# TRACING THROUGH BANK TRANSFERS

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## I. Introduction

It is widely understood that tracing is the process of demonstrating that two rights are linked by an exchange,[1] such that a claim to the right given up can be "transmitted" to the right acquired.[2] This exercise has attracted the label "exchange-product tracing",[3] and its core case is the unauthorised substitution of a trust right: if a trustee swaps the trust right for another in excess of her dispositive authority, the beneficiary can trace into the product, and (absent a defence) can claim it.[4] Yet, the conceptual ambit of tracing is broader than this central case: if a trustee diverts money from a trust account to that of a third party, it is now well established that the third party receives and may be held accountable for the "traceable proceeds" of the trust account;[5] if one or more intermediate accounts are interposed between the delinquent trustee and her payee, the tracing exercise requires proof that a "direct chain of substitutions" connects them.[6] This extension is important: almost all instances of tracing involve one or more bank transfers.

I argue here that efforts to subsume bank payments within an homogenous law of tracing have been misguided: a bank transfer does not involve a rights-substitution of the kind envisaged by exchange product tracing. Rather, the process that we have called "tracing money" through a bank transfer involves two steps: (i) converting bank money, by artifice, into an asset independent of the underlying account; (ii) following that asset from one location to another. Together, I call these steps "dummy asset tracing". Thus, there are two kinds of tracing: exchange product tracing is the process

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1 *Foskett v McKeown* [2001] 1 A.C. 102 at 127; [2000] 3 All E.R. 97 at 119 (Lord Millett); *Trustee of FC Jones v Jones* [1997] Ch. 159 at 172; [1996] 4 All E.R. 721 at 731 (Nourse LJ); *Relfo v Varsani* [2014] EWCA Civ 360; [2014] All E.R. 59 at [60] (Arden LJ); *Russell Gould Pty Ltd v Ramangkura* [2014] NSWCA 310; (2014) 87 N.S.W.L.R. 552 at [31] (Barrett JA).

2 *Boscawen v Bajwa* [1996] 1 W.L.R. 328 at 341; [1995] 4 All E.R. 769 at 783 (Millett LJ); *Shalson v Russo* [2003] EWHC 1637 (Ch); [2005] Ch. 281 at [102] (Rimer J); *Foskett v McKeown* [2001] 1 A.C. 102 at 127 (Lord Millett); L. Smith, *The Law of Tracing* (Oxford: Oxford University Press 1997), at pp. 3, 6, 119.

3 C. Rotherham, "Property and Justice" in M. Kramer (ed.), *Rights, Wrongs and Responsibilities* (London: Palgrave Macmillan 2001), at p. 174, fn. 133; B. Fitzgerald, "Tracing at Law, the Exchange Product Theory and Ignorance as an Unjust Factor in the Law of Unjust Enrichment" (1994) 13 University of Tasmania Law Review 117; *Kwai Hung Realty Co Ltd v Kung Mo Ng* [1997] HKCFI 399; [1998] 1 H.K.C. 145 at [13] (Waung J).

4 E.g. *Foskett v McKeown* [2001] 1 A.C. 102; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638; [2005] All E.R. 397; *Credit Agricole Corp and Investment Bank v Papadimitriou* [2015] UKPC 13; [2015] 1 W.L.R. 4265.

5 *Agip (Africa) Ltd v Jackson* [1991] Ch. 547; [1992] 4 All E.R. 451; *El-Ajou v Dollar Land Holdings (No. 2)* [1995] 2 All E.R. 213; (1995) 69 P. & C.R. D25; *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch. 437; [2000] 4 All E.R. 221; *Cooper v PRG Powerhouse Ltd* [2008] EWHC 498 (Ch); [2008] B.C.C. 588.

6 *OJSC Oil Co Yugraneft v Abramovich* [2008] EWHC 2613; [2008] All E.R. 299 at [349] (Christopher Clarke J); *Relfo v Varsani* [2014] EWCA Civ 360 at [35] (Arden LJ).

of linking two rights through an exchange by a single person; dummy asset tracing is the process of pursuing a notional asset (thing or right) from one person to another.

In the first part of this article, I describe the orthodox account of exchange-product tracing, and argue that we should treat bank transfers as a case apart from unauthorised substitution. In the second, I explain how we have substantiated the connection between the claimant from whom bank money has been misdirected, and the third party to whom it has been paid. I call this "dummy asset tracing", and I show that it manifests differently in equity and at law: in equity, the claimant follows a notional right into the hands of the defendant; at law, the claimant follows a notional cash thing.

I conclude the second part by showing that dummy asset tracing has had important remedial consequences: by pinning liability upon the defendant's putative receipt of an asset to which the claimant had a prior claim, we have come to replicate the consequences of cash transfers in bank payments cases, thereby increasing the ambit of third party liability. By means of dummy asset tracing, an innocent payee may now be held liable to a claimant with whom she did not transact, and of whom she was wholly unaware.[7]

In the final part of this article, I argue that existing justifications for dummy asset tracing, and its consequences for third parties, are insufficiently robust. I show that recent authority indicates a move away from dummy asset tracing, towards an approach that would shape and justify liability by reference to the legal relationship that connects claimant and defendant.[8] I argue that dummy asset tracing ought to be recognised as an anachronism in this new judicial landscape, and that there are gains to be made by permitting our jurisprudence to evolve beyond it.

## II. Exchange Product Tracing and Bank Transfers

### *1. Exchange Product Tracing*

Most academic analyses of tracing begin with an example akin to the following **Example 1**:

> **Example 1:** T holds title to a £10 note on trust for B. T buys with it a bottle of wine, without B's authority.

Although opinions differ as to the logic of any claim that results from such facts, there are two clear facets to the orthodox tracing thesis: (i) tracing is the process of identifying title to the bottle of wine as the exchange product of title to the note (the "evidential" facet);[9] and (ii) this process of

[7] See e.g. *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 K.B. 321; 90 L.J.K.B. 322; *Trustee of FC Jones v Jones* [1997] Ch 159; *Heperu v Belle* [2009] NSWCA 252; (2009) 76 N.S.W.L.R. 230.

[8] *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29; [2017] 2 W.L.R. 1200. See also *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32; [2017] 2 W.L.R. 1161.

[9] *Foskett v McKeown* [2001] 1 A.C. 102 at 127 (Lord Millett): "Tracing is the process of identifying a new asset as the substitute for the old", cited in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 at 1461 (Lewison J) for the conclusion that tracing is a "process not a remedy". See also *Armstrong v Winnington* [2012] EWHC 10 (Ch); [2013] Ch. 156 at [65] (Stephen Morris QC).

identification plays a role (though perhaps it does not complete the justificatory story)[10] in permitting the claimant to transfer her claim from title to the note to title to the bottle of wine (the "relational" facet).[11] As Smith puts it:

> The fundamental idea underlying tracing is that sometimes, for certain legal purposes, one asset stands in the place of another. A claim which could have been made in relation to the original asset is allowed in relation to the new asset… Tracing is the process which can allow the transmission of that claim to the new asset.[12]

These twin facets have been termed "exchange tracing"[13] or "exchange product tracing".[14] Exchange product tracing is often contrasted with following, which is understood to be the process of pursing an asset as it moves from one location to another.[15]

Smith argues that the way in which the claimant (B) establishes a connection between the trust right (R) and its product (R2) is by identifying some feature of R that continues to exist throughout the exchange, which feature he labels "value":

> The defendant acquired the value inherent in the new asset with the value inherent in the old asset. That is why we say that we trace value: it is the only constant that exists before, through and after the substitution through which we trace. It exists in a different form after the substitution, and that is what can justify a claim to the new asset.[16]

I have argued elsewhere that this is misleading–that it has, in fact, misled courts seeking to apply principles of tracing.[17] "Value", in tracing, is not a description of the price that an asset might be expected to fetch, nor the wealth to which an individual has recourse. Rather, it is the susceptibility of

10 See e.g. *Boscawen v Bajwa* [1996] 1 W.L.R. 328 at 334 (Millett LJ); *Foskett v McKeown* [2001] 1 A.C. 102 at 113 (Lord Steyn); 127 (Lord Millett); *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 at [1461]-[1464] (Lewison J); *Heperu v Belle* [2009] NSWCA 252 [90] (Allsop P); *Armstrong v Winnington* [2012] EWHC 10 (Ch) at [65] (Stephen Morris QC); *Russell Gould Pty Ltd v Ramangkura* [2014] NSWCA 310 at [32] (Barrett JA).

11 It brings about "the transmission of a claimant's property rights from one asset to its traceable proceeds": *Foskett v McKeown* [2001] 1 A.C. 102 at 127 (Lord Millett). See also *NABB Brothers Limited v Lloyds Bank International (Guernsey) Limited* [2005] EWHC 405 (Ch); [2005] All E.R. 322 at [75] (Lawrence Collins J) and *Armstrong v Winnington* [2012] EWHC 10 (Ch) at [81] (Stephen Morris QC).

12 Smith, *The Law of Tracing* (1997), at p. 3.

13 D. Oesterle, "Deficiencies of the Restitutionary Right to Trace" (1982) 68 Cornell L. Rev. 172 at 174.

14 C. Rotherham, "Property and Justice" in M. Kramer (ed.), *Rights, Wrongs and Responsibilities* (London: Palgrave Macmillan 2001), at p. 174, fn 133; B. Fitzgerald, "Tracing at Law, the Exchange Product Theory and Ignorance as an Unjust Factor in the Law of Unjust Enrichment" (1994) 13 University of Tasmania Law Review 117; *Kwai Hung Realty Co Ltd v Kung Mo Ng* [1997] HKCFI 399; [1998] 1 HKC 145 at [13] (Waung J).

