

Modelling Subrogation as an “Equitable Remedy”

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Following the landmark decision of the House of Lords in Banque Financière de la Cité v Parc (Battersea) Ltd, the English courts have come to say that subrogation to extinguished rights is an “equitable remedy” designed to reverse “unjust enrichment”. This creative re-rationalisation requires a fresh look at the nature and operation of this phenomenon, and in particular, at the key components of the “new” orthodoxy — that such subrogation is a “remedy”, which is “equitable” in origin, and is “restitutionary” in aim and effect. A clear understanding of these components is not of merely academic interest. It is vital for a proper understanding of the nature and timing of the entitlements that are afforded to subrogation claimants, and of a court’s role in their recognition and effectuation. On closer examination, the cases reveal an unacknowledged and unresolved tension between two different conceptions of the remedy’s operation: (i) a “strong institutional model”; and (ii) a weaker institutional model, which is labelled the “liability model”. Adopting either model, subrogation is not a drastically “remedial” phenomenon which yields entitlements for claimants only by virtue of some judicial order. Subrogation-justifying facts will immediately trigger some form of entitlement for a subrogation claimant, which arises prior to, and independently of, any subsequent court order. Nevertheless, the nature and quality of this pre-court entitlement, and the court’s role in its recognition and effectuation, will differ depending on the model preferred. On balance, the liability model is the more defensible in principle. It should ultimately prevail.

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I. Introduction

There is a substantial body of English authorities, encountered in various contexts, which exhibit the following general pattern: (i) C claimant has been responsible for discharging a liability owed by D debtor to X creditor; and (ii) subject to further conditions, C is said to be subrogated to X's rights against D, including any security that X held for D's debt. Often, C is a disappointed lender, who loaned money to finance a property purchase or to re-finance existing liabilities, and did not obtain the security for its advance that it bargained for. Alternatively, C is an unwitting victim of a misappropriation of funds, which are used without his authority to discharge another's liabilities. In yet other cases, C is a surety, or someone equivalently placed, who has paid the guaranteed debt and thereby discharged liabilities of the principal debtor and co-sureties.

At first sight, references to subrogation in this context can look puzzling. The most familiar species of subrogation, as encountered in the field of indemnity insurance, undoubtedly works differently: an

indemnity insurer, having indemnified its insured, is ordinarily entitled to bring proceedings, in the insured’s name, to enforce the insured’s *subsisting* rights against third parties. In the different cases that are presently in view, how can C be subrogated to the rights of X, the paid-off creditor, when, *ex hypothesi*, X’s rights were *extinguished*? In English law, the modern answer to this puzzle has involved recognising that in this context, the language of subrogation is a “metaphor” rather than a “literal truth”.¹ Although past cases sometimes spoke of X’s rights being “kept alive” in equity for C’s benefit,² C does not actually acquire X’s rights, or the benefit of X’s rights, by transfer or otherwise. X’s rights are extinguished, and C acquires rights only to the extent that that has occurred.³ In truth, what appears to be happening in these cases is that equity is affording new rights to C, which *prima facie* replicate X’s extinguished rights.⁴ Why? Since the House of Lords’ landmark decision in *Banque Financière de la Cité v Parc (Battersea) Ltd*⁵ (“*Banque Financière*”), the answer which the English courts have given is that equity affords such rights to C where that is appropriate to reverse the unjust enrichment that would otherwise accrue from the discharge of X’s rights, to D and others, at C’s expense. In short, this form of subrogation is said to be an “equitable remedy” directed at a very specific goal: it is a “restitutionary remedy” for “unjust

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1. See especially *Banque Financière de la Cité v Parc (Battersea) Ltd*, [1999] 1 AC 221 (HL) at 236-37, per Lord Hoffmann [*Banque Financière*].
 2. See *e.g.* *Chetwynd v Allen*, [1899] 1 Ch 353 (Eng) at 357 [*Chetwynd*]; *Butler v Rice*, [1910] 2 Ch 277 (Eng) at 282 [*Butler*]; *Ghana Commercial Bank v Chandiram*, [1960] AC 732 (PC (Ghana)) at 745 [*Chandiram*]; *Western Trust & Savings Ltd v Rock*, [1993] NPC 89 (CA (Civ)(Eng)) [*Western Trust*].
 3. See especially *Boscawen v Bajwa*, [1996] 1 WLR 328 (CA (Civ)(Eng)) at 340, per Millett LJ [*Boscawen*]; *Banque Financière*, *supra* note 1 at 236.
 4. See especially Charles Mitchell & Stephen Watterson, *Subrogation: Law and Practice* (Oxford: Oxford University Press, 2007) ch 8 [Mitchell & Watterson, *Subrogation*]; for explicit recent acceptance, see *Day v Tiuta International Ltd*, [2014] EWCA Civ 1246 at para 43 [*Tiuta*].
 5. *Banque Financière*, *supra* note 1.

enrichment”.⁶

The creative re-rationalisation of past decisions has not received unanimous approval. In particular, whilst several other common law jurisdictions appear receptive to the *Banque Financière* approach, Australian courts have rejected it.⁷ There is no need to enter into that controversy. This article’s ambition is different: to undertake a deeper, conceptual inquiry into the nature and operation of the subrogation remedy, as presently conceived by the English courts. This involves unpacking three key components of the post-*Banque Financière* orthodoxy: i.e. that subrogation is a “remedy”, which is “equitable” in origin, and is “restitutionary” in aim and effect.

A clear understanding of these components is not of merely academic interest. It is essential for a proper understanding of the nature and timing of the entitlements afforded to subrogation claimants, and of the court’s role in their recognition and effectuation. To anticipate this article’s major conclusions, it will be argued that the cases that concern the restitutionary remedy of “subrogation to extinguished rights”⁸ — hereafter, “*Banque Financière* subrogation” — exhibit an unacknowledged and unresolved tension between two different conceptions of the remedy’s operation: (i) a “strong institutional model”; and (ii) a weaker institutional model, which will be labelled the “liability model”. Adopting either model, subrogation is not a drastically “remedial” phenomenon that yields entitlements for a claimant only by virtue of some judicial order. Subrogation-justifying

6. See especially, *ibid*, at 231-32, 234-37, per Lord Hoffman. For very recent affirmation of this understanding, see the decision of the Supreme Court in *Menelaou v Bank of Cyprus UK Ltd*, [2015] UKSC 66 [*Menelaou SC*] (where only Lord Carnwath expressed scepticism).

7. See the High Court of Australia’s vehement rejection of the English approach, *obiter*, in *Bofinger v Kingsway Group Ltd*, [2009] HCA 44 [*Bofinger*], echoing scepticism previously expressed in, *inter alia*, *Highland v Exception Holdings Pty Ltd (in liq)*, [2006] NSWCA 318 (Austl) and *Challenger Managed Investments Ltd v Direct Money Corp*, [2003] NSWSC 1072 (Austl) [*Challenger*].

8. For the distinction between subrogation to “subsisting” rights and subrogation to “extinguished” rights, see Mitchell & Watterson, *Subrogation*, *supra* note 4, ch 1.

facts do immediately trigger some form of entitlement for a subrogation claimant, which arises prior to, and independently of, any subsequent court order. Nevertheless, the nature and quality of this pre-court entitlement, and the court’s role in its recognition and effectuation, will differ, depending on the model preferred. On balance, the liability model is the more defensible in principle. It should ultimately prevail.

II. A “Restitutionary” Remedy

In what sense is subrogation a “restitutionary” remedy? On some visions of the law of unjust enrichment, it looks like a rather unusual response. The standard restitutionary remedy, where a cause of action in unjust enrichment is established, is an award of monetary restitution: the law imposes a personal liability on D, measured by the value in money of the unjust enrichment that D received at C’s expense.⁹ The *Banque Financière* subrogation remedy, afforded where C discharges liabilities that D owes to X, is not of this nature. C will certainly seek this remedy in order ultimately to procure some monetary recovery, directly from D or indirectly by recourse to D’s assets. Nevertheless, C’s claim to relief by way of subrogation is not immediately a claim to an award of monetary restitution.¹⁰ C will be asserting that he should be afforded rights equivalent to those previously enjoyed by X. That ordinarily means a security interest, which replicates X’s, and secures the amount of the debt, owed by D to X, which C was responsible for discharging.

9. See e.g. Charles Mitchell, Paul Mitchell & Stephen Watterson, eds, *Goff & Jones: The Law of Unjust Enrichment*, 8d (London: Sweet & Maxwell, 2011) ch 36 [Mitchell, Mitchell & Watterson, *Goff & Jones*].

10. This has led some to suggest that subrogation cannot be a response to unjust enrichment, on the basis that a cause of action in unjust enrichment can *only* trigger an award of monetary restitution against the discharged debtor, and cannot account for the acquisition of a security interest by subrogation: see especially the doubts expressed about the *Banque Financière* unjust enrichment rationalisation in *Challenger*, *supra* note 7 at para 97.

A. “Factual Enrichment” and “Legal Enrichment”

In identifying subrogation’s role as a restitutionary remedy, one might usefully begin with a distinction recently highlighted by Andrew Lodder,¹¹ between two different kinds of enrichment: “factual” and “legal”.¹² What Lodder labels “factual” enrichment consists of the receipt of *value* by a defendant — in the form of money, or some non-money benefit, such as services, susceptible to valuation in money. “Factual” enrichments are the familiar subject-matter of awards of monetary restitution.¹³ By contrast, a “legal” enrichment consists of either the acquisition of rights or the release of duties/liabilities.¹⁴ These might also be treated as “factual” enrichments, and reversed via an award of monetary restitution. However, on Lodder’s account, viewing them as legal enrichments, the law may respond differently: reversing the enrichment “in law” via a *specific* restitutionary mechanism. For example, following Lodder’s account, one can contemplate the law achieving specific restitution, where D is enriched by the acquisition of rights, via C’s entitlement to rescind a defective transfer, or the imposition of a trust in C’s favour.¹⁵

B. The Role for the Subrogation “Remedy”

It remains hotly contested within English law whether, and on what basis, the courts might award something other than the “standard” remedy of monetary restitution in circumstances of unjust enrichment.

