Money might be overpaid for a variety of reasons, such as a spontaneous mistake, misrepresentation or where it has been misappropriated by the defendant or a third party. Usually in such circumstances the claimant will have a personal claim for restitution grounded on the defendant’s unjust enrichment. Where the claim is grounded on the claimant’s spontaneous mistake, it is sufficient that the mistake was an operative cause of the payment, which usually means that the claimant thought that it was more probable than not the money was due to the defendant: *Marine Trade SA v Pioneer Freight Futures Co Ltd* [2009] EWHC 2656 (Comm), [2010] 1 Lloyd’s Rep 631. Such a claim is subject to the defences of change of position and estoppel. Such a claim will fail if the claimant can be regarded as having made a misprediction as to the future and where there was a basis for the transfer, such as a contractual obligation to pay.

This is relatively straightforward, established in the law and not controversial. But once the defendant has become insolvent, this area of the law become much more difficult and contentious, even as regards some of the most fundamental principles. Although the issue is simply whether the claimant’s claim ranks in priority to that of the claims of the defendant’s creditors and whether the claimant can get the benefit of any increase in the value of property transferred, how this is established is complicated. This papers seeks to identify the principles relating to such claims and then examines their application with reference to three leading cases. Finally, a case study is suggested for the application of these principles.

1. **The nature of proprietary restitutionary claims**

Where the claimant seeks to recover property from the defendant, the nature of the claim has proved to be controversial. There are three contexts in which the claim can be made:

(a) **Claim to recover the property transferred to the defendant**

Where the claimant’s property has been received by the defendant, the claimant can rely on his or her property rights to recover that property. This falls within the sphere of property law and involves the vindication of property rights. See *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), at [69].

(b) **Claim to recover substitute property**
Where the defendant has received the claimant’s property but has replaced that property with a substitute, the claim for restitution can be analysed in two ways:

(i) Unjust enrichment

A number of commentators have argued that in order to assert a right in respect of substitute property, the right needs to be created by virtue of a claim in unjust enrichment. Accordingly, it is necessary to show that:

1. the defendant was enriched;
2. this was at the expense of the claimant;
3. this occurred in circumstances which fall within one of the recognised grounds of restitution;
4. defences to claims in unjust enrichment will apply, notably, change of position.

This is the approach advocated in the 8th edition of Goff and Jones’ Law of Unjust Enrichment (2011) (ed. Mitchell, Mitchell and Watterson) and Burrows, The Law of Restitution (3rd ed.). It is considered to be supported by the decision of the House of Lords in Lipkin Gorman (a firm) v Karpnale Ltd. [1991] 2 AC 548. But there are problems in establishing that the defendant was enriched and identifying the ground of restitution. These commentators suggest ignorance or unauthorised transfer.

(ii) Vindication of property rights

Rather than relying on unjust enrichment, it is sufficient that the claimant can assert that the defendant has received and retained property in which the claimant has a proprietary interest, regardless of whether this is the same or substitute property.

This approach has now been advocated by the House of Lords in Foskett v McKeown [2001] 1 AC 102, 120 (Lord Millett) and has been endorsed in Armstrong DLW GmbH v Winnington Networks Ltd [2012] EWHC 10 (Ch), at [84].

According to this approach the structure of the claim to vindicate property rights is as follows:

1. The defendant had received property in which the claimant had a legal or equitable proprietary interest. This is known as the proprietary base.
2. The claimant is able to trace the value of his property into the property which has been received and retained by the defendant.
3. The claimant can then assert his proprietary rights and seek a proprietary remedy.
4. This proprietary claim is subject to certain recognised defences.

(c) Personal claim to vindicate property rights

Where the defendant has received property in which the claimant has a proprietary interest but the defendant has dissipated that property without acquiring a substitute, the claimant can assert a restitutionary proprietary claim, founded on the vindication of property rights, but seek a personal restitutionary remedy, representing the value of the property received. There are two distinct personal claims available:
1. Vindication of legal property rights: where the defendant has received property in which the claimant had a legal proprietary interest. See Lipkin Gorman (a firm) v Karpnale Ltd. [1991] 2 AC 548. This is a strict liability claim.

2. Vindication of equitable property rights: this involves the action known as unconscientious receipt of property transferred in breach of trust. This requires proof of fault.

2. Establishing a claim to vindicate property rights

(a) Establishing the proprietary base

(i) Legal proprietary base

Where the defendant has retained legal title to property transferred to the defendant, such as where the claimant was unaware of the transfer (Lipkin Gorman (a firm) v Karpnale Ltd. [1991] 2 AC 548) or made a fundamental mistake as to the identity of the recipient or the (Middleton (1873) LR 2 CCR 38) or the identity of the property transferred (Ashwell (1885) 16 QBD 190).

