presently stands, it is submitted that *National Crime Authority v Robb* was decided *per incuriam* and ought not to be followed.

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## SUBROGATION AS A REMEDY FOR UNJUST ENRICHMENT IN THE SUPREME COURT

WHERE claimant *C* is responsible for discharging a liability of debtor *D* to creditor *X*, secured over *D*'s assets, *C* is sometimes entitled to be subrogated to *X*'s extinguished security interest. Typically, *C* is a lender, who loaned money to enable *D*, the borrower, to purchase property or refinance existing borrowing from *X*, in return for some agreed security. If that security proves defective, the courts commonly find that *C* is subrogated to *X*'s security, which was paid off via the loan. Where *C*'s loan funded a valid purchase transaction, that commonly entails subrogation to the "unpaid vendor's lien", which the vendor held as security for payment of the purchase price. Why might *C* acquire these rights? *Banque Financière de la Cité v Parc (Battersea) Ltd.* [1999] 1 A.C. 221 suggested a bold new rationalisation: such subrogation is a "restitutionary remedy" which prevents or reverses "unjust enrichment". The Supreme Court had its first opportunity to explore the implications of this insight in *Menelaou v Bank of Cyprus Plc* [2015] UKSC 66; [2016] A.C. 176.

The Menelaou parents wished to sell their family's home, Rush Green Hall (RGH), and use the proceeds, inter alia, to purchase another property in the name of their daughter, Melissa, as a gift. Contracts were duly exchanged to sell RGH for £1.9 m, and to purchase Great Oak Court (GOC) for £875,000. There was, however, an obstacle: Bank of Cyprus held a registered charge over RGH, securing liabilities that substantially exceeded the property's value. To enable the transactions to proceed as planned, the Bank agreed to release its charge over RGH, in return for a partial repayment of £750,000 and a new registered charge over GOC securing the Menelaou parents' outstanding liabilities to the Bank. Matters proceeded on that basis. It later emerged that the registered charge which the Bank believed it had acquired over GOC was invalid: Melissa, the new registered owner, never signed the mortgage documents. Was the Bank entitled in those circumstances to be subrogated to the vendor's lien over GOC, which was discharged via the proceeds of RGH's sale? The Supreme Court held, unanimously, that it was.

Of the five Supreme Court Justices, Lord Carnwath was the notable outlier. He was "less convinced" that older subrogation cases should reanalysed through the "prism" of the law of unjust enrichment. Whilst not

necessarily opposed to the idea that unjust enrichment might yield a proprietary remedy in a case like *Menelaou*, he worried that forcing the unjust enrichment analysis onto historic decisions might "distort" established principles; and he apparently doubted whether the "anomalous" subrogation remedy was an appropriate vehicle for developing proprietary remedies in future. Given these concerns, Lord Carnwath preferred to decide the case via a "strict application of the traditional rules of subrogation, without any need to extend them beyond their established limits" ([107]–[109]). In his view, these "traditional rules" required proof that the money used to pay the creditor (GOC's vendor) was "the claimant's" money ([121]–[132]). On the facts, the required "tracing link" existed: correctly analysed, the proceeds of sale of RGH were received and held by the solicitors as trustees *for the Bank*, under a *Quistclose*-style arrangement, pending their application in the purchase of GOC in return for a valid charge ([133]–[140]).

The Supreme Court majority proceeded differently. Three aspects of their analysis, represented by reasoned judgments of Lords Clarke and Neuberger, warrant emphasis.

First, the majority unequivocally accepted that subrogation was available as a remedy for unjust enrichment. *Banque Financière* was an exceptional case, where the relief awarded took an unusually attenuated *in personam* form. Nevertheless, its general analysis was said to be the "prism" through which the older subrogation cases had now to be understood ([50]). Furthermore, as an unjust enrichment remedy, subrogation's availability fell to be tested using the familiar three- or four-stage unjust enrichment inquiry ([18], [61]). This is important. It affirms the "correctness" of the path taken by recent English cases in the face of Australia's rejection of the *Banque Financière* approach (*Bofinger v Kingsway Group Ltd.* [1999] HCA 44), and of some academic accounts, which regard the *Banque Financière* decision as heretical, on the basis that a cause of action in unjust enrichment can never yield more than a (personal) monetary restitutionary remedy (notably, Virgo, *The Principles of the Law of Restitution*, 3rd ed. Oxford, 2015). As the Supreme Court understands the law, it can.

Secondly, of the elements required for a cause of action in unjust enrichment, dispute focused on whether discharge of the vendor's lien over GOC enriched Melissa "at the Bank's expense". The problem here was obvious. The Bank had not directly paid the vendors: they were paid by the solicitors acting in the transaction for the Bank/Menelaou parents. Nor was this a typical case, where loan monies are held by solicitors on trust for the lender, pending their disbursement in completion of the purchase. The Bank did not technically supply any funds at all: the release of its existing charge enabled the proceeds of RGH's sale, which the Bank could otherwise have demanded in satisfaction of the Menelaou parents' liabilities, to be used to purchase GOC in Melissa's name. Throughout the litigation, the Bank argued that it had an entitlement to the proceeds of sale which

were received and disbursed by the solicitors, via a trust or charge. The majority thought that might be right, but that it was not essential ([53]–[54], [100]–[104]). Melissa was enriched "at the Bank's expense", even without the Bank showing such a proprietary entitlement to the funds paid to GOC's vendors.