11. Andrew Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Oxford: Hart Publishing, 2012).

12. *Ibid* ch 3. *Cf.* the distinction previously drawn by Robert Chambers, on which Lodder builds, between enrichment by the receipt of “value” and enrichment by the receipt of “rights”: see Robert Chambers, “Two Kinds of Enrichment” in Robert Chambers, Charles Mitchell & James Penner, eds, *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford University Press, 2009) ch 9.

13. See Lodder, *supra* note 11 (“[w]henver the claimant seeks restitution of a factual enrichment, the response is always the same: a right to be paid the value of the enrichment received at the claimant’s expense” at 64).

14. *Ibid* at 55-67 and ch 5.

15. *Cf. ibid* at 64-66.

Nevertheless, in light of recent scholarship, it looks plausible to suggest that *Banque Financière* subrogation — the remedy of subrogation to another’s *extinguished* rights — is a restitutionary remedy, addressed to a very particular sub-set of legal enrichments, which reverses such legal enrichments by a very particular form of specific restitutionary response.¹⁶ Three key points need brief elaboration.

1. Enrichment via the release of rights, at a third party’s expense

First, properly understood, *Banque Financière* subrogation is contextually confined to circumstances that involve an enrichment in the form of a *release of another’s rights*, achieved at a *third party’s* expense. What ordinarily triggers subrogation is the discharge of a liability which D owed X, by a payment for which C, a third party, is relevantly responsible. This last feature is crucial. It is C’s status as a third party to the original creditor-debtor relation between X and D that makes it possible to talk of C acquiring equivalents of X’s extinguished rights by a process of “subrogation”. A similar enrichment could arise in a bipartite setting — *e.g.* where labouring under a mistake, C, a creditor, releases his security for D’s liabilities.¹⁷ In such circumstances, the law might also afford C a form of specific relief, which restores his released rights.¹⁸ However, this would not be subrogation: C would not step into *another’s* shoes, actually or metaphorically. He would reacquire his own previously-released rights.

16. Cf. *ibid* ch 5. There are difficulties with Lodder’s brief account of how subrogation works; however, the core of his analysis, that subrogation offers a form of *specific* restitution, addressed to the release of a duty/liability, is plausible.

17. Cf. *NRAM v Evans*, [2015] EWHC 1543 (Ch); *Garwood v Bank of Scotland*, [2013] EWHC 415 (Ch); *Fender v National Westminster Bank*, [2008] EWHC 2242 (Ch); *Dixon v Barton*, [2011] NSWSC 1525 (Austl).

18. *Ibid*. This is the effect of the relief ultimately afforded, in different ways, in the cases listed.

2. A form of specific restitutionary mechanism, involving newly-created rights that replicate the old

Secondly, *Banque Financière* subrogation can be regarded as a form of *specific* restitutionary mechanism. When C brings about the release of D's liabilities to X, in circumstances involving unjust enrichment, the law can obviously afford C a monetary remedy, measured by the value of the discharged liabilities: the value in money of the unjust enrichment that accrues to D, at C's expense, from their release. That would be an award of monetary restitution, addressed to D's "factual" enrichment. However, in the same circumstances, equity can also afford C a different remedy, in the form of a *Banque Financière* subrogation. This would be a specific restitutionary mechanism, addressed to the release of D's liabilities, conceived as a "legal" enrichment. On this analysis, equity achieves the in specie reversal of the unjust enrichment that would otherwise accrue from the release, to D and others, by effectively recreating the released liabilities in favour of C, a new party: C is afforded new rights, against D and others, which *prima facie* replicate those previously enjoyed by X.¹⁹

This explanation seems the most faithful to what the recent cases say about the basis of the remedy and its nature. Nevertheless, it is important to acknowledge that it depends on some contestable assumptions about the nature of "restitutionary" remedies afforded within the law of unjust enrichment.²⁰ In a bipartite setting,²¹ if the law was to restore C's previously-released rights against D, it would be effecting "specific restitution" in the strongest/fullest sense: the law would restore *to* C rights that *he* formerly held against D. In contrast, the subrogation cases necessitate the adoption of a broader, and in one sense weaker/diluted vision of what would be involved in specific restitution, according to

19. Cf. Lord Carnwath's sceptical statements in *Menelaou* SC, *supra* note 6 at para 117 (which seems to overlook this explanation).

20. Cf. an alternative, "reductionist" model of subrogation's role as a "restitutionary remedy" which is developed and critically examined in Stephen Watterson, "Subrogation", in Graham Virgo and Sarah Worthington, eds, *Commercial Remedies: Resolving Controversies* (Cambridge: Cambridge University Press, forthcoming 2016).

21. See the text, *supra* notes 17-18.

which the primary remedial objective would be the *in specie* reversal of D’s unjust enrichment. *Ex hypothesi*, the subrogation “remedy” involves the creation of equivalents of D’s released liabilities to X in favour of a new party, C. This reverses D’s enrichment *in specie*, but only via a “restitutionary” mechanism that affords C rights of a nature that he did not previously have.²²

3. In particularised circumstances of unjust enrichment

Thirdly, when the House of Lords held in *Banque Financière* that subrogation was a remedy for *unjust enrichment*, they did not mean that unjust enrichment merely provided a meta-principle that loosely connected the subrogation cases, at a high level, to the wider body of authorities conventionally gathered in treatises on the law of restitution/unjust enrichment. Subrogation was a remedy *for* unjust enrichment in the fullest sense: in the future, the remedy’s availability was to be tested by reference to the components of the unjust enrichment framework that has been used to analyse and determine the availability of a cause of action in unjust enrichment sufficient to support standard awards of monetary

22. This is an available understanding of “specific restitution”, which may require a corresponding commitment to a particular position in a more general controversy within the law of unjust enrichment concerning the essential character of “restitutionary remedies”. In broad terms, the debate concerns whether the law’s focus is (i) on the reversal of D’s unjust enrichment; or is (ii) a more two-sided process, where the existence and extent of any restitutionary remedy is limited by reference to C’s equivalent/corresponding “loss”. Unjust enrichment scholars divide. Lodder explicitly assumes the former, broader conception of “restitution”: see Lodder, *supra* note 11 at 7-8. Cf. the discussion in Peter Birks, *Unjust Enrichment*, 2d (Oxford: Oxford University Press, 2005) at 78-86 [Birks, *Unjust Enrichment*]; Andrew Burrows, *The Law of Restitution*, 3d (Oxford: Oxford University Press, 2011) at 64-69; Graham Virgo, *The Principles of the Law of Restitution*, 3d (Oxford: Oxford University Press, 2015) at 116-18; Mitchell, Mitchell & Watterson, *Goff & Jones*, *supra* note 9 at 6.63-6.74; Michael Rush, *The Defence of Passing On* (Oxford: Hart Publishing, 2006) Part II.

restitution.²³ Accordingly, to establish his subrogation entitlement, C would need to identify some legally recognised ground for restitution (*e.g.* a restitution-grounding mistake or failure of basis);²⁴ and he might find his claim defeated/diminished by any defence/bar that could be raised to any unjust enrichment claim (*e.g.* illegality/public policy, change of position, bona fide purchase, contractual exclusion/limitation, expiry of a limitation period).²⁵ Some early post-*Banque Financière* cases showed unease about the implications of this new approach.²⁶ Nevertheless, a gathering tide of English cases has followed their Lordships' lead, and explicitly justified the availability of the subrogation remedy, on particular facts, using the unjust enrichment framework.²⁷

C. Outstanding Questions

Even if it is accepted that *Banque Financière* subrogation functions as a restitutionary remedy as just outlined, important questions remain unanswered regarding its operation and effects. In particular, what is the court's role in these cases? Does the availability of the subrogation remedy depend upon a court order, which a judge might grant or refuse as appropriate? Or does a subrogation claimant have some form of pre-court entitlement, generated as the facts happen? If the latter, what exactly is the nature of this entitlement? And if its existence does not strictly depend upon a judicial order, what exactly is the court's role, when subsequently asked to determine the parties' legal positions? It is to these questions that our attention must now turn.

23. See especially *Banque Financière*, *supra* note 1, per Lord Hoffmann and Lord Steyn; and see now *Menelaou SC*, *supra* note 6. *Cf.* the very different vision of the law in Australia presented in *Bofinger*, *supra* note 7.

24. See Mitchell & Watterson, *Subrogation*, *supra* note 4 ch 6 (the ground identified there as “ignorance” is now better labelled as “lack of consent” or “want of authority”: Mitchell, Mitchell & Watterson, *Goff & Jones*, *supra* note 9 ch 8).

25. See Mitchell & Watterson, *Subrogation*, *supra* note 4 ch 7.

26. See *e.g.* *Halifax v Omar*, [2002] EWCA Civ 121 [*Omar*].

27. See most recently, *Menelaou SC*, *supra* note 6; and see further the cases cited *infra* notes 113 and 143.

III. An Entitlement Arising Out of Court

On examination, there is overwhelming evidence that *Banque Financière* subrogation yields some form of entitlement for C, the subrogation claimant, as the legally significant facts occur, and independently of any court order. To that extent, *Banque Financière* subrogation represents an “institutional” response, which affects the parties’ legal positions “on the ground”, “as the facts happen”. It is not a radically “remedial” response, which brings legal consequences only from the time of any subsequent court order. This is evident from the cases in at least the following eight ways.