15 Smith, *The Law of Tracing* (1997), at pp. 6-8; *Foskett v McKeown* [2001] 1 A.C. 102 at 127-8 (Lord Millett); A. Burrows, *The Law of Restitution*, 3rd edn (Oxford: OUP 2010), at p.117; *Armstrong v Winnington* [2012] EWHC 10 (Ch) at [65] (Stephen Morris QC); *Russell Gould Pty Ltd v Ramangkura* [31] (Barrett JA).

16 Smith, *The Law of Tracing* (1997), at p. 119. See also P. Birks, "Taking Seriously the Differences Between Tracing and Claiming" (1997) 11 T.L.I. 2 at 4.

17 T. Cutts, "Tracing, Value and Transactions" (2016) 79 M.L.R. 381; See now C. Mitchell, P. Mitchell and S. Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment*, 9th edn (London: Sweet & Maxwell 2017) Chapter 7. See also J. Edelman, "Understanding Tracing Rules" (2016) 16 Queensland University of Technology Law Review 9. Cf A. Nair, *Claims to Traceable Proceeds: Law, Equity, and the Control of Assets* (Oxford: Oxford University Press 2018), at pp. 70-82, who argues that we can usefully understand value as a "metaphorical construct".

a right to exchange, which I have called "exchange potential": when T acquires R2 with R, transferring R to X and taking R2 for herself, she exploits the exchange potential inherent in R.[18] Exchange potential cannot *move* from R to R2: the result of the transaction is that *X* is now in a position to exploit the exchange potential of R.[19] Thus, value cannot be pursued from one right to another through a substitution in such a way as to help us to draw or define the connection between them; that connection is substantiated by proof of an exchange *per se*.

Yet, there *is* one element of continuity present throughout any rights-exchange, which is essential to its characterisation as such. As Smith puts it: "the *only connection* between the old and the new asset is the exchange; that is, the substitution of one for the other *by some person*".[20] That feature of **Example 1** which allows us to show that title to the bottle of wine is the substitute of title to the £10 note, and so to make good the assertion of tracing's first facet, is T's role as the agent of exchange: T gives up title to the note (R) and acquires title to the wine (R2) in its place.

We rarely dwell on T's role in exchange product tracing. Instead, we emphasise that R2 "is the potential subject matter of a claim" because it is the substitute for R, "which was itself the subject matter of a claim".[21] But what makes **Example 1** a compelling case for rights-transmission is not only B's initial claim to R; it is also the fact that *T* was situated at the opposite end of that claim. Prior to exchange, T was liable to B for title to the note (R). If T exploits the exchange potential of R, acquiring title to the wine (R2) in exchange, she puts it outside her power to deliver R to B. Whichever conceptual tools we use to clothe this more precisely,[22] the peculiar role of exchange product tracing is to allow B to claim R2, thereby treating T's liability for R2 as the best proxy for T's liability for R. It is in this sense that B's claim to R is "represented by" a claim to R2.[23] Thus, exchange product tracing demands that a single actor–T–give up and receive the relevant rights; thus it permits B, without more, to transpose her claim from R to R2.

## *2. Exchange Product Tracing and Bank Transfers*

Despite the status given to trustee substitution in academic commentary on tracing, the vast majority of tracing cases involve a set of facts more akin to the following **Example 2**:

> **Example 2:** T holds a bank account on trust for B. T transfers £10 from the trust account to that of a third party, X, without B's authority.

18 T. Cutts, "Tracing, Value and Transactions" (2016) 79 M.L.R. 381, at 395.
19 T. Cutts, "Tracing, Value and Transactions" (2016) 79 M.L.R. 381, at 396.
20 Smith, *The Law of Tracing* (1997), at p. 134.
21 Smith, *The Law of Tracing* (1997), at p. 134.
22 Note that this does not commit us to a particular view of the *reason* for liability.
23 *Shalson v Russo* [2003] EWHC 1637 (Ch); [2005] Ch. 281 at [102] (Rimer J).

In these cases, principles of tracing as used as they are for **Example 1**, to demonstrate that X's account (R2) is the traceable product of the trust account (R).[24] The present editors of *Goff & Jones: The Law of Unjust Enrichment* put it thus: "it is well accepted that it is possible to trace through inter-account bank transfers, so as to identify the credit to the transferee's account as the product of the debit to the paying customer's account, whether the transfer is "in-house" or "inter-bank"".[25] Where one or more accounts are interposed between R and R2, B must show that there was a "direct chain of substitutions whereby the claimant's property was exchanged for another asset".[26]

There are, in fact, various problems with identifying a rights-exchange of kind required for exchange product tracing in **Example 2**.[27] The first and simplest is that a bank payment may not involve a loss and acquisition of rights *at all*. In *Evans v European Bank*,[28] Spigelman CJ raised this objection to characterising a bank transfer as a substitution: an account holder has a single claim to whatever is the present total of her account, which claim "always existed and still exists" before, throughout and after the putative substitution.[29]

I do not think it possible to determine whether, as a matter of principle, Spigelman CJ's conclusion is superior to an alternative that would recognise a rights-exchange from the fact of a bank transfer.[30] The decision to prefer one view simply turns upon the level of abstraction at which the transfer is viewed. If T holds £20 in her account prior to the transfer, we can either say that the effect of the transfer upon her account is: (i) to decrease the value of her (pre-existing) right to £10, or; (ii) to replace her right with a new one, worth £10. Each is plausible.[31]

Yet, even if we adopt the second reading–accept, for present purposes, that a bank transfer does involve a loss and acquisition of rights–obstacles remain for the use of exchange product tracing to connect the parties to a bank transfer. We saw above that the core instance of exchange product tracing demands a substitution effected by a single actor: T, who was accountable for R, is made accountable for the product of R, R2, in her hands. We can locate precisely such a substitution on the facts of **Example 2**, but it will not help us to substantiate a connection between the trust account and a credit to X's account. Suppose that T in **Example 2** held £20 in the trust account prior to transfer, and that X held £10 in his account prior to transfer. The effect of the subsequent transfer then is as

24 See e.g. *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 K.B. 321; *Trustee of FC Jones v Jones* [1997] Ch. 159; *Independent Trustee Services v GP Noble Trustees* [2012] EWCA Civ 195; [2013] Ch. 91; *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch. 437; [2000] 4 All E.R. 221; *Relfo v Varsani* [2014] EWCA Civ 360.

25 C. Mitchell, P. Mitchell and S. Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (2017), at para. [7-32].

26 *Relfo v Varsani* [2014] EWCA Civ 360 at [35] (Arden LJ).

27 C. Mitchell, P. Mitchell and S. Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (2017), at para. [7-33]: "there remain difficulties in characterising the chain of intervening transactions as a series of "exchanges of assets".

28 *Robb Evans of Robb Evans & Associates v European Bank Limited* [2004] NSWCA 82; (2004) 61 N.S.W.L.R. 75.

29 *Robb Evans* [2004] NSWCA 82 at [139]. This passage was cited in *Hillig v Darkinjung* [2006] NSWSC 1217 at [20] (Barrett J).

30 E.g. B. McFarlane, "Unjust Enrichment, Property Rights, and Indirect Recipients" [2009] R.L.R. 37; D. Fox, *Property Rights in Money* (Oxford: Oxford University Press 2008), at para. [5.05].

31 In *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] Q.B. 728 at 750; [1989] 3 All E.R. 252 at 269 Staughton J used both, interchangeably.

follows: T gives up one right to £20, and acquires another to £10; X gives up one right to £10 and acquires another to £20. Thus, the facts of **Example 2** reveal not one but *two* substitutions.[32] We have not yet found a way of traversing the gap between B, from whose trust account £10 was misdirected, and X, into whose account £10 was paid.

Thus, if exchange product tracing is to encompass simple bank transfers, we need an explanation for switching our attention at the evidential stage from the immediate product of T's exchange in T's hands (T's claim to £10) to what *X* got in return for T's exchange (X's claim to £20).[33] And, at the relational stage, any such explanation must account for the difference between: (i) transmitting a claim to the product of a right for which the present right-holder was accountable to B; and (ii) transmitting a claim to the product of a right for which someone other than the present right-holder was accountable to B.

Smith recognises this explanatory gap, and seeks to fill it by varying the facts of an example akin to **Example 1**:

> **Example 1.2:** T holds title to a £10 note on trust for B. T buys with it a bottle of wine, without B's authority. T gives the bottle of wine to X

According to Smith, if–having received a right to which B has a prior claim–X is liable in **Example 2**, X ought also to be liable in a case like the following **Example 1.3**, in which T simply omits the intermediate step:

> **Example 1.3:** T holds title to a £10 note on trust for B. T buys with it a bottle of wine, without B's authority, directing the vendor to give the bottle of wine to X.

And this, Smith argues, is precisely how we should think of **Example 2**, in which X acquires the right for which T paid: "The only thing that differentiates this kind of substitution is that [T] did not himself acquire possession of his purchase".[34] Smith calls this "tracing in transit".[35]

This property analogy proceeds in three steps. First, it draws upon the logic of **Example 1**, our central case: T is liable for the substitute because T was liable for the original. Secondly, it adds a straightforward variation of those facts, in which that liability is transferred to X: if X receives a right to which B had a prior claim, X is made accountable for that right (absent any defence). Thus (and this

32 This is reflected in the awkwardness of Arden LJ's remarks that "what matters is that there has been an exchange of the value of the claimant's property into the next product for which it is substituted and so on down the chain of substitutions" *Relfo v Varsani* [2014] EWCA Civ 360 at [60]. See further T. Cutts, "Modern Money Had And Received" (2018) 38 O.J.L.S 1 at 17.

33 If it is on account of T's intention to vest the product in X (as I have argued elsewhere, which explanation is adopted in C. Mitchell, P. Mitchell and S. Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (2017), at para. [7-33]), we still need to explain why this intention should permit B's claim to have any impact on X.

