

Multiple Tracing Claims in English Law

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A. Introduction

The English law of security and title-based finance is complex and uncertain in a number of areas.¹ One such area involves the rules governing claims to traceable proceeds arising from dispositions of assets subject to security. The law of tracing in England is not codified but has been developed over the centuries by the courts. Jurisdictions that adopted Personal Property Security Acts (PPSAs) sought to deal with this area expressly in the statutes.² However, even under these Acts various problems exist in relation to claims to traceable proceeds, as shown elsewhere in this volume.³ The purpose of this chapter is to discuss some of the uncertainties arising under English law. A recurring theme in the following account is that it is sometimes necessary to consider altering the interpretation of precedents to take into account the fact that the organisational concepts in law change as the legal system develops. This is particularly true in English law in which many concepts developed as part of a remedial system founded on forms of action but those concepts may not necessarily be suited to a system concerned with substantive rights. This chapter argues that the law governing cumulation of proprietary claims to traceable proceeds and original asset in the context of secured transactions is in a state of confusion, unnecessarily perpetuated in a more recent case⁴ and stemming from the use of old organisational concepts without due consideration of alternative ones.

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¹ See also Ch 13 D(iv).

² For example, Saskatchewan PPSA 1993 s 28; New Zealand PPSA 1999 ss 45–47; Australian PPSA 2009 ss 31–34; Security Interests (Jersey) Law 2012, ss 24–26.

³ Ch 5; Ch 6 D; Ch 8 F(iii).

⁴ *Buhr v Barclays Bank plc* [2001] EWCA Civ 1223.

Let us consider the following scenario. A debtor company borrows £5,000 from a lender, who takes a charge over the debtor company's van as security for the loan. The company is based in England and the charge is registered in Companies House. The debtor company sells the van to a third party without the secured creditor's consent. The market value of the van at the time of sale is £2,700 but the agreed price is £1,000. The price is deposited in an account in which there are no other funds, so the price is identifiable as traceable proceeds of the van.⁵ Can the secured creditor assert security in both the original asset and the traceable proceeds of misappropriated collateral? No statute in English law provides an answer to this question while the judicial guidance is sparse. An existing view seems to be that the secured creditor cannot claim both the traceable proceeds and the original asset because the remedies are inconsistent. The secured creditor is thought to adopt the unauthorised sale when he claims traceable proceeds and to reject the sale when he claims the original asset. Some judicial support for this reasoning can be gathered from the decision in *Buhr v Barclays Bank plc*.⁶ However, this point was considered only obiter. In the literature, while there are views that claims to traceable proceeds are inconsistent with parallel claims to the original asset, the basis for the inconsistency has not been explored. This is unfortunate because it results in an uncertainty of when a proprietary remedy is available. This chapter aims to fill this gap by identifying the relevant distinctions with a view to enhancing the rigour of theoretical analysis and certainty of practical application in this difficult area. In so doing, it makes a contribution to the law of tracing as might apply to secured transactions but it does not simplify it. The persisting complexity may well be seen as unwarranted in a modern system of secured transactions law.

One reason for the current complexity and uncertainty of the law governing proprietary claims contingent on tracing in English law is that a number of basic issues remain controversial while bearing on more detailed questions in this area. It is, therefore, useful to begin with an outline of the controversy surrounding the existing explanations of claims to traceable proceeds in English law in order to see if any analysis sheds light on whether claims to traceable proceeds and to the original asset

⁵ This is purposefully analogous to the first of the three tracing problems set out by Duggan in Ch 6 D(i).

⁶ *Buhr v Barclays Bank plc* [2001] EWCA Civ 1223.

can coexist or whether they are inconsistent. As we shall see, none of the explanations is determinative, which prompts an investigation into analogies that can be drawn with other areas where multiple claims are available. It is shown that the idea of the grantor of security becoming an agent of the creditor retrospectively, akin to the ratification of an unauthorised act by an agent, is an unsatisfactory explanation of claims to traceable proceeds in the context of security and that such an analogy should be abandoned. Consequently, this chapter shows first, that *Buhr* should not be treated as good authority for the basis of claims to traceable assets and secondly, following on from this, that it is at least open to debate that the secured creditor in English law may be able to assert cumulative claims to both proceeds and the original collateral so long as he does not recover excessively.

This chapter deals only with proprietary claims to traceable proceeds, excluding any personal claims. Also outside the scope of this chapter is the much-discussed basis of proprietary claims contingent on tracing, with the debate split primarily between the proponents of the unjust enrichment view⁷ and the vindication of property view.⁸ Consequently, discussion on the possible defences of third parties is also omitted.

⁷ P Birks, *Unjust Enrichment*, 2nd edn (Oxford, Oxford University Press, 2005) 35; P Birks, 'Receipt' in P Birks and A Pretto (eds), *Breach of Trust* (Oxford, Hart Publishing, 2002) 216–22; P Birks, 'On Taking Seriously the Difference between Tracing and Claiming' (1997) 11 *Trusts Law International* 2, 7–8; P Birks, 'On Establishing a Proprietary Base' (1995) 3 *Restitution Law Review* 83, 91–92; P Birks, 'Property, Unjust Enrichment and Tracing' (2001) 54 *Current Legal Problems* 231; A Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 *Law Quarterly Review* 412; A Burrows, *The Law of Restitution*, 3rd edn (Oxford, Oxford University Press, 2011) 185–89; R Chambers, 'Tracing and Unjust Enrichment' in J Neyers, M McInnes and S Pitel (eds), *Understanding Unjust Enrichment* (Oxford, Hart Publishing, 2004); L Smith, *The Law of Tracing* (Oxford, Oxford University Press, 1997) 300; but see L Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 *Texas Law Review* 2115, which represents a more nuanced approach leaning towards the vindication view; L Smith, 'Unravelling Proprietary Restitution' (2004) 40 *Canadian Business Law Journal* 317, 327–28.

⁸ G Virgo, *The Principles of the Law of Restitution*, 2nd edn (Oxford, Oxford University Press, 2006) 11–17; G Virgo, 'Vindicating Vindication: *Foskett v McKeown* Reviewed' in A Hudson (ed), *New Perspectives on Property Law, Obligations and Restitution* (London, Routledge-Cavendish, 2004); G Virgo, 'Restitution through the Looking Glass' in J Getzler (ed), *Rationalizing Property, Equity and Trusts* (London, Butterworths, 2003) 82; J Penner, 'Value, Property and Unjust Enrichment: Trusts of Traceable Proceeds' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford, Oxford University Press, 2009) 313–14; R Grantham and C Rickett, 'Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity' (1997) 2 *New Zealand Law Review* 623; R Grantham and C Rickett, 'Property and Unjust Enrichment' (1997) *New Zealand Law Review* 668, 675–84; P Millett, 'Proprietary Restitution' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Sydney, Lawbook Co, 2005) 314; P Millett, 'Property or Unjust Enrichment' in A Burrows and L Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford, Oxford University Press, 2006) 265, 273 (arguing that the law of tracing is itself part of the law of property); L Ho, Book Review of 'Mapping the Law: Essays in Memory of Peter Birks' (2007) *Trusts Law International* 110; W Swadling, 'Property and Unjust

B. Explanations of Claims to Traceable Proceeds

Claims contingent on tracing have attracted considerable attention, both judicial and academic, in the context of claims by owners with legal title and claims by trust beneficiaries claiming traceable proceeds of unauthorised dispositions by the trustee.⁹ To some extent, the principles and debates that developed in those contexts apply to security interests. One such area concerns methods of asserting interests in traceable proceeds, which we consider in turn to see whether any light is shed on the inconsistency of claims to traceable proceeds and to the original asset. The following account also serves to illustrate the complexity of this area of law. Since there is no authority in English law determining which analysis best explains the basis of proprietary claims to traceable proceeds in the context of security interests, any of these explanations could theoretically apply. However, if an analogy between security interests and trusts in the context of tracing holds, the explanation based on vindication would likely be preferred.¹⁰