A. Party Pleadings, Judicial Reasoning, and Court Orders

First, the language of parties’ pleadings, judicial reasoning, and court orders points strongly to C having some form of pre-court entitlement. Claimants in their pleadings and arguments, and judges when addressing them, have often spoken of the claimant “being” subrogated, or having “become entitled” to be subrogated from some material date in the past; or more often in older cases, of the former creditor’s rights “being kept alive” or “having been kept alive” for the claimant’s benefit. Consistently with this, when claimants ask a court to adjudicate as to their subrogation rights, the primary remedy sought is a *declaration* that they are or have become entitled to a security interest by subrogation²⁸ — terms suggestive of a confirmatory, rather than purely constitutive, order. The courts routinely oblige, granting declarations which have often declared,

28. See e.g. *Butler*, *supra* note 2 at 278; *Congresbury Motors Ltd v Anglo-Belge Finance Co Ltd*, [1971] Ch 81 (CA (Civ)(Eng)) at 83 [*Congresbury* CA]; *Coptic Ltd v Bailey*, [1972] Ch 446 (Eng) at 448; *Burston Finance Ltd v Spierway Ltd*, [1974] 1 WLR 1648 (Ch (Eng)) at 1650 [*Burston Finance*]; *Boodle Hatfield & Co v British Films Ltd*, (1986) 2 BCC 99221 (Ch (Eng)) [*Boodle Hatfield*]; *Castle Phillips Finance Co Ltd v Piddington*, (1995) 70 P&CR 592 (CA (Civ)(Eng)) at 598 [*Piddington*]; *Boscawen*, *supra* note 3 at 329-30; *Primlake Ltd v Matthews Associates*, [2009] EWHC 2774 (Ch) at para 17 [*Primlake*]; *Lehman Commercial Mortgage Conduit Ltd v Gatedale Ltd*, [2012] EWHC 848 (Ch) at para 2 [*Lehman*].

in explicit terms, that C's rights exist *as at a particular, material date in the past*.²⁹

Although the courts have rarely analysed the nature of C's position before he comes before them, the few dicta that do also point strongly to some form of pre-court entitlement. In particular, in the influential pre-*Banque Financière* decision in *Boscawen v Bajwa*³⁰ ("*Boscawen*"), Lord Justice Millett spoke of a pre-existing subrogation "right" or "equity", which the court's order would "satisfy" — apparently meaning by this to deny that C's subrogation entitlement *depends* on any judicial order, or indeed on any election by C, and to affirm that C's subrogation "right" or "equity" was an entitlement that came into being, out of court, *as the triggering facts occurred*.³¹ Reinforcing this, Millett LJ drew an explicit analogy with constructive trusts, which in English law at least are regarded as "institutional" responses, which arise as the legally significant facts occur.³² The same vision is endorsed in subsequent Court of Appeal decisions: *Halifax v Omar*³³ ("*Omar*"), *Eagle Star Insurance Co Ltd v Karasiewicz*³⁴ ("*Karasiewicz*"), and *Day v Tiuta International Ltd*³⁵ ("*Tiuta*").

29. See e.g. *Chetwynd*, *supra* note 2 at 358-59; *Thurstan v Nottingham Permanent Benefit Building Society*, [1902] 1 Ch 1 (CA (Eng)) at 14 (affirmed [1903] AC 6 (HL))(explicit dating back) [*Thurstan*]; *Butler*, *supra* note 2 at 283-84; *Chandiram*, *supra* note 2 at 747 (explicit dating back); *Congresbury Motors Ltd v Anglo-Belge Finance Co Ltd*, [1970] Ch 294 (Eng) at 321 (affirmed *Congresbury* CA, *supra* note 28 (explicit dating back)); *Coptic Ltd v Bailey*, [1972] Ch 446 (Eng) [*Bailey*]; *Banque Financière*, *supra* note 1 at 237 (explicit dating back); *UCB Group Ltd v Hedworth (No 2)*, [2003] EWCA Civ 1717 at para 150 [*Hedworth*].

30. *Boscawen*, *supra* note 3.

31. *Ibid* at 335, 342.

32. *Ibid* at 335.

33. *Omar*, *supra* note 26 at paras 79-84.

34. [2002] EWCA Civ 940 at para 19 [*Karasiewicz*].

35. *Tiuta*, *supra* note 4 at para 42.

B. Priority Disputes

Secondly, when C claims that he is subrogated to another’s security interest, questions may arise as to the effect of subsequent transactions, under which third parties acquire interests in the same asset, by transfer or grant from D, the discharged debtor. Imagine that C discharged X’s security interest over D’s property, in circumstances that justified C’s being subrogated to X’s rights, and that D subsequently sold, leased or charged his property to a third party, Y. Is this third party, Y, affected by C’s subrogation “remedy”? Recent cases indicate that Y may be affected, apparently on the assumption that C acquired an entitlement *in rem* as the legally significant facts occurred, which can prevail against subsequently-interested parties, like Y, in accordance with the rules that generally govern the priority of competing interests of the relevant quality affecting the same subject-matter.³⁶ Within English law’s system of registered land titles, this includes, *inter alia*, the possibility of preserving the priority of C’s entitlement *vis-à-vis* later transactions by entering a notice against the affected register of title.³⁷

C. The Validity of Supervening Enforcement Action

Thirdly, in *Tiuta*,³⁸ the Court of Appeal appeared to assume that a court might determine the legal effect of supervening conduct of C, which occurred before he brought proceedings asserting a subrogation entitlement, and even in ignorance that he had any subrogation entitlement, on the basis that, *at the time C acted, C was entitled to exercise*

36. Cf. especially *Chandiram*, *supra* note 2; *Boscawen*, *supra* note 3; *Omar*, *supra* note 26; *Cheltenham & Gloucester v Appleyard*, [2004] EWCA Civ 291 at para 44 [*Appleyard*]; *Bank of Scotland v Joseph*, [2014] EWCA Civ 28 [*Joseph*]. Cf. *Anfield (UK) Ltd v Bank of Scotland*, [2010] EWHC 2374 (Ch) [*Anfield*], criticised in Mitchell, Mitchell & Watterson, *Goff & Jones*, *supra* note 9 at 39.68-39.76.

37. *Joseph*, *supra* note 36 (a notice entered against a registered title in respect of the claimant’s invalid charge was held to be effective to protect the priority of the subrogation entitlement that arose due to the charge’s invalidity).

38. *Tiuta*, *supra* note 4.

rights that replicated the rights of the paid-off creditor.

Tiuta International Ltd (“TIL”) had loaned money to Day, secured by a charge over Day’s property, which was used to pay off an existing charge held by Standard Chartered (“SC”). Day failed to repay TIL’s loan when it became due for repayment, and TIL appointed receivers under its charge, with a view to having the property sold and recovering its debt. Day opposed this enforcement action arguing, *inter alia*, that he could avoid TIL’s charge *ab initio* for fraudulent misrepresentation, and that this would necessarily render the receivers’ appointment invalid. This was not, however, quite the end of the matter. The Court of Appeal held that even if TIL’s charge was voidable *ab initio*, TIL would *from that time* have been entitled to be subrogated to the SC charge, which also conferred powers to appoint receivers.³⁹ Day answered that this should make no difference: the receivers were appointed under powers in TIL’s invalid charge, and not under the subrogation-based charge; as such, it was necessary to appoint the receivers again, expressly relying on powers conferred by the subrogation based charge:

a party purporting to exercise subrogated rights had to do so pursuant to the powers contained in the subrogated security; therefore it was not sufficient for TIL to have appointed the [r]eceptors by reference to the TIL Charge and then have sought to justify such appointment by reference to the SC Charge, or by reference to any new equitable charge created by reference to the equitable doctrine of subrogation; TIL needed to appoint the [r]eceptors again, but this time in express reliance on the SC Charge.⁴⁰

The Court of Appeal disagreed: the receivers *could* be deemed to have been properly appointed. Lady Justice Gloster stated that it was “immaterial” that TIL “did not purport to rely on the SC Charge when appointing the [r]eceptors”, and that unaware of the potential defect, TIL had “purported to rely only on the TIL Charge to make the appointment”.⁴¹ Subrogation, “in conferring a new equitable proprietary right on TIL” that “replicates the [paid-off] creditor’s old interest”, “operated to entitle TIL to the notional benefit of the SC Charge for the purposes of securing repayment of the TIL Loan made under the terms of the

39. *Ibid* at paras 37-40.

40. *Ibid* at para 41.

41. *Ibid* at para 44.

TIL Loan Facility”.⁴² The SC charge had included an express right to appoint receivers at any time after the lender had demanded any of the secured liabilities, or breach by the chargor of the charge provisions, or an event of default. Some event of this nature had certainly occurred in relation to the TIL loan. And according to Gloster LJ, the equitable doctrine of subrogation was “clearly flexible enough”, where the secured creditor is not aware that there is any challenge to his security, “*to deem an appointment purportedly pursuant to a voidable security as one having been made pursuant to subrogation rights*”.⁴³ This decision presents some difficulties, but it undoubtedly provides further support for the existence of some pre-court entitlement.

D. Assignability

Fourthly, it has been assumed that a subrogation claimant may have a pre-existing entitlement that is transmissible by assignment;⁴⁴ and cases can be found where a party has brought proceedings in the capacity of assignee without any exception being taken.⁴⁵

E. Sub-Subrogation

Fifthly, there are cases involving so-called “*sub*-subrogation”, where C is held to be entitled to be subrogated to an *intermediate* creditor’s entitlement to be subrogated to an *earlier* creditor’s rights.⁴⁶ This needs more explanation.

One of the most common contextual applications of *Banque Financière* subrogation involves defective financing/re-financing transactions. Typically, C advances money to D, in order to discharge D’s existing secured liabilities to X, on the basis that C will be granted some new

42. *Ibid* at paras 43-44.

43. *Ibid* at para 47 [emphasis added].

44. *Omar*, *supra* note 26 at para 61 (counsel’s concession).

45. *Lehman*, *supra* note 28 (a lender and the loan’s subsequent assignee brought proceedings claiming *inter alia* that, if the original charge was void, they were entitled to be subrogated to two earlier charges which were discharged using the monies advanced by the original lender).

