sweet and Maxwell, 2010), at para.13-28; Hayton, Matthews and Mitchell, *Underhill and Hayton's Law Relating to Trusts and Trustees,* 2010, at para.90.56. Burrows supports the idea in some settings but not others: A. Burrows, *The Law of Restitution,* 3rd edn (OUP, 2011), at pp.142-143.

10 See, e.g. A.J. Oakley, "Proprietary Claims and their Priority in Insolvency" (1995) 54 C.L.J. 377 at 413-414; A.J. Oakley, *Parker and Mellows' Modern Law of Trusts,* 9th edn (London: Sweet and Maxwell, 2008), at para.22-175. Others relate the question without offering a view: see, e.g. R. Pearce, J. Stevens and W. Barr, *The Law of Trusts and Equitable Obligations,* 5th edn (OUP, 2010), at p.1051; S. Worthington, *Equity,* 2nd edn (OUP, 2006), at p.117. Yet others do not address the question at all: see, e.g. G. Thomas and A. Hudson, *The Law of Trusts,* 2nd edn (OUP, 2010), at para.33.86.

11 [1995] Ch. 211 CA.

12 *Homan* [1995] Ch. 211 at 217.

13 *Homan* [1995] Ch. 211 at 216.

14 *Homan* [1995] Ch. 211 at 221 (emphasis original).

15 *Homan* [1995] Ch. 211 at 222.

16 *Shalson v Russo* [2003] EWHC 1637 (Ch); [2005] Ch. 281 at [141].

17 A petition for leave to appeal *Homan* to the House of Lords was dismissed (see [1995] 1 W.L.R. 31 HL), but that indicates nothing as to the validity or otherwise of the reasoning in the Court of Appeal: see *Re Wilson* [1985] A.C. 750 HL at 756.

18 Smith, "Tracing into the Payment of a Debt" (1995) 54 C.L.J. 290 at 295.

19 184 F. 480 (1911).

20 [1994] 4 All E.R. 890 CA.

