The Administration and Maladministration of Funds in Equity:

Making a Coherent set of Choices

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The author would like to thank Professor Matthew Conaglen, Professor Eilís Ferran, Dr David Fox, Professor Simon Halliday and Dr Peter Turner for comments on drafts of this chapter. The usual disclaimers apply.

I. *Introduction*

The creation, definition and administration of funds constitute some of the most useful contributions of equity to English private law. Maitland remarked that the trust was “perhaps … the most distinctive achievement of English lawyers”;[[1]](#footnote-1) yet the trust would be of very limited utility if its range of application were limited merely to the passive holding of title for another, rather than the active management of a fund of assets. The floating charge, another innovation of equity in the administration of funds, likewise still has great utility in English law, though it has been superseded by statutory systems in many other common law jurisdictions. How a fund is created, ascertained and administered, and what is the distribution of rights and interests in a fund of assets, are therefore important issues in themselves, but they are not the main focus of this chapter.[[2]](#footnote-2) This chapter is principally concerned with the implications of these matters for remedying the maladministration of the fund: it considers the implications of duly administering a fund for tracing, that is, the process of identifying the assets which may be the subject of a proprietary claim following a breach of trust or equivalent duty.

The key to a proper theoretical understanding of tracing is the notion of exchange, as understood in the administration of funds. This chapter argues that the existing law of tracing seeks to mimic, so far as possible, the due administration of the fund, rather than directly to reverse unjust enrichment. In other words, tracing has its theoretical basis in the law relating to fund management, not the law of restitution. The distinction is much more than mere semantics. Allowing the capture of exchange products through a combination of tracing and claims founded on the equitable property rights that are the result of tracing may very often overlap with the reversal of unjust enrichment, but they are not necessarily and always the same. The distinction matters crucially from the perspective of timing. Exchanges do not have to be simultaneous: for example, in the banking system, monies may be credited to an account in anticipation of a receipt, and yet be the traceable product of the receipt. This is an exchange, not an example of so called “backwards tracing”,[[3]](#footnote-3) which, by contrast, remains inconsistent with the well established and accepted equitable principles of administering a fund and, if needs be, restoring it using tracing. If there is to be a coherent approach to the administration and maladministration of funds, where rights and remedies form a consistent set of choices, “backwards tracing” is neither necessary nor appropriate. The proper theoretical understanding of tracing also matters crucially in the application of tracing beyond its origins in the law of trusts.

The chapter begins by considering the administration of a trust fund as offering the paradigm case of due administration of a fund in equity and examines the principles and concepts used to describe and establish what amounts to due administration of the fund. It then goes on to consider what implications this correct way of proceeding have for one particular response to the maladministration of a fund – that is, what implications it has for the consequences which follow on from depletion of the fund through a breach of trust or equivalent duty. The chapter focuses on the proprietary rather than personal liabilities which may result from misapplication of assets in breach of trust, and in particular the rules, the tracing rules, which are used to identify the assets which may be the subject of a proprietary claim with a view to restoring the fund. It makes an argument for consistency between the basic right – the right to due administration of a fund – and not just the remedies which vindicate that right, but also the procedures, such as tracing, whose purpose is to facilitate some of those remedies. Finally, it considers the implications of the argument for circumstances beyond the paradigm case of the trust fund *stricto sensu*. If there is to be departure in these circumstances from the approach taken in the paradigm case, those departures are neither minor nor trivial.

II. *The Due Administration of assets in a Trust Fund*

The rules which define what is a trust fund – what assets fall within the fund and why – are obviously vital to the law of trusts. It is axiomatic that the subject matter of a trust must be certain if the trust is to be validly established.[[4]](#footnote-4) The trustees, beneficiaries and the court need to know what assets are subjected to the trust. This matters for the purposes of defining the extent of obligations, the trustees’ duties, and the correlative rights of the beneficiaries; and it matters for the purposes of defining the extent of the beneficiaries’ proprietary rights, and the correlative extent to which assets owned by a trustee do not form part of his beneficial estate.[[5]](#footnote-5) The rules which define a trust fund also ensure that the collection of assets subject to a trust continues to be identifiable at any point in the future as the individual assets change when the trustees exercise any powers they have (or fulfil their duty) to exchange a trust asset for another asset. Such a continuing ability to identify assets matters for the same reasons that it is vital to identify trust assets in the first place.

These points can be expressed in more general terms in the language of organisational theory:[[6]](#footnote-6) the rules which define a trust fund are necessary for the purposes of asset partitioning and asset management. These rules define which assets are partitioned and subjected to a specific regime of property rights, and priorities amongst those rights. Once the partitioned fund is identified, the fund manager can apply the rules governing its administration.

A very common way of creating a defined fund of assets is to use the concept of legal personality. A corporation is treated as a legal person and “its” assets – the fund that is to be managed as a separate pool of assets – are determined by application of the general law which governs the allocation and transfer of assets among persons, subject to some glosses and modifications to reflect the fact that a corporation is not a natural person. The most important glosses are rules of attribution, through which the behaviour of human beings can, in law, be treated as that of the corporation, an artificial person.[[7]](#footnote-7) Only by application of such rules can a corporation be said to acquire, keep, or dispose of assets. An example of the modification of the generally applicable law is the doctrine of *ultra vires* which can preclude a corporation from undertaking an act which a natural person could have done.[[8]](#footnote-8) Another example of modification is the law regulating consideration for the issue of shares by a company. But the use of corporations to create funds of assets basically draws on the ordinary rules governing the allocation of assets between persons, however those rules are glossed and modified. And the most common example of a corporation used to create and manage a distinct fund of assets is a registered company limited by shares.

A trust, however, is not a corporation: the law does not attribute legal personality to a trust, so the use of personality to constitute a fund of assets is not possible. Instead, a specific set of rules is used to determine what constitutes a trust fund. Rules require the identification of the initial fund and further rules determine what goes into and what comes out of that fund. The scope and operation of these rules is largely unproblematic. Crucial to them is the notion of exchange, as explained below.[[9]](#footnote-9) But it is worth dwelling on these rules for a moment for the sake of clarity before considering the more controversial question of their implications for what happens when the due administration of a trust breaks down.

The trust fund developed out of the settlement of specific assets. The original and basic principle is that assets settled on trust are to be retained for the use and enjoyment of the beneficiaries *in specie*.[[10]](#footnote-10) This primary duty was subject to some exceptions, even in equity, though all these exceptions yielded to any contrary intent expressed in the relevant trust instrument.[[11]](#footnote-11) Some of these exceptions have themselves now been modified by statute law, but again subject to any contrary provision in the trust instrument.[[12]](#footnote-12) Furthermore, trustees were obviously to realise trust assets where the settlement directed them to do so, for example where assets were settled on a trust for sale which did not include a power to postpone sale. For present purposes, however, the key exception to the general principle of retaining trust assets *in specie* was that the trustees might lawfully realise trust assets where the settlement authorised them to do so.