34 Smith, *The Law of Tracing* (1997), at p.248.

35 Smith, *The Law of Tracing* (1997), at p.248. The editors of *Goff and Jones* have called this explanation "elegant": C. Mitchell, P. Mitchell and S. Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (2017), at para.[7-33].

is the final step), X should be liable where T omits the intermediate property transfer, and causes X to be in immediate receipt of the right.

Yet, however compelling Smith's explanation may be for the connection between T's title to the note and X's title to the wine in **Example 1.3**, the logic of the property analogy has no force on the facts of **Example 2**, for the simple reason that the **Example 1.2** counterfactual is impossible: a bank transfer does not involve the transfer of any right.[36] Thus, the second step–the argument that short-circuiting **Example 1.2** by omitting a transfer of possession should not alter our conclusion as to X's liability–is a straightforward *non sequitur*. If there is a reason why **Example 2** and **Example 1.3** are normatively akin, we have not yet found it.

However, I think that Smith's reasoning *does* provide an important insight into the method by which we have come to accommodate bank transfer cases within our law of tracing. In what follows I seek to demonstrate that the process that we have called "tracing money" through a bank account does not involve exchange product tracing. Rather, it involves two steps: (i) converting bank money, by artifice, into an asset that is segregable from the account itself; (ii) following and locating that asset. Together, I call these steps "dummy asset tracing".

## III. Dummy Asset Tracing

In this part, I deal first with the use of dummy asset tracing to reach the dual conclusions that a beneficiary can: (i) retain an equitable title to bank money transferred by a trustee to a third party; and (ii) trace and recover money that is paid into a "mixed fund". I show that the object of dummy asset tracing in equity is always a notional right, which supports her claim to a "persistent" equitable title. The purpose of this section is largely expository: the claims made here are substantially in line with at least a core part of orthodox trusts theory.

Second, I consider the development of a parallel jurisprudence at law, which permits a claimant to trace and recover money diverted from the claimant's account to that of a third party by someone who is not the claimant's fiduciary. The argument in this section departs from orthodoxy: I argue that the object of dummy asset tracing at law is a *physical thing*, which is a notional cash asset.

### *1. Equity*

Let us return to our **Example 2:**

> **Example 2:** T holds a bank account on trust for B. T transfers £10 from the trust account to that of a third party, X, without B's authority.

[36] See e.g. *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] Q.B. 728 at 750 (Staughton J): "Transfer" may be a somewhat misleading word, since the original obligation is not assigned".

We saw above that exchange product tracing cannot readily encompass the connection between the right that X acquires and that which T gives up. In what follows, I show that this connection has been forged by interposing title to a notional money asset, which B follows throughout the steps of transfer from T to X, and which grounds B's claim to X's right. I call this "dummy asset tracing".

### *i)* *Dummy asset tracing in equity*

In *Independent Trustee Services v GP Noble Trustees*,[37] some £52m had been misappropriated from various occupational pension schemes by their corporate trustees, GP Noble Trustees Ltd and BDC Trustees Ltd. Mr Anthony Morris received £4.89m of those funds, immediately paying £1.48m to his former wife (Mrs Morris) to satisfy his liability under a consent order. Independent Trustee Services Ltd ("ITS"), which had been appointed to manage the pension schemes, commenced proceedings to recover those funds.

By the time the case reached the Court of Appeal, it was common ground both that the funds received by Mrs Morris were traceable to the breach of trust, and that she could have raised the defence of bona fide purchase at the time of receipt: she had given value in the form of agreeing not to pursue any further claims for ancillary relief. The relevant question concerned two facts: (i) Mrs Morris had sought and achieved rescission of the consent order under which the funds were paid, and; (ii) she had acquired knowledge of trust provenance of the funds before a new order for financial provision was made. ITS argued that this negated the effect of the defence, thereby reviving the trust. The Court of Appeal agreed: though Mrs Morris had obtained "legal title to the money"; nevertheless, the beneficiaries could "trace the £1·481m into the hands of Mrs Morris on the basis of a subsisting beneficial interest".[38]

In *Credit Agricole Corporation and Investment Bank v Papadimitriou*,[39] the Privy Council considered an action by the owner of a collection of art deco furniture to recover the proceeds of a sale effected without her consent. It was common ground that the defendant bank still had, and that the claimant could trace, the proceeds of sale; the only question was whether the bank could raise the defence of bona fide purchase. Delivering judgment for the court, Lord Clarke held that it could not: the bank ought to have made inquiries that would have revealed the claimant's pre-existing proprietary right to the funds received.

In neither case did the court mention an "exchange" or "substitution" of rights; each simply identified the object of the tracing exercise, and of the beneficiaries' "continuing beneficial interest" as "the money in [the defendant's] possession".[40] We are encouraged to assume–indeed, it was common

37 *Independent Trustee Services v GP Noble Trustees* [2012] EWCA Civ 195.
38 *ITS* [2012] EWCA Civ 195 at [67].
39 *Credit Agricole Corp and Investment Bank v Papadimitriou* [2015] UKPC 13.
40 *Independent Trustee Services v GP Noble Trustees* [2012] EWCA Civ 195 at [44]; *Papadimitriou* [2015] UKPC 13 at [2].

ground in each case–that the money paid and received remained, for all relevant purposes, the same money throughout. Yet, it is not immediately clear how we are to reach this conclusion. We have already seen that a bank transfer from T to X transfers no thing or right from T to X–[41] nothing, indeed, but a "stream of electrons",[42] through which T's account is debited and X's credited;[43] value, in the sense of an accretion to the payee's wealth, manifestly is not something that can be pursued and claimed *per se*.

The object of the tracing exercise in these cases–"the money paid" by T to X–is not a thing or right that actually moves from one to the other, but a *notional* money asset. The sum debited from the trust fund is treated as an independent right, which B pursues from T to X, to support her claim against the latter. I have labelled these steps, aggregated, "dummy asset tracing", and it bears emphasis that the object of its equitable manifestation is always a right. In what follows, we will see that this is conceptualised variously as a chose in action,[44] or as a title to some physical cash asset that is transferred by delivery T to X.[45] But the argument from dummy asset tracing is that X has received (and retains)[46] *the trust right;* this is what supports B's claim to a "subsisting beneficial interest".

### *ii) Mixed funds*

The ability of equity to treat money paid and received as an asset independent of the underlying account underpins its approach to more complex cases, involving so-called "mixed funds". It is accepted that a "mixed fund" is created where the value of the account into which the claimant seeks to trace is attributable to multiple sources. Take the following **Example 3:**

> **Example 3:** T holds a bank account on trust for B, in which stands £20. T transfers £10 from that account into T's current account, in which stands £10.

According to Birks, **Example 3** creates a gap in the evidence through which we might connect the £10 transfer with any payment made subsequently from T's current account:

> When money has been paid into an account (or, for that matter, into a bucket, if money were often so kept) and there are subsequent drawings out, it is usually not possible to show by evidence exactly when those particular units of value were withdrawn.[47]

41 *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] Q.B. 728 at 750 (Staughton J).
42 *Agip v Jackson* [1990] Ch. 265.
43 *R v Preddy* [1996] A.C. 815; [1996] 3 W.L.R. 255.
44 *Agip v Jackson* [1990] Ch. 265.
45 *Re Hallett's Estate* (1880) 13 Ch. D 696; [1874-80] All E.R. Rep. 793.
46 Where, as in *GP Noble Trustees* [2012] EWCA Civ 195 and *Papadimitriou* [2015] UKPC 13 the claim is proprietary, to a specific right.
47 P. Birks, "Taking Seriously the Differences Between Tracing and Claiming" (1997) 11 T.L.I. 2 at 4, emphasis added.

Accordingly, Birks argued that "either the tracing exercise must be regarded as generally foiled by payment into a bank account or it must be supported by artificial presumptions".[48]

Birks acknowledged that this conceptualisation does not match the true nature of a bank account, which is a single, indivisible, debt:[49] in his words, "a bank account which receives multiple credits is, *metaphorically*, an incorporeal mixture".[50] Without dummy asset tracing, the fact of a bank transfer simpliciter (with or without the addition of subsequent payments in or drawings out) does not create any "evidential gap". We know exactly what happens when T makes the payment to X:[51] the trust account is replaced with a right worth £10 and T acquires a right worth £20, which process we can repeat for any subsequent drawings out. It is only by treating the bank transfer *as if* it involved the transfer of a segregable asset that we reach the conclusions that: (i) the current account in **Example 3** is an "incorporeal mixture",[52] or "confusion of funds";[53] so that (ii) T's payment creates a problem for any attempt to match the various credits with subsequent debits to that account.