21 (1991) 79 D.L.R. (4th) 22 Sask CA.
22 [1948] Ch. 465.
23 [1990] Ch. 265.
24 [2003] EWHC 2486 (Ch).
25 See, e.g. Mitchell, *Hayton and Mitchell's Commentary and Cases on the Law of Trusts and Equitable Remedies,* 2010, at para.13-28 (fn.58); Penner, *Law of Trusts,* 2010, at para.11.113; Virgo, *Principles of the Law of Restitution,* 2006, at p.633 (fn.373).
26 184 F. 480 (1911).
27 The account had been ordered in an earlier judgment: *Primeau v Granfield* 180 F. 847 (1910).
28 *Primeau v Granfield* 184 F. 480 (1911) at 486-487.
29 *Primeau v Granfield* 184 F. 480 (1911) at 487.
30 Smith, "Tracing into the Payment of a Debt" (1995) 54 C.L.J. 290 at 294.
31 See *Primeau v Granfield* 184 F. 480 (1911) at 487-488.
32 *Malayan Credit Ltd v Chia-Mph (Jack)* [1986] A.C. 549 PC (Sing.) at 560.
33 *Property Holding Co v Clark* [1948] 1 K.B. 630 CA at 648. See also *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904 at 956; *CH Bailey Ltd v Memorial Enterprises Ltd* [1974] 1 W.L.R. 728 CA at 732 and 735; *Escalus Properties Ltd v Robinson* [1996] Q.B. 231 CA at 243. See also K. Lewison (ed.), *Woodfall's Landlord and Tenant,* Looseleaf edn (London: Sweet and Maxwell, 2007), at para.7.001; C. Harpum, S. Bridge and M. Dixon, *Megarry and Wade's Law of Real Property,* 7th edn (London: Sweet and Maxwell, 2008), at para.17-003; J. Furber (ed.), *Hill and Redman's Law of Landlord and Tenant,* Looseleaf edn (London: LexisNexis Butterworths, 2009), at para.A1562.
34 *Primeau v Granfield* 184 F. 480 (1911) at 488 (emphasis added).
35 Historically, rent was not recoverable as a debt because it was considered a proprietary interest, issuing out of the land, reserved by the landlord in the terms of the grant: see W.S. Holdsworth, *A History of English Law,* Vol. VII (London: Methuen & Co, 1925), at pp.262-263 and 264-265; Lewison, *Woodfall's Landlord and Tenant,* 2007, at para.7.001; Harpum, Bridge and Dixon, *Megarry and Wade's Law of Real Property,* 2008, at para.19-053; Furber, *Hill and Redman's Law of Landlord and Tenant,* 2009, at paras A-1541, A-1547 and A1561. Rent was not recoverable by an action for debt (other than on an estate for a term of years) until the Landlord and Tenant Act 1709 s.4 (which remains in force).
36 *Ingram v Inland Revenue Commissioners* [1995] 4 All E.R. 334 Ch D at 340-341. See also *Property Holding Co v Clark* [1948] 1 K.B. 630 at 648-649; *CH Bailey Ltd v Memorial Enterprises Ltd* [1974] 1 W.L.R. 728 at 732; *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904 at 935, 956 and 963-964; Holdsworth, *History of English Law,* Vol. VII, 1925, at p.262; Lewison, *Woodfall's Landlord and Tenant,* 2007, at para.7.001; Furber, *Hill and Redman's Law of Landlord and Tenant,* 2009, at para.A-1542. Rent still issues out of the land: *Escalus Properties Ltd v Robinson* [1996] Q.B. 231 at 243.
37 [2001] 1 A.C. 102.
38 Penner argues that *Foskett* itself involved backwards tracing, for this reason: Penner, *Law of Trusts,* 2010, at paras 11.113 and 11.127; Penner, "Value, Property, and Unjust Enrichment" in Chambers, Mitchell and Penner (eds.), *Philosophical Foundations of the Law of Unjust Enrichment,* 2009, at p.321. But that does not accurately reflect the Lords' reasoning: Lord Millett, in particular, identified substituted assets (rather than the payment of a debt) at each stage of his analysis of the facts (see [2001] 1 A.C. 102 at 134).
39 *Primeau v Granfield* 184 F. 480 (1911) at 486.
40 The authority of Hand J.'s decision is further reduced by its reversal in the Circuit Court of Appeals (see *Primeau v Granfield* 193 F. 911 (1911)), although the appeal was allowed because Primeau had not come to court with clean hands rather than because of anything to do with tracing principles, which were not addressed. Leave to appeal to the Supreme Court was denied: 225 U.S. 708 (1912).
41 [1948] Ch. 465.
42 Smith, "Tracing into the Payment of a Debt" (1995) 54 C.L.J. 290 at 295.
43 See also *Boscawen v Bajwa* [1996] 1 W.L.R. 328 CA at 340.
44 *Re Diplock* [1948] Ch. 465 at 548-549.
45 This would not be the case now: see *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 A.C. 221 HL. Nor should it have been when *Re Diplock* was decided: see *Re Cork and Youghal Railway Co* (1869) L.R. 4 Ch. App. 748 at 759; *Wenlock v River Dee Co* (1887) L.R. 19 Q.B.D. 155 at 166; *Re Wrexham Mold & Connah's Quay Railway Co* [1899] 1 Ch. 440 CA at 458; *Cheltenham & Gloucester Plc v Appleyard* [2004] EWCA Civ 291; [2004] 13 E.G. 127 (C.S.) at [36].
46 *Re Diplock* [1948] Ch. 465 at 549.