When trustees lawfully use such administrative powers to dispose of a trust asset to a purchaser, there are consequences both for the purchaser and for the beneficiaries of the trust.[[13]](#footnote-13) Unless statute provides to the contrary,[[14]](#footnote-14) the purchaser will acquire a derivative title to the asset, or a derivative interest in it, from the trustees: the trustees had some title to the asset and could accordingly pass that title to the purchaser, or confer on him some interest granted out of it. So long as the trustees acted lawfully within their powers, the beneficiaries can have no complaint about this: the beneficiaries’ rights are limited *ab initio* by the trustees’ powers, so the beneficiaries simply do not have sufficient title to sue the trustees. Furthermore, where the trustees dispose of a trust asset without any breach of trust, the beneficiaries have no grounds for any claim against the purchaser either, so he can enjoy the title he acquired from the trustees free of the beneficiaries’ equitable interests or claims. The trustees do not dispose of the beneficiaries’ rights, nor do they infringe the principle of *nemo dat quod non habet*. The trustees deal with their property in an asset, and the beneficiaries’ property or other interest in that asset is simply so limited that it does not affect a purchaser from the trustees.[[15]](#footnote-15)

In fact, a purchaser’s immunity from the beneficiaries’ claims may be wider than the trustees’ immunity. If the terms of a trust provide that a purchaser is not to be affected by some breach of trust committed in the course of the disposition by which he receives a trust asset,[[16]](#footnote-16) then the purchaser will still get good title to the asset even if such a breach of trust has been committed. The trustees, as owners of a trust asset, can still alienate that asset to a purchaser, even though they commit a breach of trust by doing so. The purchaser still has immunity from the beneficiaries’ claims, although in this case the trustees do not enjoy a similar immunity. In other words, though the beneficiaries might sue the trustees, the beneficiaries still have insufficient title under the terms of the trust to sue the purchaser. Consequently, the purchaser will acquire title to the asset free of the beneficiary’s rights.[[17]](#footnote-17) Again, there is no infringement of the *nemo dat* principle: the trustees still deal with their property in an asset, albeit wrongfully, but the beneficiaries’ property or other interest in that asset is still so limited that it does not affect the purchaser from the trustees.

Where trustees act so as to overreach their beneficiaries’ rights in an asset, as described above, the beneficiaries will typically get something else, *quid pro quo*. If the trustees do in fact acquire any proceeds from a lawful dealing with a trust asset, the beneficiaries will acquire rights in those proceeds equivalent to their rights in the original asset, unless the terms of the trust in question provide otherwise. Such rights to substitutes depend on a development of English jurisprudence which was, and remains, of great practical importance. In equity, beneficiaries can automatically take proprietary rights in assets which are the proceeds of the trustees’ lawful dealing with a trust asset, without the need for any further act by the trustees or the beneficiaries to generate such rights.

What assets shall form part of the fund may be stated explicitly. It has long been very common to provide expressly in trust instruments that beneficiaries shall have equivalent rights in both the initial trust assets and their proceeds, direct and indirect. The form of words used to achieve this end may vary, but the substance is the same.[[18]](#footnote-18) In fact, and though lawyers still tend to draft trusts which expressly entitle beneficiaries to such rights, express words are rarely strictly necessary, whatever comfort they give to the lawyers concerned. Where trustees lawfully dispose of a trust asset, and in exchange acquire some other asset, equity has long recognised that beneficiaries who had an interest in the original asset may *prima facie* claim an equivalent interest in the substitute.[[19]](#footnote-19)

A beneficiary’s right to assets lawfully acquired by trustees in substitution for other assets always depends on the terms of the relevant trust, however: the beneficiary would not have such a right if the trust instrument provided to that effect, which very occasionally it might. For example, if a trust provided that realty should be held for X, personalty for Y, and the trustees exercised a power conferred on them to sell land and turn it into money, then Y, not X, would take an interest in what had become personalty.[[20]](#footnote-20)

Trustees might also acquire assets by way of further settlement,[[21]](#footnote-21) or from someone who is obliged for value to settle such assets on them.[[22]](#footnote-22) In the former case, the beneficiaries’ interests must attach to the assets in question when the trustees receive them, because “[p]roperty which is not presently owned cannot be impressed with a trust any more than it can be effectively assigned”.[[23]](#footnote-23) In the latter case, the beneficiaries’ interests attach to an asset within the scope of the obligation once the obligor must and can deliver the asset to the trustees - normally, that is, when he receives it.[[24]](#footnote-24)

All this means that an expressly created trust fund will be something quite particular. It will be the product of a particular bargain or undertaking to which equity gives effect, not the direct result of some rule of law. That particular bargain or undertaking subjects the trustees’ property in a class of assets to whatever equitable proprietary rights a beneficiary may have, but in turn gives the trustees limited powers to deal with the assets free of the beneficiary’s rights. In addition, the bargain or undertaking almost invariably grants the beneficiary rights in any product of such a dealing which are equivalent to the rights he enjoyed in the original assets. The general law then gives effect to the bargain or undertaking and supplements it where necessary. Express terms are supreme, save where they contravene some mandatory provision of law, and implied terms deal with issues where express terms have no effect.

This analysis also explains what happens to property in a trust fund when things go wrong. When trust assets are misapplied, equitable proprietary rights in those assets are not overreached. The rights continue to affect the assets until the assets reach the hands of someone who is, by operation of law, immune from the rights, such as a *bona fide* purchaser of a legal interest in the assets for value without notice of the rights. Consequently, the beneficiary can assert his right in the asset in accordance with normal rules of priority. There is no need to explain the rights as only having proprietary effect following the misapplication.[[25]](#footnote-25) The beneficiary will also be able to trace into substitutes for the misapplied asset, and claim an interest in such a substitute, subject to any defences available to other people who have an interest in the substitute.[[26]](#footnote-26) However, such rights to substitutes are generated by mandatory rules of law, rather than by voluntary undertakings to which the law gives effect.[[27]](#footnote-27)

III. *The Administration of Assets derived improperly from a Trust Fund*

The question for the present chapter is, therefore, what is the relevance of the rules governing the due administration of a trust fund, a body of rules founded primarily on consensual agreement and implications into such an agreement, given effect by law, on the rules of mandatory law which identify the assets in which a beneficiary may assert a proprietary right following a breach of trust. The core argument of this chapter is that the one set of rules must have significant implications for the other, or else various absurdities result. This is because the tracing rules are purposive. They do not exist in a vacuum. They are rules that exist to identify assets for the purposes of restoring due administration of a trust fund. They are not Platonic universals.

Tracing is about identifying one asset as a substitute, in whole or in part, for another. What amounts to a ‘substitute’ asset is a matter of positive law, not a fact of nature: tracing is in that sense a matter of attribution. Rules of attribution – including the tracing rules – exist for a purpose, and their content is informed by that purpose. The core purpose of the equitable tracing rules is to identify assets for the purposes of a claim to redress a breach of trust. The claim may be proprietary, for example the assertion of a beneficial interest in,[[28]](#footnote-28) or a charge over,[[29]](#footnote-29) the asset in question, or it may be a personal claim founded on a proprietary right, for example a claim for knowing receipt (or unconscionable retention) of an asset in which such a proprietary right subsisted.[[30]](#footnote-30)

Tracing must therefore reflect the rules governing how a breach of trust should be redressed. So, for example, the principle that a wrongdoing trustee may not take advantage of his own wrong is reflected in presumptions against a trustee in the allocation of a mixed fund derived from both his own assets and the trust fund.[[31]](#footnote-31) Another crucial principle of trust law which must be reflected in the tracing rules is the principle that beneficiaries are entitled to respond to a breach of trust, if they so wish, by treating the trustee’s wrongful acts as done for their benefit.[[32]](#footnote-32) This means that the beneficiaries can claim rights in an asset the trustee acquired by wrongful use of trust funds (whether directly or through a chain of transactions), because the trustee can be treated as acting for their benefit.