46. See Mitchell & Watterson, *Subrogation*, *supra* note 4 at 9.16-9.37.

effective security for its loan over D's assets. If C's expectation of security is not realised, C is commonly subrogated to X's security interest, which its advance discharged. However, what if, exceptionally, X's security interest *also* turns out to have been defective? Any entitlement to be subrogated to that security will be of limited value: any subrogation-based security, mirroring X's security, will suffer from the same frailty. Nevertheless, in such circumstances, it is conceivable that X, who previously advanced money to fund a property purchase by D, or to refinance D's existing liabilities, would have been entitled to be subrogated to the valid security held by an *earlier* creditor, who was paid off via X's loan. Where that is so, the courts have been willing to say that C may be "(sub)-subrogated" to X's subrogation entitlement: *i.e.* C is subrogated to the subrogation entitlement that X held, which was discharged when D's outstanding liabilities to X were cleared via C's payment.⁴⁷

Consider *UCB Group Ltd v Hedworth (No 2)*.⁴⁸ Barclays Bank loaned monies to fund the joint purchase of a farm by Mr. and Mrs. Hedworth, expecting a valid first legal charge over the property as security for its advance. Subsequently, UCB lent monies which were used to discharge the Barclays charge, also expecting a valid first legal charge as security. On the assumption that each of the legal charges executed by Mr. and Mrs. Hedworth could be avoided by Mrs. Hedworth, because her consent was obtained by misrepresentations or undue influence of her husband, of which the lenders had notice, the Court of Appeal held (i) that Barclays had been entitled to be subrogated to the unpaid vendor's lien, which its advance had discharged; and (ii) that when UCB's advance was later used to repay Barclays' advance, UCB in turn became entitled to be "sub-subrogated" to the unpaid vendor's lien.

Such "sub-subrogation" is difficult to explain unless one assumes that X had a *pre-existing* subrogation entitlement, which could have been discharged by C's payment, so as to generate new rights for C, mirroring X's extinguished rights, by a process of sub-subrogation (or, in the

47. See especially *Piddington*, *supra* note 28 at 600-601; *Hedworth*, *supra* note 29 at paras 134-48. See also *Kingsway Finance Ltd v Wang Qingyi*, [2013] HKCFI 1178 at paras 26-31; affirmed [2014] HKCA 578 at paras 35-37.

48. *Hedworth*, *supra* note 29.

problematic language of pre-*Banque Financière* cases, which could have been “kept alive” for C’s benefit, when C paid X).

F. Loss of Existing Rights by Waiver, Abandonment or Merger

Sixthly, pre-*Banque Financière* cases commonly adopted a generous presumption that where C loaned money to discharge another’s secured liabilities, he must have intended to “keep alive” the earlier creditor’s security for his own benefit — a presumption that apparently yielded an immediate subrogation entitlement. Adopting this starting-point, the courts might then ask whether C had *lost* the subrogation entitlement that he had acquired in this way, by virtue of his having been *granted* some form of security by the borrower.⁴⁹ Typically, the courts might inquire whether C had “waived” or “abandoned” his subrogation-based security, as a result of that transaction, or whether his subrogation-based security was “lost” by “merger” into some “higher-ranking” security that C had been granted. These cases would certainly be reasoned differently today, post-*Banque Financière*, in which the House of Lords explicitly preferred a restitutionary explanation for subrogation, to the earlier over-reliance on fictitious presumptions of party intentions. Nevertheless, these decisions are interesting as further evidence of an assumption that there is nothing contrary to principle in C acquiring some form of immediate entitlement, as the relevant facts occur.

G. Interest Entitlements

Seventhly, the courts’ approach to interest awards in subrogation cases also evidences a pre-existing entitlement. Ordinarily, D’s debt to X, which C discharged, will have carried a contractual right to interest for X. Modern English cases consistently assume that where C is subrogated to X’s rights as secured creditor, C is *prima facie* subrogated to X’s security interest, and with it, both the principal debt discharged, and X’s previous

49. See *e.g.* *Chandiram*, *supra* note 2 at 745; *Congresbury CA*, *supra* note 28 at 94; *Bailey*, *supra* note 29 at 454; *Burston Finance*, *supra* note 28 at 1652-58; *Orakpo v Manson Investments Ltd*, [1978] AC 95 (HL) [*Orakpo*]. *Cf.* also post-*Banque Financière*: *Appleyard*, *supra* note 36.

contractual right to interest. On that assumption, the “subrogation debt” which C can recover via its subrogation rights typically encompasses the amount of the debt that C was immediately responsible for discharging, plus interest on that sum, at X’s contractual rate, *running from the time of discharge of X’s debt*.⁵⁰

H. Compatibility with the Juristic Basis of *Banque Financière* Subrogation

Finally, *Banque Financière*’s new rationalisation for subrogation — as a “restitutionary remedy” afforded to reverse “unjust enrichment” — can also justify C’s being afforded an immediate, pre-court entitlement. This is important. Earlier cases were not reasoned using the principles of the modern law of unjust enrichment, and the explanations explicitly adopted — which might rationalise subrogation as a contractually-derived entitlement,⁵¹ or as afforded by the law to effectuate actual/attribution party intentions⁵² — might have different logical implications from the *Banque Financière* rationalisation. Nevertheless, an unjust enrichment framework is equally capable of justifying a pre-court entitlement.

First, it is orthodox that as soon as the components of a cause of action in unjust enrichment are present (*e.g.* from the moment D receives a mistaken payment from C, in the absence of any justifying ground), C has a cause of action against D which, if proceedings are brought, ordinarily results in an award of monetary restitution: *i.e.* a court order requiring D to pay C the money value of the enrichment he has received. It is currently controversial whether D comes under an immediate *duty* to make restitution to C, who acquires an immediate, correlative claim-*right* to restitution; or alternatively, whether D merely becomes *liable* to

50. See *e.g.* *Piddington*, *supra* note 28 at 602; *Filby v Mortgage Express (No 2) Ltd*, [2004] EWCA Civ 759 at paras 63-67 [*Filby*]; *Kali Ltd v Chawla*, [2007] EWHC 2357 (Ch) at para 31 [*Kali*] and following. See further *infra* at note 159 below.

51. *Cf.*, *e.g.* the contractual flavour of the reasoning in *Orakpo*, *supra* note 49, per Lord Diplock.

52. *Cf.*, *e.g.* the reasoning in the influential decision of *Chandiram*, *supra* note 2, per Lord Jenkins.

be ordered by a court to make restitution to C.⁵³ Either way, D’s duty or liability arises out of court, “as the facts happen”.

Secondly, the *Banque Financière* subrogation remedy’s function seems to require C’s subrogation entitlement to be dated from the time when D’s liabilities were unjustly released at C’s expense. If the remedy is a specific restitutionary mechanism, which reverses *in specie* the unjust enrichment that would otherwise flow from the release of D’s liabilities, then dating C’s subrogation entitlement *from the time of the unjust release* looks natural: it is the most closely-tailored way of achieving that specific reversal.

Thirdly, recent descriptions of subrogation as a restitutionary “remedy”⁵⁴ do not necessarily contradict the idea that subrogation claimants have some pre-court entitlement. “Remedy” is a notoriously unstable term.⁵⁵ It is certainly common in legal discourse to use “remedy” to denote orders that a *court* might make; and on that assumption, the courts, when labelling subrogation a “restitutionary remedy”, *might* be describing relief *dependent on court intervention*. Nevertheless, that cannot be decisive. A court, when granting the relevant subrogation “remedy”, could be effectuating a pre-existing entitlement held by C, the subrogation claimant. In any case, there is a broader sense of “remedy” — a cure for an ill, or a legal response to a legally recognised mischief (*e.g.* a wrong or an unjust enrichment) — which is apt to describe legal institutions like English law’s “institutional” constructive trust, which operate by affording substantive rights to a claimant, independently of any court order, as the legally significant facts occur. This broader usage can easily accommodate descriptions of subrogation as a “restitutionary remedy”, even if it works in the most strongly “institutional” way — via

53. The leading proponent of the “liability” view is Stephen A Smith; a key recent contribution is Stephen A Smith, “A Duty to Make Restitution” (2013) 26:1 Canadian Journal of Law and Jurisprudence 157.

54. See *e.g.* *Filby*, *supra* note 50 at paras 1, 52, 55, 60, 62; *Appleyard*, *supra* note 36 at para 32; *Banque Financière*, *supra* note 1 at 228, 231-32, 236-37; *Boscawen*, *supra* note 3 at 335.

55. On the meaning(s) of the term “remedy”, see in particular, Rafal Zakrzewski, *Remedies Reclassified* (Oxford: Oxford University Press, 2005) chs 2-4.

equity affording a subrogation claimant immediate rights, independently of any court order, that are equitable replicas of the paid-off creditor's extinguished rights.

Finally, a pre-court entitlement is supportable *even* if the “liability” model of the law of unjust enrichment is preferred — that is, even if D, against whom a cause of action in unjust enrichment has arisen, merely incurs a “*liability*” to be ordered by a court to make restitution, in proceedings brought by C.⁵⁶ Translated to subrogation cases, an equivalent analysis would be that subrogation-justifying facts do not result in C immediately acquiring rights that are equitable replicas of the paid-off creditor's extinguished rights. Instead, subrogation-triggering facts would immediately yield only a liability on D and relevant others to be subjected, via court order, to legal relations mirroring those that were extinguished (and a concomitant entitlement in C to bring proceedings to obtain such relief). This important possibility is examined further in Part IV, below.

IV. The Nature of Any Pre-Court Entitlement

If C has some form of pre-court entitlement in a subrogation case, two key questions remain to be answered: (i) what is the nature of this entitlement?; and (ii) what is the court's role in effectuating it? Although interconnected, these questions will be tackled separately, in turn, in the following two Parts. On closer examination, some features of C's pre-court entitlement seem undisputed, whilst others are more open to doubt. It will be argued that the uncertainty reflects an as-yet-unrecognised and unresolved tension in the authorities between two different conceptions of the operation of the *Banque Financière* subrogation “remedy” — a “strong institutional model” and a weaker institutional model, which can be termed the “liability model”.

