11-2001

Foskett v. McKeown – Hard-nosed property rights or unjust enrichment?

Hang Wu TANG
Singapore Management University, hwtang@smu.edu.sg

Tang, Hang Wu --- "Foskett v McKeown; Hard-Nosed Property Rights or Unjust Enrichment?" [2001] MelbULawRw 8; (2001) 25(1) Melbourne University Law Review 295

FOSKETT v McKEOWN[*]

Hard-Nosed Property Rights or Unjust Enrichment?

I INTRODUCTION

The recent judgment of the House of Lords in *Foskett*[1] is extremely important as it straddles insurance law, property law, tracing and unjust enrichment. First, it establishes the proposition that it is possible to trace misappropriated moneys wrongfully paid as premiums into the proceeds of a policy. Second, two of the Law Lords contemplated the abolition of the distinction between the rules for tracing in law and tracing in equity. Third, the judgments of the Law Lords contain valuable guidance as to the context in which equitable ownership and the law of unjust enrichment should be viewed.

II THE FACTS

The salient facts of *Foskett* are as follows. The claimants were a group of purchasers who entered into contracts for the purchase of plots of land in Portugal. Moneys were paid to be held on trust by one Timothy Murphy until completion of the development. The land was never developed and the moneys were dissipated.

On 6 November 1986, Timothy Murphy effected a whole life policy in the sum of £1 000 000 at an annual premium of £10 220. Five premiums were paid in November 1986, 1987, 1988, 1989 and 1990. The 1986 and 1987 premiums were paid by Timothy Murphy, whereas the 1989 and 1990 premiums totalling £20 440 were paid out of moneys misappropriated by Timothy Murphy from the purchasers. (The source of the 1988 premium was disputed.) The named beneficiaries of the policy were his wife (a one-tenth share) and his three children (a nine-tenths share).

On 9 March 1991, Timothy Murphy committed suicide. The insurers paid out a sum of £1 000 580.04. The dispute was essentially one between the children of Murphy, as named beneficiaries of the policy, and the purchasers. The children contended that the purchasers were only entitled to a return of £20 440 without interest or nothing at all. The purchasers, on the other hand, alleged that they were entitled to 40 per cent of the proceeds of the policy.

The policy had a notional investment content which served the following purposes: (a) to determine the surrender value of the policy; (b) to determine the alternative calculation of the death benefit if the value of the allocated units exceeded the sum assured of £1 000 000; and (c) to pay for the cost of life cover after the payment of the second premium in November 1987. If the third premium was not paid, the policy would be converted into a paid-up policy and the units that were allocated to the policy would be applied annually in meeting the cost of life insurance until all the allocated units had been used up. The policy would lapse thereafter. Due to the investment content of the policy, it was found that, even if the 1989 and 1990 premiums had not been paid, the proceeds payable to the children would have remained the same. This was essentially the children's argument as to why the purchasers were not entitled to a pro rata payment of the policy proceeds.

The Court of Appeal's decision in *Foskett v McKeown*[2] has been extensively noted.[3] In the Court of Appeal, Scott V-C and Hobhouse LJ (with Morritt LJ dissenting) held that the purchasers were entitled to repayment of the amount of the fourth and fifth premiums with interest, but were not entitled to a pro rata share of the policy proceeds. Essentially, Scott V-C took the view that the purchasers' claim was more analogous to a situation where misappropriated trust moneys were used to improve or maintain an asset rather than a situation where a beneficiary's moneys were used to help purchase an asset.[4] In the circumstances, he held that the purchasers had at most a charge on the policy.[5]Hobhouse LJ, on the other hand, found that there was no causative link between the fourth and fifth premiums and the proceeds paid out under the policy.[6]

III THE DECISION IN THE HOUSE OF LORDS

The House of Lords by a bare 3–2 majority[7] held that the purchasers were entitled to more than a return of the premium paid. The result was particularly close as Lord Browne-Wilkinson confessed that at the close of the hearing he had wanted to hold for the children. However, he changed his mind after reading the draft speech of Lord Millett.[8] Even within the majority, the Law Lords disagreed on the manner in which the purchasers' share should be calculated.[9]