But the beneficiaries cannot do more: they cannot have access to more assets in the hands of the trustee than they would have had if the trustee’s actions had been undertaken for their benefit. As so often, the point has been made by Maitland.

“Observe that metaphor of ‘investment’. We conceived that the ‘trust fund’ can change its dress, but maintain its identity. To-day it appears as a piece of land; tomorrow it may be some gold coins in a purse; then it will be a sum of Consols; then it will be shares in a Railway Company, and then Peruvian Bonds. When all is going well, changes of investment may often be made; the trustees have been given power to make them. All along the ‘trust fund’ retains its identity. ‘The price of takes the place of the object’ we might say, ‘and the object takes the place of the price’. But the same idea is applied even when all is not going well. Suppose that a trustee sells land meaning to misappropriate the price. The price is paid to him in the shape of a bank-note which is now in his pocket. That bank-note belongs ‘in equity’ to the destinatories [*sc*. beneficiaries]. He pays it away as the price of shares in a company; those share belong ‘in equity’ to the destinatories. He becomes bankrupt; those shares will not be part of the property that is divisible among his creditors; they will belong to the destinatories. And then, again, if the trustee mixes ‘trust money’ with his own money, we are taught to say that, so long as this is possible, we must suppose him to be an honest man and to be spending, not other people’s money, but his own.”[[33]](#footnote-33)

The tracing rules are thus framed by reference to the rules which determine what assets are comprised within a duly administered trust fund. As Viscount Ratcliffe noted, “Equity in fact calls into existence and protects equitable rights and interests in property only where their recognition has been found to be required in order to give effect to its doctrines.”[[34]](#footnote-34)

This conceptualisation of tracing, derived from the cases, has significant theoretical implications: while the notion of replenishing a fund to its proper state as if it had been duly administered may often overlap with the notion of reversing unjust enrichment, it is not the same thing, and it explains the cases and their reasoning more accurately. If there is to be a departure from this conceptualisation to a conceptualisation based on unjust enrichment theory, that change would amount to much more than just a minor exercise in tidying up: it would either produce results that are inconsistent with the law of trusts and fiduciary fund management, or else necessitate different tracing rules for different purposes, creating complexity rather than simplicity. In neither case is the change minor or insignificant. The rest of this section shows why.

The tracing rules are a process, but they are a process directed towards an end – identifying assets for the purposes of claims. Claims for breach of trust, naturally, reflect the obligations of a trustee. A trustee must perform his office. A trustee cannot claim to act for his own benefit in breach of trust, subject only to the payment of compensation for loss caused by his action. To put the point in more generalised terms, trust law does not admit of an “efficient breach of trust”: a trustee is not an economic actor who is independent of the beneficiary and may divest himself of his obligations to the beneficiary, subject to the payment of compensation for loss caused thereby. The beneficiary is not, therefore, obliged to acknowledge the wrong and seek compensation for it, though of course he may do so. The beneficiary can, in the alternative and at his election, claim to take the benefit of what the defaulting trustee has done, notwithstanding that it amounts to a wrong. In short, the basic approach to remedying a breach of trust is founded on the idea that a trustee cannot be heard to say he has done wrong.[[35]](#footnote-35) This is very different from the position of someone who breaches a contract. In the vast majority of cases, a contract breaker is not required to do right, or to account for whatever he has done on the (counterfactual) basis that he did it in performance of the contract. All he has to do is to pay damages for the loss which in law results from the breach;[[36]](#footnote-36) and if he has, as a result of his wrongdoing, made a profit which exceeds that loss, he may keep the excess.[[37]](#footnote-37)

The next question is, therefore, how do the tracing rules serve to facilitate this approach to remedying a breach of trust? After all, if the tracing rules truly are just a process, then the principles governing actions for breach of trust – the principles which govern how a beneficiary’s rights may be vindicated – must inform the rules, not *vice versa*.

Claims on (or regarding) substitute assets constitute one example of a claim where the beneficiary seeks to take benefit from what the trustee has done: any such claim relies on what the trustee has done to give the beneficiary rights in an asset that he would not otherwise have. The beneficiary’s claim, whatever it may be, is founded on those rights. The beneficiary might be able to claim an equitable ownership interest in that asset.[[38]](#footnote-38) He might be able to make a personal claim to vindicate an equitable ownership interest in that asset such as a claim for knowing receipt (or unconscionable retention).[[39]](#footnote-39) He might be able to claim a security interest in the asset, either directly,[[40]](#footnote-40) or via subrogation.[[41]](#footnote-41) Where more than one such claim is possible, the facts, or, if needs be, the beneficiary’s election, will govern which is pursued and awarded. Indeed, the beneficiary’s election (where it is available) between an ownership interest and a security interest also reflects the ability of the beneficiary either to take the benefit of what the trustee has done, and claim that the asset is held for the beneficiary, or to repudiate what the trustee has done and hold the asset as security for the trustee’s obligation to make “compensation” for his wrongdoing in the *Re Dawson* sense of replenishing the trust fund.[[42]](#footnote-42) But the key point, for present purposes, is that any claim on the asset, or on a person in respect of an interest in the asset, is a claim where the beneficiary seeks to take benefit from what the trustee has done in acquiring the asset: the beneficiary in every such claim necessarily treats, and is allowed to treat, the trustee’s actions in acquiring the asset as if they were something done for his benefit, even though that is contrary to the facts.

In summary, therefore, the position is this. When a trustee wrongfully deals with trust assets, the beneficiary can assert that the trustee’s actions are to be treated as if they were undertaken for his (the beneficiary’s) benefit. When a trustee deals with the wrongfully acquired substitutes for trust assets, the beneficiary can make the same assertion. But it is implicit in any such assertion that the beneficiary cannot claim *more* than if the trustee had acted rightfully.

The same principles apply to tracing into or through the hands of anyone whose conscience is affected. The principle is still that the beneficiary can seek to have that person’s actions treated as if they had been undertaken properly and for his (the beneficiary’s) benefit. And as before, the applicable tracing rules mirror this. There is an entirely separate, and for present purposes irrelevant, debate to be had about whether the rules determining who is a wrongdoer are too wide and draw too many into their ambit. But that does not affect the points about tracing once it is accepted, at least for present purposes, that such people are wrongdoers.