It is now well established that the claimant can indeed resort to "artificial presumptions" or "impasse-breaking rules"[54] to solve this problem, which rules have been drawn from cases that involve physical mixtures.[55] The starting point is the allocation of a claim that is equal, and abates rateably in proportion, to the value of the respective contributions;[56] this rule applies "whenever the mixture consists of fungibles, whether these be physical assets like oil, grain or wine or intangibles like money in an account".[57] Whenever the mixing is the product of a wrongful action on the part of one of the contributors, this starting point is supplanted by another. In these cases, any loss is borne by the wrongdoer in the first instance.[58] In *Re Hallett's Estate*,[59] Lord Jessell MR explained this consequence with the following analogy:

> The simplest case put is the mingling of trust moneys in a bag with money of the trustee's own. Suppose he has a hundred sovereigns in a bag, and he adds to them another hundred sovereigns of his own, so that they are commingled in such a way that they cannot be distinguished, and the next day he draws out for his own purposes £100, is it tolerable for anybody to allege that what he drew out was the first £100, the trust money, and that he misappropriated it, and left his own £100 in the bag? It is

48 P. Birks, "The Necessity of a Unitary Law of Tracing" in R Cranston (ed.), *Making Commercial Law: Essays in Honour of Roy Goode* (Oxford: Oxford University Press 1997), at p. 254.
49 *Foskett v McKeown* [2001] 1 A.C. 102 at 128 (Lord Millett).
50 P. Birks, "Taking Seriously the Differences Between Tracing and Claiming" (1997) 11 T.L.I. 2 at 4 (emphasis added).
51 Assuming, of course, that we the view that such a payment does affect the rights of payor and payee at all: see the text accompanying fn. 28-31.
52 P. Birks, "Taking Seriously the Differences Between Tracing and Claiming" (1997) 11 T.L.I. 2 at 4.
53 J. Ames, "Folllowing Misappropriated Property into its Product" (1906) 19 Harv L. Rev. 511, 520.
54 P. Birks, "Taking Seriously the Differences Between Tracing and Claiming" (1997) 11 TLI 2 at 4.
55 Smith, *The Law of Tracing* (1997), at p. 160.
56 "A mixed fund, like a physical mixture, is divisible between the parties who contributed to it rateably in proportion to the value of their respective contributions" *Foskett v McKeown* [2001] 1 A.C. 102 at 141 (Lord Millett).
57 *Foskett v McKeown* [2001] 1 A.C. 102 at 141 (Lord Millett).
58 For physical mixtures see *Indian Oil Corp Ltd v Greenstone Shipping Co SA (Panama) (The Ypatianna)* [1988] Q.B. 345; [1987] 3 All E.R. 893.
59 *Re Hallett's Estate* (1880) 13 Ch. D 696.

> obvious he must have taken away that which he had a right to take away, his own £100.[60]

The result must, he thought, be precisely the same for bank accounts: "[the trustee's] money was there, and he had a right to draw it out, and why should the natural act of simply drawing out the money be attributed to anything except to his ownership of money which was at his bankers".[61] Thus, the money that remains in the account can be claimed by the beneficiaries. In *Re Oatway*,[62] this rule was developed to allow the beneficiary to attribute her portion of the mixed fund to any purchase that returned a profit for the trustee, thus producing the conclusion that the beneficiary may "cherry-pick": she may either say that "her funds" are still sitting in the account, or that "her funds" were used to acquire the new right.

So, the basic rule is one of proportionate allocation; that rule is displaced by one that prejudices the wrongdoer in the event of any further dealings with the mixed fund. Amongst others, these rules are known as the "rules of tracing".[63] The rules of tracing are an antidote to the evidential gap created by tracing dummy assets in equity, through which B pursues a notional right through the stages of transfer from T to X.

### 2. The Common Law

It is generally understood that there is a parallel (though perhaps more limited)[64] process of tracing at common law. "Tracing into a substitute is possible", we are told, "provided that there has been a 'clean substitution'",[65] which is to say: the claimant can trace at law from one right into its substitute so long as there is no mixture of the kind considered immediately above.

Yet, much of the work performed by so-called "common law tracing" should be a puzzle to those who view bank transfers through the prism of exchange product tracing. We saw above that exchange product tracing is the process of demonstrating that one right (R2) is the product of another (R), in order to transmit a claim from R to R2. We also saw how his works in a typical trusts case: T, who was previously accountable to B for R as trustee, is now accountable to B for R2. It is much more difficult to see how this works at common law. Take the following **Example 4**:

> **Example 4:** A steals B's bicycle, selling it for £10.

60 *Re Hallett's Estate* (1880) 13 Ch. D 696.
61 *Re Hallett's Estate* (1880) 13 Ch. D 696.
62 *Re Oatway* [1903] 2 Ch. 356; 72 L.J. Ch. 575.
63 P. Birks, "Taking Seriously the Differences Between Tracing and Claiming" (1997) 11 T.L.I. 2 at 4.
64 See e.g. *Fistar v Riverwood Legion and Community Club Ltd* [2016] NSWCA 81 at [43] (Leeming JA).
65 A. Burrows, *The Law of Restitution*, 3rd edn (Oxford: Oxford University Press 2010), at p.123.

Common law tracing is thought to provide a mechanism for linking B's title to the bicycle with A's title to the £10: the substitution is "clean" in the requisite sense.[66] But this step is not straightforward: the right that A acquires and which she exchanges is a *new* title, which could only ever have been asserted by A;[67] B's title remains with B. And at the relational stage, it would seem that a transmission of legal title must, if it is to be effective at all, oust that of A. The latter problem is made only more acute by the fact of a bank transfer:

> **Example 5:** A diverts £10 from B's bank account to A's bank account without B's authority. A then transfers £10 to C from that account.

The assertion that tracing permits B to transmit a claim at law to the asset in C's hands is an assertion that B can usurp, unilaterally and without notifying the bank, the position of creditor.[68]

In what follows, I argue that common law tracing never has been a form of exchange product tracing. Those cases which establish a distinct version of tracing at law involve bank money paid and received, and in these cases–as in equity–the courts have interposed a notional asset, which is followed from one person to another through the steps of a bank transfer. I argue that the difference between dummy asset tracing in equity and at law goes to the nature of the asset interposed: in equity, the asset pursued from one party to another is a right; at law, the asset is a physical thing.

### *i) Developing common law tracing*

Although most of our tracing cases involve attempts to trace and claim in equity,[69] the best-known and foundational instance of exchange product tracing is a case that was decided in a common law court three decades prior to procedural fusion. In *Taylor v Plumer*,[70] Plumer had given his stockbroker, Walsh, a draft for £22,500 to buy Exchequer bills. Instead, Walsh exchanged the draft for bank notes, with which he bought stock and gold coins. Walsh attempted to abscond to the United States, but was apprehended by Plumer's agent, who confiscated the stock and gold. Walsh's assignees in bankruptcy brought an action against Plumer in trover, arguing that Walsh's act of fleeing London was an act of bankruptcy, which vested title in them. Departing from a long line of cases that had placed the agent's authority to act at the heart of the justification for a proprietary claim to the exchange product of a right held on trust,[71] Lord Ellenborough concluded that:

66 Burrows, *The Law of Restitution* (2010), at p.123: "Examples of clean substitutions are the exchange of a car for a boat; or a cow for a goat; or £1000 in cash for a picture".
67 *Armory v Delamirie* (1721) 1 Strange 505; 93 E.R. 664.
68 I consider this below, in the text accompanying fn. 95-97.
69 See e.g. *Fistar* [2016] NSWCA 81 at [43] (Leeming JA).
70 *Taylor v Plumer* (1815) 3 M. & S. 562; 105 E.R. 721.
71 These include *Perry v Phelips* (1790) 1 Ves. Jr. 251; 30 E.R. 327; *Cox v Bateman* (1715) 2 Ves. Sen. 19; 28 E.R. 13; *Gladstone v Hadwen* (1813) 1 M. & S. 517; 105 E.R. 193 and *Scott v Surman* (1742) Willes 400; 125 E.R. 1235.

> If the property in its original state and form was covered with a trust in favour of the principal, no change of that state and form can divest it of such trust… for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description.[72]

It is now accepted that the success of the claim depended upon Walsh's status as trustee,[73] and that the extension of money had and received to trustee substitution was the product of a desire to prevent a clash of jurisprudence between Chancery and the common law courts.[74] The notion that there is a distinct process of tracing "at common law" stems from the popular interpretation of the final clause of the passage cited above:[75] the emphasis placed upon the ability to distinguish money from a fungible mixture crystallised the idea that when a claimant cannot point to a fiduciary relationship at the start of the story, she must trace and claim "at common law", which exercise is thwarted whenever it is confronted by a "mixed fund".[76]

I shall return to mixtures below.[77] The object of present attention, to which I turn in what follows, is the notion that there is a common law variant of exchange product tracing, which underpins the claimant's capacity to transmit her claim from one right to its traceable proceeds.

### *ii) Modern common law tracing*

Despite the equitable foundation for common law tracing, it is now well established that there is a distinct process of tracing at common law.[78] In what follows, I consider three cases that have encouraged that conclusion. In each, the court held that the claimant could trace at law in order to establish title to money debited from the claimant's account by a wrongdoer and credited to the account of an innocent third party.

In *Banque Belge pour l'Etranger v Hambrouck*,[79] an employee had forged his employer's signature, thereby procuring a transfer of some £6000 from his employer's account to his own. Hambrouck then drew cheques on this account, giving them to his mistress, Mlle Spanoghe, who credited her account with corresponding sums. The Court of Appeal held that Banque Belge could recover £315 then standing in Mlle Spanoghe's account as "their property":[80] *Taylor v Plumer* permitted "money though

[72] *Taylor v Plumer* (1815) 3 M. & S. 562.
[73] S. Khurshid and P. Matthews, "Tracing Confusion" (1979) 95 L.Q.R. 78; L Smith, "Tracing in *Taylor v Plumer*: Equity in the Court of King's Bench" [1995] L.M.C.L.Q. 240; Smith, *The Law of Tracing* (1997), at p. 168.
[74] T. Cutts, "Modern Money Had And Received" (2018) 38 O.J.L.S 1 at 10.
[75] Here, Lord Ellenborough put to work the words of Willes J in *Scott v Surman* (1742) Willes 400 at 404. See further T. Cutts, "Modern Money Had And Received" (2018) 38 O.J.L.S 1 at 11.
[76] *Agip (Africa) Ltd v Jackson* [1991] Ch. 547. Televantos argues that the most important milestone was the decision in *Re Hallett's Estate* (1880) 13 Ch D 696: A. Televantos, "Losing the fiduciary requirement for equitable tracing claims" (2017) 133 L.Q.R. 492 at 493.
[77] See the text accompanying fn. 161-162,
[78] *Trustee of FC Jones v Jones* [1997] Ch.159 at 169 (Millett J).
[79] *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 K.B. 321.
[80] *Hambrouck* [1921] 1 K.B. 321 at 333 (Bankes LJ)).

changed in character to be recovered, if it can be traced";[81] as she had given no valuable consideration, Mlle Spanoghe could not "set up a title derived from Hambrouck, who had no title against the true owner".[82] Thus, title either remained with the bank throughout,[83] or had revested when the bank expressed a desire to disavow the transaction.[84]

In *Lipkin Gorman v Karpnale*,[85] Cass, one of the partners of a firm of solicitors, obtained funds from a client account by withdrawing cash by cheque, and by causing funds to be transferred to building society accounts in his name, from which he withdrew cash. He used that money to gamble in the defendant casino. Considering *Hambrouck* to be clear authority for the solicitors' ability to "trace their property at common law" in the bank account "into its product, i.e. cash drawn by Cass from their client account at the bank",[86] the House of Lords ordered the casino to pay the firm a sum equivalent to that which it had received from Cass, reduced to reflect sums that it had paid out sums to Cass as winnings.