(i) The Immediate Interest Explanation

The immediate interest explanation is the earliest way of analysing claims to traceable proceeds. The claimant is seen as having an immediate proprietary interest in traceable proceeds from the moment of substitution.¹¹ The reasoning behind this approach is that the substitute follows the nature of the original asset, so when the original asset is subject to a particular proprietary interest, no change of the state or form of the asset can divest it from that interest.¹² On this approach, the claimant may end up with an

Enrichment' in J Harris (ed), *Property Problems from Genes to Pension Funds* (London, Kluwer, 1997) 130; W Swadling, 'A Claim in Restitution?' (1996) 1 *Lloyd's Maritime and Commercial Law Quarterly* 63. See also L Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (2000) 116 *Law Quarterly Review* 412, 413; L Smith, 'Transfers' in P Birks and A Pretto (eds), *Breach of Trust* (Oxford, Hart Publishing, 2002) 121, fn 42.

⁹ The key work in this area is L Smith, *The Law of Tracing* (n 7).

¹⁰ *Foskett v McKeown* [2001] 1 AC 102 (HL) 127 (Millett LJ).

¹¹ *Cave v Cave* (1880) 15 Ch D 639. This model is also known as the exchange product theory.

¹² See *Taylor v Plumer* (1815) 3 M&S 562, 574 (Ellenborough LJ); *Scott v Surman* (1743) Willes 400, 404, 125 ER 1235, 1239 (Willes LJ), cited more recently in *Triffit Nurseries (a Firm) v Salads Etcetera Ltd (in administrative receivership)* [2001] BCC 457, 461 (Robert Walker LJ).

automatic proprietary interest in both traceable proceeds and the original asset followed in the hands of the third party so long as the third party has no defence to the chargee's claim. In the example considered at the start of this chapter, the secured creditor would be able to claim a lien in both the van in the hands of the buyer and the £1,000 deposited in the debtor's account.

This approach is no longer considered as a robust explanation of tracing claims because of the problems it gives rise to in the context of ownership claims.¹³ With each substitution the claimant comes to own a new asset. Conceptually, on this view, multiple claims are not inconsistent with one another given that the claimant merely claims what he already has a right to. However, with multiple substitutions the claims are geometrically multiplied. For example, a stolen car can be sold to a buyer, who knows about the theft while the thief buys a Rolex watch with the sale proceeds from a seller, who also knows about the theft. It may be that the claimant can claim the car, the Rolex and the sale proceeds. Recovering all of them simultaneously would likely exceed the value of the car originally misappropriated, which could be seen as a problem of excessive recovery.¹⁴ Another (more serious) objection to the immediate interest approach is that the claimant might become an owner of an asset without knowing about it or wanting it. Such ownership might attract liabilities to the owner, giving rise to the so-called 'involuntary ownership' problem.¹⁵ For example, a van stolen from the owner could be substituted for a lion or some illegal substances. The owner of the stolen car might not want to own a dangerous animal or drugs. This objection is not of primary concern in the context of security interests to the extent that a secured creditor does not normally bear the liabilities in relation to the asset. However, the weakness of this explanation in the context of ownership might undermine its use in the context of security interests in English law at present.¹⁶

¹³ For objections to the exchange theory see S Worthington, 'Justifying Claims to Secondary Profits' in EJM Schrage, *Unjust Enrichment and the Law of Contract* (The Hague, Kluwer Law International, 2001) 451, 462.

¹⁴ A similar problem of excessive recovery is raised later in relation to security interests, see Section E.

¹⁵ See *Dexter Motors Ltd v Mitcalfe* [1938] NZLR 804 (CA).

¹⁶ It does not necessarily mean that English law would be precluded from adopting the immediate interest explanation in the context of security interests in the future. It seems that such an approach underlies PPSAs (n 2) which provide that security interests automatically extend to proceeds. See, for example, Ch 6 D.

(ii) The Explanation Based on Power *In Rem*

The problems raised by the immediate interest approach can be resolved in two ways.¹⁷ One is to say that there is no interest in traceable proceeds until the claimant makes an informed decision to assert the interest. This would be done by way of exercising the power *in rem*¹⁸ to vest the interest. This power is similar to the power to re-vest title under a voidable contract.¹⁹ Another is to say that the claimant has an immediate interest subject to a power to release title (election), discussed in (iii) below. On the ‘power to re-vest’ view, the claimant would not acquire an interest in the traceable proceeds until the power was exercised. It is not clear when the exercise of power would occur: when the court adjudicates,²⁰ when the defendant is informed of the duty towards the claimant²¹ or some other time. Whenever the power is exercised, it would not of itself be inconsistent with a parallel claim to the original asset, whether the original asset were claimed using the same (power *in rem*) approach or was based on an immediate interest explanation.

One problem with this approach is the weak protection it bestows upon the claimant prior to the exercise of the power. If a third party were to acquire an interest in the traceable proceeds prior to the exercise of the power, the claimant’s interest would be defeated by the time the power was exercised.²² In addition, in the context of security interests, it is not clear how the interest based on a power *in rem* arises. The interest, which is based on a unilateral act of the creditor, would clearly not arise

¹⁷ See Smith, *The Law of Tracing* (n 7) 323–26.

¹⁸ P Birks, *An Introduction to the Law of Unjust Enrichment*, revised edn (Oxford, Clarendon Press, 1989) 393–94; P Birks, ‘Mixing and Tracing’ (1992) 45 *Current Legal Problems* 69; P Birks, ‘Overview: Tracing, Claiming and Defences’ in P Birks (ed), *Laundering and Tracing* (Oxford, Clarendon Press, 1995) 307–11; P Birks, ‘Property and Unjust Enrichment: Categorical Truths’ (1997) *New Zealand Law Review* 623, 629, 662–63.

¹⁹ D Fox, ‘Overreaching’ in Birks and Pretto (eds) (n 7) 102; D Sheehan, *The Principles of Personal Property Law* (Oxford, Hart Publishing, 2011) 252. See also B Häcker, ‘Proprietary Restitution after Impaired Consent Transfers: A Generalised Power Model’ (2009) 68 *Cambridge Law Journal* 324 (arguing that proprietary restitution after impaired consent transfers should always take the form of a power to vest and not an immediate interest).

²⁰ Smith, *The Law of Tracing* (n 7) 323.

²¹ B McFarlane *The Structure of Property Law* (Oxford, Hart Publishing, 2008) 325. This would make the power a purely factual power.

²² *Re French’s Estate* (1887) 21 LR Ir 83 (mere equity). The power would have a proprietary effect if it could be exercised by vesting the title in the proceeds retrospectively, as suggested by Bogert, GG Bogert and GT Bogert, *The Law of Trusts and Trustees*, 2nd revised edn (West Publishing Co, 1978) § 472, cited in Smith, *The Law of Tracing* (n 7) 324–25 fn 128.

consensually. Since it may arise even against the will of the owner of the assets, it cannot be argued, for instance, that the exercise of the power to vest an interest gives rise to a presumption that a charge is created by the chargor.²³ In any case it would be very unlikely that a fresh registration in Companies House would be necessary to preserve the effectiveness of the security if the grantor were a company. The current wording of the Companies Act 2006 indicates that a charge is registrable where it is created by a company²⁴ and the word ‘create’ does not ordinarily include a situation where a company is liable to have its assets encumbered with a charge because the creditor exercised a power to create such an interest.²⁵ Given that the new interest arises upon the exercise of a power by the creditor, it is difficult to see that it would arise by operation of law, at least not in a remedial sense.²⁶ It could be described as arising by operation of law in a sense analogous to the constructive trust in English law (ie a non-remedial constructive trust).