Tracing against innocent volunteers is different and does not follow the paradigm explained above.[[43]](#footnote-43) That is entirely consistent with the basic thesis that the tracing rules are informed by the purposes of the claims they facilitate. When tracing against a trustee, or someone who is in no better position than a trustee, the rules are modelled to identify assets as if the trustee’s (or similar person’s) actions had occurred in the due administration of the trust, given that the very notion of tracing involves relying on the trustee’s (and possibly the third party’s) actions. The innocent volunteer, *ex hypothesi*, is not under the managerial obligations of a trustee and cannot be treated as so obliged: his conscience is not affected by the obligations of a trustee, even though he cannot (being a volunteer) claim priority to the interests of the beneficiaries. The rules have to reflect that. But crucially, for present purposes, the rules applied to an innocent volunteer are *less* stringent than those applicable to trustees and wrongdoers, *not more* stringent. In short, the core case, and the case by which the rules applicable to others are measured – and measured more leniently, in the case of innocent volunteers – is the trustee. And the tracing rules as they apply to a trustee are modelled on the due administration of a trust for reasons given above, namely to give the beneficiaries access to assets which they would have had if the trustee’s actions had been rightful, but no more.

This brings the focus of attention back to the question of how trust assets are identified when administered properly. The answer, where the constitution of the fund is in the hands of the trustee, and not the result of further settlement, lies, as has been seen earlier, in the concept of exchange. Two points should be mentioned here, before going on. First, exchange means expenditure of trust funds in return for some interest in an asset, not necessarily in exchange for the acquisition of full title to the asset. Secondly, exchange is only used to identify the asset in which an interest is sought; it does not dictate what interest is then asserted in that asset, which depends on the transaction in question, whether a purchase, a lease, a charge or some other disposition.

Now, once it is said that the key notion is *exchange*, as understood and defined in the law relating to the administration of trusts, the question becomes what that means. In order to answer that question, it is necessary to look in trust doctrine, to examine some examples, to see what is meant by exchange.

Take the example of buying a particular, ascertained, book. Assume title to the book passes on contract, in accordance with Sale of Goods Act 1979, s. 18, rule 1, and in advance of payment for the book. If the purchaser were a trustee, seeking to use trust funds lawfully to buy the book, how would we characterise his actions? It would be necessary to do so, for example, in order to ascertain whether the trustee had acted within his powers under the terms of the trust to deal lawfully with the trust fund. To answer that question requires both a correct understanding (construction) of the trustee’s powers and also correct characterisation of what the trustee has done, to see whether the trustee’s action was permitted by his powers. In the scenario outlined above, the transaction would be characterised as a purchase (exchange of money for a chattel) using trust funds, lawfully made by the trustee if he had power to purchase a book.

This example also shows the importance of understanding characterisation correctly as a purposive activity. The juridical characterisation of facts is always (and inevitably) undertaken from a perspective and for a purpose. In general terms, there is no one single “correct” characterisation of facts; and to suggest otherwise is bizarre. A single individual can be categorised quite correctly, for different purposes, as a man, a human being, English, a lawyer and so on and so forth. Categorisation is purposive, not absolute.

So, the characterisation of the above transaction from the perspective of the parties and for the purposes of determining their rights and liabilities *inter se* at any given moment may perfectly well be as follows. First, the purchaser of the book (the trustee) gains title to the book, by reason of the unrebutted presumption of Sale of Goods Act 1979, s. 18, rule 1. Secondly, the book shop advances credit to the purchaser (trustee) for a short period, credit that could be satisfied by the transfer of cash, and in the mean time holds the rights of an unpaid seller under sections 38(1)(a) and 39 of the Sale of Goods Act 1979. Thirdly, the period of credit is terminated by the purchaser’s (trustee’s) delivery of the cash to the book shop with the intention that the shop should become owner of it, thereby transferring title to the cash and discharging the purchaser’s (trustee’s) outstanding contractual obligations.

But that is not the way to characterise the same facts from the perspective of the trustee’s beneficiary for the purposes of determining whether the trustee acted within the scope of his powers and duties.[[44]](#footnote-44) The transaction would not be characterised for those purposes as an acquisition on credit and discharge of that credit. There would be no investigation of the terms of the trust to discover whether the trustee could borrow or take credit. This transaction would undoubtedly be permitted if the trustee had power to purchase chattels but did not have power to borrow or take credit. That is very simply because the transaction is characterised in context and in its entirety for the purposes of deciding what the trustee may and may not do: equity looks to substance not form. The transaction is not broken down into the constituent steps of contractual performance for those purposes; and there is no reason why it should be, because what matters for the purposes of trust administration is the nature of the transaction as a whole, by which its lawfulness as between trustee and beneficiary is to be judged.

If the trustee did the same thing, but this time had no power to buy a book and so acted in breach of trust, how would we characterise the transaction? Again, as exchange, and for the same reasons, but this time for the purposes of tracing. This is not an example of so-called “backwards tracing”: it is exchange as understood in trust law. The fact that, when tracing, a beneficiary is addressing actions which are *ex hypothesi* wrongful (in breach of trust) is reflected in the fact that he is offered elections: first, the beneficiary may choose whether or not to trace at all (*i.e.*, whether or not to assert any sort of remedy that relies on the trustee’s albeit wrongful action); secondly, even when the beneficiary does decide to trace assets, and does so successfully, he may assert a right to claim the asset (or a share in it) if the trust funds were used to acquire it, or else hold the asset as security for the monetary restoration of the trust fund. This is where the wrongfulness of the trustee’s actions is accommodated: in the decision whether or not to trace, and in the choice of remedies a beneficiary may assert, not by warping notions used to identify assets in respect of which he may assert a remedy.

The examples given above can be contrasted with an example of “true” backwards tracing. The case law does not admit of such backwards tracing.[[45]](#footnote-45) And there are very good reasons for that, namely the need for consistency of claims founded on tracing with the due administration of a trust. Suppose an individual took out a bank loan, bought a car with the loan monies and then used monies he held on trust to repay the loan. If the trustee were to seek to justify his action as lawful, within the terms of the trust, he would have to show both that the terms of the trust permitted him to borrow for the purposes of buying a car, so that the loan monies became part of the trust fund, and the trustee correspondingly had authority to use trust funds in repayment of the loan, and also that the terms of the trust permitted him to buy a car using trust monies. Both authorities must be shown. If the trustee did not have power to borrow, then whatever his intentions the trustee would be personally liable for the debt he incurred, but he could not look to the trust fund to repay the loan, whilst the loan monies would be his beneficially, and would not constitute trust monies. Their use in buying the car, therefore, would not give the beneficiaries any rights in the car: in that case, the trustee’s own monies were paid in exchange for the car, not trust monies. Why should a breach of trust in using trust monies to repay the trustee’s own personal indebtedness give the beneficiaries greater rights? Why should so-called “backwards tracing” be the means through which the beneficiaries can acquire any greater rights? There is no reason whatsoever.[[46]](#footnote-46) It is one thing to say that a beneficiary may elect to take the benefit of his trustee’s misadministration of trust assets;[[47]](#footnote-47) but it is quite another to allow the beneficiary to claim some benefit from the trustee’s use of what are undoubtedly the trustee’s own assets.[[48]](#footnote-48) That said, the trustee may well have been enriched. So naturally the beneficiaries should have personal remedies against the trustee, and quite possibly the right to be subrogated to any security for the loan. But whatever the matter of enrichment, the nexus of exchange is not present so as to warrant proprietary rights in the car.