In *Trustee of FC Jones v Jones*,[87] Mr Jones had drawn cheques in his wife's favour on his insolvent firm. She used the funds thereby credited to her account to speculate successfully in potato futures. The trustee in bankruptcy was held to be entitled to "trace his money at Midland Bank into the money in the defendant's account with the commodity brokers",[88] and to claim the proceeds of her investments as its property. Lord Millett called this claim "exclusively proprietary",[89] concluding that, "as from the date of the act of bankruptcy the money in the bankrupts' joint account at Midland Bank belonged to the trustee".[90] Again, the court held that the claimant retained title throughout, so that Mrs Jones was "in possession of funds to which she had no title".[91]

In each of these cases, the defendant's liability depended upon the claimant's ability to show a title to the intermediate money asset in the wrongdoer's hands; in each, the court held that the claimant was able to do so, and that this title was a claim at common law. This conclusion has proven exceedingly difficult to explain.[92] In *Lipkin Gorman*, Lord Goff was not prepared to depart from a series of cases that established conclusively that the cash withdrawn from the client account, and that which

81 *Hambrouck* [1921] 1 K.B. 321 at 330 (Bankes LJ)
82 *Hambrouck* [1921] 1 K.B. 321 at 330 (Bankes LJ).
83 *Hambrouck* [1921] 1 K.B. 321 at 327 (Bankes LJ).
84 *Hambrouck* [1921] 1 KB 321 at 322 (Atkin LJ).
85 *Lipkin Gorman v Karpnale* [1991] 2 A.C. 548; [1992] 4 All E.R. 512.
86 *Lipkin Gorman* [1991] 2 A.C. 548 at 574 (Lord Goff).
87 *Trustee of FC Jones v Jones* [1997] Ch. 159.
88 *FC Jones* [1997] Ch. 159 at 170.
89 *FC Jones* [1997] Ch. 159 at 168.
90 *FC Jones* [1997] Ch. 159 at 166. This nominally produced the absurd result that the trustee in bankruptcy was creditor; in practice it permitted the claimant to recover the original sum and profits, all of which had been paid into court.
91 *FC Jones* [1997] Ch. 159 at 167.
92 In L. Smith, "Simplifying Claims to Traceable Proceeds" (2009) 125 L.Q.R 338 at 338 Smith says that "There are as many theories of *Lipkin Gorman v Karpnale Ltd* as there are writers on the subject". See fn.2 for the commentaries listed there.

was transferred from the account into Cass' building society account, belonged to Cass.[93] Nevertheless, he held that the cash was "[the solicitors'] property at common law".[94] This apparent contradiction is exacerbated by the nature of the asset claimed in both *Hambrouck* and *Trustee of FC Jones*. If the claimant, by tracing, acquires an immediate claim at common law to the relevant account, it is difficult to avoid the conclusion that she thereby usurps the position of creditor.[95] This obviates the rules prohibiting secret assignment,[96] and make it impossible for the debtor to know from whom she can obtain a good receipt.[97]

In the next section, I explain that a substantial part of this confusion has been caused by aggregating two different types of case. The first, which reflects the fact pattern of *Lipkin Gorman v Karpnale*, and which I considered above, is as follows:

> **Example 1.2:** T holds title to a £10 note on trust for B. T buys with it a bottle of wine, without B's authority. T gives the bottle of wine to X.

I argue (like others)[98] that **Example 1.2** involves the common law recognition of a claim in equity, to the object of a trust.

The second type of case, which reflects the fact pattern of *Banque Belge v Hambrouck* and (imperfectly) *Trustee of FC Jones v Jones*, is as follows:

> **Example 5:** A diverts £10 from B's bank account to A's bank account without B's authority. A then transfers £10 to C from that account.

I argue (unlike others)[99] that **Example 5** involves the pursuit of a notional asset from B to C, which I have called "dummy asset tracing".

### *iii) Exchange product tracing at common law*

The prevailing view of the common law tracing cases that I have considered so far is that they are mislabelled: in each, the claimants did not acquire a direct claim in respect of the cash, or against the bank; rather they acquired a claim to the defendant's right – or, in other words, a trust.[100]

93 *Lipkin Gorman v Karpnale* [1991] 2 A.C. 548 at 573 (Lord Goff).
94 *Lipkin Gorman* [1991] 2 A.C. 548 at 574 (Lord Goff).
95 Fox, *Property Rights in Money* (2008), at para. [5.02].
96 *Durham Bros v Robertson* [1896] 1 Q.B. 765; [ 1895-9] All E.R. Rep. Ext. 1683.
97 P. Birks, "Taking Seriously the Differences Between Tracing and Claiming"'(1997) 11 T.L.I. 2 at 7.
98 See e.g. L. Smith, "Simplifying Claims to Traceable Proceeds" (2009) 125 L.Q.R 338; B. McFarlane, "Unjust Enrichment, Property Rights, and Indirect Recipients" [2009] R.L.R. 37; Fox, *Property Rights in Money* (2008), at para. [5.103].
99 For Smith and McFarlane, these cases *also* involve trusts: L. Smith, "Simplifying Claims to Traceable Proceeds" (2009) 125 L.Q.R 338 at 346; B. McFarlane, "Unjust Enrichment, Property Rights, and Indirect Recipients" [2009] R.L.R. 37.
100 L. Smith, "Simplifying Claims to Traceable Proceeds" (2009) 125 L.Q.R 338 at 346; B. McFarlane, "Unjust Enrichment, Property Rights, and Indirect Recipients" [2009] R.L.R. 37.

It is relatively easy to reconcile this analysis with the way in which Lord Goff conceptualised the claim in *Lipkin Gorman*. Lord Goff noted that, "even if legal title to the money did vest in Cass immediately on receipt, nevertheless he would have held it on trust for his partners, who would accordingly have been entitled to trace it in equity";[101] yet, he emphasised that "your Lordships are not concerned with an equitable tracing claim in the present case, since no such case is advanced by the solicitors, who have been content to proceed at common law".[102] We have seen that this is precisely the proposition for which *Taylor v Plumer* stood at the time of its decision, which is that the common law ought to recognise a personal claim for money had and received on facts that would have given rise to a trust, if the case had been framed and brought as an equitable action.

If we adopt this explanation of *Lipkin Gorman*, the only relevant difference between that case and *Taylor v Plumer* is that in the former the trust asset was in the hands of a third party at the time of the claim; in the latter, the principal had seized it from his trustee. Thus, the facts of *Lipkin Gorman* are analogous to our **Example 1.2**:

> **Example 1.2:** T holds title to a £10 note on trust for B. T buys with it a bottle of wine, without B's authority. T gives the bottle of wine to X.

No additional explanation, beyond the mere fact of receipt, is necessary to account for the firm's claim against the casino: the claim that arose upon Cass' substitution persisted through the cash transfer to the casino, grounding a claim to the money in its hands.

Yet, whilst it is possible to construct a strong case for an equitable account of *Lipkin Gorman*, that account depends upon three features that make it an uneasy template for all of our common law tracing cases. The first is that there must be grounds for the conclusion that the intermediate party is a trustee of the right acquired. The facts of *Trustee of FC Jones* can be reconciled with that conclusion (though the court did not, of course, explain the claim in that way): Mr Jones, as a partner to the firm from which he misdirected funds, might well have been accountable for title to the cheque that he gave to Mrs Jones.[103] But it is much more difficult to find similar grounds for the conclusion that Hambrouck, who was not in the position of a fiduciary with respect to the claimant, was a nevertheless a trustee of the account from which he paid Mlle Spanoghe.[104] Secondly, the equitable account of *Lipkin Gorman* requires that the third party receive the object of the trust. If this is possible in *Trustee of FC Jones*, it is not in *Hambrouck*: the right received by Mlle Spanoghe – title to the cheque and then the right against her bank – was a *new* right, different from title to the cheque through which Hambrouck debited Pelabon's account or Hambrouck's right against his bank. Third, the right *claimed*

101 *Lipkin Gorman v Karpnale* [1991] 2 A.C. 548 at 572.
102 *Lipkin Gorman* [1991] 2 A.C. 548 at 572.
103 See 29(1) Partnership Act 1890 and *Don King Productions Inc v Warren* [1998] 2 All E.R. 608; [1998] 2 Lloyd's Rep. 176; *Barber v Rasco International Ltd* [2012] EWHC 269; [2012] All E.R. 22.
104 We might be able to reach the conclusion that Hambrouck was a trustee of the cheque, by reference to the mechanics of rescission, but rescission *revests* title; the account was not an asset with which the bank began.

must be the trust right. And here, neither case fits the trusts analysis: in *Trustee of FC Jones*, as in *Hambrouck*, the right claimed was not the cheque that moved from wrongdoer to third party, but the account into which the funds were paid. If there is a reason for reconceptualising these cases on the basis of equitable principles, *and* treating the steps of payment as a single property transfer, so as to warrant the analogy between **Example 1.2** and *Hambrouck* and *FC Jones*, we have not yet found it.