(iii) The Explanation Based on Election

Election is in some ways a halfway house between the immediate interest explanation and the power *in rem* explanation. The claimant is seen as having an immediate and vested property right in traceable proceeds of the original property subject to the requirement of election.²⁷ Objections to this model, voiced by a proponent of the power *in rem* explanation, Professor Peter Birks, included an observation²⁸ that the vested interest model, albeit subject to election, is inconsistent with the choice that the claimant owner typically has between an equitable ownership or a lien when asserting an interest in traceable

²³ See *Re Wallis & Simmonds (Builders) Ltd* [1974] 1 All ER 561, 574 (Templeman J).

²⁴ Companies Act 2006, s 859H.

²⁵ The terms ‘power’ and ‘liability’ are used in the Hohfeldian sense as jural correlatives. See WN Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Legal Reasoning’ (1913) 23 *Yale Law Journal* 16, 44–54.

²⁶ In any case remedial proprietary interests are not currently recognised in English law and given the opposition to them, they are not likely to be recognised in the future, see H Beale, M Bridge, L Gullifer and E Lomnicka, *The Law of Security and Title-based Financing*, 2nd edn (Oxford, Oxford University Press 2102) para 6.163 citing R Goode, ‘Ownership and Obligation in Commercial Transactions’ (1987) 103 *Law Quarterly Review* 433; G McCormack, ‘The Remedial Constructive Trusts and Commercial Transactions’ (1996) 17 *Company Lawyer* 3; P Birks, ‘The End of the Remedial Constructive Trust’ (1998) 12 *Trust Law International* 202.

²⁷ Smith, *The Law of Tracing* (n 7) 322–24, 358–61.

²⁸ Birks, ‘Overview’ (n 18) 309–10.

proceeds.²⁹ One response to this is that the claimant from the moment of substitution has multiple vested interests in proceeds: equitable ownership and a lien and by exercising the power releases one of them. Alternatively, the choice between ownership and a lien could be seen as a new (secondary) election that arises after the claimant exercised the power to release the title to other assets. However, this reasoning makes this secondary election look like a choice between remedies, which would be problematic because equitable ownership cannot be asserted as a remedy in English law.³⁰ Thus, the former is preferable. All vested interests are subject to election.

Conceptually, election works like a power to release title (retroactively, from the moment of the unauthorised disposition)³¹ but with simultaneous acquisition of full rights and liabilities at the point of election in relation to the asset, which is not released. This avoids the problem of involuntary ownership, so that, for example, if land constitutes traceable proceeds, the claimant does not need to pay stamp duty until, and if, he elects ownership.³²

On the election model, the claimant chooses between claiming traceable proceeds or the original asset. What is not clear is whether the claimant exercising the power *can* release or *must* release her interest in the original asset in order to acquire the full interest in traceable proceeds. Smith seems cautiously to suggest that he must so release.³³ However, the authorities for the claimant's right to elect

²⁹ As to availability of the choice (also referred to as election) see *In re Hallett's Estate* (1880) 13 Ch D 696 (CA) 709 (Sir George Jessel MR): 'the beneficial owner has a right to elect either to take the property purchased, or to hold it as a security for the amount of the trust money laid out in the purchase'; *Foskett* (n 10) 130–31 (Millet LJ).

³⁰ See, eg, *Williams v National Bank of Nigeria* [2014] UKSC 10 [9] (Sumption JSC); A Burrows, *The Law of Restitution*, 3rd edn (Oxford, Oxford University Press, 2011) 193–94; but cf W Swadling, 'The Fiction of Constructive Trust' (2011) 64 *Current Legal Problems* 399 (arguing that constructive trusts should be treated as informal express trusts). The traditional English rejection of remedial constructive trust is often contrasted with other jurisdictions which recognise remedial constructive trusts, eg in the US: *Restatement of Restitution: Quasi Contracts and Constructive Trusts* (1937) para 160 and *Restatement (Third) of Restitution and Unjust Enrichment* (2011) para 55 comment b, and Canada (*Rawluk v Rawluk* [1990] 1 SCR 70).

³¹ It is a power in the Hohfeldian sense, as noted by Smith, *The Law of Tracing* (n 7) 324 fn 124.

³² The claimant may of course prefer to elect for a lien, precisely for this reason, as seen in *Fern Advisers Ltd v Burford* [2014] EWHC 762 (QB) at [19] (Mackie J).

³³ Smith, *The Law of Tracing* (n 7) 324.

are inconclusive on this point,³⁴ so it should be treated as open to question. Even if the claimant must release the interest in the original asset and even if this is due to an inconsistency between claims to the original asset and the proceeds, it is far from clear what the rationale for such a proposition would be.

C. How to Determine Whether Claims to an Asset and its Traceable Proceeds Are Inconsistent

We saw above that none of the explanations of proprietary claims to traceable proceeds are determinative of whether claims to the misappropriated asset and to traceable proceeds of the misappropriation are consistent.

The Judicial and Academic Views on Inconsistency of Claims in the Law of Security Interests

There is some judicial and academic support for the argument that the secured creditor cannot successfully claim both the proceeds and the original asset following an unauthorised disposition. A statement to that effect was made by Professor Sir Roy Goode in *Legal Problems of Credit and Security*.³⁵ This was based on a view that claims to traceable proceeds of an unauthorised disposition are based on an implied adoption of the wrongful act and one cannot simultaneously adopt a wrongful act and make a claim based on the wrongful adoption.³⁶ While the latest edition generally embraced

³⁴ *Foskett* (n 10) 127 (Millet LJ): ‘Where one asset is exchanged for another, a claimant can elect whether to follow the original asset into the hands of the new owner or to trace its value into the new asset in the hands of the same owner. In practice his choice is often dictated by the circumstances’. Smith, *The Law of Tracing* (n 7) 324 also cites *Marsh v Keating* 131 ER 1094 (HL), (1834) 1 Bing NC 198, which seems to be authority for the point that a claim can be made to traceable proceeds even if the original asset was not lost and that the interest in the proceeds exists from the moment of substitution. It does not seem to be an authority for the point that once proceeds are claimed, the original asset cannot be.

³⁵ R Goode, *Legal Problems of Credit and Security*, 1st edn (London, Sweet & Maxwell, 1988) 16.

³⁶ *cf* the use of the language of adoption in the parallel context of trusts, *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), [2006] FSR 17 at [1514]–[1515], [1518] (Lewison J); see also J Penner, ‘Duty and Liability in Respect of Funds’ in J Lowry and L Mistelis (eds), *Commercial Law: Perspectives and Practice* (London, Lexis Nexis Butterworths, 2006) 207, 217 paras 12.26–12.27.

Professor Goode's formulation, the reference to adoption of a wrongful sale was removed.³⁷

Professor Goode's views expressed in the first edition of *Legal Problems of Credit and Security* and in the 1995 edition of *Commercial Law*³⁸ were considered in the case of *Buhr v Barclays Bank*.³⁹ Although it concerned charges over unregistered land, the principles enunciated in this case are of wider application.⁴⁰ The case was factually straightforward. Mr and Mrs Buhr executed a charge by way of legal mortgage in favour of Barclays Bank over their farm, which was unregistered land.⁴¹ This was a second charge, which Barclays sought to protect as a puisne mortgage by entry of a Class C1 land charge under the Land Charges Act 1972, but the entry was in the wrong name, which meant the land charge was not registered and was void against a purchaser.⁴² The Buhrs later sold the farm to a third party, who discharged the first mortgagee, leaving a balance of £27,500 in the solicitors' account.⁴³ Mr Buhr subsequently went bankrupt. Barclays Bank sought to affirm that it had a proprietary interest, enforceable against the purchaser, in the traceable proceeds of sale and succeeded at the High Court and later at the Court of Appeal.