56. Smith, *supra* note 53.

A. The Essential Characteristics of the Pre-Court Entitlement

1. An equitable entitlement?

In its earliest manifestations, *Banque Financière* subrogation was the product of intervention by courts of equity. This heritage remains evident in the modern law. Leading modern cases expressly classify this species of subrogation as an “equitable remedy”,⁵⁷ and it is common to find it referred to as the “remedy”, “doctrine” or “principle” of “*equitable* subrogation”.⁵⁸ Consistently with this jurisdictional basis, there is a consensus that the pre-court entitlement is some species of *equitable* entitlement. In older cases, this might be conveyed by statements that the security interest of X, the paid-off creditor, was “*kept alive*” “*in equity*” for C’s benefit,⁵⁹ or that C was in the position of, or equivalent to, an “*equitable assignee*” of X’s security interest.⁶⁰ Post-*Banque Financière*, we know that such statements are metaphors, rather than literal truths. X’s rights are not actually “kept alive”, and C does not actually acquire X’s rights, or the benefit of X’s rights, by transfer or otherwise. In Lord Hoffmann’s words:

the phrase ‘keeping the charge alive’ needs to be handled with some care. It is not a literal truth but rather a metaphor or analogy: see Birks, *An Introduction to the Law of Restitution*, pp 93-97. In a case in which the whole of the secured

57. See e.g. *Menelaou SC*, *supra* note 6 at para 49; *Filby*, *supra* note 50 at paras 1, 52, 55, 60; *Appleyard*, *supra* note 36 at para 32; *Banque Financière*, *supra* note 1 at 228, 231-32, 236-37; *Boscawen*, *supra* note 3 at 335.

58. See e.g. *Swynson Ltd v Lowick Rose LLP*, [2015] EWCA Civ 629 at para 47; *Tiuta*, *supra* note 4 at paras 14, 23, 27, 50, 52, 81; *Pickenham Romford Ltd v Deville*, [2013] EWHC 2330 (Ch) at para 54 and following; *Filby*, *supra* note 50 at paras 19, 31, 44, 51-52, 55, 57, 62; *Cressman v Coys of Kensington (Sales) Ltd*, [2004] EWCA Civ 47 at para 44; *Appleyard*, *supra* note 36 at para 30.

59. See e.g. *Chetwynd*, *supra* note 2 at 357; *Butler*, *supra* note 2 at 282; *Chandiram*, *supra* note 2 at 745; *Western Trust*, *supra* note 2.

60. See e.g. *Burston Finance*, *supra* note 28 at 1652; *Western Trust*, *supra* note 2. In cases involving subrogation to an *unsecured* debt, the courts have also sometimes described the personal claim arising via subrogation as an “*equitable liability*”: e.g. *Baroness Wenlock v The River Dee Company*, (1887) 19 QBD 155 (CA (Eng)) at 166.

debt is repaid, the charge is not kept alive at all. It is discharged and ceases to exist. ... It is important to remember that ... subrogation is not a right or a cause of action, but an equitable remedy against a party who would otherwise be unjustly enriched. It is a means by which the court regulates the legal relationships between a plaintiff and a defendant or defendants in order to prevent unjust enrichment. When judges say that the charge is “kept alive” for the benefit of the plaintiff, what they mean is that his legal relations with a defendant who would otherwise be unjustly enriched are regulated *as if* the benefit of the charge had been assigned to him. It does not by any means follow that the plaintiff must for all purposes be treated as an actual assignee of the benefit of the charge and, in particular, that he would be so treated in relation to someone who would not be unjustly enriched.⁶¹

It has been suggested that the older cases, on which Lord Hoffmann based this analysis, proceeded via a “legal fiction”: equity regulated the parties’ relations “as though the [paid-off] creditor’s rights were not extinguished by the payment, [and] were transferred to the claimant so that he could enforce them for his own benefit”.⁶² However, in truth, this elaborate fiction is unnecessary. One can say simply that where this form of subrogation operates, equity operates on the facts to afford C *new* equitable rights, *which prima facie replicate the rights that X previously held, and C extinguished*.⁶³ The English cases now tell us that this is a “restitutionary” mechanism, to reverse the unjust enrichment that would

61. *Banque Financière*, *supra* note 1 at 236.

62. See Mitchell & Watterson, *Subrogation*, *supra* note 4 at 1.05, and see further ch 3.

63. See further *ibid* ch 8; and now *Tiuta*, *supra* note 4 at para 43, adopting passages from this text with approval.

otherwise arise from their release.⁶⁴

2. Potentially *in rem*?

Where C has discharged another’s *unsecured* debt, C obviously cannot acquire more than an *in personam* entitlement by subrogation.⁶⁵ However, where C has discharged another’s security interest, and there is no objection in principle to C acquiring the special advantages of a security interest by subrogation, the English courts have afforded C’s pre-court entitlement an *in rem* status — reflecting his entitlement to be treated, in equity, as if he had the paid-off creditor’s security.

This looked in doubt immediately following *Banque Financière*.⁶⁶ Both the decision, and Lord Hoffmann’s reasoning, hinted that subrogation was an unnervingly flexible remedy in two connected senses: (i) even where a security interest was discharged, subrogation did not yield rights *in rem* — instead, the court operated *in personam*, regulating C’s relations with one or more other parties *as if* C had taken an assignment of the paid-off creditor’s rights; (ii) as a corollary, if a court had to decide whether a third party, who had subsequently acquired an interest in the relevant subject-matter, was subject to C’s subrogation claim, the answer was to be found by asking *directly* whether (if he were not so subject) the

64. As Australian authorities seem to confirm, it is unnecessary to subscribe to the unjust enrichment theory to accept that “equitable subrogation” operates like this: *e.g. Re Dalma No 1 Pty Ltd*, [2013] NSWSC 1335 (Austl) at paras 20-21 (“legal fiction” of revival); *Saraceni v Mentha (No 2)*, [2012] WASC (Austl) 336 at para 238 (“legal fiction” of revival) (quoting Mitchell & Watterson, *Subrogation*, *supra* note 4); *Taleb v NAB Ltd*, [2011] NSWSC 1562 (Austl) (“keeping a previous security alive is a figure of speech” at para 69); *Saraceni v Mentha*, [2011] WASC 94 (Austl) at paras 39-40 (quoting Mitchell & Watterson, *Subrogation*, *supra* note 4); *Cook v Italiano Family Fruit Co Pty Ltd*, [2010] FCA 1355 (Austl) at para 106 (“legal fiction” of revival) (quoting Mitchell & Watterson, *Subrogation*, *supra* note 4).

65. For recent illustrations of subrogation to unsecured debts, see *e.g. Filby*, *supra* note 50 (unsecured HSBC joint loan account debt); and *Niru Battery Manufacturing Co v Milestone Trading (No 2)*, [2004] EWCA Civ 487 (unsecured judgment debt).

66. See Mitchell & Watterson, *Subrogation*, *supra* note 4 at 8.48-8.60.

third party would be unjustly enriched at C's expense.

After early equivocation,⁶⁷ the consensus today is that *Banque Financière* has not radically destabilised past cases. Thus: (i) where a security interest is discharged, *Banque Financière* subrogation does typically generate an entitlement *in rem*, as the facts happen, as a mechanism for reversing *in specie* the unjust release of an earlier security interest; and (ii) C's ability to assert this entitlement *vis-à-vis* a later party is determined by reference to its quality as such — *i.e.* on the assumption that C has some form of pre-existing and potentially competing equitable entitlement *in rem*.

3. The nature of the equitable entitlement *in rem*

We come, finally, to the most difficult question: what exactly is the nature of C's equitable entitlement *in rem*? The puzzle can be illustrated by reference to the “ordinary and typical”⁶⁸ subrogation case, which arises from a defective lending transaction. If C lender is entitled to be subrogated to the security held by X, which was extinguished via C's advance, what does C acquire, as the facts happen? Is C immediately afforded rights, before any court order, which are equitable replicas of X creditor's extinguished rights, or does that put C's position too strongly? If it is too strong, what exactly does C obtain as the facts happen? No sustained attention has yet been given to these questions, despite their theoretical and practical importance. The major contention of this article is that it will be hard to achieve satisfactory answers unless one recognises that there is a hitherto unrecognised and unresolved tension in the authorities between two different conceptions of the operation of the *Banque Financière* subrogation “remedy”.

B. Two Different Models of the Pre-Court Entitlement

English law is frequently said to adopt an “institutional” form of constructive trust, implying that such trusts are generated by operation

67. See especially *Omar*, *supra* note 26, discussed further, *below*, Part IV.C.2.

68. The terminology used by Walton J in the much-cited decision in *Burston Finance*, *supra* note 28.

of law, in accordance with legal rules, as the trust-justifying facts occur.⁶⁹ They do not arise only by virtue of any later court order. *A fortiori*, English law has not yet adopted any strong form of “remedial constructive trust”, which might allow courts, exercising a broad remedial discretion in proceedings before them, to impose a trust or lien over a defendant’s assets, retrospectively or prospectively from the date of the court’s order, as they think appropriate.⁷⁰

It would be surprising if English law tolerated a dramatically different vision of the equitable entitlements generated in subrogation cases. The analysis in Part III confirms, beyond reasonable doubt, that it does not. The evidence overwhelmingly suggests that the *Banque Financière* subrogation remedy involves a species of pre-court entitlement, generated as the legally significant facts occur, independently of any court order. To that extent, where C is entitled to be subrogated to X’s extinguished security interest, the subrogation remedy, like English law’s constructive trust, appears to involve an “institutional” form of proprietary response.

Caution is nevertheless needed. “Institutional” responses are not necessarily homogeneous. And on examination, two different “institutional” models may be discernable in the subrogation cases.

1. An orthodox vision: the “strong institutional model”

The orthodox conception of subrogation seems to be a “strong” institutional conception: it assumes that C immediately acquires rights, independently of any court order, as the subrogation-justifying facts occur, *which are an immediate equitable replica of the extinguished rights of X, the paid-off creditor*. In effect, C is immediately placed in a position akin to an equitable assignee, albeit by operation of law, rather than by any voluntary disposition of X, the former right-holder.