### *iv) Dummy asset tracing at common law*

**Example 5** is intended to serve as a proxy for the facts of *Hambrouck* and *FC Jones*:

> **Example 5:** A diverts £10 from B's bank account to A's bank account without B's authority. A then transfers £10 to C from that account.

I argue here that the tracing process established by these cases is a form of dummy asset tracing, in which the notional asset interposed is a physical cash asset.

In *Agip v Jackson*,[105] a payment order had been altered fraudulently to name Baker Oil as beneficiary. That order was executed by the claimant's bank, Banque du Sud, which debited their account with $518,822.92, and instructed Baker Oil's bank (Lloyds Bank) to credit Baker Oil's account in London with the same sum, giving instructions to its correspondent bank in New York to reimburse Lloyds Bank. Lloyds Bank acted on those instructions. At the third defendant's behest, it then transferred the sum to the account of the defendants' firm with the bank.

The putative problem with tracing at common law lay in the existence of clearing, which the court treated as a kind of "mixed fund".[106] We saw above that equity treats money paid and received as a right that retains its integrity as it moves through the steps of transfer, and which survives admixture. Thus, there was "no difficulty in tracing the plaintiffs' property in equity, which can follow the money as it passed through the accounts of the correspondent banks in New York or, more realistically, follow the chose in action through its transmutation".[107] Millett J was clear, however, that tracing at common law has never benefited from the same flexibility. Echoing the words of Lord Greene in *Re Diplock*,[108] Millett J said:

> The common law has always been able to follow a physical asset from one recipient to another. Its ability to follow an asset in the same hands into a changed form was established in *Taylor v Plumer*. In following the plaintiff's money into an asset purchased exclusively with it, no distinction is drawn between a chose in action such as the debt of a bank to its customer and any other asset: *In re Diplock*. But it can only follow a physical asset, such as a cheque or its proceeds, from one person to another. It can follow money but not a chose in action. Money can be followed at common law into

105 *Agip (Africa) Ltd v Jackson* [1990] Ch. 265.
106 *Agip v Jackson* [1990] Ch. 265 at 289.
107 *Agip v Jackson* [1990] Ch. 265 at 289.
108 [1948] Ch. 465 at 520; [1948] 2 All E.R. 318 at 344.

> and out of a bank account and into the hands of a subsequent transferee, provided that it does not cease to be identifiable by being mixed with other money in the bank account derived from some other source.[109]

There are four steps to this analysis, which has been taken as the starting point for very many accounts of the distinction between common law and equitable tracing: (i) there are two kinds of tracing – tracing from one asset to another in the same set of hands, and tracing from one person to another; (ii) in the latter capacity, common law tracing always demands a physical object; (iii) the common law will treat money in an account as such a physical asset, but (iv) it will not do so if there is a "mixed fund" (which is either an account into which money has been paid from multiple sources, or clearing). Thus, like equity, the common law is able to turn a bank transfer from one person to another into the transfer of a notional asset; unlike equity, that notional asset is always physical cash. This difference lies at heart of the common law's inferior capacity to deal with mixed funds: a process that treats money in a "strictly materialistic way" cannot cope with a confusion of fungible claims.[110]

This makes a great deal more sense of the decisions in *Banque Belge v Hambrouck* and *Trustee of FC Jones v Jones*: by treating each bank payment as if it transferred a cash asset to the defendant, the court could at once recognise that the payee was creditor *and* hold that the transfer vested in the claimant a title that could ground a claim to get it back from the eventual recipient. And it explains why Lord Millett saw nothing wrong with the conclusion that the trustee's claim in *FC Jones* was both a claim at law and a property claim: the subject matter of that claim was not the bank debt (which could only have been owed to Mrs Jones, and which could not have been "owned" at all) but the notional money asset that it represented. Thus, Mrs Jones was "in possession of funds to which she had no title".[111]

### *v) Dummy asset tracing and unjust enrichment*

Though it is by no means the only justification offered for claims that depend upon tracing,[112] the debate concerning how best to conceptualise *Hambrouck, Lipkin Gorman* and *FC Jones* has largely taken place within the parameters of unjust enrichment theory. Yet, the relationship between unjust enrichment and tracing has been described as "far from an easy topic".[113] In particular, it has proven extremely difficult to reconcile tracing with the requirement that the enrichment must come "at the expense of" the claimant.

109 *Agip v Jackson* [1990] Ch. 265 at 285.
110 *Re Diplock* [1948] Ch. 465 at 520.
111 *Trustee of FC Jones v Jones* [1997] Ch.159 at 167.
112 In *Foskett v McKeown*, Lord Millett insisted that tracing was not part of the law of unjust enrichment: [2001] 1 A.C. 102 at 127. See also Lord Browne Wilkinson at 108, Lord Steyn and Lord Hoffmann at 115, and Lord Hope at 125-6 (though note that the case involved trustee substitution).
113 A. Burrows: *The Law of Restitution*, 3rd edn (Oxford: Oxford University Press 2010), at p.117.

According to Burrows, the decision in *Hambrouck* exemplifies a "title and tracing" exception to the ordinary rule that the claimant who seeks to recover money from the defendant in an action for restitution of an unjust enrichment must be the "direct provider" of that sum:[114] "by means of tracing and title, a claimant can show that value in a substitute asset comprises a transfer of value from the claimant: one is tracing value as it is transferred from the claimant's asset to its substitute".[115] Thus, in the following **Example 5**, B can trace through each substitution (B's right for A's right, A's right for C's right), thereby demonstrating that the credit to C's account represents a transfer of value from her:

> **Example 5:** A diverts £10 from B's bank account to A's bank account without B's authority. A then transfers £10 to C from that account.

Framed as a process of pursuing value, *Taylor v Plumer* and *Hambrouck* appear identical: the claimant can either pursue value from one right to another through an exchange, or she can pursue value from one person to another through a transfer; either way, the claimant can show that the defendant received value that emanated from her. I have argued elsewhere that this is a mistake, which conflates two distinct kinds of value.[116] The first is the susceptibility of a right to exchange (which I have called exchange potential); this is the kind of value involved in exchange product tracing, and it does not move from one right to another.[117] The second is wealth (value measured as a sum of the purchasing power to which an individual has recourse, minus her liabilities). This is the kind of value involved in a bank transfer from one person to another, and it provides no mechanism for connecting B's account with that of C (with whom B had no dealings) so as to substantiate B's claim that C should reverse A's wrongful debit. The conclusion "B's wealth has reached C's hands" requires prior proof that there is a sufficient connection between the two transfers, which connection is ordinarily established by demonstrating that B (or B's agent) paid C. If there is a reason for applying a different test to such facts, the notion of value does not provide it.

Birks offered a simpler account of three-party cases. For Birks, "a receipt of your money is always a receipt directly from you",[118] so that if the claimant can establish a proprietary claim to the thing or right transferred to the defendant, it would be irrelevant that someone else effected transfer:

> If I find your wallet it makes no difference whether I am the first recipient or the second or the twenty-second. Suppose a pickpocket took it and, in alarm, threw it down, and then I found it. My position would be exactly the same as if your wallet had fallen from your pocket into the road in front of me without your noticing its loss.[119]

[114] Burrows, *The Law of Restitution* (2010), at p.119.
[115] Burrows, *The Law of Restitution* (2010), at p.119.
[116] T. Cutts, "Tracing, Value and Transactions" (2016) 79 M.L.R. 381 at 392-396.
[117] See above, the text accompanying fn. 17-20.
[118] P. Birks, *Unjust Enrichment* (Oxford: Oxford University Press 2004), at pp. 86-7.
[119] Birks, *Unjust Enrichment* (2004), at p. 87.

Thus, the "proprietary connection",[120] which justifies the claimant's claim against a party with whom she did not transact directly, is no more or less than *persisting title*

Birks applied this account directly to the facts of *Hambrouck*,[121] thereby treating the money paid by the bank to Hambrouck, and by Hambrouck to Mlle Spanoghe, as transfer akin to that of a physical cash asset. This reflects the approach adopted explicitly by the court in that case, which encouraged the conclusion that Mlle Spanoghe could not "set up a title derived from Hambrouck, who had no title against the true owner".[122] This is what I have called dummy asset tracing, and it allows us to conceptualise **Example 5** as a simple transfer of money that is owned by the claimant at law into the hands of a third party: C receives a notional cash asset to which B has or had a better title.

There has been some debate about whether cases that involve receipt of the claimant's property are appropriately termed "unjust enrichment" at all.[123] I have considered this elsewhere,[124] and will not dwell on it here, save to say this: to the extent that the legal event responsible for the creation of liability is some breach of a (real or putative) exclusionary obligation, the alternative clothing in unjust enrichment seems at best unnecessary, and at worst confusing. However, I have not yet addressed the question that is logically prior to taxonomical one: in the final part of this paper, I will analyse existing justifications for using principles of property to ground and shape liability for misdirected bank money.

## IV. Justifying Dummy Asset Tracing

We have seen that dummy asset tracing allows a claimant to connect her bank account with that of an innocent third party payee, in order to support her claim for restitution from the latter. In what follows, I argue that there is no robust justification for this outcome, and that we should embrace judicial efforts to direct attention to the role that the defendant has played in any misallocation of funds for which the claimant seeks to hold her accountable.

### *1. The cash analogy*

Whenever it has been necessary to formulate a justification for dummy asset tracing, it is usually along the following lines: the defendant would be liable if the facts involved dealings with physical money; thus, liability cannot be escaped by the mere fact that the money happens to take an intangible form.[125] This has been framed, alternatively, as an institutional or individual claim.