47 *Re Diplock* [1948] Ch. 465 at 549.
48 *Re Diplock* [1948] Ch. 465 at 546-547.
49 *Re Diplock* [1948] Ch. 465 at 547.
50 [1990] Ch. 265.
51 *Agip (Africa) Ltd v Jackson* [1990] Ch. 265 at 285-286.
52 *Agip* [1990] Ch. 265 at 289-290.
53 *Agip* [1990] Ch. 265 at 279.
54 *Agip (Africa) Ltd v Jackson* [1991] Ch. 547 CA at 566.
55 Various arguments were put to Millett J. against the possibility of tracing, none of which focused on the time zone difference: see *Agip* [1990] Ch. 265 at 272.
56 See [1991] Ch. 547 at 550.
57 (1887) L.R. 19 Q.B.D. 155.
58 Smith, "Tracing into the Payment of a Debt" (1995) 54 C.L.J. 290 at 303 (fn.40).
59 *Wenlock v River Dee Co* (1887) L.R. 19 Q.B.D. 155 at 166.
60 *Wenlock* (1887) L.R. 19 Q.B.D. 155 at 166.
61 See also *Re Wrexham Mold & Connah's Quay Railway Co* [1899] 1 Ch. 44 at 462.
62 The terms of the order made it irrelevant whether the debt or liability existed at the time the plaintiffs' money was first advanced to the company: *Wenlock v River Dee Co* (1887) L.R. 19 Q.B.D. 155 at 164-166.
63 (1991) 79 D.L.R. (4th) 22 Sask CA.
64 S.S. 1979-80 c. P-6.1 (hereinafter the "PPSA").
65 *Agricultural Credit Corp of Saskatchewan v Pettyjohn* (1991) 79 D.L.R. (4th) 22 at 36-37.
66 *Pettyjohn* (1991) 79 D.L.R. (4th) 22 at 40.
67 *Pettyjohn* (1991) 79 D.L.R. (4th) 22 at 43.
68 *Pettyjohn* (1991) 79 D.L.R. (4th) 22 at 39 (emphasis added).
69 *Pettyjohn* (1991) 79 D.L.R. (4th) 22 at 42 (emphasis added). Vancise J.A. concurred, at 24. See also at 25 and 26 per Wakeling J.A. Sherstobitoff J.A. did, however, suggest that his "extension" of principle was "also consistent with the traditional principles of tracing in equity", at 43.
70 M.G. Bridge, "Form, Substance and Innovation in Personal Property Security Law" [1992] J.B.L. 1 at 9.
71 *Kennon v Spry* [2008] HCA 56; (2008) 238 C.L.R. 366 at [89], see also at [52], [89], [154] and [162]. And see *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 24 N.S.W.L.R. 370 CA at 398.
72 *Agricultural Credit Corp of Saskatchewan v Pettyjohn* (1991) 79 D.L.R. (4th) 22 at 42.
73 [1994] 4 All E.R. 890.
74 *Westdeutsche* [1994] 4 All E.R. 890 at 939.
75 Smith, "Tracing into the Payment of a Debt" (1995) 54 C.L.J. 290 at 294.
76 Smith, *Law of Tracing,* 1997, at pp.147-148.
77 *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 HL at 706.
78 *Westdeutsche* [1996] A.C. 669 at 707.
79 [2003] EWHC 2486 (Ch).
80 Penner, *Law of Trusts,* 2010, at para.11.113. See also fn.25 above.
81 *Law Society v Haider* [2003] EWHC 2486 (Ch) at [37]-[39].
82 It might be argued that an equitable title to the property arose when contracts were exchanged and a deposit paid and that thereafter Haider owed the vendor a debt. But, pending completion "neither the seller nor the buyer has unqualified beneficial ownership": *Jerome v Kelly* [2004] UKHL 25; [2004] 1 W.L.R. 1409 at [32]. Payment of the purchase price is necessary to acquire full beneficial ownership. Similarly, see the deposits and part payments on indigo contracts in *Re Brooke* (1869) 20 L.T. 547 at 549.
83 *Foskett v McKeown* [2001] 1 A.C. 102 at 130-131.
84 *Law Society v Haider* [2003] EWHC 2486 (Ch) at [39].
85 An alternative explanation for this part of the decision in *Law Society v Haider,* which again does not depend on the possibility of tracing backwards, is to focus on the unpaid vendor's lien over the property pending payment of the purchase price. Because the client funds were used to pay the vendor, the clients could subrogate to the unpaid vendor's lien, thereby justifying a charge over the property: see, e.g. *Halifax Plc v Omar* [2002] EWCA Civ 121; [2002] 2 P. & C.R. 26.
86 *Law Society v Haider* [2003] EWHC 2486 (Ch) at [40]-[42].
87 See, e.g. *Boscawen v Bajwa* [1996] 1 W.L.R. 328; *Orakpo v Manson Investments Ltd* [1978] A.C. 95 at 104; *Ghana Commercial Bank v Chandiram* [1960] A.C. 732 PC (Ghana) at 745. Subrogation also

explains the recoverability of the first sum in *Re Brooke* (1869) 20 L.T. 547 at 548-549. See also *Patten v Bond* (1889) 60 L.T. 583 Ch D.