69. For this distinction, see *Westdeutsche Landesbank Girozentrale v Islington LBC*, [1996] AC 669 (HL) at 714-16, per Lord Browne-Wilkinson [*Westdeutsche*].

70. See *e.g.* *Westdeutsche*, *ibid*; *Polly Peck International (No 5)*, [1998] 3 All ER 812 (CA (Civ)); *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*, [2011] EWCA Civ 347 at para 37; *FHR European Ventures LLP v Mankarious*, [2013] EWCA Civ 17 at para 76.

If accepted, this model is likely to have important implications for the resolution of priority disputes where C is subrogated to a security interest: it assumes that C has an immediate equitable security interest, rather than a mere equity. However, it may also bring implications for the court's role in subrogation cases.⁷¹ Arguably, there is no *legal* necessity for C to obtain any court order at all. C is obviously well-advised, to avoid subsequent challenge, to obtain a declaration *confirming* that the relevant rights have arisen; and C could certainly seek consequential orders, as necessary, with a view to *enforcing* the rights so declared — *e.g.* orders for possession or for the appointment of a receiver. Nevertheless, adopting this strong institutional model, any court order would have no role in creating or constituting the entitlements that C acquires “by subrogation”. They have already been delivered fully-fledged and fully-formed, out of court, as the subrogation-justifying facts occurred.

2. An alternative vision: the “liability model”

On closer examination, there are reasons of both authority and principle to question the veracity of this “orthodox” vision of subrogation, and to prefer a “weaker” institutional model. Adopting this alternative model, C does not immediately acquire rights which are equitable replicas of X creditor's extinguished rights, as subrogation-justifying facts occur. Instead, those legally significant facts merely trigger a *liability* on D and relevant others to be subjected by subsequent court order to legal relations equivalent to those which previously existed, if this is needed to reverse their unjust enrichment (and a concomitant entitlement in C to bring proceedings to obtain such relief). It is aptly labelled the “liability model”.

The distinction between this liability model and the strong institutional model is not merely semantic. Important practical implications may follow. For example, adopting the liability model, where C is subrogated to X's extinguished security interest, priority disputes should not be resolved on the simple premise that C has an immediate, vested equitable security interest *ab initio*. C has the benefit

71. See for further exploration, Part V, below, “The Role of the Court”.

of a *liability* to have a court subject D and relevant others to legal relations equivalent to those which previously existed. The law faces a genuine choice whether — for priority purposes — this “liability *in rem*” (and C’s concomitant entitlement) should rank as a full equitable interest, or have the lesser status of a “mere equity”, which is more vulnerable in priority disputes. Equally importantly, a court asked to adjudicate a subrogation case will have a real, non-trivial role, in effectuating C’s subrogation entitlement. At the very least, a court order will be a *necessary* step, in conclusively crystallising C’s pre-existing entitlement. However, one can also contemplate the court having *some* latitude, to deny/shape the remedy, on a principled basis.⁷²

C. Choosing Between the Models: the Position as a Matter of Authority

Which model is the more “correct”? Looking to authority alone, the messages seem mixed. Much material from the subrogation cases is inconclusive. One Court of Appeal decision, *Omar*,⁷³ seems to point decisively towards the strong institutional model, and thus requires extended discussion. However, on closer inspection, the case turns out to be an unsafe foundation from which to derive any general theory about the nature and operation of the *Banque Financière* “remedy”.

1. The largely inconclusive state of the authorities

On a cursory examination, the support for the strong institutional model might seem uncontested. Certainly, in key pre-*Banque Financière* cases, the parties and the courts commonly spoke in terms which implied that, within the traditional categories of subrogation, C *would be regarded from the outset as equivalently placed to an equitable assignee of another’s security*, and by extension, would immediately have a vested equitable security interest, effective *in rem*. Nevertheless, the best test of the veracity of such language is whether the legal characteristics which the courts have afforded to C’s entitlement *in practice* are only consistent with the strong

72. *Ibid.*

73. *Omar*, *supra* note 26.

institutional model. On closer examination, it seems that they are not. With little straining, the liability model can also accommodate the evidence, reviewed in Part III, that C has some pre-court entitlement. In particular:

- Common linguistic usage, which describes C as being “entitled to” be subrogated or “having become entitled to be” subrogated, or as having a “right to be subrogated”, is compatible with a vision of the law that involves C immediately acquiring the benefit of a *liability* of D and relevant others, to have a court subject them to legal relations equivalent to those that previously existed.
- A court’s “declaration” that C is entitled to security by subrogation at some earlier point in time⁷⁴ can be interpreted as effectuating a pre-existing *liability*, dating from that time, to have the court recognise/impose legal relations equivalent to those that previously existed.
- The liability model can support the courts’ approach to priority disputes, which assumes that a subrogation claimant, who is entitled to be subrogated to a security interest, has a species of equitable entitlement, of a proprietary quality, which exists independently of any court order.⁷⁵ One can conceive of subrogation-justifying facts triggering what amounts to a “liability *in rem*”, which has the quality of a proprietary entitlement — a liability to have a court recognise/impose legal relations in relation to an asset, equivalent to those that previously existed, which has the potential to affect third parties who later acquire competing claims to the same subject matter.
- The benefit of an uncrystallised “liability” of this sort might be assignable, just as one might assign an unliquidated claim in unjust enrichment, or an unliquidated liability to pay

74. See on court declarations, Part III.A, above.

75. See on priority disputes, Part III.B, above.

damages for a wrong, within the limits that public policy allows.⁷⁶

- A liability model can accommodate the phenomenon of sub-subrogation, merely by adjusting one’s understanding of what is released/extinguished, when C pays X. It is not a pre-existing, fully-fledged security interest held by X, which replicates an earlier creditor’s security that X previously discharged. Instead, it is the benefit of an uncrystallised *liability* to have the court recognise/impose legal relations of that sort.⁷⁷
- A court might decide to treat the parties’ legal positions, *before* proceedings are brought, *as regulated in material respects as if C had the relevant rights from the time that the relevant liability accrued*.⁷⁸
- With little modification, cases exploring the possibility of waiver, abandonment, or merger of C’s subrogation-based charge are susceptible to a reading that what is “waived” or “abandoned” or lost by “merger” is the benefit of an uncrystallised *liability* to have the court recognise/impose legal relations equivalent to those that previously existed.⁷⁹

In fact, the case for the liability model can be put more positively. In *Banque Financière* and ensuing cases, the availability of subrogation has sometimes been described in subtly different terms that, if anything, seem more consistent with the liability model. Three points require particular mention.

First, the courts commonly refer to this species of subrogation as a

76. See on assignment, Part III.D, above.

77. See on sub-subrogation, Part III.E, above.

78. See on the validity of supervening enforcement action, Part III.C, above.

79. See on loss by waiver, abandonment or merger, Part III.F, above.

“remedy”.⁸⁰ This is potentially significant. In legal discourse, the term “remedy” often refers to orders that *courts* make in proceedings before them. Indeed, consistently with this, in some influential recent cases, judges have explicitly referred to subrogation as a “remedy” which is “granted” by the court.⁸¹ Such language points strongly towards the liability model, which assumes that the court has a *necessary* role, in crystallising subrogation entitlements by the orders that it makes. Rather more straining is needed to explain this language consistently with the premises of the strong institutional model. One would have to imagine that the term “remedy” is being used more broadly⁸² to describe a legal response to some legally recognised mischief, according to which *the law* alters the parties’ legal positions, out of court, where this is required by the principles of the law of unjust enrichment.

Secondly, even more tellingly, in some of the same decisions, judges have drawn an explicit distinction between (i) the pre-existing entitlement that C has acquired independently of any court decision; and (ii) the “remedy” or “order” for subrogation that a court might later make. Again, whilst not completely unequivocal, this distinction is more suggestive of the liability model, according to which a court’s order has a *necessary* role in crystallising C’s pre-existing subrogation entitlement. Particularly important in this respect are Millett LJ’s words in the key pre-*Banque Financière* case of *Boscawen*.⁸³ His Lordship seemed to draw a clear distinction between the pre-existing “equity” of subrogation and

80. See e.g. *Filby*, *supra* note 50 at paras 1, 52, 55, 60; *Appleyard*, *supra* note 36 at para 32; *Banque Financière*, *supra* note 1 at 228, 230, 231-32, 234, 236-37; *Boscawen*, *supra* note 3 at 335.

81. See e.g. *Boscawen*, *supra* note 3 at 335, 342; *Omar*, *supra* note 26 at 81; *Karasiewicz*, *supra* note 34 at para 19; *Tiuta*, *supra* note 4 at para 42. Cf. Lord Hoffmann, in *Banque Financière*, *supra* note 1 (“subrogation is not a right or a cause of action but an equitable remedy against a party who would otherwise be unjustly enriched. It is a means by which *the court* regulates the legal relationships between a plaintiff and a defendant or defendants in order to prevent unjust enrichment” at 236 [emphasis added]).

82. Cf. Zakrzewski, *supra* note 55 ch 2.

83. *Boscawen*, *supra* note 3.

any subsequent court order for subrogation. To quote his words:

[s]ubrogation ... is a remedy, not a cause of action ... It is available in a wide variety of different factual situations in which it is required in order to reverse the defendant’s unjust enrichment. Equity lawyers speak of a right of subrogation, or of an equity of subrogation, *but this merely reflects the fact that it is not a remedy which the court has a general discretion to impose whenever it thinks it just to do so*. The equity arises from the conduct of the parties on well-settled principles and in defined circumstances which make it unconscionable for the defendant to deny the proprietary interest claimed by the plaintiff. A constructive trust arises in the same way. *Once the equity is established the court satisfies it by declaring that the property in question is subject to a charge by way of subrogation in the one case or a constructive trust in the other.*⁸⁴

And later:

[t]here is no justification for the proposition that [the claimant’s] right to be subrogated to the Halifax’s charge did not arise until [the claimant] elected to seek that remedy. *Nor ... is there any justification for the proposition that [the claimant’s] right to be subrogated ... did not arise until the court made the necessary order ...* It arose at the very moment that the Halifax’s charge was discharged, in whole or in part, with [the claimant’s] money. It arose because, having regard to the circumstances in which the Halifax’s charge was discharged, it would have been unconscionable for [the debtor, Mr. Bajwa] to assert that it had been discharged for his benefit. At law, Mr. Bajwa became the owner of an unencumbered freehold interest in the property; but he never did, even for an instant, in equity.⁸⁵

Drawing on Millett LJ’s words, in *Omar*,⁸⁶ Lord Justice Jonathan Parker said that in the “ordinary and typical” case, where a claimant seeks to be “subrogated to security rights”, “the remedy of subrogation gives effect to a property right which already exists in equity, *i.e.* the right to be regarded as chargee of the property in question”.⁸⁷ Likewise, in *Karasiewicz*,⁸⁸ building on Jonathan Parker LJ’s analysis, Lady Justice Arden said that the “effect of the ... decision [in *Omar*] is that ... the creditor who seeks to be subrogated is given the remedy by way of satisfaction of a pre-existing equitable proprietary right which is vindicated by the order

84. *Ibid* at 335 [emphasis added].