In relation to asserting claims to both proceeds and the original collateral, it is reasonably clear that Judge Weeks QC in the first instance agreed with Professor Sir Roy Goode that the secured creditor cannot have both.⁴⁴ Lady Arden in the Court of Appeal was less unequivocal, saying only that it was

³⁷ L Gullifer (ed), *Goode on Legal Problems of Credit and Security*, 5th edn (London, Sweet & Maxwell, 2013) para 1-66.

³⁸ R Goode, *Commercial Law*, 2nd edn (London, Butterworths, 1995) 667–88.

³⁹ [2001] EWCA Civ 1223.

⁴⁰ *ibid* at [37] (noting a parallel between the consequences of non-registration of land charges over unregistered land and charges granted over any asset by a company that are registrable in Companies House).

⁴¹ It was decided before the Land Registration Act 2002 introduced compulsory registration of land upon disposition. If analogous facts came before the court today, the grant of a legal charge would trigger the requirement to register.

⁴² Land Charges Act 1972 s 4(5).

⁴³ One curious aspect of this case is that factually it appears unclear whether Barclays consented to the sale although it is clear that the courts found the sale unauthorised. See *Buhr* (n 4) at [45] and [49] (Arden LJ). But *cf* L McMurtry, 'The Extent of Security: Sale, Substitutions and Subsequent Mortgages' [2002] *Conveyancer and Property Lawyer* 407, 411.

⁴⁴ *Buhr* (n 4) at [11] and [13].

not true to say that the secured creditor had a right to elect between proceeds and the original asset in every case, giving an example of authorised dispositions in which the secured creditor has no right to claim proceeds.⁴⁵ Importantly, Her Ladyship did not say that, where the sale was unauthorised, the secured creditor had to elect and release title to the asset it did not choose. In any case, any such comment by Lady Arden would have been (and in the case of Judge Weeks QC was) obiter. Barclays Bank's claim to traceable proceeds was the only available claim on the facts in the absence of a duly registered land charge and the purchaser taking free of it.

This does not fully resolve the issue of inconsistency of claims to traceable proceeds and the original asset because it is not clear why adoption should be the basis for claims to traceable proceeds. However, this points us to a method which could be used to determine the issue. We need to look for analogies with scenarios where multiple claims to different assets are made. There is a strong sense that in *Buhr* the analogy drawn was with that of a principal adopting an unauthorised act of an agent. But other analogies could work too. Smith, for example, suggested an analogy with the way in which proprietary rights are protected by personal rights.⁴⁶ If we explore the possible analogies in more detail, we shall be able to shed some light on the inconsistency of claims to the asset and its proceeds.

(ii) Where to Search: the Alternative and Cumulative Remedies Elsewhere in Law

Drawing analogies can be problematic because there may be scenarios that more closely resemble one with which a parallel is to be drawn. One way to address this risk is to contrast a range of similar scenarios. So, on the one hand, we have a secured creditor seeking to claim an asset that was wrongfully sold to a third party and traceable proceeds of this unauthorised disposition (in the hands of the wrongdoer or, perhaps, passed to a third party). On the other, we have three possible scenarios with which to draw an analogy:

⁴⁵ *ibid* at [45]–[46].

⁴⁶ Smith, *The Law of Tracing* (n 7) 324.

(1) A contractual party seeks to avoid a contract voidable for fraud or to affirm it, or a principal seeks to ratify an unauthorised act done on his behalf or to disaffirm it and treat the person who acted as accountable.

(2) An owner, whose stolen goods were sold on by the thief to a third party, seeks to recover from the thief sale proceeds as gain-based damages (in the common law form of money had and received or equity's form of account of profits) and compensatory damages for the tort of conversion⁴⁷ to compensate the loss suffered, measured with reference to the value of the misappropriated goods at the time of conversion.⁴⁸

(3) As in (2) but the owner seeks to sue not only the thief, but also the buyer for damages for conversion.

Much of the law applying to the availability and recoverability of remedies that underlies these scenarios was clarified in the House of Lords' decision in *United Australia Ltd v Barclays Bank*.⁴⁹ Prior to this decision all three scenarios would have been viewed as examples of substantially inconsistent remedies. The inconsistency is clear in the first scenario. In relation to a contract voidable for fraud, the claimant cannot simultaneously elect to bring the parties' respective obligations to an end and to leave the contract effective.⁵⁰ Similarly, where a contract is concluded by an agent without any authority from the principal, the principal cannot choose to continue not to be bound by the contract and at the same time to ratify it and become bound. The inconsistency is less obvious in (2) and (3). Early cases employed the doctrine of waiver of tort to demonstrate the substantial inconsistency.⁵¹ According to the doctrine, when the claimant sued for sale proceeds he was seen to have adopted the wrongdoer's acts as those of an agent and could not sue for damages for conversion. The decision in *United Australia* made it clear that the owner may pursue claims for both compensatory damages and gain-based damages together as alternative remedies and need not elect until the judgment is made (which corresponds to

⁴⁷ English law does not know a common law action of vindication of misappropriated assets as Civilian jurisdictions do. An owner is left with conversion, ie a claim that the defendant interfered with the claimant's right to immediate possession of the asset, the typical remedy being damages, Torts (Interference with Goods) Act 1977 s 3.

⁴⁸ *Caxton Publishing Co v Sutherland Publishing Co* [1939] AC 178 (HL); *BBMM Finance (Hong Kong) v Eda Holdings* [1990] 1 WLR 409 (PC).

⁴⁹ *United Australia Ltd v Barclays Bank* [1941] AC 1 (HL).

⁵⁰ *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525, 550 (Sellers LJ): 'The disaffirmation or election to avoid a contract changes the relationship of the parties and brings their respective obligations to an end, whereas an affirmation leaves the contract effective though subject to a claim for damages for its breach'.

⁵¹ See *Smith v Baker* (1873) LR 8 CP 350, 355 (Bovill CJ), followed by Lord Smith in *Rice v Reed* [1900] 1 QB 54 (CA).

scenario (2)).⁵² The House of Lords rejected the doctrine of waiver because it imported a fiction that the claimant adopts an act of a wrongdoer where in fact he is not adopting but protesting;⁵³ in fact, the action for money had and received ‘lies only because the acquisition of the defendant is wrongful and there is thus an obligation to make restitution’.⁵⁴ By recovering sale proceeds from the thief, the claimant has merely waived the right to recover another remedy—damages—from the thief.⁵⁵ At the very least *United Australia* makes the explanation of adoption of a wrongful act ‘a redundant embellishment’⁵⁶ to the explanation of recoverability of alternative remedies.

Another issue clarified in *United Australia* is that by recovering sale proceeds from the wrongdoer *in full* the claimant elects not to recover compensatory damages for conversion of the same goods from the same wrongdoer. One question, which was not answered in *United Australia* and which merits consideration before we proceed to the next part of the chapter, is on what basis the claimant can obtain judgment for only one remedy if more claims can be pursued against one wrongdoer. In the Privy Council decision *Tang Man Sit v Capacious Investments Ltd*, Lord Nicholls suggested that judgments for money had and received (gain-based damages) and compensatory damages were ‘alternative and inconsistent remedies’⁵⁷ but did not explain what he meant by ‘inconsistent’. Although the authorities do not offer extensive explanations of inconsistency there is some useful analysis in the literature.⁵⁸

One approach is that the remedies are inconsistent because they have different aims (one to

⁵² *United Australia* (n 49) 21 (Viscount Simon LC) and 30 (Atkin LJ), approving the dicta of Lord Russell CJ and Vaughan Williams LJ in *Rice v Reed* [1900] 1 QB 54 (CA) 63 (Lord Russell CJ) and 67 (Vaughan Williams LJ) and disapproving the dictum of Smith LJ in that case at 65–66 that to bring an action for money had and received waives the tort. See also *Halifax Building Society v Thomas* [1996] Ch 217.