88 Harpum, Bridge and Dixon, *Megarry and Wade's Law of Real Property,* 2008, at para.24-017.

89 Hence, with registered land, the owner's estate and the mortgagee's charge are recorded in separate parts of the register: see Land Registration Rules 2003 rr.4, 8 and 9. Each type of interest in the land is separately registrable and able to be disposed of separately: see Land Registration Act 2002 ss.27 and 29-30.

90 Note that Penner does not argue that *Haider* is an instance of the court tracing backwards on the basis that subrogation involves backward tracing, as he observes elsewhere that "subrogation, while achieving a similar result … is the *opposite* of backwards tracing": Penner, *Law of Trusts,* 2010, at para.11.136 (emphasis added).

91 See text accompanying fnn.12-13 above.

92 *Shalson v Russo* [2003] EWHC 1637 (Ch) at [141].

93 [2003] EWHC 1637 (Ch) at [141].

94 *Foskett v McKeown* [1998] Ch. 265 CA at 284.

95 *Foskett* [1998] Ch. 265 at 289.

96 *Foskett* [1998] Ch. 265 at 296. For Leggatt L.J.'s analysis, see text accompanying fn.14 above.

97 (1991) 34 N.S.W.L.R. 308.

98 S. Evans, "Rethinking Tracing and the Law of Restitution" (1999) 115 L.Q.R. 469 at 486-487. See also *Re Global Finance Group Pty Ltd* [2002] WASC 63; (2002) 26 W.A.R. 385 at [129], [135] and [200].

99 *Serious Fraud Office v Lexi Holdings Plc* [2008] EWCA Crim 1443; [2009] Q.B. 376 at [50].

100 *Re BA Peters Plc* [2008] EWCA Civ 1604; [2010] 1 B.C.L.C. 142 at [15].

101 *Conlan v Registrar of Titles* [2001] WASC 201; (2001) 24 W.A.R. 299 at [273]. See also *Re Registered Securities Ltd* [1991] 1 N.Z.L.R. 545 CA at 554; *Box v Barclays Bank* [1998] Lloyd's Rep. Bank. 185 Ch D at 203; *Re Global Finance Group Pty Ltd* [2002] WASC 63 at [129], [135] and [200]; *Re Lehman Brothers International (Europe)* [2009] EWHC 3228 (Ch); [2010] 2 B.C.L.C. 301 at [192]. And see *Re Global Trader Europe Ltd* [2009] EWHC 602 (Ch); [2009] 2 B.C.L.C. 18 at [60].

102 Smith, "Tracing into the Payment of a Debt" (1995) 54 C.L.J. 290 at 295.

103 See, e.g. *Re Registered Securities Ltd* [1991] 1 N.Z.L.R. 545 at 557 and 558.

104 R. Cross and J.W. Harris, *Precedent in English Law,* 4th edn (OUP, 1991), at p.43.

105 (1812) 18 Ves. Jr. 499; 34 E.R. 406.

106 Smith, "Tracing into the Payment of a Debt" (1995) 54 C.L.J. 290 at 303. The basis for this argument is the proposition that "tracing is … distinct from claiming": *Foskett v McKeown* [2001] A.C. 102 at 128. See also *Boscawen v Bajwan* [1996] 1 W.L.R. 328 at 334; P. Birks, "Mixing and Tracing: Property and Restitution" (1992) 45 C.L.P. 69 at 86-87.

107 [1924] St. R. Qd. 241.

108 *Moffatt v Crawford* [1924] St. R. Qd. 241 at 245.

109 *Moffatt* [1924] St. R. Qd. 241 at 246.

110 *Moffatt* [1924] St. R. Qd. 241 at 248.

111 As to which, see text accompanying fn.14 above.

112 *Re Goode* (1974) 4 A.L.R. 579 at 594 (emphasis original).