85. *Ibid* at 342 [emphasis added].

86. *Omar*, *supra* note 26.

87. *Ibid* at para 81.

88. *Karasiewicz*, *supra* note 34.

for subrogation”.⁸⁹ And most recently, in *Tiuta*, Gloster LJ again cited Jonathan Parker LJ’s analysis for the proposition that “the remedy of subrogation afforded by the court gives effect to a pre-existing equitable proprietary right (*i.e.* the right to be regarded as the chargee of the question)”.⁹⁰

Thirdly, unlike the strong institutional model, the liability model does not assume that C immediately acquires a fully-formed, fully-fledged bundle of rights that represent an equitable replica of the paid-off creditor’s discharged rights. As such, the liability model seems consistent with the juristic basis of this form of subrogation,⁹¹ and with the indications that the courts sometimes give, that the subrogation “remedy” has a degree of flexibility, and is susceptible to a degree of principled court shaping.⁹² The exact nature of this flexibility is examined in Part V, “The Role of the Court”.⁹³ On any view, C’s entitlement is not dramatically inchoate, to the same extent as an entitlement grounded in proprietary estoppel is sometimes — and perhaps wrongly — assumed to be. Nevertheless, its existence and extent may be in some respects uncertain, and therefore properly dependent on a necessary stage of court crystallisation — as the liability model assumes. This uncertainty is increased by the fact that later events can vitally affect the continued existence, extent and enforceability of any rights that C might appear to acquire via subrogation.⁹⁴

89. *Ibid* at para 19. She went on to acknowledge, in the same paragraph, that there may be “factors which would lead the court to the conclusion that subrogation was not the appropriate relief”.

90. *Tiuta*, *supra* note 4 at para 42.

91. See further, Part V.B, below.

92. *Cf.* *Chetwynd*, *supra* note 2; *Boodle Hatfield*, *supra* note 28; *Western Trust*, *supra* note 2; *Halifax Mortgage Services Ltd v Muirhead*, (1998) 76 P&CR 418 (CA (Civ)(Eng)) [*Muirhead*]; *Mortgage Corporation v Shaire*, [2001] Ch 743 (Eng) at 756; *Karasiewicz*, *supra* note 34; *Appleyard*, *supra* note 36; *Filby*, *supra* note 50; *Kali*, *supra* note 50; *Anfield*, *supra* note 36; *Menelaou v Bank of Cyprus*, [2013] EWCA Civ 1960 [*Menelaou* CA], and on further appeal *Menelaou* SC, *supra* note 6; *Sandher v Pearson*, [2013] EWCA Civ 1822 [*Sandher*].

93. See further, Part V.B.3, below.

94. For a clear demonstration of this, see *Muirhead*, *supra* note 92.

2. A leading authority for the strong institutional model — *Halifax v Omar*

Pausing here, the liability model might appear to be a viable interpretation of the authorities on *Banque Financière* subrogation. There is, however, one key post-*Banque Financière* decision that seems to stand as clear authority for the opposing, strong institutional model: the Court of Appeal’s decision in *Omar*.⁹⁵ *Omar* is the only modern English authority to have directly considered the quality and status of a subrogation claimant’s pre-existing entitlement, and it reaches some emphatic conclusions. In short: (i) where C is entitled to be subrogated to a security interest, C has a fully-fledged equitable (security) interest, and not any lesser form of “mere equity”; (ii) the priority of C’s entitlement vis-à-vis later transferees/incumbrancers falls to be determined on that assumption; (iii) this is because “[C] who is subrogated to a security right is treated in equity as if it had that security”,⁹⁶ by which the Court of Appeal appears to have meant “treated from the outset as if”. This important decision warrants extended analysis.

i. The decision in *Halifax v Omar*

The proceedings in *Omar* arose out of frauds practiced on Halifax by a “Mr. Khan”, with the assistance of a corrupt solicitor. Mr. Khan had obtained a £147,000 loan from Halifax, ostensibly to buy the registered long-leasehold of a flat for £210,000 from its proprietor, Ms. Garcia. The loan was to be secured by a first legal charge over Mr. Khan’s newly-acquired registered title. In truth, the price paid to Ms. Garcia, via the loan monies, was only £132,000, and the transaction never proceeded as Halifax was led to expect. Two transfers of the leasehold title were apparently executed by Ms. Garcia — one in favour of Unitbase, a company controlled by Mr. Khan, and a second in favour of Mr. Khan, expressed to be at Unitbase’s direction. However, neither leasehold transfer was ever completed by registration, and no legal charge was ever executed in favour of Halifax to secure its advance. When it subsequently

95. *Omar*, *supra* note 26.

96. *Ibid* at para 84.

discovered the frauds, Halifax attempted to rescue itself by claiming that it was subrogated to the unpaid vendor's lien, previously held by Ms. Garcia, which had been discharged via its £132,000 advance. Unfortunately, an obstacle emerged in the shape of Mr. Omar, then in possession of the flat, who claimed to have acquired a superior equitable interest in the property some months later, by virtue of (i) a contract to purchase the leasehold from Unitbase; or (ii) a 20-year equitable lease from Unitbase. As argued, the case presented itself as a priority dispute between Halifax's entitlement to be subrogated to Ms. Garcia's unpaid vendor's lien, and Mr. Omar's later, competing equitable interest, acquired via the transaction(s) with Unitbase.⁹⁷

The first instance judge found in favour of Halifax. Apparently on the assumption that Halifax had acquired an *equitable* interest, by subrogation, as the relevant facts occurred, the case was treated as a familiar priority dispute between *competing equitable interests*, which fell to be resolved in accordance with the familiar equitable principle that where the equities are equal, the first in time prevails. As Halifax's interest pre-dated Mr. Omar's, and there was no gross negligence or inequitable conduct to deprive Halifax of the priority that it would otherwise enjoy, Halifax prevailed.⁹⁸

Mr. Omar appealed. His counsel's arguments, insofar as they appear from Jonathan Parker LJ's discussion, were ambitious. The starting assumption was clear: following *Banque Financière*, Halifax's entitlement to be subrogated to Ms. Garcia's unpaid vendor's lien was a restitutionary remedy, awarded by the law of unjust enrichment. Less clear is what counsel sought to derive from this. On close inspection, Mr. Omar's counsel seems to have presented three distinct lines of argument on his behalf. They can be restated as follows:⁹⁹

97. Unitbase's entitlement to the leasehold, of which Mr. Omar's must have been derivative, was not closely analysed in the Court of Appeal's reported decision; the argument probably proceeded on the assumption that Unitbase had acquired an equitable title to Ms. Garcia's registered leasehold, by virtue of the unregistered transfer in its favour.

98. *Omar*, *supra* note 26 at para 25.

99. The arguments are extracted/re-constructed from *ibid* at paras 61-63, 84.

- *Argument 1*: Halifax acquired an immediate equitable entitlement, in the nature of an entitlement *in rem*, which was nevertheless a lesser form of entitlement — a “mere equity”. Applying conventional priority principles, this left Halifax vulnerable: a bona fide purchaser of a competing legal *or equitable* interest (which is what Mr. Omar claimed to be), would not be subject to an earlier “mere equity”.
- *Argument 2*: Halifax acquired an immediate entitlement, in the nature of an entitlement *in rem*. It was an equitable interest, but having been generated by the law of *unjust enrichment*, it was more fragile. The developing law of unjust enrichment embodied a defence of “*bona fide* purchase”, and there was no reason why this developing defence should track historic technical distinctions adopted within property law. Any innocent purchaser, whether of a legal interest, or of an equitable interest (as Mr. Omar claimed to be), should take free of this form of entitlement.
- *Argument 3*: Halifax did not have an entitlement *in rem*. As suggested by a literal reading of Lord Hoffmann’s reasoning in *Banque Financière*, the question whether a later party would be bound to respect Halifax’s claim was not determined on the basis that Halifax had an immediate *in rem* entitlement, whose priority and enforceability should be determined by applying property law’s conventional priority rules. Instead, it was answered by directly inquiring whether, unless bound by Halifax’s claim, that later party would be unjustly enriched at Halifax’s expense. That would not be so, if the later party was an innocent purchaser of a competing interest in the same property.

These contentions raise obvious difficulties. *Argument 3* depends upon a radical reading of *Banque Financière*,¹⁰⁰ which sees the remedy operating

100. See Part IV.A.2, above.

in a dramatically *in personam* fashion, inconsistently with widespread assumptions that subrogation can yield a real, fully-fledged security interest. *Argument 2* meanwhile requires the unorthodox assumption that Halifax immediately acquired an equitable interest, which had a lesser *in rem* quality than a conventional equitable interest — and was the practical equivalent of a “mere equity” for priority purposes — *merely because it was generated by the law of unjust enrichment*. *Argument 1* offers a more orthodox route to the same conclusion. *If* Halifax’s subrogation entitlement was a “mere equity”, then on conventional property law principles, it would attract priority rules that rendered it more fragile in the face of later competing interests.