(ii) Equitable proprietary base

A recognised event must have occurred to create the equitable proprietary interest, such as under an express trust, or a resulting trust or a constructive trust. A constructive trust will be recognised where:

1. the defendant has acted unconscionably

   Westdeutsche Landebank Girozentrale v Islington LBC [1996] AC 669, 715

   “The argument for a resulting trust was said to be supported by the case of a thief who steals a bag of coins. At law those coins remain traceable only so long as they are kept separate ….I agree that the stolen moneys are traceable in equity. But the proprietary interest which equity is enforcing in such circumstances arises under a constructive trust, not a resulting trust. Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient.” (Lord Browne-Wilkinson)


   Westdeutsche Landebank Girozentrale v Islington LBC [1996] AC 669, 715

   “Although the mere receipt of the moneys, in ignorance of the mistake, gives rise to no trust, the retention of the moneys after the recipient bank learned of the mistake may well have given rise to a constructive trust.” (Lord Browne-Wilkinson).

   Pitt v Holt [2011] EWCA Civ 197, [2012] Ch 132: mistaken voluntary dispositions: the mistake must be relevant and be of such gravity that is is unjust for the donee to retain the property.


(b) Following and tracing

Following involves identifying the claimant’s original property in the defendant’s hands.
The essence of tracing was identified by Lord Millett in *Foskett v McKeown* [2001] 1 AC 102, 127:

“Tracing is thus neither a claim nor a remedy. It is merely the process by which the claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can be regarded as representing his property. Tracing is also distinct from claiming. It identifies the traceable proceeds of the claimant’s property. It enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim. But it does not affect or establish his claim.”

*Shalson v Russo* [2003] EWHC 1637 (Ch.), [2005] 2 WLR 1213, 1246

“…the process by which a claimant seeks to show that an interest he has had in an asset has become represented by an interest in a different asset’ (Rimer J)

(i) At common law

It is possibly to trace into substitutes and products but not into a mixture.

*Agip (Africa) Ltd. v Jackson* [1990] Ch. 265, 285

“Money can be followed at common law into 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.” (Millett J)

In fact there is no reason to restrict tracing at law in this way. Such a restriction has been rejected by the Supreme Court of Canada: *BMP Global Distribution Inc v Bank of Nova Scotia* [2009] SCC 15

(ii) In Equity

It is possible to trace into a mixture. Traditionally the property must have passed through the hands of a fiduciary in breach of fiduciary duty. This requirement is satisfied by virtue of the need to show that the claimant has an equitable proprietary interest: *Campden Hill Ltd. v Chakrani* [2005] EWHC 911 (Ch.), at [74] (Hart J)

(c) Proprietary claims and remedies

(i) Proprietary claims at Common Law

The claimant can only recover the value of the property received.

(ii) Proprietary claims in Equity

1. Constructive trust
2. Equitable charge or lien
3. Subrogation

Although this is sometimes considered to be triggered by unjust enrichment (*Anfield (UK) Ltd v Bank of Scotland* [2010] EWHC 2374 (Ch), [2011] 1 WLR 2414, the better view
is that it is a response to the vindication of property rights, as effectively recognised in Australia: Bofinger v Kingsway Group Ltd [2009] HCA 44, (2009) 260 ALR 71

(iii) *Personal claim at Common Law*

In *Lipkin Gorman (a firm) v Karpnale Ltd.* [1991] 2 AC 548 it was recognised that the claimant could recover the value of money stolen by means of the action for money had and received.

(iv) *Personal claim in Equity*

This is the action for unconscionable receipt. The following matters must be shown:

1. The defendant received, but did not retain, property in which the claimant had an equitable proprietary interest.
2. This receipt was for the defendant’s own use and benefit.
3. The receipt was unconscionable.

*Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch. 437

(d) *Defences*

(i) *Bona fide purchase for value*

If the defendant has received property in which the claimant has an equitable proprietary interest for value and in good faith the proprietary interest will be defeated.

(ii) *Change of position*

Since the claim is founded on the vindication of property rights and not unjust enrichment there is no scope for the defence of change of position to operate.