120 Birks, *Unjust Enrichment* (2004), at p. 87.
121 Birks, *Unjust Enrichment* (2004), at pp. 86-87.
122 Birks, *Unjust Enrichment* (2004), at p. 87.
123 See e.g. W. Swadling, "Ignorance and Enrichment: the Problem of Title" (2008) 28 O.J.L.S. 627.
124 T. Cutts, "Modern Money Had And Received" (2018) 38 O.J.L.S 1 9.
125 *Re Hallett's Estate* (1880) 13 Ch. D 696.

Proctor makes the institutional case for dummy asset tracing: "if money is to exist in several different forms", he says, "the law should certainly ensure that the rights of a person who receives 'money' are the same, irrespective of the precise form in which that money is conveyed".[126] Thus, the law must attribute to bank media "characteristics which will enable it effectively to fulfil functions which similar to those performed by notes and coins".[127] One such characteristic goes to the circumstances in which money can be recovered: though money can be "followed in rem against a holder who acted in bad faith or gave no consideration", it must (Proctor says) be irrecoverable from a good faith payee.[128]

This requires some unpacking. In contrast with other tangible assets, cash cannot be recovered from a good faith payee.[129] This is known as the rule that money "has no ear-mark", and it helps to ensure fluid circulation by affording cheap and easy confidence to the holder of their security of receipt.[130] Proctor's argument, here, is that if we want bank money to circulate with equivalent fluidity, that rule must be applied to money in all its forms.

In fact, that confidence in security of receipt which might be supplied by lending bank money the same legal attributes as cash is already supplied by the irrevocability of the payment instruction by which credit is transferred.[131] There is no need to treat bank money *as if* it had no ear-mark: a payment instruction neither conveys any asset that an individual might segregate and claim from her payee, nor–once the participating bank has acted to debit one account and credit another–can it be reversed. It is only by first treating bank money as property that we encounter the need to limit the circumstances in which it can be recovered; if we do not admit property concepts into bank transfers, the problem does not arise. In short, the instrumental argument counts *against* dummy asset tracing.

The analogical case is not much stronger at an individual level. According to Webb, a bank transfer is "equivalent to the handing over of that same sum in cash" because it amounts to the depletion of a facility to put the holder in funds that is "matched exactly and directly" by an addition to that of the transferee.[132] A bank transfer thus "serves the same function" as a cash transfer, "taking funds at my disposal and making them available to you".[133]

There are various ways in which Webb's argument might bear on the justification for dummy asset tracing. Webb's primary objective is to show that there is something functionally equivalent about different money forms, which justifies the extension of principles of unjust enrichment from one to the other. I will not dwell on this point, save to note that this argument is at least more difficult than

126 C. Proctor (ed.), *Mann on the Legal Aspect of Money*, 7th edn (Oxford: Oxford University Press 2012) 43.
127 Proctor (ed.), *Mann on the Legal Aspect of Money* (2012) 43.
128 Proctor (ed.), *Mann on the Legal Aspect of Money* (2012) 43.
129 *Miller v Race* (1758) 1 Burr. 452; 97 E.R. 398.
130 See *Miller* (1758) 1 Burr. 452 at 459 (Lord Mansfield).
131 *The Brimnes* [1973] 1 W.L.R. 386; [1973] 1 All E.R. 769; *Tayeb v HSBC Bank* [2004] EWCH 1529, [2004] 4 All E.R. 1024.
132 C. Webb, *Reason and Restitution* (Oxford: Oxford University Press 2016), at p. 99.
133 Webb, *Reason and Restitution* (2016), at p. 98.

Webb makes it seem: however I may conceptualise "my" bank money in a funds transfer from my account to that of my payee, the fact is that it consists of a contractual claim that is at least one step removed from, and substantially more precarious than, that which we describe as "cash".

For present purposes, the more important point goes to the *scope* of that liability. There is a great deal of difference between invoking principles of property to justify a bank transferee's liability for money paid to her by the claimant, and doing so to justify a third party's liability for money transferred to her by someone *other* than the claimant. Indeed, Webb's claim that the property analogy depends on a kind of "directness" carries a strong implication that this justification for restitution is limited to those who deal as payor and payee.

The question of whether or not it is appropriate to use property principles to define the scope of liability for intangible assets is not new to private law. The thrust of the decision in *OBG v Allan*,[134] that a person who sought to usurp the contractual claim of another could not be held liable in conversion, is that we should be chary of extending the ambit of exclusionary duties to intangible assets. There are good reasons for this: it is usually far easier for someone to recognise and comply with exclusionary obligations in respect of objects that have some tangible form.[135]

Yet, there is an important sense in which the contract in *OBG v Allan* was a *better* candidate for ownership than bank money paid. If the exclusionary responsibility were to extend only to a true usurpation of contractual rights, it would not often be possible to breach it accidentally. By contrast, dummy asset tracing gives rise to liability for interfering with the (fictional) property claim of a person who may be wholly unknown to the defendant, on the basis of a defective transaction that occurred at some point in time prior to the payment now impugned. It is extremely *easy* to interfere with such a claim accidentally. Such was the court's conclusion as to Mrs Jones' position in *Trustee of FC Jones v Jones*:[136] Mrs Jones knew nothing about the circumstances through which her husband diverted money from his partnership; yet, she was strictly liable for the profits that she acquired by investing it.

Neither the institutional nor individual argument supplies a robust defence for this conclusion – that an innocent payee, who did not transact with the claimant, may be held liable in circumstances that gave her no reason to suspect that her activities would conflict with the claimant's prior entitlement.[137] Precedent alone cannot justify dummy asset tracing, and I show in what remains of this article that precedent is evolving in a manner that is conceptually inconsistent with it: courts tasked with defining the scope of liability for bank money misapplied have emphasised the need for a legal relationship that connects claimant and defendant directly.

134 *OBG Ltd v Allan* [2007] UKHL 21; [2008] 1 A.C. 1.
135 See e.g. *OBG* [2007] UKHL 21 at [321] (Lord Brown); B. McFarlane and S. Douglas, "Defining Property Rights" in J. Penner and H. Smith (eds), *Philosophical Foundations of Property Law* (Oxford: Oxford University Press 2013), at p.239.
136 *Trustee of FC Jones v Jones* [1997] Ch. 159.
137 See e.g. *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 K.B. 321; *FC Jones* [1997] Ch. 159.

## *2. The future*

There are new indications that courts tasked with justifying, and defining the scope of, liability for bank money misapplied are prepared to look more closely at the relationship between the claimant and defendant. I argue here that this development is incompatible with a process that would impose liability for the passive receipt of a notional asset, and that we should be prepared to allow our jurisprudence to evolve beyond principles of dummy asset tracing.

### *(i) The claimant's counterparty*

We saw above that B may pursue a notional money asset through the steps of transfer in order to maintain a claim at law against C, who is not her payee:

> **Example 5:** A diverts £10 from B's bank account to A's bank account without B's authority. A then transfers £10 to C from that account.

In what follows, I show that courts are beginning to take more seriously the search for a meaningful connection between claimant and defendant, which has been mediated though the notion that a "single transaction" must unite them. I argue that this is incompatible with, and should supersede, the orthodox approach to **Example 5**: B ought not to be entitled to recover from C, with whom she did not transact; there ought to be no alternative route to C's liability by "tracing" through A's account.

In *Investment Trust Companies v Revenue and Customs Commissioners*,[138] the claimants brought a claim against HMRC for restitution of sums paid by investment managers to discharge a putative tax liability from which the managers were in fact exempt under EU law. The claimants sought to ground their claim in an earlier payment that they had made to the managers in respect of services provided by the latter, called "VAT" and paid on the understanding that it was due.

Giving judgment for the Supreme Court, Lord Reed rejected previous assertions that a "sufficient causal connection" could substantiate the requisite connection between claimant and defendant,[139] insisting that a "direct transfer of value"[140] was necessary, and must be established either by proof of a relationship of agency between the claimant and the defendant's payor,[141] or by "a set of co-ordinated transactions" that formed a "single scheme or transaction"[142]–where to consider each individual transaction separately would be unrealistic".[143] Lord Reed considered that such a scheme could not be established on the instant facts: rather, "there were two separate transactions–first,

138 *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29.
139 See e.g. *Menelaou v Bank of Cyprus UK* [2015] UKSC 66; [2016] A.C. 176.
140 *ITC* [2017] UKSC 29 at [9].
141 *ITC* [2017] UKSC 29 at [48].
142 *ITC* [2017] UKSC 29 at [48].
143 *ITC* [2017] UKSC 29 at [48].

between the Claimants and the Managers, and secondly between the Managers and the Commissioners".[144] Thus, HMRC had not been enriched at the claimants' expense.

By placing the parties' legal relations *inter se* at the heart of the requisite connection, Lord Reed judgment takes us a step towards direct engagement with the question of when a defendant is sufficiently implicated in the impugned event as to warrant her liability to make restitution. Progress should not be overstated: though he rejected the case for a transactional link on the facts of *ITC*, Lord Reed did not present anything like a template for determining what *does* meet that threshold. Moreover, he left intact the notion that the "at the expense of" nexus could be proven "where the defendant receives property from a third party into which the claimant can trace an interest".[145] Yet, if we can give shape to the transactional test,[146] a parallel route to restitution that grounds liability in the passive receipt of a notional asset is not merely superfluous; it altogether undermines the thrust of a move to focus upon the legal relationship that forms a genuine connection between payor and payee. If C in **Example 5** is not B's counterparty, that ought to be the end of the matter: there should be no alternative enquiry into whether B can "trace" through A's account, to support C's liability to B. I return to tracing below; there is some evidence of a confluence between the mechanisms of tracing and the transactional approach to unjust enrichment that would render this point moot.[147]

The transactional approach may also provide the requisite impetus to revisit other areas in which dummy asset tracing has obfuscated the reason for liability. Take the following example:

> **Example 6:** A, director of B Co, transfers money from B Co's bank account to C's bank account without B Co's authority.