A *Vindication of Property Rights or Unjust Enrichment?*

The majority of the House of Lords (Lord Browne-Wilkinson,[10] Lord Hoffmann[11] and Lord Millett[12]) stressed that it must be appreciated that this was a claim based on a vindication of the purchasers' equitable interest and not a claim premised on unjust enrichment. In fact, Lord Hope also opined that the purchasers were seeking to vindicate their claim to their own money.[13] Lord Browne-Wilkinson stated:

The rules establishing equitable proprietary interests and their enforceability against certain parties have been developed over the centuries and are an integral part of the property law of England. It is a fundamental error to think that, because certain property rights are equitable rather than legal, such rights are in some way discretionary. This case does not depend on whether it is fair, just and reasonable to give the purchasers an interest as a result of which the court in its discretion provides a remedy. It is a case of hard-nosed property rights.[14]

Lord Millett was equally emphatic:

The transmission of a claimant's property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment. There is no 'unjust factor' to justify restitution (unless 'want of title' be one, which makes the point). The claimant succeeds if at all by virtue of his own title, not to reverse unjust enrichment. Property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend upon ideas of what is 'fair, just and reasonable.' Such concepts, which in reality mask decisions of legal policy, have no place in the law of property.[15]

The analysis of the majority of the House of Lords that the claim was a vindication of the purchasers' property rights and not premised on the principle of unjust enrichment is significant as it affects the formal structure of the law of unjust enrichment. In particular, it impacts on the current debate on the circumstances where a restitutionary response is generated, or what are commonly known as the unjust factors. Burrows maintains that one unjust factor is the 'retention of property belonging to the plaintiff without his

consent.'[16] This unjust factor overlaps with other unjust factors such as mistake or failure of consideration. However, according to Burrows, to avoid an overlap and to maintain conceptual purity, where such an unjust factor is operating any claim should be analysed as the sole autonomous unjust factor.

Until recently, Burrows' analysis had the extra-judicial support of Lord Millett:

It is, therefore, my thesis that there are two situations, and two situations only, in which proprietary restitutionary remedies are available for *subtractive unjust enrichment*. The first is where the claimant can establish a continuing beneficial interest in the property to which he lays claim. Such a beneficial interest will almost invariably arise under a resulting trust.[17]

Rather surprisingly, Lord Millett appears to have rescinded from this position in *Foskett* as demonstrated by the passage quoted above.[18] On balance, it is this author's view that a proprietary analysis is preferable where the claimant retains the equitable title and is merely seeking to vindicate their equitable title. Grantham and Rickett forcefully argue that once a claimant is able to show that they continue to retain an equitable right in rem it follows that there must be a secondary obligation in personam to vindicate such rights.[19] There is simply no reason in such circumstances why a proprietary analysis should bow down in deference to an unjust enrichment analysis.[20]

However, the words used by Lord Millett in the parentheses in the passage quoted above[21] may give rise to an argument that his position is equivocal at best. It can be argued that the passage above should be confined to the particular situation where the claim is a proprietary claim premised on the claimant's equitable title. If such a restrictive reading of *Foskett* is adopted, then perhaps Burrows' categorisation of 'retention of property belonging to the plaintiff without his consent' as an unjust factor may still be salvaged where the claimant is not pursuing a proprietary claim but a personal one.[22]

The distinction between a proprietary analysis and an analysis premised upon unjust enrichment at first blush appears to be mere academic hair-splitting, but it is not. It has two important practical consequences: (a) the elements of an equitable proprietary claim and a claim in unjust enrichment are different; and (b) different defences may apply. Lord Millett held that, in a claim for a vindication of an equitable interest, the claimant only needs to show that the defendant was in receipt of property which belonged beneficially to the claimant or of its traceable proceeds. The claimant need not show that the receipt had enriched the defendant.[23] Thus, the children's argument that the purchasers should only be entitled to the premiums paid because the 1989 and 1990 premiums did not cause an increase in the proceeds payable to the children was misconceived. Further, Lord Millett opined that a claim in unjust enrichment was subject to a change of position defence. An action such as the present one was subject to a 'bona fide purchaser for value defence'.[24]