One more example might be useful. The following argument has been made.

 “[I]t would seem that ‘backward tracing’ must be accepted if one is to explain tracing into and through ‘in credit’ bank accounts. This is because if one is tracing funds into a bank account, the account is often credited before the bank has received the relevant funds. In other words, the debt owed by the bank to the customer, which is treated as a substitute for the funds, exists in advance of the funds being received.”[[49]](#footnote-49)

In fact, there is no need for so-called “backwards tracing” to explain what happens in these circumstances. A credit is only applied to the account because the crediting bank has been informed that it will receive funds debited from another account which constitutes, or through a prior process of tracing, represents, trust monies. If that information turns out to be wrong, the credit will be reversed. Just as in the earlier example of buying a book where the book is delivered before the tender of cash in payment, there is an exchange, not backwards tracing. The concept of exchange does not necessarily entail simultaneous performance, though a particular contractual term in a particular contract may do so. And the concept of exchange does not necessarily entail that one particular side perform before the other. In other words, the new credit is perfectly properly described and characterised as the exchange product of the misapplied funds, notwithstanding that the credit was raised in anticipation of receiving the funds, assuming the funds were subsequently received. And if those funds are not subsequently received, there will be no exchange, and the credit will be reversed.[[50]](#footnote-50)

Exchange is the concept that warrants the beneficiaries’ acquisition of proprietary rights in substitute assets in the course of the due administration of a trust fund. It would be perverse if a wider notion than exchange were used to warrant their acquisition of such rights following a breach of trust: otherwise the process of tracing would enable the remedy to become greater than right. This is quite aside from the practical consideration of the untoward effect of “backwards tracing” on the holders of unsecured claims. An unsecured creditor can only look for satisfaction of his claim to the debtor’s beneficially owned assets after discharge of encumbrances on them. That pool of available assets would be further depleted by allowing backwards tracing: backwards tracing would increase the number of assets against which a proprietary claim might lie, having priority to the creditor’s unsecured claim.

As it happens, though it is not the main point of this chapter, the notion of exchange also underlies some, but not all, of the remedies which may follow a successful exercise in tracing. It is exchange that warrants a beneficiary’s election, where such an election is possible after tracing, to assert a beneficial ownership of an asset or a beneficial undivided share in an asset, thus capturing for the trust fund uplift in value of the asset. When one asset is exchanged for a beneficial interest in another, it is axiomatic in our system of law that acquisition of that interest carries with it the fruits of that interest and any uplift in its value, *absent* some specific provision to the contrary like provision for overage payments. Tracing is based in the concept of exchange; and the remedies consequent on it admit the normal consequences of that concept, though these consequences are not mandated, given that the relevant exchange was, from the perspective of the beneficiaries, improper. The result in *Foskett v McKeown*[[51]](#footnote-51) is entirely consistent with principle; though in *Foskett*, what rights were exchange for what others was a matter of contention and difficulty. That does not affect the principle. It is often possible that reasonable people may differ in the application of the principle to difficult facts.[[52]](#footnote-52) Equally, the evidence may be such that the principles are difficult to apply, and consequently some indulgence may be shown towards claimants who suffer a lack of information which makes application of the principles difficult.[[53]](#footnote-53) But that too does not affect the principle.

Finally, there are some well known but difficult cases that may at first sight appear to test the notion of exchange used in tracing; but they are perfectly consistent with it. In some cases, misapplied trust monies are used to discharge a secured debt, and the beneficiaries of the trust may be granted a new charge over the asset which formerly stood as security for the debt discharged with the trust funds.[[54]](#footnote-54) In other cases, the misapplied trust monies may be used to improve existing property, and it is possible for the beneficiaries to be granted a charge over the property.[[55]](#footnote-55) In yet other cases, misapplied trust assets may be destroyed by their use in the manufacture of a new asset; and it is arguable that the beneficiaries can acquire a charge over that asset.[[56]](#footnote-56) In all these cases, there is no item of property constituting the exchange product of the misapplied trust funds. There simply is no asset resulting from the transaction which the beneficiaries could claim, or in which they could share: were beneficiaries to try and treat the transaction as if undertaken on their behalf, they would be entitled to nothing. So there is no tracing into the asset. Yet there can be a proprietary remedy for the beneficiaries by way of charge. In such a case, the beneficiaries gain no rights in the asset itself. Instead, a charge may be imposed *de novo* by way of remedy, founded on the distinct principles of subrogation.

IV. *Summary*

The principle which informs remedies for breach of trust is not to reverse unjust enrichment, but to restore the due administration of the trust, whether by compensating losses caused to the trust fund or capturing benefits that should be in the fund. Tracing may be a process, not a remedy, but it is a process directed towards these remedies and consequently it does, and should, mimic the due administration of a trust in taking its key concept as *exchange*. Now, allowing the capture of exchange products may very often overlap with the reversal of unjust enrichment, but they are not necessarily and always the same.

Failure to realise or acknowledge this may reflect a pre-Judicature Act common law mindset, where all litigation involves two parties and (more or less) straightforwardly correlative rights and liabilities. This may accommodate an “event/response” analysis of restitution. But two points should be made. Any attempt to fit all litigation into a conceptual structure based on two-party actions before 1875 cannot survive the general application of the post-Judicature Act procedural rules. Nor does that conceptual framework accommodate equitable procedures with a different structure: trust administration, the administration of deceased estates, partnership dissolution, the (now largely historical) jurisdiction over infants and lunatics, and many others. The two-party way of looking at things is entirely adequate for many purposes, but not others. Any attempt to make everything fit such a paradigm is bound to end in distortion.

V. *Beyond Trust Funds*

Tracing within the context of the law of trust provides no warrant for backwards tracing. However, tracing is used well outside the context of the law of trusts. Do these other contexts warrant acceptance of backward tracing? More generally, should the exercise of tracing to locate property rights be approached differently outside the context of the law of trusts?

It might be argued that when an action is directed towards reversing unjust enrichment, tracing should not be limited by reference to the rules developed in the context of the law of trusts. This claim must be considered carefully. The response to it is in parts. But throughout it must be borne in mind that the argument is not concerned with the question of when title does or should pass in compromised transactions: when title does or should pass is a matter for the law of property. The only question at issue is the extent of any proprietary response in a situation where title has passed.

The first important, but partial, response to the suggestion that backwards tracing might be used outside the context of the law of trusts is to check the facts. Many proprietary claims commonly described as claims in unjust enrichment are in fact about the restoration of a fund (for example, claims to restore misapplied corporate property). In those contexts, the analogy with trust law is compelling, because these cases are concerned with the restoration of a fund, just like trust law. It is the need to restore the integrity of a fund of assets that warrants the proprietary claim. The notion of restoring a fund, being the primary and governing concept in these cases, should determine the nature and scope of remedies following unlawful depletion of the fund, and processes such as tracing which are directed towards achieving such remedies.