113 See fnn.45, 85 and 87 above.

114 *Curley v Parkes* [2004] EWCA Civ 1515; [2005] 1 P. & C.R. DG15 at [14].

115 (1984) 155 C.L.R. 242.

116 *Calverley v Green* (1984) 155 C.L.R. 242 at 252 and 262. See also K. Gray and S.F. Gray, *Elements of Land Law,* 5th edn (OUP, 2008), at paras 7.2.11, 7.2.17 and 7.2.19.

117 *Ingram v Ingram* [1941] V.L.R. 95 at 102. See also *Pettitt v Pettitt* [1970] A.C. 777 HL at 816; *Springette v Defoe* [1992] 2 F.L.R. 388 CA at 392; *Carlton v Goodman* [2002] EWCA Civ 545; [2002] 2 F.L.R. 259 at [22]; Law Commission, *Sharing Homes: a Discussion Paper* (TSO, 2002), Law Com. No.278, Cm.5666, at para.2.61; *Kerr v Baranow* 2011 SCC 10; (2011) 328 D.L.R. (4th) 577 at [25]. Cf. Lord Neuberger's (dissenting) suggestion to the contrary in *Stack v Dowden* [2007] UKHL 17; [2007] 2 A.C. 432 at [117], [141] and [146].

118 *Lloyds Bank Plc v Rosset* [1991] 1 A.C. 107 at 132, see also at 133. And see *Gissing v Gissing* [1971] A.C. 886 HL at 906.

119 *Stack v Dowden* [2007] UKHL 17 at [56], [68] and [33]. See *Jones v Kernott* [2010] EWCA Civ 578; [2010] 3 All E.R. 423 at [72] and [75].

120 *Stack v Dowden* [2007] UKHL 17 at [33], [58] and [69]; *Abbott v Abbott* [2007] UKPC 53; [2008] 1 F.L.R. 1451 at [2]. See e.g. *Laskar v Laskar* [2008] EWCA Civ 347; [2008] 1 W.L.R. 2695 at [15]-[17].

121 *Bernard v Josephs* [1982] Ch. 391 CA at 404. See also *James v Thomas* [2007] EWCA Civ 1212; [2007] 3 F.C.R. 696 at [24].

122 Penner, *Law of Trusts,* 2010, at para.11.110.

123 Smith, "Tracing into the Payment of a Debt" (1995) 54 C.L.J. 290 at 292-294.

124 Smith, "Tracing into the Payment of a Debt" (1995) 54 C.L.J. 290 at 294.

125 Smith, "Tracing into the Payment of a Debt" (1995) 54 C.L.J. 290 at 293, see also at 298.

126 *Foskett v McKeown* [2001] 1 A.C. 102 at 109, see also at 113 and 127.

127 Smith, "Tracing into the Payment of a Debt" (1995) 54 C.L.J. 290 at 293.

128 See R. Bradgate, *Commercial Law,* 3rd edn (OUP, 2000), at paras 20.0-20.1 and 21.0.

129 Smith, "Tracing into the Payment of a Debt" (1995) 54 C.L.J. 290 at 293.

130 *Banque Financière de la Cité SA v Parc (Battersea) Ltd* [1999] 1 A.C. 221 at 236 (emphasis original).

131 *Foskett v McKeown* [2001] 1 A.C. 102 at 128.

132 *El Ajou v Dollar Land Holdings Plc (No.1)* [1993] 3 All E.R. 717 Ch D at 737. See also *El Ajou v Dollar Land Holdings Plc (No.1)* [1994] 2 All E.R. 685 CA at 699 and 701; *El Ajou v Dollar Land Holdings Plc (No.2)* [1995] 2 All E.R. 213 Ch D at 221 and 223; *Re French Caledonia Travel Service Pty Ltd* [2003] NSWSC 1008; (2003) 59 N.S.W.L.R. 361 at [83]; *Commerzbank AG v IMB Morgan Plc* [2004] EWHC 2771 (Ch); [2005] 2 All E.R. (Comm) 564 at [36].

133 *Campden Hill Ltd v Chakrani* [2005] EWHC 911 (Ch); [2005] N.P.C. 65 at [79].