It is also not entirely clear whether Lord Millett rejected the analysis that all proprietary rights contingent on a tracing exercise are subject to a change of position defence.[25] This is because, on the facts, there was no conceivable change of position by the children and thus the House of Lords did not have to grapple with this issue. Further, Lord Millett only said that different defences 'may' apply.[26] One view is to argue that the claimants had an immediate and automatic vested proprietary right in the traceable proceeds of the original property subject to the requirement of election.[27] It may also be argued that, since the change of position defence does not apply to a claim for the original property, the defence is equally inapplicable to a claim for the traceable proceeds of the original property. However, there is a conceptual difficulty with such an analysis because of the problem of identifying

the process whereby the traceable proceeds vest in the claimant's name. Birks argues that what a claimant has in these circumstances is merely a suspensory right or a power in rem to ask the court to vest the property in their name.[28] This power acts prospectively and not retroactively. On this analysis, the question would be whether this power in rem should be subject to a change of position defence. Ultimately, this issue is a question of policy, that is, how strong should proprietary rights be? In other words, in the context of this case, should a claimant's equitable interest take precedence over a defendant's security of receipt? It would appear that Lord Millett was in favour of stronger proprietary rights and was not inclined to consider the policy of ensuring a defendant's security of receipt as a justification for defeating such property rights. He took the view that legal policy had no place in the law of property.[29]

Next, Birks' famous cause and response analysis appears to be incompatible with the House of Lords' decision. According to Birks, all rights which an individual holds, whether in personam or in rem, derive from the following causative factors: (a) wrongs; (b) consent; (c) unjust enrichment; and (d) others.[30] Birks characterises an equitable interest as inert and argues that equity's *vindicatio* is given teeth by the recognition of a subsidiary obligation to restore the res. Thus, according to Birks, in an action in equity for a vindication of an equitable interest, the causative factor is among the category known as 'others'.[31] However, the House of Lords' decision suggests that a neat and clean delineation between a cause and response analysis may not always be possible. An equitable proprietary interest may be both a cause and a response.[32] While it is agreed that in certain circumstances a proprietary interest is usually a response,[33]*Foskett* proves that a pre-existing equitable proprietary interest may also be a causative factor. The confusion in *Foskett* as to whether this was a vindication of an equitable proprietary interest or a claim in unjust enrichment shows that perhaps it is not so prudent to characterise such a claim in a category known as 'others', as it hides the fact that a pre-existing equitable interest may also be a causative factor.

B *Premiums Paid — Mixed Funds or Mere Improvement to a Pre-Existing Property?*

Lord Browne-Wilkinson and Lord Millett rejected the analogy that the moneys paid as the fourth and fifth premiums of an insurance policy should be viewed as an improvement to a pre-existing property. Lord Browne-Wilkinson agreed with Lord Millett that the analogy with moneys mixed in an account is more accurate.[34] They reasoned that, where a trustee mixed moneys in a bank account, there were no actual physical moneys in the account. Before the mixture, the trustee had a chose in action against the bank to demand payment of the credit balance on their account. After the mixture, the trustee had the same chose in action but the value of the chose in action would include the moneys wrongly paid in. Applying this analogy to the present case, Lord Browne-Wilkinson held that, when the purchasers' moneys were wrongfully paid as premiums, the purchasers had a proprietary right to share rateably in the proceeds of the policy as reflected in their contribution.[35]

With regard to the argument that the purchasers were unable to show a causative link between the fourth and fifth premiums and the proceeds payable, Lord Browne-Wilkinson held that the beneficial ownership of the policy did not depend upon how the events turned out. He stated that '[t]he rights of the parties in the policy, one way or another, were fixed when the relevant premiums were paid when the future was unknown.'[36] Lord Millett held that the causative link argument was fallacious as it was derived from the language of the law of unjust enrichment. He also found that the relevant question was whether the death benefit was attributable to all the premiums or only to some of them. The answer would be that the death benefit was attributable to all the premiums because the policy

represented the product of all the premiums.[37] Lord Millett held that the argument that the fourth and fifth premiums did not contribute to the amount payable under the insurance would lead to a capricious result as it would be dependent on the order of the payments made. He found that this approach was unacceptable, as it would mean that the ownership of the policy could not be determined until the policy matured or was realised.[38] According to Lord Millett, '[t]he ownership of the policy must be ascertainable at every moment from inception to maturity; it cannot be made to await events.'[39]