⁵³ *United Australia* (n 49) 29 (Atkin LJ), 34 (Romer LJ).

⁵⁴ *ibid* 18 (Viscount Simon LC).

⁵⁵ See *Hunter v Prinsep* (1808) 10 East 378, 391, 103 ER 818, 824 (Lord Ellenborough CJ) cited with approval in *United Australia* (n 49) 32 (Atkin LJ) and 34 (Romer LJ).

⁵⁶ S Watterson, ‘An Account of Profits or Damages? The History of Orthodoxy’ (2004) 24 *Oxford Journal of Legal Studies* 471, 472.

⁵⁷ *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 (PC) 521, 522, 525 (Nicholls LJ).

⁵⁸ S Watterson, ‘Alternative and Cumulative Remedies: What is the Difference?’ (2003) 11 *Restitution Law Review* 7.

compensate the claimant for losses, the other to deprive the defendant of the benefit), which the law should not pursue simultaneously.⁵⁹ This approach has rightly been criticised in the literature;⁶⁰ the mere fact that the aims are different does not mean, without more, that the aims are mutually exclusive. Another and preferable view is that the term ‘inconsistent’ does not add anything to the remedies being alternative and the reason they are alternative is to ensure the claimant does not make a double recovery,⁶¹ ie both ‘full damages and complete restitution’.⁶² For that reason the claimant has to elect when the judgment is entered. The question that arises is whether the claimant is debarred from recovering *some* compensatory damages if he recovered *some* restitution. The authorities are clear that the claimant is not precluded from suing third parties, for example third- and fourth-party buyers from the thief.⁶³ There are suggestions in *United Australia* that the claimant may sue third parties (in tort or for money had and received) and recover from them even when the claimant already recovered in full from the original wrongdoer.⁶⁴ As against one defendant, there are some arguments in favour of not precluding the claimant from recovering partially under both remedies from the same defendant. For one thing, the ability to recover under both remedies partially is not necessarily inconsistent with the principle of prevention of double recovery. Further, there are some authorities that at least admit the

⁵⁹ *Redrow Homes Ltd v Betts Bros Plc* [1997] FSR 828 (CtSn, IH) 831 (Cullen LJ) (suggesting that damages and an account of profits are inherently inconsistent remedies for copyright infringement because they are different); *Devenish Nutrition v Sanofi-Aventis* [2007] EWHC 2394 at [110]–[111] (Lewison J) upheld by CA [2008] EWCA Civ 1086 at [103] (Arden LJ).

⁶⁰ Watterson (n 58) 15; D Sheehan, ‘Competition Law Meets Restitution for Wrongs. Case Comment’ (2009) 125 *Law Quarterly Review* 222, 224–25 (critique of *Devenish* (n 58)).

⁶¹ *Watson Laidlaw & Co Ltd v Potts, Cassells & Williamson* (1914) 31 RPC 104 (HL) 119–20 (Shaw LJ); *Mahesan v Malaysia Government Officers’ Co-operative Housing Society* [1979] AC 1 (HL) 28 (Diplock LJ). See also P Birks, ‘Inconsistency between Compensation and Restitution’ (1996) 112 *Law Quarterly Review* 375, 378. This explanation is seen as insufficient, see Watterson (n 58) 17.

⁶² See G Treitel, *Remedies for Breach of Contract* (Oxford, Oxford University Press, 1988) 98–100, cited in P Birks, ‘Inconsistency between Compensation and Restitution’ (1996) 112 *Law Quarterly Review* 375, 378.

⁶³ *Burn v Morris* (1834) 2 Cr & M 579, 149 ER 891 (A lost a £20 banknote, which B found and took to C to change. Subsequently, B gave A £7. A sought to recover damages in tort (trover) from C and succeeded); *Davies v Petrie* [1906] 2 KB 786 (CA) (claims by the trustee in bankruptcy against third parties for debts are not altered even if the assignee received part payment and accounted for it to the trustee in bankruptcy).

⁶⁴ *United Australia* (n 49) 31 (Atkin LJ) and 50–51, 54 (Porter LJ) (indicating that the problem was posed but not solved by Lord Haldane in *John v Dodwell* [1918] AC 563 (PC) 570).

possibility of this rule. It is hinted in *Lythgoe v Vernon*⁶⁵ that the claimant need not be prevented from recovering under both remedies against the same wrongdoer. In that case the owner, whose hops were wrongfully sold, recovered part of the proceeds of sale. He subsequently sought to sue the wrongdoer in tort for damages for the rest. Although the claimant was precluded from suing in tort, this was on the basis that he accepted part of the proceeds in *full* satisfaction of the recovery of proceeds of sale.⁶⁶ Counsel for the defendant admitted that if the proceeds had not been taken in full satisfaction of the obligation to pay the entire sum, the claimant would have been able to sue the same wrongdoer in tort.⁶⁷ Stronger support can be found in *United Australia*, where Lord Porter held:

[Some cases including *Lythgoe v Vernon*] are instances of a plaintiff electing to receive something in satisfaction of his claim, and thereby precluding himself from denying that he has obtained his chosen remedy. On the other hand, where the proceeds are received by the plaintiff but not accepted in full discharge, he may still sue for the original wrong.⁶⁸

While Lord Porter goes on to illustrate the principle with authorities that involved cumulation of restitution against the wrongdoer and damages against third parties,⁶⁹ which strengthens further the support for cumulation of remedies against multiple defendants, it might cast a shadow on the strength of authority of these obiter dicta regarding recoverability against the same wrongdoer. However, it seems clear that Lord Porter had in mind recovery of damages against the same wrongdoer as he refers to ‘the original wrong’, not that of a third party, and talks earlier in the same paragraph about recovering against the same wrongdoer.⁷⁰ While cases are not decisive, there is at the very least a suggestion that the claimant who recovered under one remedy in partial satisfaction is not precluded from recovering under the other remedy for the balance.

In addition, there are arguments in the literature that the doctrine of election should not be seen as logically inevitable where remedies are alternative. Watterson argues that the true mischief of

⁶⁵ *Lythgoe v Vernon* (1860) 5 H & N 180, 157 ER 1148.

⁶⁶ See also *Brewer v Sparrow* (1827) 7 B & C 310, 313, 108 ER 739, 740 (Holroyd J); *United Australia* (n 48) 43 (Porter LJ).

⁶⁷ *Lythgoe* (n 65) 181–82.

⁶⁸ *United Australia* (n 49) 43 (Porter LJ), see also further 48 and 49 (Porter LJ).

⁶⁹ *Burn v Morris* (n 63); *Davies v Petrie* (n 62).

⁷⁰ See further *United Australia* (n 48) 49 (Porter LJ).

cumulations of compensatory and gain-based damages is to prevent excessive recovery for the same wrongful conduct by achieving the minimum necessary to fulfil the aims of each remedy, so that a recovery of gain-based damages would reduce the claimant's losses and, conversely, a recovery of compensatory damages would reduce the wrongdoer's wrongful enrichment.⁷¹ On that view, election is not a logical necessity⁷² but one of the techniques of avoiding excessive remedial cumulations, the other being a judgment for both remedies with a non-discretionary⁷³ judicial adjustment to the amount of the award, which could be based, for example, on a rule that the award of a sum equal to the higher of the full compensatory damages or the full gain-based damages for the same wrongful conduct.