134 Although the charges in *Re Bank of Credit and Commerce International SA (No.8)* [1998] A.C. 214 HL can be conceived of as charges over debts owed by the chargee bank, they were treated by the House of Lords as charges granted by the depositors over *assets* that the depositors held (the debts owed by the bank to the depositors). The reasoning in *BCCI (No.8)* accepts that an ordinary charge over book debts is a charge over assets and holds that the nature of the charge is not changed by the fact that the debt happens to be owed by the chargee: see at 226-227.

135 Smith, "Tracing into the Payment of a Debt" (1995) 54 C.L.J. 290 at 292 (fn.6).

136 Sale of Goods Act 1979 s.18.

137 Sale of Goods Act 1979 s.17.

138 Notwithstanding the wide definition of "credit" contained in s.9(1) of the Act: see, e.g., albeit on quite different facts, *McMillan Williams v Range* [2004] EWCA Civ 294; [2004] 1 W.L.R. 1858.

139 See text accompanying fn.92 above.

140 [2001] 1 A.C. 102 at 137.

141 Virgo, *Principles of the Law of Restitution,* 2006, at p.634.

142 See, e.g. *Frith v Cartland* (1865) 2 Hem. & M. 417 at 422; *Re Strachan Ex p. Cooke* (1876) L.R. 4 Ch. D. 123 CA at 127-128; *Re Hallett's Estate* (1880) L.R. 13 Ch. D. 696 CA at 699, 700, 701, 727-728, 735, 737, 739, 740, 743 and 750; *James Roscoe (Bolton) Ltd v Winder* [1915] 1 Ch. 62 at 69.

143 See text accompanying fn.46 above.

144 W.M.C. Gummow, "Form or Substance?" (2008) 30 Aust. Bar Rev. 229 at 241, see also at 233, 235 and 236.

145 Virgo, *Principles of the Law of Restitution,* 2006, at p.634.

146 See Bradgate, *Commercial Law,* 2000, at para.27.3.2.

147 Smith, "Tracing into the Payment of a Debt" (1995) 54 C.L.J. 290 at 304.

148 It does not take account of the position of involuntary unsecured creditors, such as the victims of torts.

149 *Re BA Peters Plc* [2008] EWCA Civ 1604 at [18].

150 *Re BA Peters Plc* [2008] EWCA Civ 1604 at [21]. Similar considerations are evident in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347 at [54], [83] and [90].

151 [2009] EWHC 3228 (Ch); [2010] 2 B.C.L.C. 301 at [175].

152 F.W. Maitland, *Equity,* rev. edn by J. Brunyate (Cambridge: CUP, 1936), at p.220.

153 See Evans, "Rethinking Tracing and the Law of Restitution" (1999) 115 L.Q.R. 469 at 492.

154 S. Williston, "The Right to Follow Trust Property When Confused with Other Property" (1888) 2 Harv. L. Rev. 28 at 38-39.

155 Evans, "Rethinking Tracing and the Law of Restitution" (1999) 115 L.Q.R. 469 at 497-498. Evans was responding to an example given by Bogert, but the example differs from Williston's only in the numbers used.

156 [2001] 1 A.C. 102 at 110, 115, 127 and 132.

157 Insolvency Act 1986 ss.239(5) and 340(4); *Re MC Bacon Ltd* [1990] B.C.L.C. 324 Ch D at 334-336.

158 See, e.g. *Re MC Bacon Ltd* [1990] B.C.L.C. 324 at 336-337; *Re Oxford Pharmaceuticals Ltd sub nom. Wilson v Masters International Ltd* [2009] EWHC 1753 (Ch); [2009] 2 B.C.L.C. 485 at [78]-[79]. See also *Re Ledingham-Smith* [1993] B.C.L.C. 635 Ch D at 641-642; A. Walters, "Preferences" in J.H. Armour and H. Bennett (eds), *Vulnerable Transactions in Corporate Insolvency* (Oxford: Hart Publishing, 2003), p.123 at paras 4.69-4.73.