Lord Millett unequivocally rejected the suggestion that the case of *Re Hallett's Estate; Knatchbull v Hallett*[40] was authority for the proposition that in a situation where a new asset is acquired by the trustee partly with their own money and partly with trust money the beneficiary was confined to a lien. He held that the basic rule was that where the trustee in breach of trust used trust moneys to make part payment in acquiring an asset the beneficiary was 'entitled *at his option* either to claim a proportionate share of the asset or to enforce a lien upon it to secure his personal claim against the trustee for the amount of the misapplied money.'[41] The basic rule was applicable to volunteers like Timothy Murphy's children in this case. However, this rule was only applicable against the wrongdoer and those deriving title under the wrongdoer otherwise than for value. It was not available against other contributors who were innocent of any wrongdoing, whose funds were mixed with the beneficiary's moneys. Where there were other contributors and the mixed fund was deficient, the beneficiary would not be entitled to enforce a lien for their contribution and all the contributors would share rateably in the mixed fund.[42]

Lord Millett further held that it did not matter whether the trust money was mixed in a single fund before being used to acquire the asset or separate payments (whether simultaneously or sequentially) were made out of differently owned funds to acquire the asset. It was therefore unnecessary for the claimant to show that their property had contributed to any increase in the value of the new asset. This is because, in a claim to vindicate a proprietary interest, proof of enrichment is unnecessary.[43]

On the other hand, Lord Steyn and Lord Hope, who were in the minority, considered that the situation was analogous to a situation where the moneys were used to improve a pre-existing property.[44] They agreed with the majority of the Court of Appeal that where a trustee used trust moneys to improve or maintain their house the beneficiaries were only entitled to a charge on the house to recover their money. The beneficiaries were entitled to a pro rata share in the house only if the improvements had increased the value of the house. On the facts, Lord Steyn and Lord Hope found that there was no causative link between the fourth and fifth premiums and the proceeds paid out.[45] Lord Hope held that in this case the policy had been paid out and the reason why it was paid out could be determined.[46] In the circumstances, Lord Steyn and Lord Hope were of the opinion that the purchasers were not entitled to a pro rata share of the policy.

This point again seems to turn on whether the purchasers had an immediate and automatic vested interest in the traceable proceeds of the insurance policy or whether they merely had a suspensory interest in the insurance policy, that is, a power in rem. The majority of the House of Lords seems to have taken the position that the purchasers' rights crystallised at the time the premium was paid and they consequently had an immediate vested interest in the policy.[47]However, the minority appears to have taken the view that the court was entitled to look at the transactions in totality ex post facto and that the purchasers' rights were suspensory in the meantime. This issue is really a question of policy as to how far the court would go to protect a claimant's equitable interest as weighed against the defendant's security of receipt. Evidently, the majority in the House of Lords felt that the latter was subservient to the former.

C *Windfall Argument*

Lord Browne-Wilkinson and Lord Millett also rejected the argument that the purchasers would enjoy a 'windfall' on the facts of the case. In response to this argument, Lord Browne-Wilkinson pointed out that a so-called windfall is a necessary incident to property rights.[48] Lord Millett, on the other hand, rejected the unspoken assumption that the assured had provided a form of contribution by dying earlier. Lord Millett pointed out that the death of the assured merely determined when the assured sum was to be paid and did not affect the question of ownership.[49]

D *Is the Same Principle Applicable to Indemnity Insurance?*

It must be noted that *Foskett* was concerned with a life policy, that is, a non-indemnity insurance. The proceeds of the life insurance are not a valuation of or substitute for the life of the assured. However, it is not clear whether the same principle would apply to indemnity insurance. Dr Lionel Smith argues that in an indemnity insurance, where an asset is insured and destroyed, the proceeds of the insurance policy are determined not merely by the premiums paid but also by the diminution of the value of the asset.[50] Thus, if the asset that was destroyed belonged to the defendant, *Foskett* does not preclude the argument that where an indemnity insurance is concerned the diminution of the value of the asset should be taken into account when assessing the claimant's share in the proceeds of the policy.