3. *Three case studies*

(a) *Foskett v McKeown*

A trustee had misappropriated money from a trust to pay the fourth and fifth premium of a life assurance policy, the earlier premiums having been paid from his own money. He committed suicide and his estate received £1 million. The beneficiaries of the trust claimed a proportionate share, amounting to £400,000, on the basis that their money had been used to pay two of the premiums which resulted in the death benefit. Their claim succeeded. A majority of the House of Lords adopted the following analysis:

1. Recognised that claim fell within law of property. Concerned vindicating property rights rather than unjust enrichment.
2. Emphasised concerned with law not discretion i.e. rejected normative approach to vindication e.g. Lord Browne-Wilkinson called it a case of hard-nosed property rights.
3. Initial proprietary base arose from the express trust which meant that the beneficiaries had equitable proprietary interest in money taken from the trust fund.
(iv) Tracing: needed to show that the money taken from the trust fund could be identified in the payment of the premiums and then in the death benefit. Accepted that the test was whether the value in the original property could be identified in the substitute property. The difficult part of the analysis related to whether it was possible to trace from the premiums into the death benefit. It was held that this was possible because the insurance policy was a unit-linked life policy under which the premiums were used to pay for the cost of life cover through the allocation of units. The policy would only lapse once the allocated units had been exhausted. Had the fourth and fifth premiums not been paid at all, the children would still have received the death benefit because the earlier premiums were still operating to ensure that the policy did not lapse at the time when the trustee committed suicide, but this need not have been the case and, as Lord Browne-Wilkinson recognised

“the beneficial ownership of the policy, and therefore the policy moneys, cannot depend on how events turn out. The rights of the parties in the policy, one way or another, were fixed when the relevant premiums were paid when the future was unknown.”

In other words, at the time of the payment of the premiums they could have kept the policy alive and that was sufficient to trace into the policy and from that to the death benefit.

(v) This proprietary interest could be vindicated by recognising a proportionate share in the death benefit e.g. 2/5 representing two of the five premiums.

(vi) There were no defences. The children were not bona fide purchasers since they had not provided any value.

(b) Lipkin Gorman (a firm) v Karpnale Ltd

The case concerned Cass, one of the partners of the claimant firm of solicitors, who had authority to draw on the firm’s client bank account on his signature alone. Cass was a compulsive gambler who stole over £300,000 from the account which he used to fund his gambling habit at the defendant casino. On discovering what had happened the firm sought to recover the stolen money from the club. The House of Lords held that the claim against the club for money had and received should succeed because the club had been unjustly enriched, although the liability to make restitution was reduced to the extent that the club had changed its position.

But it is difficult to identify all the elements of the unjust enrichment claim, notably the ground of restitution, a matter of particular difficulty because Cass had authority to draw money from the client account, so that the transaction was valid. Also the defendant’s enrichment was obtained at the expense of Cass and not the firm.

In fact the House of Lords accepted that the money which had been stolen belonged to the firm, so the proprietary nature of the claim was acknowledged, so it is consistent with the vindication of property rights principle. This was recognised in Armstrong DLW GmbH v Winnington Networks Ltd [2012] EWHC 10 (Ch), at [75]. But there are two difficulties with this analysis:
(i) Lord Goff emphasised that the defendant had received money which belonged to the firm at Common Law. He held that the firm did not have any proprietary rights in the money which was credited to the client bank account because Cass had authority to draw money from the account. However, he concluded that, since the bank owed the money to the firm, it owned a chose in action at law which it could trace into the cash drawn from the bank account by the solicitor and into the money received by the club. But this does not satisfactorily deal with the fact that the money drawn by Cass belonged to him because he had authority to draw on the account. True, his act of drawing the money constituted theft, because he had interfered with another’s property rights dishonestly, but this did not render the withdrawal to be unauthorised.

(ii) The money drawn from the client account might have been mixed with Cass’s own money when he gambled at the club, so that it would have lost its identity. This is because tracing at law is defeated by mixing in a fund. But counsel for the defendant had conceded that title to the money would not have been lost had it been mixed. This is a very odd concession. Had it not been made it is likely that the claim for restitution would have failed or, perhaps more likely, the House of Lords would have taken the opportunity to remove the distinction between tracing at law and in equity and concluded that it was possible to trace at law even through a mixture.

There was an alternative proprietary claim available to the firm, but this had not been pursued. Although the effect of Cass having authority to draw money meant that legal title to the money passed to him, his reason for doing so was such that he would have been acting in breach of fiduciary duty, so the money would be held on constructive trust for the firm, which would have been able to trace it in equity to the defendant. This would have been a lot easier to establish, since tracing in equity is not defeated by money becoming mixed. But counsel for the firm did not make such a claim, presumably because the personal claim would have been for what is now known as unconscionable receipt, which would have required proof of fault on the part of the defendant at the time of receipt and would have been difficult to establish on the facts.

(c) Armstrong DLW GmbH v Winnington Networks Ltd [2012] EWHC 10 (Ch)

The claimant sued the defendant in respect of 21,000 carbon emission allowances which had been transferred to the defendant as the result of a fraud perpetrated by the claimant by a third party. The claimant sought restitution founded on vindication of property rights, unjust enrichment and unconscionable receipt.