Cases that adopt this pattern have been forced into the mould of property transfers: the tracing question is thought to determine whether assets can be connected to a breach of trust,[148] enabling a beneficiary to recover, or claim in respect of, "trust property that has been misappropriated".[149] This both diverts attention from the question of whether a particular transaction was within the scope of the directors' authority,[150] and disguises the true nature of the circumstances through which a third party may come to benefit from a director's breach of fiduciary duty:[151] a director who diverts funds

144 *ITC* [2017] UKSC 29 at [72].
145 *ITC* [2017] UKSC 29 at [48].
146 I have argued that the process of construing and characterising transactions should be conducted by reference to its commercial counterpart, for which there are well-established rules: T. Cutts, "Tracing, Value and Transactions" (2016) 79 M.L.R. 381.
147 See below, the test accompanying fn. 157.
148 *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch.437.
149 *Relfo v Varsani* [2014] EWCA Civ 360 at [65]. Televantos explains that not all such cases have involved genuine trust relationships; nevertheless he thinks the proprietary connection pivotal: A. Televantos, "Losing the fiduciary requirement for equitable tracing claims" (2017) 133 L.Q.R. 492 at 503.
150 This was ignored in *BCCI v Akindele* [2001] Ch. 437. See also *Criterion Properties v Stratford UK Properties* [2004] UKHL 28; [2004] 1 W.L.R. 1846 at [4] (Lord Nicholls).
151 M. Conaglen and R. Nolan, "Contracts and knowing receipt: principles and application" L.Q.R. 359 at 359.

from the company account is an *agent*, not a trustee,[152] and a company is not a beneficiary of its bank accounts; it is the creditor at law.

Without dummy asset tracing, we are able to address this distinction directly. If A lacks the authority to make the payment, **Example 6** fits neatly within Lord Reed's categories, and the model of a standard two-party claim for restitution of an unjust enrichment: B Co, who is made a party to the transaction effected by its agent, A, can set that transaction aside and recover money paid to C as an unjust enrichment at its expense. There is no question of tracing, nor any of third party liability: C is B Co's counterparty and proper defendant at law.

Last, rejecting dummy asset tracing gives us a new reason to revisit the justification for awarding proprietary restitution where B *can* establish that C is her payee: if a bank payment does not transfer any segregable asset, there is good reason to think that the best way of restoring both parties to the *status quo ante* is a *personal* claim, to reverse both debit and credit.[153]

### *(ii) The trustee's counterparty*

We saw above that courts have approached the following **Example 2**, like **Example 5**, by following a notional asset from T to X:

> **Example 2:** T holds a bank account on trust for B. T transfers £10 from the trust account to that of a third party, X, without B's authority.

Dummy asset tracing supports a proprietary claim, to vindicate "pre-existing equitable proprietary rights",[154] or a personal claim for the "knowing receipt" of a trust asset.

If, as I have argued, we reject the notion that X receives an asset from T, the transactional approach can be a useful catalyst for conceptual clarity here too. It is now clear that a beneficiary may set aside certain transactions effected by her trustee.[155] Here, the case for X's liability is not made on the basis that the payee is *B*'s counterparty; rather, the argument is that T has executed a transaction that (whether for a want of authority, or other breach of trust) she should not have, which transaction B is procedurally competent to set in train the necessary steps to unwind.[156]

There are two important consequences of the transactional account of the circumstances in which a beneficiary may proceed against her trustee's payee. The first mirrors the discussion above, of the manner in which a claimant goes about proving the requisite nexus for restitutionary liability: B

152 Cf R. Chambers, "The End of Knowing Receipt" (2016) 2 Canadian Journal of Comparative and Contemporary Law Aug 1 at 20: Chambers argues that a *constructive* trust arises by operation of law.
153 See J. Edelman, "Restitution of (Property) Rights", paper provided to the University of Melbourne Colloquium on Proprietary Rights, 2012.
154 *Independent Trustee Services v GP Noble Trustees* [2012] EWCA Civ 195; [2013] Ch. 91 [91].
155 *Pitt v Holt* [2013] UKSC 26; [2013] 2 A.C. 108.
156 Whether B requires judicial assistance depends on the nature of the transaction, and on whether it was effected in breach of trust, or wholly in excess of authority.

must show that X is T's counterparty to the transaction impugned; it will *not* be enough, without more, to demonstrate that the impugned payment was made from an account into which T paid misdirected trust funds. It is worth noting in this regard that courts tasked with applying principles of equitable tracing in fact pre-empted Lord Reed's approach in *ITC*. Most notably, the Privy Council in *The Federal Republic of Brazil v Durant International Corporation* rejected the argument that the interposition of debt necessarily thwarted the tracing exercise; rather, claimant and defendant could be connected by means of a set of "interconnected transactions" that formed part of a "co-ordinated scheme".[157] In this sense, the goal at law and in equity appears to be a common one: a genuine connection is sought from a single, overarching, transaction, to which defendant is situated as one party, and the claimant (or her trustee) the other. Yet it bears repeating that this objective demands a concerted effort to draw precise contours for that nexus.

Second, if we reject dummy asset tracing, it follows that we reject the proprietary response to **Example 2**; X does not receive any asset that is recoverable *in specie*. This entails a departure from the reasoning in cases like *ITS v GP Noble Trustees*, but it does not necessarily demand that we disregard certain operative facts. In *ITS*, the defendant was not insolvent; the claim was not framed as proprietary in order to elevate its priority with respect to her creditors. Rather, the nature of the claim was prescribed by dummy asset tracing: as soon as the money had been conceptualised as property,[158] the case became a conflict between claimant and defendant as to the relative status of their respective titles. The question was then whether the defendant could raise the defence of bona fide purchase, which was resolved by her acquisition of knowledge. If we do not admit the first (fictional) step, knowledge may *still* be relevant, but it goes instead to the question of whether the third party is able to set up her rights as a defence to the claim to rescind a transaction effected in breach of trust.[159]

### *(iii) Fiduciary liability*

A by-product of the analysis in this article is a new reason for doubting the continued utility of so-called "common law tracing", either within and outside of the context of bank transfers. I have argued that in *Lipkin Gorman v Karpnale*, the firm's claim to the cash in Cass' hands, which claim persisted and grounded a claim against the casino, ought to have been in the nature of a trust.[160] And I have defended

157 [2015] UKPC 35; [2016] A.C. 297 at [38]; [41] (Lord Toulson).

158 See [2010] EWHC 3275; [2011] Fam. Law 803.

159 See R. Nolan, "Fiduciaries and their flawed decisions" 129 L.Q.R. 469 at 471; R. Nolan, "Controlling fiduciary power" (2009) 68 C.L.J. 293 at 322; C. Mitchell, "Reining in the rule in Re Hastings-Bass" (2006) 122 L.Q.R. 35 at 42; C. Mitchell, P. Mitchell and S. Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (2017), at paras. [29-18]–[29-27].

160 See above, the text accompanying fn. 100-103.

the move away from the kind of strict liability claim for the passive receipt of a putative asset for which *Hambrouck* and *FC Jones* stand as precarious authority.[161]

However, we must be careful not to make too much of this conclusion. There have been many arguments to the effect that a corollary of the loss of a distinct law of tracing at common law is the loss of any distinct role for fiduciary duties in establishing a connection between old and new assets.[162] Yet, quite apart from reducing the importance of fiduciary duties, replacing dummy asset tracing may place a renewed emphasis on the status of the party responsible for the loss. For instance, there may well be an argument from fiduciary responsibility for allowing a beneficiary to "cherry-pick" the product of an unauthorised investment made by the trustee, which does not also require us to treat the account as a corporeal confusion of funds; such an argument would necessitate careful consideration of the scope and form of the core custodial duty.[163]

*This* is what we gain by replacing dummy asset tracing, and it warrants emphasis: arguments that concern the existence and extent of liability cannot be made by simple analogy with cash transfers; they must be made with clear reference to the contours and content of the relationship between claimant and defendant.

## V. Conclusion

I have argued that the process of tracing money through bank transfers is distinct from the process of demonstrating that two rights are connected by an exchange, which has been called "exchange product tracing". A claimant who traces through bank payments and claims in equity does so on the basis of a notional rights-transfer; a claimant who traces through bank payments and claims at law does so on the basis of a notional transfer of some physical thing. I have called these processes "dummy asset tracing".

I have demonstrated that allowing principles of property to inform the template for liability in bank payments cases has had important remedial consequences: an innocent payee may now be held liable to a claimant with whom she did not transact, on the basis of an earlier debit to the claimant's account in which she played no part. I have argued that there is no robust justification for holding a payee liable in circumstances that gave her no reason to suspect that her activities would conflict with the claimant's prior entitlement

Finally, I have suggested that recent authorities indicate a move towards placing the legal relationship between claimant and defendant at the heart of the justification for holding the latter liable for money wrongfully diverted from the former. And insofar as this move is incompatible with those

161 Cf *Heperu v Belle* [2009] NSWCA 252.
162 See e.g. P. Birks, "The Necessity of a Unitary Law of Tracing" in R. Cranston (ed.), *Making Commercial Law: Essays in Honour of Roy Goode* (Oxford: Oxford University Press 1997); P. Birks, "Taking Seriously the Differences Between Tracing and Claiming" (1997) 11 T.L.I. 2.
163 See further J. Campbell (2016) 42 Aust. Bar Rev. 32.

authorities in which the justification for strict liability depends upon the defendant's passive receipt of a notional money asset, I have argued that we should promote normative rigour over narrative cohesion.