E *Moral Claims, Wrongdoing, Fairness, Justice and Equity*

Lord Steyn considered the relative moral claims of the purchasers and the children relevant. Lord Steyn held that the children were unaware of any wrongdoing of their father and that the children could say that, if they had become aware that their father had planned to use trust money to pay the fourth and fifth premiums, they would have insisted that he did not do so.[51] Lord Steyn and Lord Hope held that it would be artificial to argue that all five premiums produced the proceeds of the policy. The stolen moneys were also not causally relevant to any benefit received by the children. As such, Lord Steyn was of the view that the proprietary claim of the purchasers was not underpinned by any considerations of fairness or justice. Therefore, there was no justification for creating, by analogy with cases on equitable interests in mixed funds, a new proprietary right to the policy moneys in the circumstances of this case.[52]

Lord Hope also considered the question whether it was equitable that the purchasers should recover a pro rata share. He held that the equities of the parties, their conduct and the consequences of allowing or rejecting the purchasers' claim must be analysed and weighed up. In the end, the judgment had to consider what was fair, just and reasonable. He held that, since the purchasers were unable to demonstrate that the value of the moneys paid was causal to the proceeds paid out, the equities lay with the children and not with the purchasers.[53]

The references to moral claims, wrongdoing, fairness, justice and equity by Lord Steyn and Lord Hope are regrettable. With respect, it is this author's view that ultimately these references contributed nothing to their analysis and were unnecessary. The issue was whether the events in the present case should properly be viewed as a mere improvement to a pre-existing property as opposed to a mixing of moneys. Further, as Dr Smith perceptively points out, the defendants were the children of the wrongdoer. Furthermore, the children were volunteers in this action who had not contributed to the policy.[54] If

Lord Steyn's and Lord Hope's views are taken, then it would invite 'commission of the wrong by assuring the wrong-doer that there is one mode in which he could surely profit by his turpitude, in securing a provision for his family.'[55]

F *Tracing — A Unitary System?*

The law of tracing is plagued by a perceived difference between common law tracing and tracing in equity. It is often said that the common law was only capable of tracing property when a clean substitution of property was involved and could not trace through a mixed fund.[56] Equity, on the other hand, had no such difficulty in tracing into mixed funds.

Lord Browne-Wilkinson expressly refrained from entering into this thorny discussion as to whether the different legal and equitable rules of tracing were justifiable.[57]

On the other hand, Lord Steyn had no such reluctance. Lord Steyn accepted that tracing is a process of identifying assets and that it properly belongs to the realm of evidence. He accepted Birks' analysis[58] that, since tracing belonged to the realm of evidence, the process of identification ceased to be either legal or equitable and there should be a unified regime for tracing.[59]

Lord Millett also boldly wiped away the distinction between tracing in common law and equity. He defined tracing as follows:

Tracing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property.[60]

He went on to hold: 'Given its nature, there is nothing inherently legal or equitable about the tracing exercise. There is thus no sense in maintaining different rules for tracing at law and in equity.'[61]

Thus, at least two of the Law Lords in this case were of the view that the same rules should apply to tracing in law and tracing in equity. This is heartening to note because as late as 1996 Millett LJ in the Court of Appeal, in *Trustee of the Property of F C Jones & Sons (a Firm) v Jones*, had said that the fact that there were different tracing rules at law and in equity was 'unfortunate though probably inevitable'.[62]

IV CONCLUSION

Foskett raises many interesting issues. However, it is unfortunate that some of these issues remain unresolved. First, is there finally a unitary rule of tracing? Two of the Law Lords seem to think so, whereas the others remain ambivalent on this issue. On a strict reading of the judgments, it would be impossible to say that the House of Lords has held unequivocally that there is a unitary rule of tracing. The pronouncements by Lord Steyn and Lord Millett are at most obiter dicta. Second, is the defence of change of position inapplicable to a claim where the claimant is vindicating their equitable interest in the traceable proceeds? It would appear from Lord Millett's judgment that this is so although he did not consider the conceptual difficulty of when the property vests in the traceable proceeds. Third, it is also not entirely clear whether the principles laid down by the majority apply equally where premiums are paid to service indemnity insurance as opposed to non-indemnity insurance — in other words, whether the diminution in value of the defendant's insured asset can be

taken into account when assessing the claimant's share in the insurance proceeds. Finally, it remains to be seen whether *Foskett* has the effect of abolishing 'want of title' or 'retention of property belonging to the plaintiff without his consent' as an unjust factor that generates a restitutionary response where the claim is a personal one. However, quite apart from the unresolved issues set out above, *Foskett* is a valuable decision as it clarifies the relationship between equitable ownership and the law of unjust enrichment.