The argument that the mischief of the rule against cumulation of alternative remedies is to prevent excessive recovery is a welcome refinement of the established view that the rule's rationale is to prevent double recovery; while excessive recovery includes double recovery, it allows for inclusion of more nuanced scenarios. As to the techniques of preventing excessive cumulations, there seems no practical advantage to choosing judicial adjustment over a claimant's election⁷⁴ and there would probably have to be a compelling reason for abandoning the doctrine of election as a deep-rooted technique of preventing double (or excessive) recovery without a good reason. The difficulty that arises is to determine in which circumstances cumulation of remedies would be excessive.⁷⁵

Returning to the three groups of scenarios outlined above, the election by a contractual party seeking to avoid a contract or by a principal seeking to ratify an agent's unauthorised act (scenario (1)) stands in a stark contrast with the election in scenarios (2) and (3). The causes of action in scenario (1) are mutually exclusive and so the rights and remedies are inherently inconsistent,⁷⁶ and thus when the

⁷¹ Watterson (n 58) 17–19.

⁷² *ibid* 21–23.

⁷³ Reliance on judicial discretion in awarding remedies would have been open to objection, see P Birks, 'Three Kinds of Objection to Discretionary Remedialism' (2000) 29 *University of Western Australia Law Review* 1, noted by Watterson (n 58) 24.

⁷⁴ Watterson himself so admits, see Watterson (n 58) 23.

⁷⁵ This is discussed in Section E in the context of security.

⁷⁶ *United Australia* (n 49) 4 (as argued by the counsel—Denning KC, as he then was).

claimant is entitled to one of two inconsistent rights and with full knowledge does an act unequivocally showing which he has chosen, he cannot afterwards pursue the other.⁷⁷ By contrast, in scenarios (2) and (3) the remedies are based on different causes of action that can be concurrent, so claims for alternative remedies can be pursued together and no question of election arises until either claim has been brought to judgment and, we can add based on the discussion above, unless the recovery would be excessive.⁷⁸ In what follows we examine the possible analogies between the scenarios of recovering under one or more available remedies discussed in this section and claims to traceable proceeds of unauthorised dispositions of collateral..

D. An Analogy to Adoption of Unauthorised Act of an Agent by a Principal

While there is some support for the analogy between an agent and a grantor of security in *Buhr*, there are also important objections to maintaining that parallel.

(i) Support in Authority for the Analogy

In *Buhr v Barclays Bank* Lady Arden, with whom Lord Woolf CJ and Lord Tuckey concurred, held:

The Buhrs' disposition was unauthorised. They purported to sell with full title guarantee and thus free from Barclay's charge. Barclays (if indeed it has already done so by commencing these proceedings) could adopt this transaction and thus retrospectively make the Buhrs its agent.⁷⁹

Lady Arden did not explain why the secured creditor had a power to adopt the unauthorised transaction. The reference to retrospective agency suggests that the idea of adoption was used as a parallel with the doctrine of ratification of an act performed without authority by an agent (A) in the name of the

⁷⁷ See *ibid* 30 (Atkin LJ).

⁷⁸ See *ibid*.

⁷⁹ *Buhr* (n 4) at [49].

principal (P).⁸⁰ If the parallel between the chargor and the agent holds, the position of the chargor claiming traceable proceeds would be similar to a position of the principal ratifying an unauthorised disposition: the secured creditor could either ratify and claim proceeds or do nothing and treat the transaction as unauthorised, in which case he would continue to have rights in the original asset. Suing simultaneously for remedies in the original asset and in its proceeds would be inconsistent.

(ii) Critique of the Analogy

(a) Objections of a General Nature

The use of ratification to explain proprietary claims to traceable proceeds in general law is not new. There are some early authorities, in which the right to recover proceeds was based on the rule that a wrongdoer, like an agent, had to account for money had and received when he sold property on his principal's behalf.⁸¹ The claimant could, however, waive or ratify the wrongful disposal and, in so doing, claim the original asset from the wrongdoer and, where possible, the third party. This line of reasoning was based on the doctrine of waiver of tort, which we saw was rejected in *United Australia Ltd*. An action to recover proceeds of an unauthorised act is a method of obtaining a remedy, not an expression of a mental state of forgiveness of an unauthorised act.⁸² In other words, there is *no intention* on the part of the claimant to *adopt* the unauthorised transaction, whether expressly or impliedly. Yet, it is important to explore in more detail whether an analogy can nevertheless be drawn between the agent and the chargor.

(b) Specific Objections to the Analogy

A parallel between an agent and the chargor works to a certain extent: both the agent and the chargor can act with or without authority given by the other contractual party. For example, just as an agent can

⁸⁰ R Munday, *Agency. Law and Principles* (Oxford, Oxford University Press, 2010) para 6.01.

⁸¹ *Lamine v Dorrell* (1705) 2 Ld Raym 1216, 1217, 92 ER 303, 303–04 (Holt CJ).

⁸² See also D Fox, 'Common Law Claims to Substituted Assets' (1999) 7 *Restitution Law Review* 55, 56 (referring to the right to proceeds as originating in 'a fictitious extension of the doctrine of rectification and in the general rule that an agent had to account for the money he received when he sold property on his principal's behalf').

contract on behalf of the creditor, the chargor has the power to sell the asset subject to security in a way that may affect the legal position of the chargee. But the parallel does not go very far. First, ratification is only available where the agent acted on behalf of the principal, which is considered from the perspective of the third party with whom the purported agent deals, not from the perspective of the agent or the principal.⁸³ When the chargor sells the asset subject to a charge in an unauthorised way, his action is anything but on behalf of the chargee. Secondly, when the principal chooses not to ratify, he is not bound by the agent's act. When the secured creditor elects not to 'ratify', he is still bound by the consequences of the chargor's act: the third party acquired the asset subject to the charge and may or may not have a defence of a bona fide purchaser for value without notice, which is a matter of an exception to the *nemo dat* principle. The chargor's disposition of the asset subject to security will, at the very least, amount to the change of the person of the chargor, but it may, in some cases, lead to the destruction of the charge over the asset where the third party buyer will be able to raise an exception to the *nemo dat* rule effectively. Thirdly, it is arguable that even if the above objections to ratification can be overcome, the explanation of claims to proceeds based on ratification is inconsistent with the existing rules governing dispositions under fixed and floating charges in English law. This requires explanation.

A fixed charge requires the chargor to be restricted in dealing with the collateral free of security without the chargee's consent.⁸⁴ Consequently, the holder of a fixed charge acquires an interest in the proceeds of authorised dispositions where he consented to the specific disposition on the basis that he would acquire an interest in the proceeds. A blanket consent to disposal of charged assets given in advance is unlikely to be consistent with a fixed charge because such consent may be interpreted as giving the chargor a right to dispose.⁸⁵ By the same token, if an agreement provided that a consent were to be given *after* dispositions of charged assets, the charge created would be unlikely to be fixed.

⁸³ *Keighley Maxstead & Co v Durant* [1901] AC 240 (HL). Note that the issue of ratification of an act by an undisclosed principal stimulates some academic interest.

⁸⁴ See *Re Spectrum Plus Ltd (in liquidation)* [2005] UKHL 41, [2005] 2 AC 680. See also the discussion in Beale et al (n 26) paras 6.106–6.112; S Worthington and I Mitchkovska, 'Floating Charges: The Current State of Play' (2008) 9 *Journal of International Banking and Financial Law* 467.

⁸⁵ Beale et al (n 26) para 6.111.