The above argument is only a partial response, however. If we assume, for the sake of argument, that there are claims in unjust enrichment which generate a proprietary response, what then? The argument might be made that the equitable interests raised to reverse unjust enrichment should not be limited in their vindication by reference to principles developed in the context of express trusts. What else could the law do? One possibility is that it could identify assets that the holder would not have but for the enrichment – an approach based on causation – and allow the claimant a proprietary interest in such assets. There are at least two responses to this possibility.

The first is that causation alone is too weak a notion to be the basis of remedial property rights: where is the normative basis for allowing causation to generate property rights, rather than exchange? Exchange is at least a well founded and accepted justification for property rights in substitute assets – though no justification of property is entirely water-tight. Causation is a much broader and weaker notion than exchange. The natural justice of allowing a proprietary right to a claimant in the exchange product of an asset in which the claimant had a proprietary right is clear, but not beyond criticism. But any such criticism applies with much greater force to any proprietary claim based merely on the fact that he can show that the defendant is wealthier than he would be but for the facts alleged. This is, in substance, the “swollen assets theory” revisited. The swollen assets theory suggested that a court should be able to award a proprietary remedy over any of the assets of someone who had been enriched by the receipt of misapplied trust assets (or, possibly, their proceeds). But this theory of tracing and consequent proprietary remedies has not been accepted; nor should it be now. Whatever the strength of exchange as a basis for claiming proprietary rights in substitute assets, causation is a much weaker justification, quite aside from further arguments that it would cast the net of proprietary claims too widely, particularly in the context of insolvency.

Another response is to focus on the bizarre result of using a different set of tracing rules to identify assets that the holder would not have but for the enrichment. If such rules were accepted and applied in the context of proprietary claims that respond to unjust enrichment, the result would be to give greater scope for vindication to restitutionary equitable rights (that is, equitable rights created following the transfer or loss of express property rights) than would be given using the current tracing rules to expressly created equitable property rights under trusts. That is self-evidently wrong. And it cannot be put right by the suggestion that expressly created equitable property rights should be vindicated using tracing rules that are founded on causation. The reasons why the tracing rules applicable to trusts should be grounded in the notion of exchange are set out above: remedies, and processes such as tracing which are directed towards achieving a remedy, must reflect rights. Exchange is the key concept underlying and explaining the due administration of a trust fund. It must therefore be the key concept underlying the process of identifying assets which may be used to restore the trust fund following its unlawful depletion.

A more radical proposal would be to sever the link between equity and proprietary responses to unjust enrichment. This would involve establishing proprietary rights generated in response to unjust enrichment, which can form the basis for tracing, as entirely separate and distinct species of rights than equitable interests. Of course, this is emphatically not the law: it forms at most an argument for radical law reform. But that argument seems unconvincing, because, as above, it would lead to the perverse result that these proprietary rights (again, *ex hypothesi* rights created following the transfer or loss of express property rights) would be given greater scope for vindication than expressly created rights under trusts. Again, this is perverse: simply and self-evidently wrong.

In summary, some of the “strain” pulling against the current exchange-based view of tracing results from the fact that the right to trace extends well beyond the law of trusts *stricto sensu*, so that any explanation of tracing based on trusts may seem less convincing the further away the explanation is used from the paradigm case of the rights of a beneficiary to trace following a misapplication of assets subject to an express trust. But as shown above, there are good reasons not to allow “wider” tracing rules in other contexts.

What may well provide a more promising route for the development of the law is to recognise, albeit cautiously, incrementally and in appropriate cases, *personal* rather than proprietary claims in just enrichment against indirect recipients of some benefit, claims which are not founded on proprietary reasoning, and so do not involve the use of tracing. Indeed, there is evidence that law may be developing in this way.[[57]](#footnote-57) Such claims focus openly and immediately on issues of enrichment which warrant a personal, not a proprietary, claim, and so avoid the risk of distorting rules about property right – the tracing rules – into rules about enrichment or the receipt of benefits.

VI. *Conclusion*

The due administration of funds in equity has clear implications for the equitable consequences of maladministration of a fund. Tracing is one of those consequences. Tracing is a purposive activity, whose content is informed by its purpose and context. The paradigm purpose of tracing is as one technique to allow the restoration of a trust fund following depletion of the fund through a breach of trust. It follows that tracing is not concerned exclusively with identifying enrichment or value. It is concerned with the value inherent in specific assets, and those assets are identified by reference to the notion of exchange. Indeed, if tracing were purely about value, surely a proprietary claim should lie where no trust property as such had necessarily been removed from the trust fund, but where something had been done by the trustee in breach of trust which had the effect of enhancing somebody’s wealth. Yet that is clearly not the law. Nor should it be, given the effect of proprietary claims on third parties.

A notion of tracing properly based on the concept of exchange reflects the current law, which in England does not admit of so-called “backwards tracing”. This is for reasons of consistency between tracing following maladministration of a fund and the principles governing due administration of the fund. Any alteration of that position will entail either incoherence or more significant change to the law than might be supposed: the change would not be minor, trivial or insignificant.

This conclusion is itself indicative of a wider phenomenon, deserving more attention: the distorting effect of over-inclusive theory. What has often seemed to happen is evident in the subject matter of this chapter. Legal rules, principles and doctrines may have a certain effect, in the present case, “locating value” in the hands of a defendant. But that is only part of the story, and a part told without context. The rules, doctrines and principles “locate value” in certain assets identified by reference to certain criteria chosen for certain purposes. If the effect of the rules is translated into broad, theoretical terms, but the context is not, the result is too often distortion in the description of what has happened and in the prescriptions offered for what should happen: such theory “may distort well settled principles in other fields, including those respecting equitable doctrines and remedies, so that they answer the newly mandated order of things.”[[58]](#footnote-58)

The law of trusts and equitable rules for the administration of funds embody well and long settled principles which facilitate the due administration of a fund. The equitable rules which address the consequences of maladministration must vindicate those principles and reflect how they were meant to operate. Looking at the effect of remedies, and procedures through which a remedy may be claimed, should not obscure the fact that they exist to vindicate particular rights.