TANG HANG WU[*]

---

[*] [2000] UKHL 29; [2000] 3 All ER 97 ('*Foskett*').

[1] [2000] UKHL 29; [2000] 3 All ER 97.

[2] [1998] Ch 265.

[3] See, eg, Charles Mitchell, 'Tracing Trust Funds into Insurance Proceeds' [1997] *Lloyd's Maritime and Commercial Law Quarterly* 465; Richard Nolan, 'Our Money on Your Life' [1997] *Cambridge Law Journal* 491; John Stevens, 'Equitable Tracing into the Proceeds of a Life-Insurance Policy Partially Funded with Misappropriated Trust Money' [1998] *Conveyancer and Property Lawyer* 406; Lionel Smith, 'Tracing into Life Assurance Proceeds' (1997) 113 *Law Quarterly Review*552.

[4] *Foskett v McKeown* [1998] Ch 265, 278–9.

[5] Ibid 281.

[6] Ibid 291–2.

[7] Lord Browne-Wilkinson, Lord Hoffmann and Lord Millett; Lord Steyn and Lord Hope dissenting.

[8] *Foskett* [2000] UKHL 29; [2000] 3 All ER 97, 101.

[9] Lord Hoffmann, with whom Lord Browne-Wilkinson concurred, held that the policy moneys should be divided pro rata according to the contributions made to the payment of the premium. The reference to the notional units was an over-complication: ibid 108–9. Lord Millett, on the other hand, embarked on a careful analysis of the claimants' shares with reference to the units actually allocated: at 133–6.

[10] Ibid 101.

[11] Ibid 108.

[12] Ibid 121.

[13] Ibid 111.

[14] Ibid 102. Cf George Palmer, *The Law of Restitution* (1978) vol 1, 186, who analysed a similar factual matrix as one premised on the principle of unjust enrichment.

[15] *Foskett* [2000] UKHL 29; [2000] 3 All ER 97, 119–20.

[16] Andrew Burrows, *The Law of Restitution* (1993) 362–75.

[17] Sir Peter Millett, 'Restitution and Constructive Trusts' in W R Cornish et al (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (1998) 199, 217 (emphasis added).

[18] See text accompanying above n 15.

[19] Ross Grantham and Charles Rickett, 'Tracing and Property Rights: The Categorical Truth' (2000) 63 *Modern Law Review* 905.

[20] Cf Craig Rotherham, 'Trust Property and Unjust Enrichment: Tracing into the Proceeds of Life Insurance Policies' [2000] *Cambridge Law Journal* 440.

[21] See text accompanying above n 15.

[22] See also Lionel Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (2000) 116 *Law Quarterly Review* 412.

[23] *Foskett* [2000] UKHL 29; [2000] 3 All ER 97, 121–2.

[24] Ibid 122.

[25] See Peter Birks, 'Change of Position and Surviving Enrichment' in William Swadling (ed), *The Limits of Restitutionary Claims: A Comparative Analysis* (1997) 36; Richard Nolan, 'Change of Position' in Peter Birks (ed), *Laundering and Tracing* (1995) 135; Graham Virgo, 'What Is the Law of Restitution About?' in W R Cornish et al (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (1998) 305; Burrows, above n 16, 431, who all argue that such proprietary rights are subject to a change of position defence.

[26] *Foskett* [2000] UKHL 29; [2000] 3 All ER 97, 122.

[27] See Lionel Smith, *The Law of Tracing* (1997) 322–4, 383–5.

[28] See Birks, 'Change of Position and Surviving Enrichment', above n 25.

[29] *Foskett* [2000] UKHL 29; [2000] 3 All ER 97, 119–20.