The essence of the fraud involved allowances being transferred from the claimant to the defendant and without the claimant’s authority and the defendant then paid the third party for them. The third party disappeared. The defendant sold the allowances to another party.

The judge (Stephen Morris QC) identified the key issue as being: ‘if B steals A’s property and sells it to C, does A have a legal claim against C for the property or its value, and if so, what is the legal basis of A’s claim and what defences, if any, does C have to such a claim?’

(i) It was acknowledged that if the property was goods there would be a claim in conversion. Since the claim related to intangible property such a claim was not available: OBG v Allan [2008] 1 AC 1.
(ii) It was recognised that carbon allowance is not a right, since it does not give the holder a right to emit CO2, but it creates a permission or an exemption from prohibition. It exists in electronic form only. It has economic value and there is an active market for trade of allowances. Consequently it is intangible property at common law.

(iii) A proprietary restitutionary claim is based on the notion that the claimant has retained title to the property or its substitute. It was recognised that the claimant may recover the property or the value of the property: [63].

(iv) The key claim here was a claim to vindicate the claimant’s common law proprietary rights in the allowances, which could be followed into the defendant’s hands, so there was no question of tracing of the allowances. Tracing did apply as regards a proprietary claim to the proceeds of sale.

(v) Such a claim lies at Common Law in respect of money and intangible property, such as a chose in action, even though there is no claim in conversion. The proprietary right can be vindicated by a personal claim, as recognised in Trustee of FC Jones v Jones [1997] Ch 159.

(vi) There was no claim in unjust enrichment. Since the defendant had given full value for the property the defendant could not be considered to have been enriched and the benefit had been provided indirectly (although see now Investment Trust Companies v The Commissioners for Her Majesty’s Revenue and Customs [2012] EWHC 458 (Ch) for recognition of unjust enrichment through indirect benefit, albeit on very particular facts).

(vii) Bona fide purchase is a defence to a proprietary restitutionary claim, even though the claim was founded on vindication of legal title. It was recognised that bona fide purchase is not a defence to a claim in unjust enrichment: at [105]

(viii) Doubts whether change of position is defence to a proprietary restitutionary claim.

(ix) The judge also considered the availability of a personal claim in Equity for unconscionable receipt. This turned on whether when property is stolen it can be considered to be held on trust by the thief. It was held, at [126] that the trust had to exist before the property was received by the defendant. The thief becomes a constructive trust by virtue of the principle recognised by Lord Browne-Wilkinson in Westdeutsche. Although this was not analysed in Armstrong, this is best justified on the basis that the thief holds possessory title on trust for the victim. See Virgo, The Principles of Equity and Trusts (OUP, 2012), pp. 298-299.

(x) But the trial judge assumed that the personal claims arose either in Equity, if the fraudster had become a constructive trustee of the allowances or at Common Law if legal title had been retained. But the two claims could be pursued concurrently.

(xi) On the facts it was found that the fraudster had become a constructive trustee of the allowances. This is consistent with the possessory analysis of title:

[276] “Whatever control the fraudster had at that time, I consider that (1) the control gave him some form of de facto legal title and (2) that this did not deprive Armstrong of its beneficial entitlement to those EUAs, and thus (3) all the while the EUAs remained held by the fraudster they were held on constructive trust for Armstrong.”

(xii) The subsequent receipt by the defendant was considered to be unconscionable, since relevant personnel were aware that there was a possibility that the fraudster did not have title to the allowances or authority to sell them and they consciously and deliberately closed their
eyes to that risk or possibility. In fact, inquiries were made but were not followed through by awaiting a response to the inquiries, so that the defendant was wilfully shutting its eyes to the obvious.

(xiii) If there was no constructive trust then the claimant would have a proprietary restitutionary claim at Common Law and the defendant would not have a defence of bona fide purchase.

4. A case study

Alan leases commercial premises from Brenda, which Alan sub-lets to Craig. Brenda demands that Alan owes her an additional £100,000 under the lease. Alan suspects that he is not liable to pay this money under the terms of the lease, but he decides to pay it anyway in the belief that he will be able to recover it if Brenda’s arguments about the construction of the lease are proved to be incorrect. Alan demands an additional £50,000 from Craig in order to part reimburse him for the money demanded from Brenda. Fearing that the lease will be terminated if he does not pay, Craig pays the money to Alan. It turns out that Brenda’s construction of the lease was incorrect and Alan was not liable to pay the money to Brenda.

Having received the £100,000 from Alan, Brenda invests £99,999 in shares which are now worth £200,000. Since she is now well-off she withdraws £10,000 from her bank account and uses the money to pay for a round the world cruise. She uses the remaining £1 to buy a National Lottery ticket, which wins a £1 million jackpot.

Advise Alan and Craig as to any claims they might have against Brenda.