159 See A. Walters, "Unlawful Preferences and Proprietary Rights" (2003) 119 L.Q.R. 28; Walters, "Preferences" in Armour and Bennett, *Vulnerable Transactions in Corporate Insolvency,* 2003, p.123 at paras 4.54 and 4.56; R. Goode, *Principles of Corporate Insolvency Law* (London: Sweet and Maxwell, 2005), at para.11-87.

160 The Australian courts have taken a different view: *Richardson v Commercial Banking Co of Sydney Ltd* (1952) 85 C.L.R. 110; *G & M Aldridge Pty Ltd v Walsh* (2001) 203 C.L.R. 662.

161 Insolvency Act 1986 s.340(2) (emphasis added); see also s.239(3).

162 See Walters, "Preferences" in Armour and Bennett, *Vulnerable Transactions in Corporate Insolvency,* 2003, p.123 at paras 4.102-4.103.

163 Funds held by the bankrupt on trust do not form part of the bankrupt's estate: Insolvency Act 1986 s.283(3). For corporate insolvency, see, e.g. *Re English & American Insurance Co Ltd* [1994] 1 B.C.L.C. 649 Ch D.

164 [2009] EWHC 3228 (Ch); [2010] 2 B.C.L.C. 301 at [198].

165 See, e.g. *Agip (Africa) Ltd v Jackson* [1990] Ch. 265. Although see, in Canada, *BMP Global Distribution Inc v Bank of Nova Scotia* [2009] SCC 15; [2009] 1 S.C.R. 504 (noted: D.M. Fox, "Identification of Money at Common Law" (2010) 69 C.L.J. 28).

166 *Shalson v Russo* [2003] EWHC 1637 (Ch) at [144]; cf. *Turner v Jacob* [2006] EWHC 1317 (Ch); [2008] W.T.L.R. 307 at [102].

167 *Re Hallett's Estate* (1880) L.R. 13 Ch. D. 696; *Re Oatway* [1903] 2 Ch. 356.

168 *James Roscoe (Bolton) Ltd v Winder* [1915] 1 Ch. 62 at 69; see generally at 67-69.

169 *Campden Hill Ltd v Chakrani* [2005] EWHC 911 (Ch) at [79]. See also *Bishopsgate Investment Management Ltd v Homan* [1995] Ch. 211 at 220.

170 *Minnit v Warnock* (1900) 7 Argus L.R. 2 FC at 8; *Re Joscelyne* [1963] Tas. S.R. 4 SC at 21.

171 See, e.g. *Re Stenning* [1895] 2 Ch. 433 at 436; *Re Joscelyne* [1963] Tas. S.R. 4 SC at 21; *Lofts v MacDonald* (1974) 3 A.L.R. 404 at 407; *Campden Hill Ltd v Chakrani* [2005] EWHC 911 (Ch) at [79]. See also Williston, "The Right to Follow Trust Property When Confused with Other Property" (1888) 2 Harv. L. Rev. 28 at 36; J.B. Ames, "Following Misappropriated Property into its Product" (1906) 19 Harv. L. Rev. 511 at 518-520.

172 *Re Lehman Brothers International (Europe)* [2009] EWHC 3228 (Ch); [2010] 2 B.C.L.C. 301 at [198].

173 As Scott V.-C. suggested in *Foskett v McKeown* [1998] Ch. 265 at 284. See also *Bishopsgate Investment Management Ltd v Homan* [1995] Ch. 211 at 216 per Dillon L.J.

174 Mitchell, *Hayton and Mitchell's Commentary and Cases on the Law of Trusts and Equitable Remedies,* 2010, at para.13-29.

175 R.P. Meagher, J.D. Heydon and M.J. Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies,* 4th edn (Chatswood: Butterworths LexisNexis, 2002), at paras 3-160-3-200; J. McGhee (gen. ed.), *Snell's Equity,* 32nd edn (London: Sweet and Maxwell, 2010), at para.5-29.

176 See *Parkin v Thorold* (1852) 16 Beav. 59 at 66-67; 51 E.R. 698. It should not, however, be thought that equity has a monopoly over that approach: Gummow, "Form or Substance?" (2008) 30 Aust. Bar Rev. 229 at 230.

177 Tracing; Transfer; Trustees