Conversely, where the chargor disposes of the asset without the chargee's prior consent, there is no reason why the chargee should not be able to provide a retrospective consent. However, it is far from clear that such retrospective consent would (or even could) operate as ratification. The situation is straightforward if the chargor did not acquire any proceeds in the unauthorised disposition. By providing retrospective consent, the chargee adopts the withdrawal of the asset from security, making it authorised *ab initio*, just as adoption of an unauthorised act by the principal makes it authorised *ab initio*.⁸⁶

It is more difficult to see how ratification would work if the unauthorised disposition by the chargor yielded proceeds in the hands of the chargor. When providing retrospective consent, the chargee is free to choose whether to consent to the withdrawal of the asset with or without acquiring a right to proceeds. This follows from the fact that, depending on the terms of the agreement authorising the disposition, a fixed chargee is free to consent to a disposition of a charged asset on the basis that he has a security interest in the proceeds or, albeit unusually, on the basis that he does not. An obstacle to viewing retrospective consent as ratification is that it is not certain on what terms the chargee would have consented to the authorised disposition. Although it could be argued that the terms of the retrospective consent would run backwards to the terms of the authorised disposition (ie the terms on which the chargee retrospectively consented would be deemed the same as the terms on which he would have consented prior to the disposition), such reasoning would not be easily reconcilable with the rule in agency law that ratification is made on the terms corresponding to what would have been an authorised disposition.⁸⁷ In other words, ratification must carry the terms of the authorised disposition, not the other way round. If the terms on which the chargee would have consented to an authorised disposition are not known, it is impossible to tell what ratification in full would have looked like.

Another difficulty with using ratification is the possible inconsistency with the rules on

⁸⁶ *Koenigsblatt v Sweet* [1923] 2 Ch 314, 325 (Lord Sterndale MR); *Wilson v Tumman and Fretson* 134 ER 879, (1843) 6 M&G 236, 242 (Tindal CJ); *Bird v Brown* (1850) 4 Exch 786, 154 ER 1433.

⁸⁷ This follows from the rule that when the principal chooses to ratify an unauthorised transaction he must do so in full and cannot choose to ratify only the parts which are favourable to him: see *Smith v Hodson* (1791) 4 Term Rep 211, 100 ER 979; *Peru v Peruvian Guano Co* (1887) 36 Ch D 489, 499 (Chitty J); *Re Mawcon* [1969] 1 WLR 78, 83 (Pennycuik J).

characterisation of fixed and floating charges. While characterisation of a charge as fixed or floating is typically a matter of interpretation of the charge agreement and any contemporaneous agreements,⁸⁸ post-contractual agreement or conduct may be relevant to the characterisation of the charge in some circumstances.⁸⁹ A one-off retrospective consent to an unauthorised disposition is not likely to cast a shadow of doubt on whether the charge is fixed but repeated unauthorised disposals and subsequent retrospective consents might. They are likely to indicate that the parties varied their agreement to one where the chargor has freedom to use the charged assets. To show variation it would be necessary to demonstrate an offer, acceptance and certainty of terms.⁹⁰ If each retrospective consent operated as ratification, each disposition would be considered as having been authorised *ab initio*. This would preclude or at least weaken any argument that parties varied an agreement because the chargor would not be seen as having had freedom to use charged assets beyond the most recent unauthorised disposition. So, each unauthorised disposition would look as if it were one-off, not one in a series. If this is correct, using ratification as an explanation of retrospective consent undermines the rules on characterisation of fixed and floating charges and could, arguably, be used to circumvent the existing rules on the interpretation of parties' agreement as creating a floating charge.

If the role of ratification is doubtful in the context of the fixed charge, it is even more so in the context of a floating charge. Under an uncrystallised floating charge the chargor has a power to dispose of assets free from security to the extent permitted in the charge agreement, usually in the ordinary course of business, so the dispositions of assets subject to a floating charge are likely to be for the account of the debtor.⁹¹ Whether the floating charge extends to the proceeds of such authorised dispositions depends on the terms of the agreement, usually where proceeds of authorised dispositions

⁸⁸ *Spectrum* (n 84) at [158] (Walker LJ).

⁸⁹ See S Atherton and R Mokal, 'Charges over Chattels: Issues in the Fixed/floating Jurisprudence' (2005) 26 *Company Lawyer* 10; A Berg, 'The Cuckoo in the Nest of Corporate Insolvency: Some Aspects of the Spectrum Case' [2006] *Journal of Business Law* 22, 33–44; L Gullifer and J Payne, 'The Characterization of Fixed and Floating Charges' in J Getzler and J Payne (eds), *Company Charges: Spectrum and Beyond* (Oxford, Oxford University Press, 2006) 69–73; Beale et al (n 26) paras 6.115–6.119.

⁹⁰ See *Glencore Grain Ltd v Flacker Shipping Ltd (The 'Happy Day')* [2002] EWCA Civ 1068 at [61] (Potter LJ).

⁹¹ Gullifer (ed) (n 37) para 1-68.

are within the description of the subject matter of the floating charge. Where the charge agreement is silent about proceeds, the floating chargee is not automatically entitled to proceeds purely because they are proceeds of authorised dispositions⁹² although this view is far from settled or uncontroversial.⁹³ Where the disposition of assets subject to a floating charge is unauthorised, there is authority to suggest that the disposition is for the account of the disponent from the chargor, not the chargee. In *Hubbuck v Helms*⁹⁴ assets subject to a floating charge were sold outside the ordinary course of business. Unusually, the unauthorised sale did not crystallise the charge. It was held that the chargee could obtain an order for the appointment of a receiver restraining the purchaser from selling assets outside the ordinary course of business of the chargor company. It follows that the purchaser was free to deal with the assets in the ordinary course of business. There was certainly no question of retrospective consent to unauthorised dispositions or ratification. Given that dispositions of assets subject to a floating charge are almost always for the account of the chargor, there seems to be no scope for an argument that the floating chargee could be in a position to adopt an unauthorised transaction as authorised. Even if we assume, for the sake of argument, that the floating chargee could do so, ratification of an unauthorised disposition as authorised would yield proceeds for the account of the chargor, not the chargee, which means that ratification would have no role to play in explaining a floating chargee's rights to proceeds of unauthorised dispositions where the charge is floating (if such rights can be asserted at all).

The weight of arguments suggests that the explanation of an interest in traceable proceeds based on adoption of an unauthorised disposition is unsatisfactory. It remains unclear to what extent, if at all, parallels can be drawn between secured transaction and agency. An examination of such parallels is beyond the scope of this chapter. However, if the objections to ratification undermine any analogy between an agent and the charged, then it is also unsatisfactory to say that the chargee's claims to proceeds and to the original asset are inconsistent (as they are in scenario (1) in Section C(ii) above).

⁹² Beale et al (n 26) para 15.05; see also Gullifer (ed) (n 37) para 1-68.

⁹³ For a contrary view see R Nolan, 'Property in a Fund' (2004) 120 *Law Quarterly Review* 108 (arguing that substitutes of authorised dispositions automatically fall within an uncrystallised floating charge and that this is an implied, though silent, default rule, which he thought emerged through the use of precedents).

⁹⁴ *Hubbuck v Helms* (1887) 56 LJ Ch 536.

The obiter dictum in *Buhr* in this respect must be doubted.

E. Cumulative Claims to Traceable Proceeds and the Original

Asset

(i) Drawing the Correct Analogy: is the Chargor More Like a Thief Than an Agent?