1. FW Maitland, *Uses and Trusts in Equity: A Course of Lectures* (John Brunyate, rev ed, 2nd ed 1936) at p 23. [↑](#footnote-ref-1)
2. The author has addressed these issues before in “Property in a Fund” (2004) 120 LQR 108. [↑](#footnote-ref-2)
3. “Backwards tracing” is the short-hand name for allowing tracing into an asset acquired using a loan raised by the trustee once trust monies have been used to discharge the loan. [↑](#footnote-ref-3)
4. *Knight v Knight* (1840) 3 Beav 148, 49 ER 58. [↑](#footnote-ref-4)
5. Nolan, “Equitable Property”, (2006) 122 LQR 232. [↑](#footnote-ref-5)
6. See, *e.g.*, Hansmann and Mattei, “The Functions of Trust Law: a Comparative and Economic Analysis” (1998) 73 New York University L Rev 434; Hansmann & Kraakman, “The Essential Role of Organizational Law” (2000) 110 Yale LJ 387. [↑](#footnote-ref-6)
7. See, *e.g.*, *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500. [↑](#footnote-ref-7)
8. *Ashbury Railway Carriage and Iron Co. v Riche* (1879) LR 7 HL 653. As regards companies formed under the Companies Acts, see now Companies Act 2006, s 31. [↑](#footnote-ref-8)
9. See the text to note 000 below. [↑](#footnote-ref-9)
10. See, *e.g.*, *Pickering v Pickering* (1839) 4 My & Cr 289 at pp 298 – 299, 41 ER 113 at p 116. [↑](#footnote-ref-10)
11. Such exceptions include, for example, the rule in *Howe v Earl of Darmouth* (1802) 7 Ves 137, 32 ER 56. [↑](#footnote-ref-11)
12. See, *e.g.*, the Trusts (Capital and Income) Act 2013. [↑](#footnote-ref-12)
13. The qualification “lawfully” indicates that the trustees must respect any implicit limitation on their explicit power: for example, they must not use it in bad faith or for an improper purpose. See, generally, Nolan, “Controlling Fiduciary Power”, [2009] C.L.J. 293 and cross-refer to Newey chapter. [↑](#footnote-ref-13)
14. See, *e.g.*, Settled Land Act 1925, s. 18. [↑](#footnote-ref-14)
15. Note that sometimes a purchaser will be affected by the beneficiaries’ rights because other distinct principles apply to the facts. For example, if Trustees A and B sell an asset to Trustee B within the terms of the trustees’ administrative powers, that sale is valid at law (Law of Property Act 1925, s. 72(4)) and the purchaser (B) is no longer a trustee of the asset, but the sale to him is *voidable* at the instance of the beneficiaries because Trustee B has engaged in self-dealing: *Campbell v Walker* (1800) 5 Ves Jun 678, 31 E.R. 801; *Guinness plc v Saunders* [1990] 2 AC 663 at pp 697 - 698, *per* Lord Goff. See also Conaglen, *Fiduciary Loyalty* (Hart Publishing, 2010) at pp 77-79, and “Fiduciary Duties and Voluntary Undertakings” (2013) 7 *Journal of Equity* 105 at pp 119-122. [↑](#footnote-ref-15)
16. See, *e.g.*, Trustee Act 1925, s 17, Trusts of Land and Appointment of Trustees Act 1996, ss 10(1), 16(1), (2) and *The Encyclopaedia of Forms and Precedents* (London, Butterworths, 5th ed., by Lord Millett and others, 2001), p 291, clause 5. [↑](#footnote-ref-16)
17. See, generally, Fox, “Overreaching”, chapter 4 in Birks and Pretto (eds.), *Breach of Trust* (Oxford, Hart Publishing, 2002), pp 99 – 100. For completeness, it should be remembered that there are some (generally statutory) limitations on how far the terms of a trust may exonerate a purchaser from the effects of a breach of trust: see, *e.g.*, Law of Property Act 1925, ss. 2 and 27(2) as regards the payment to trustees of capital proceeds from land. [↑](#footnote-ref-17)
18. So, for example, the Society of Trust and Estate Practitioners’ standard provisions (2nd ed.) use the following definitions: “ ‘Trust Fund’ means the property comprised in the Trust for the time being” and “ ‘Trust Property’ means any property comprised in the Trust Fund”. The *Encyclopaedia of Forms and Precedents* is a little more expansive: “ ‘the Trust Fund’ means the sum of £ ... cash paid by the Settlor to the Original Trustees as recited above, all assets at any time added to it by way of further settlement accumulation of income capital accretion or otherwise and all property from time to time representing the same” (London, Butterworths, 5th ed., by Lord Millett and others, 2001), Volume 40(1), p 283). [↑](#footnote-ref-18)
19. See, *e.g.*, *Burdett v Willett* (1708) 2 Vern 638, 23 ER 1017 (a factor held goods as trustee for the plaintiff, lawfully sold them, and was likewise a trustee of the proceeds for the plaintiff, which therefore did not form part of the factor’s estate in bankruptcy) and *Ex parte Chion* (1721) 3 P Wms 185 at p 187, n(2), 24 E.R. 1023 (a trader held money for another and used it to buy South-sea stock in his own name but for the account of that other; the trader held the stock on trust for the other, and so the stock did not form part of the trader’s estate in bankruptcy). Indeed, this right to lawfully acquired substitutes was so well established by the early nineteenth century that it formed common ground between the parties in *Taylor v Plumer* (1815) 3 M. & S. 562, 105 ER 721. [↑](#footnote-ref-19)
20. *Rich v Whitfield* (1866) LR 2 Eq 583, but note Settled Land Act 1925, s. 75(5). See also Vaizey on Settlements (H. Sweet & Sons, London, 1887), Vol 1, p 424. A trust which obliged (rather than merely permitted) trustees to convert realty into personalty, or *vice versa*, was until recently treated differently from a power to effect such conversion. For the purpose of determining equitable entitlements under a trust, interests under a trust for sale of land were treated *ab initio* as interests in personalty, and likewise personalty which was to be used to buy land, or was to be sold and the proceeds used to buy land, was itself treated as land: *ibid*. p 425; Maitland, *Lectures on Equity*, *op. cit.* note 000, pp 215 *et seq.*; Megarry & Wade, *The Law of Real Property* (London, Stevens, 5th ed., 1984), pp 431 - 434. This was a consequence of the “doctrine of conversion”, which was abolished on 1st January, 1997 by section 3 of the Trusts of Land and Appointment of Trustees Act 1996, subject to minor transitional savings. Even before its abolition, however, the doctrine did not apply for all purposes: see, *e.g.*, *Williams & Glyn’s Bank Ltd. v Boland* [1981] AC 487. [↑](#footnote-ref-20)
21. See, *e.g.*, the language commonly used to define a trust fund in the text to note 000: this envisages further settlement. [↑](#footnote-ref-21)
22. For an exposition of the complicated law relating to covenants to settle property, see Underhill & Hayton, (London, Butterworths, 15th ed., 1995), pp. 124 - 159 and 271 - 291. [↑](#footnote-ref-22)
23. *Williams v Commissioners of Inland Revenue* [1965] NZLR 395 at p 401, *per* Turner J (NZCA). [↑](#footnote-ref-23)
24. *Pullan v Coe* [1913] 1 Ch. 9. [↑](#footnote-ref-24)