[30] See, eg, Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' [1996] UWALawRw 1; (1996) 26 *University of Western Australia Law Review* 1; Peter Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] *New Zealand Law Review* 623; Peter Birks, 'Misnomer' in W R Cornish et al (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (1998) 1; Peter Birks, 'The Law of Restitution at the End of an Epoch' (1999) 29 *University of Western Australia Law Review* 13; Peter Birks, 'Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment' [1999] MelbULawRw 1; (1999) 23 *Melbourne University Law Review* 1; Peter Birks, 'The Law of Unjust Enrichment: A Millennial Resolution' [1999] *Singapore Journal of Legal Studies* 318. Cf Geoffrey Samuel, 'Can Gaius Really Be Compared to Darwin?' (2000) 49 *International and Comparative Law Quarterly* 297, who challenges Birks' taxonomy.

[31] Birks, 'Property and Unjust Enrichment', above n 30, 658.

[32] See Ross Grantham and Charles Rickett, 'Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity' [1997] *New Zealand Law Review* 668; Ross Grantham and Charles Rickett, *Enrichment and Restitution in New Zealand* (2000) 23–43; Virgo, 'What Is the Law of Restitution About?', above n 25; Graham Virgo, *The Principles of the Law of Restitution* (1999) 11–16; Grantham and Rickett, 'Tracing and Property Rights', above n 19.

[33] See, eg, *A-G (Hong Kong) v Reid* [1993] UKPC 2; [1994] 1 AC 324, where the wrongdoing of the defendant was the causative factor in the creation of an equitable proprietary right.

[34] *Foskett* [2000] UKHL 29; [2000] 3 All ER 97, 103 (Lord Browne-Wilkinson), 128–9 (Lord Millett).

[35] Ibid 104.

[36] Ibid.

[37] Ibid 125–7.

[38] Ibid 129–30.

[39] Ibid 130.

[40] (1880) 13 Ch D 696, 709 (Jessel MR), cited in ibid 123.

[41] *Foskett* [2000] UKHL 29; [2000] 3 All ER 97, 124 (emphasis in original).

[42] Ibid.

[43] Ibid.

[44] Ibid 106–7 (Lord Steyn), 117 (Lord Hope).

[45] Ibid 105 (Lord Steyn), 115 (Lord Hope).

[46] Ibid 116.

[47] Rotherham, above n 20, 441.

[48] *Foskett* [2000] UKHL 29; [2000] 3 All ER 97, 103–4.

[49] Ibid 127–8.

[50] See Smith, *The Law of Tracing*, above n 27, 234–5.

[51] *Foskett* [2000] UKHL 29; [2000] 3 All ER 97, 105.

[52] Ibid 107–8.

[53] Ibid 117.

[54] Smith, 'Tracing into Life Assurance Proceeds', above n 3.

[55] *Shaler v Trowbridge*, 28 NJ Eq 595, 604 (1877), quoted in ibid 556–7.

[56] *Taylor v Plumer* [1815] EngR 551; (1815) 3 M & S 562; 105 ER 721. Cf Lionel Smith, 'Tracing in *Taylor v Plumer*: Equity in the Court of King's Bench' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 240.

[57] *Foskett* [2000] UKHL 29; [2000] 3 All ER 97, 102.

[58] Peter Birks, 'The Necessity of a Unitary Law of Tracing' in Ross Cranston (ed), *Making Commercial Law: Essays in Honour of Roy Goode* (1997) 239, 239–58.

[59] *Foskett* [2000] UKHL 29; [2000] 3 All ER 97, 106.

[60] Ibid 120. For a similar pronouncement by Millett LJ, see *Boscawen v Bajwa* [1995] EWCA Civ 15; [1996] 1 WLR 328, 334 (CA).

[61] *Foskett* [2000] UKHL 29; [2000] 3 All ER 97, 121.

[62] [1997] Ch 159, 170.

[*] LLB (NUS), LLM (Cantab); Assistant Professor, Faculty of Law, National University of Singapore; Advocate and Solicitor of the Supreme Court of Singapore; Solicitor, England and Wales. The author would like to thank his colleagues Associate Professor Tan Sook Yee and Associate Professor Tjio Hans for their invaluable comments on an earlier draft of this case note. The usual caveats apply.