Given the difficulties with making the chargor retrospectively an agent for the creditor, it may be more appropriate to compare the position of the secured creditor to a claimant suing a thief for money had and received and a third party for damages in conversion of the original asset. This means that in English law the secured creditor is not precluded from making claims to assert an interest in the original asset and in the traceable proceeds. The remedies sought by the secured creditor are alternative but the claims are not inconsistent. A full recovery under one will prevent the secured creditor from recovering under the other. We saw above that the mischief of the rule against cumulation of alternative remedies is prevention of double or excessive recovery.⁹⁵ Where the claimant recovers under one remedy in part, there is nothing to stop them from recovering under the other for the balance. Although there were some doubts in relation to recovering under alternative remedies against one wrongdoer, the rule seems reasonably well established and uncontroversial where the claimant sues different defendants (for example, the thief and a buyer of stolen goods or, in the secured transactions scenario, typically the grantor of security who holds traceable proceeds and the third party buyer).⁹⁶ If the argument advanced here is correct, the analysis of recovery in relation to the key types of approaches to claims to traceable proceeds discussed in section B is as follows. If claims are based on a power *in rem* the claimant is not prevented (subject to any defences) from exercising a power in relation to the original asset or in relation to the proceeds or in relation to both unless the claimant would recover excessively. If claims are based on election, the claimant can, *but need not*, elect to release his interest in relation to the

⁹⁵ See Section C(ii).

⁹⁶ See *ibid.*

original asset while preserving his interest fully in traceable proceeds.⁹⁷

(ii) The Problem of Determining Excessive Recovery

The difficulty in the context of secured transactions is establishing what constitutes an excessive recovery; an associated consideration is whether the assessment of what amounts to excessive recovery should vary depending on the context. In American literature, for example, it was pointed out that cumulation of claims in original collateral in the hands of a third party and its proceeds does not give rise to a problem of a ‘windfall’ or ‘double recovery’ because the creditor cannot recover beyond the amount of the secured debt.⁹⁸

However, the ability to resort to multiple assets may be seen as a windfall where the value of the assets which the secured creditor is able to claim exceeds the value of the original collateral prior to disposition. This ‘oversecuritisation’ might create an economically inefficient result. The argument about economic inefficiency could go something like this: the greater value of the collateral does not necessarily translate to a benefit to the secured creditor because he can only resort to the assets up to the amount of the secured debt. Probability of repayment does not increase infinitely with the increasing number of assets. There comes a point where any added extra asset that inflates the value of the collateral will not increase the probability of repayment.⁹⁹ The benefit to the secured creditor is marginal at most. At the same time the debtor (and, indeed, a third party against whom the creditor claims interest in the original asset or traceable proceeds) ceases to be able to offer these assets as first-ranking security for new loans, which—the argument could go—may mean he will be unable to raise finance or to raise it as cheaply as would otherwise be possible. The debtor (or a third party), therefore, bears an opportunity cost and is worse off. This situation is economically inefficient (more specifically, Pareto inefficient) because the debtor (or a third party) can be made better off by freeing up some of the

⁹⁷ See Section B(iii).

⁹⁸ S Harris and CW Mooney, Jr, *Security Interests in Personal Property. Cases, Problems and Materials*, 5th edn (New York, Foundation Press, 2011) 286. See also Ch 6, D(i).

⁹⁹ For example, if Andy lends £5 to Jenny, who gives security over her watch worth £100, the likelihood of repayment will not increase substantially (if at all) just because Jenny adds security over her computer worth £500.

assets from the security without making the secured creditor worse off. The issue just described has been identified as a problem and addressed in Canada by a provision that the amount secured by the security interest in the disposed-of original collateral and the proceeds is limited to the market value of the collateral at the date of the dealing.¹⁰⁰

There is an important caveat to the economic efficiency argument described above: it assumes that the amount of the secured debt does not change or, if anything, diminishes as the debtor repays the debt. However, many secured transactions are more complex in practice than that. For example, parties may have agreed that the secured creditor could make further advances, enlarging the amount of the debt secured against the assets. This alters the economic efficiency argument because the ability to resort to the original collateral and to proceeds would provide the secured creditor with a benefit.¹⁰¹ The benefit may be so considerable that the ability to resort to the original asset and to the proceeds would be more economically efficient than if the creditor were limited in some way. This illustrates the importance of understanding commercial reality underlying any economic efficiency analysis whenever one considers what the legal rules should be. Some commentators also note that the additional protection of (or the ‘windfall’ to) the secured party is justified because when the debtor sells without authorisation, the original collateral as well as the proceeds are likely to be in jeopardy.¹⁰² These arguments strengthen Professor Duggan’s criticism of a statutory limitation on the secured party’s cumulative enforcement rights except where the secured party takes enforcement action to recover proceeds.¹⁰³

In the context of enforcement actions of proprietary claims to traceable assets in English law discussed in this chapter, it has been argued that the claimant ought not to be able to recover

¹⁰⁰ See, for example, the Saskatchewan Personal Property Security Act 1993 s 28(1) and the Ontario case *Bank of Nova Scotia v IPS Invoice Payment System Corporations* (2010) 318 DLR (4th) 751 (Ontario Superior Court of Justice) (in which the limitation was held to be implied in the absence of codification of the rule akin to the Saskatchewan PPSA) discussed in Ch 6 D.

¹⁰¹ See further Ch 6 D(ii).

¹⁰² L LoPucki and W Warren, *Secured Credit. A Systems Approach*, 7th edn (New York, Wolters Kluwer, 2012) 170.

¹⁰³ Ch 6 D(ii).

excessively. The recovery should be limited in some way. The authorities have tended to use the reference to ‘prevention of double recovery’ or ‘achievement of full satisfaction’ as a way of determining how much, and what, should be recovered. While their instructive value is modest, they seem to focus on recovery from the perspective of the claimant. If this were to apply in the context of secured transactions, full recovery short of excessive recovery would mean recovery of an interest in assets (original, traceable proceeds of both) up to the amount of the outstanding secured debt.

F. Conclusion

To say that the English law of tracing is complex is far from an overstatement. A number of issues remain controversial or uncertain while others are unearthed only through the detailed questioning of the existing orthodoxies and assumptions. This chapter falls into this last-mentioned category. It questioned the judicial and academic view that the secured creditor’s interest in traceable proceeds of an unauthorised disposition is based on adoption. This was accomplished by looking at how the organisational concepts in law have changed and by considering the possible new distinctions and analogies. In relation to security, the analogy with ratification of an unauthorised transaction in agency law has been questioned based on the current understanding of fixed and floating charges. The feasibility of drawing analogies between secured creditor and a person claiming against a thief was considered where it would seem possible to hold cumulative remedies. The transition from the fiction of waiver of tort to the consideration of recovery based on prevention of excessive recovery signifies a transition from a legal system governed by forms of action to a system in which courts are able, but are not free in their discretion, to take into account the aims and bases of the substantive rights. If the same applied in relation to security interests, the rules under English law would have effect that is much closer to that of the rules found in the PPSAs than previously thought. However, any enthusiasm should be weighed against at least two factors. One is the significant number of problems that persist in the law of tracing, the issue of the correct basis being only one example. Another is the possible conceptualisation of secured transactions as giving rise to issues analogous to those arising in agency

law, different to the analysis based on retrospective agency considered in *Buhr* but detailed debate of those issues must wait for another day.

The question which ought to be asked, and which has not been considered in this chapter, is whether the rules governing claims contingent on tracing in the context of secured transactions ought to be codified, as took place under the PPSAs. This requires careful consideration. The discussions in this chapter, focused on the existing uncertainties in the law of tracing shows that the law is much more complex than previously thought and the analysis presented here may help provide a direction for the future discussion of reform in the area. Opponents of codification of tracing rules in the context of the law of security and title-based finance sometimes argue that if any such codification were to take place, it should cover the entirety of the law of tracing and not be limited to secured transactions. One theme that began to emerge in this chapter was that the policy considerations relevant to claims contingent on tracing in the context of security are often different from those which would apply to ownership. If this is so, an argument against codification of tracing rules based on the extent of that codification would fall away.