25. The view put forward by the author here, and previously in “Property in a Fund” (2004) 120 LQR 108, has been adopted in the most recent editions of Hayton & Mitchell, *Commentary & Cases on the Law of Trusts and Equitable Remedies* (London, Sweet & Maxwell, 12th ed. by David Hayton and Charles Mitchell (2005) at §1-58 and 13th ed. by Charles Mitchell, (2010 at §1-52); but contrast previous editions. The situation described in the text is not the only one in which a person interested in a trust may reclaim misapplied assets. For example, the beneficiaries of a discretionary trust may not have a right in the fund which can reasonably be called proprietary, because it fails to satisfy the commonly accepted *indicia* of such a right. (See note 000 and the texts cited there.) Nevertheless, such beneficiaries can reclaim misapplied assets: see generally Underhill & Hayton, *op. cit.* note , pp. 39 - 41, and R P Meagher, J D Heydon and M J Leeming (eds), *Meagher, Gummow & Lehane’s* *Equity: Doctrines & Remedies* 4th ed (Chatswood, LexisNexis, 2002), §§ [4-070] - [4-105]. In that regard, their respective interests share features with an equitable proprietary interest under a trust, even though in other regards those interests are so significantly different as not to warrant the epithet “proprietary”. [↑](#footnote-ref-25)
26. See *Foskett v McKeown* [2001] 1 AC 102. [↑](#footnote-ref-26)
27. The right of a beneficiary following an *authorised* disposition of trust property is a right to the substitute asset(s), if there are any, and unless the trust provides otherwise. Following an *unauthorised* disposition of trust assets, the beneficiary may have a similar interest in the substitute asset(s), but that will depend on his election: purely personal relief aside, he could, in the alternative, elect to claim a lien over those substitute asset(s) to secure due reinstatement of the trust fund. See generally, Fox, *op. cit.* note 000. [↑](#footnote-ref-27)
28. *Foskett v McKeown* [2001] 1 AC 102. [↑](#footnote-ref-28)
29. *Re Hallett’s Estate* (1879) 13 ChD 696. [↑](#footnote-ref-29)
30. *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685. [↑](#footnote-ref-30)
31. *Lupton v White* (1808) 15 Ves Jun 432; *Re Hallett’s Estate* (1879) 13 ChD 696; *Re Oatway* [1903] 2 Ch 356, esp at p 359, *per* Joyce J; *Re Tilley’s W.T.* [1967] Ch 1179 at p 1183, *per* Ungoed-Thomas J. [↑](#footnote-ref-31)
32. See, *e.g.*, Hayton, “The Development of Equity and the ‘Good Person’ Philosophy in Common Law Systems” [2012] 76 Conv 263 at pp 265-267; Millett, “Proprietary Restitution” in Degeling and Edelman (eds), *Equity in Commercial Law*, ch 12. [↑](#footnote-ref-32)
33. F Maitland, “Trust and Corporation”, in D Runciman and M Ryan (eds), *F W Maitland: State, Trust and Corporation* (2003), pp 94-95. The point was made at least as long ago as Lord Ellenborough’s judgment in *Taylor v Plumer* (1815) 3 M & S 562 at p 574, 105 ER 721 at pp 725-726, where he explicitly rejects the arguments of Mr Marryat, counsel for the plaintiff, reported at (1815) 3 M & S 562 at p 567, 105 ER 721, at p 723. [↑](#footnote-ref-33)
34. *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694 at p 712, *per* Viscount Radcliffe. [↑](#footnote-ref-34)
35. See, *e.g.*, the texts cited at note 000 above. [↑](#footnote-ref-35)
36. *Hadley v Baxendale* (1854) 9 Ex 341, 156 Eng Rep 145 as interpreted in *The Achilleas, Transfield Shipping Inc v Mercator Shipping Inc* [2008] UKHL 48, [2009] 1 AC 61. [↑](#footnote-ref-36)
37. The exception to the general rule, where “gain based damages” may be recovered, is very limited, whatever the arguments about its precise extent: *Attorney-General v Blake* [2001] 1 AC 268. [↑](#footnote-ref-37)
38. *Foskett v McKeown* [2001] 1 AC 102. [↑](#footnote-ref-38)
39. *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685. [↑](#footnote-ref-39)
40. *Re Hallett’s Estate* (1879) 13 ChD 696. [↑](#footnote-ref-40)
41. *Boscawen v Bajwa* [1996] 1 WLR 328. [↑](#footnote-ref-41)
42. [1966] 2 NSWR 211. [↑](#footnote-ref-42)
43. *Re Diplock* [1948] Ch 465; *Barlow Clowes v Vaughan* [1992] 4 All ER 22. [↑](#footnote-ref-43)
44. *Cf* Smith, “Tracing into the Payment of a Debt” [1995] CLJ 290. [↑](#footnote-ref-44)
45. See M Conaglen, “Difficulties with Tracing Backwards” (2011) 127 LQR 432, but *cf* *Brazil v Durant* [2013] JCA 71, 2013 (1) JLR 103 in Jersey. [↑](#footnote-ref-45)
46. See *Bishopsgate Investment Management Ltd v Homan* [1995] Ch 211 at p 220, *per* Leggatt LJ. [↑](#footnote-ref-46)
47. See note 000 above. [↑](#footnote-ref-47)
48. cp. *James Roscoe (Bolton) Ltd v Winder* [1915] 1 Ch 62. [↑](#footnote-ref-48)
49. A Burrows, *The Law of Restitution* (OUP, 3rd ed, 2011), at p. 142. [↑](#footnote-ref-49)
50. See now *Relfo Ltd v Varsani* [2014] EWCA Civ 360 at [60]-[64] *per* Arden LJ, with whom Gloster and Floyd LJJ agreed at [101] and [106] respectively. [↑](#footnote-ref-50)
51. [2001] 1 AC 102. [↑](#footnote-ref-51)
52. A well known example is the occasional difficulty in applying the principle governing conflicts of duty and interest: “The division in the House of Lords in *Phipps v Boardman* respecting the application of principle to the facts in that case indicates that different minds may reach different conclusions as to the presence or absence of a real or substantial possibility of conflict between duty and interest or between duty and duty.” *Pilmer v Duke Group Ltd (in liquidation)* [2001] HCA 31, (2001) 207 CLR 165 at [79], *per* McHugh, Gummow, Hayne and Callinan JJ. [↑](#footnote-ref-52)
53. For example, Buckley L.J. said, “[I]t is a fundamental feature of the doctrine of tracing that the property to be traced can be identified at every stage of its journey through life" (*Borden v Scottish Timber Ltd* [1981] Ch 25 at p 46F). Yet, as Millett J noted in *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 at pp 734-736, presumptions may be used against a wrongdoer in the absence of evidence, and in other circumstances the court may well draw inferences as to identification based on limited positive evidence. Millett J’s views were accepted and applied by the Court of Appeal in *Relfo Ltd v Varsani* [2014] EWCA Civ 360. [↑](#footnote-ref-53)
54. *Boscawen v Bajwa* [1996] 1 WLR 328. [↑](#footnote-ref-54)
55. *Re Diplock* [1948] Ch 465, where the possibility was admitted but defeated on the facts by a defence of “unconscionability”. [↑](#footnote-ref-55)
56. *Re Bond Worth Ltd* [1980] Ch 228, though the charge in that case was rendered void as against the company’s liquidator for want of registration under Companies Act 1948, s 95. [↑](#footnote-ref-56)
57. See now the *obiter dicta* in *Relfo Ltd v Varsani* [2014] EWCA Civ 360 at [69]-[99] *per* Arden LJ, [103]-[104] *per* Gloster LJ and [107]-[123] *per* Floyd LJJ [↑](#footnote-ref-57)
58. *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68, 208 CLR 516 at [74], *per* Gummow J. [↑](#footnote-ref-58)