This conclusion aligns with other recent decisions, including *Investment Trust Company (in liquidation) v RCC* [2012] EWHC 358 (Ch); [2015] EWCA Civ 82, and *Relfo Ltd. (in liquidation) v Varsani* [2014] EWCA Civ 360, in confirming that claims in unjust enrichment are not categorically limited to "direct transfers", *C–D*, or, more broadly, to cases where *D* is immediately enriched by *C*'s agent, or a third party's application of money/assets "belonging to" *C*. A sufficient connection may be found beyond this. Unfortunately, the majority offered little further by way of general principle to assist in drawing the outer boundaries of that criterion, beyond general endorsement of Henderson J.'s analysis in the *Investment Trust Company* case ([23]–[33], [77]). Their strong instinct that it *was* satisfied in *Menelaou* reflected the essential interconnectedness of the transactions and a desire to recognise "substance" and "reality". In particular, (1) the release of the Bank's charge, RGH's sale, and GOC's purchase were not just causally linked: they were really one composite transaction ([24]–[25], [66]–[67]); (2) the Bank's charge entitled it to require that all proceeds from RGH's sale be paid to it, and "form" would triumph over "substance" if the Bank was denied a remedy which would be uncontroversially available, had it required such payment, and then *re-lent* the sums needed to purchase GOC ([26]–[27], [66], [99]).

Thirdly, assuming that the discharge of Melissa's liability to the vendors was an unjust enrichment obtained "at the Bank's expense", how was that to be remedied? The "standard" restitutionary remedy is a (personal) monetary remedy. On what assumption was the law justified in going further, awarding the (proprietary) remedy of subrogation to the vendor's extinguished security? Debate centred on whether the remedy's availability depended on the Bank showing a "proprietary base" or "tracing links" (especially that the vendor's lien was discharged via *"the Bank's" monies*). The majority held that it did not. Three headline points emerge from their analysis.

First, as a remedy for unjust enrichment, subrogation does not necessarily require *C* show to a "proprietary base": the remedy is not awarded to vindicate the claimant's pre-existing/continuing property rights (esp. [37]–[38], [96]–[99]).

Secondly, unjust enrichment scholars sometimes invoke the concept of a "proprietary base" or "tracing links" as a conceptual tool for setting narrower limits on the availability of *proprietary* restitutionary remedies (cf. Mitchell, Mitchell and Watterson, *Goff & Jones: The Law of Unjust Enrichment 8th ed.*, London 2011 ch. 7). In that role, it operates, in

particular, to restrict the availability of claims to substitute assets acquired via the original enrichment and/or against subsequent recipients. *Menelaou* now suggests, however, that matters may be less clear-cut. The discharge of Melissa's liability to GOC's vendor was held to be an "unjust enrichment" at "the Bank's expense", which was appropriately reversed via the (proprietary) remedy of subrogation, *even without proof of a "proprietary base" or "tracing links"*. Where then is the line to be drawn?

Thirdly, on close examination, the *Menelaou* decision, and earlier subrogation cases involving disappointed lenders of which *Menelaou* is an outworking, may be compatible with alternative criteria sometimes offered for testing whether the consequences of proprietary restitutionary relief are justified. These variously look to whether *C* is "analogous" to a secured creditor in not taking the risk of *D*'s insolvency (especially Burrows), or whether the subject matter was at *D*'s free disposal before *C*'s right to restitution arose (especially Birks and Chambers). Older lending decisions tend to be cases where *C* lender authorised the release of loan monies to discharge existing security only in return for new security, which is never granted or proves defective, immediately or subsequently. *C* lender never intends to be unsecured, and neither the monies loaned, nor the assets acquired or refinanced using them, are unencumbered and at the borrower-owner's free disposal before the events that justify the lender's subrogation entitlement. Likewise, on *Menelaou*'s more unusual facts (especially as emphasised by Lord Neuberger, [94]–[95]): (1) the Bank was intended to *remain* a secured creditor of the Menelaou parents throughout; (2) the monies realised from RGH's sale were to be applied for the Menelaous' benefit, rather than paid to the Bank, only on the basis that a valid charge was acquired over GOC on its acquisition; (3) the equity in GOC, acquired using those monies, was never unencumbered or at Melissa's free disposal before the events that justified the Bank's subrogation entitlement: the Bank's intended charge was invalid at the point when the vendor's lien was extinguished.

The irony is that, despite the majority rejecting the need for what have sometimes been called a "proprietary base" or "tracing links" as prerequisites for the subrogation remedy, the facts thought salient in *Menelaou* in justifying subrogation came "precious close" to justifying the finding of a proprietary base (i.e. that the monies paid towards purchasing GOC were, in any event, *beneficially* the Bank's (cf. Lord Neuberger, at [106])).

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