The Court of Appeal did not hesitate in dismissing Mr. Omar’s claims. Unpacked, there were four essential steps in Jonathan Parker LJ’s reasoning.

- *Step 1*: Wary of the unsettling implications of the *Banque Financière* decision, Jonathan Parker LJ attempted to confine it within a narrow sphere. In his view, the unjust enrichment theory had no role in “ordinary” cases, where a claimant claimed to be entitled to a security interest by subrogation. Such cases should be resolved via well-established principles, and not by reference to any novel unjust enrichment analysis. As such, the origin of Halifax’s entitlement, and its persistence vis-à-vis a third party like Mr. Omar, did not fall to be shaped by references to the law of unjust enrichment at all.¹⁰¹

To quote Jonathan Parker LJ:

[t]he key to the decision in the instant case lies in the distinction, emphasised by Lord Hoffmann in the *BFC* Case ... between on the one hand subrogation to a security ... and on the other hand subrogation merely to the indebtedness itself ... The former category includes rights *in rem*; the latter is limited to rights *in personam*. The instant case falls within the former category; the *BFC* Case falls within the latter. ... In the *BFC* Case, the House of Lords fashioned the restitutionary remedy of subrogation to meet a situation in which ... property rights were not in issue. It did so by the application of the wider doctrine of

101. *Omar*, *supra* note 26 at paras 70-83.

unjust enrichment, so as to confer personal rights (as opposed to property rights) on a claimant who had been unjustly deprived as against a defendant who had been unjustly enriched. The instant case, on the other hand, does not require the remedy of subrogation to be fashioned in that special way. [...] *[It is] a straightforward case involving property rights, calling into play well-settled principles.*¹⁰²

Jonathan Parker LJ went on to cite a handful of earlier authorities, including Justice Walton’s classic encapsulation of the “ordinary and typical example” of subrogation in *Burston Finance Ltd v Speirway Ltd*,¹⁰³ whereby A, having paid off secured debts owed to B, was “entitled to be regarded in equity as having had an assignment to him of B’s rights as a secured creditor”. He then continued:

[t]he correctness of that statement of the law by Walton J is not in any way affected by the reasoning or the decision of the House of Lords in the *BFC* Case. As Walton J makes clear, he is addressing the “ordinary and typical” case where the claimant seeks to be subrogated to security rights ... *In such a case, the remedy of subrogation gives effect to a property right which already exists in equity, i.e. the right to be regarded as chargee of the property in question.*¹⁰⁴

Adopting these premises, *Arguments 2* and *3* necessarily failed at the first hurdle. Each depended on the unjust enrichment theory, which *ex hypothesi*, was not in play.

- *Step 2*: A long line of authorities indicated that in “ordinary” cases, where a claimant claimed to be entitled to a security interest by subrogation, the claimant acquired an immediate equitable proprietary entitlement, independently of any court order, as the triggering-facts occurred.¹⁰⁵
- *Step 3*: The priority of this equitable proprietary entitlement should be resolved in accordance with the principles that ordinarily govern the priority of competing interests of the relevant quality, in the relevant subject-matter.

Stopping here, *Argument 1* might still seem viable. A court might conclude, adopting a conventional property law perspective, that the

102. *Ibid* at paras 70-71 [emphasis added].

103. *Burston Finance*, *supra* note 28 at 1652.

104. *Omar*, *supra* note 26 at paras 80-81 [emphasis added].

105. *Ibid* at paras 71, 80-81.

pre-court entitlement of a subrogation claimant like Halifax was a “mere equity”. However, this point was apparently only weakly pressed by counsel,¹⁰⁶ and it was dismissed very perfunctorily at the end of Jonathan Parker LJ’s judgment:

- *Step 4:* For priority purposes, the subrogation claimant’s equitable proprietary entitlement was a fully-fledged equitable interest, and not a “mere equity”. Any argument to the contrary was “bad”. The authorities cited made it “clear [that] a claimant who is subrogated to a security right is treated in equity as if it had that security”.¹⁰⁷

This last step was crucial. Jonathan Parker LJ’s explicit premise was that the entitlement that Halifax acquired from the time of the subrogation-justifying facts was a full equitable interest, *because it was an (equitable) replica of the paid-off creditor’s security*. Halifax was “treated in equity as if it had that security”. In *Omar*, the paid-off creditor’s security was Ms. Garcia’s unpaid vendor’s lien. To the extent that Halifax’s money was used to pay the purchase price for the property, Halifax was therefore “an equitable chargee”.¹⁰⁸ It further followed that Halifax had priority:

- i. Halifax had an equitable interest which pre-dated Mr. Omar’s competing equitable interest;
- ii. applying conventional priority principles, Halifax’s interest had prima facie priority, as the first equitable interest in time; and
- iii. Halifax was not guilty of any “inequitable conduct” or “gross negligence” that could justify the postponement of its interest to the interest subsequently acquired by Mr. Omar.

Presented in this way, the decision in *Omar* looks like clear authority for the strong institutional model of subrogation. A subrogation claimant like Halifax was assumed to acquire an *immediate* equitable entitlement *in rem*, amounting to an equitable replica of the paid-off creditor’s security interest, from the time of the subrogation-justifying facts.

106. *Ibid* at para 84 (observing that the argument, made in written skeletons, was “rightly” not developed in oral argument).

107. *Ibid* [emphasis added].

108. *Ibid*.

ii. Doubts about the status of *Halifax v Omar*

It is certainly *possible* to read early cases as Jonathan Parker LJ did.¹⁰⁹ Nevertheless, we should not leap too quickly to the conclusion that the strong institutional model has prevailed. There are several reasons, cumulatively weighty, for doubting the authoritative status of the *Omar* decision on this point.

First, the cases on which Jonathan Parker LJ relied pre-date the authoritative re-rationalisation of “equitable subrogation” in *Banque Financière*, as a restitutionary remedy to reverse unjust enrichment. The language of those earlier cases certainly pointed to a strongly “institutional” response, insofar as C was described as, or as equivalently placed to, an equitable “assignee”, or X’s rights were said to be “kept alive” for C’s benefit. However, this is a vision which cannot be sustained, without qualification, post-*Banque Financière*.

Secondly, Jonathan Parker LJ’s conception of subrogation partly depended on the assumption that the *Banque Financière* rationalisation can be marginalised, and has no role in explaining subrogation to a security interest. However, the *Banque Financière* rationalisation cannot be dismissed so easily: their Lordships’ analysis does not bear the narrow reading that Jonathan Parker LJ proposed. Although the facts of *Banque Financière* were unusual, and the subrogation entitlement recognised by the House of Lords took an unusual, *in personam* form, the unjust enrichment framework was *not* thought to operate only in such unusual cases. It was being offered as a general rationalisation for the remedy afforded even in “ordinary and typical cases”, where the claimant had discharged another’s security interest, and was claiming to be entitled to

109. See also later cases, which seem to accept the same understanding, *obiter*, without close scrutiny: *Tiuta*, *supra* note 4 (where the *Omar* case is relied on); *Trustees Executors Ltd v Steve G Ltd*, [2013] NZHC 16 (where *Boscawen* is cited as authority that an equitable charge arises “on the discharge of the secured creditor’s debt, independently of any court order” at paras 114-115).

a security interest by subrogation.¹¹⁰

On close examination, the line that Jonathan Parker LJ drew between “subrogation to a security interest” (in relation to which he thought unjust enrichment had no role) and “subrogation to a mere debt” (which he thought was governed by the *Banque Financière* rationalisation) does not withstand examination, either conceptually or as an accurate reading of *Banque Financière*. It confuses the subject-matter of the subrogation claim with the nature of the rights generated by subrogation.

In *Banque Financière*, BFC had advanced money for the purpose of paying off an earlier first charge held by RTB over Parc’s land, in the belief that it had effective security in the form of a postponement agreement with Parc’s group creditors, including OOL, a second charge-holder. In fact, the postponement agreement was not effective, and BFC sought to rescue itself, by alleging that it was entitled, by subrogation, to be placed in the same position as RTB — the first chargee — had previously occupied. To that extent, *Banque Financière* did involve subrogation “to a security interest”, and it seems that the court might have been justified in finding that BFC had an equitable entitlement *in rem*, mirroring the nature and priority of RTB’s security interest, but for one crucial circumstance. This was that to afford such an entitlement to BFC — as BFC originally claimed — would have left BFC unjustifiably better off than it had expected. It did not bargain for proprietary security over Parc’s land: it loaned money in the mistaken belief that it had an effective postponement agreement with BFC’s group creditors. That is why the House of Lords chose, exceptionally, to recognise BFC’s subrogation entitlement in an attenuated *in personam* form: *i.e.* BFC was treated as if it were an assignee of RTB’s first charge, but *only vis-à-vis* OOL, the second charge-holder, over whom BFC had expected priority by virtue of

110. For recent acceptance of this at Supreme Court level, see *Menelaou SC*, *supra* note 6 (and in particular Lord Clarke, giving one of two majority opinions: “I would accept ... that the analyses in *Banque Financière* have rationalised the older cases through the prism of unjust enrichment” at para 50). *Cf.* the lone sceptical voice of Lord Carnwath, in the same case, at para 108.

the postponement agreement.¹¹¹

Immediately post-*Omar*, some judges appeared tempted to accept Jonathan Parker LJ’s awkward distinction.¹¹² However, this view has not persisted. In numerous subsequent cases, the courts have directly invoked the *Banque Financière* unjust enrichment framework to justify the availability of subrogation even in what Jonathan Parker LJ described as the “ordinary and typical” case: *i.e.* where a claimant claims to be entitled to a security interest by subrogation.¹¹³

Thirdly, contrary to Jonathan Parker LJ’s assumptions, pre-*Banque Financière* cases may not have authoritatively determined the exact nature of the subrogation claimant’s pre-court entitlement. They certainly indicated that it ordinarily had some form of *in rem* status. However, it is hard to find a pre-*Banque Financière* case in which a court had to decide the exact quality of C’s pre-court entitlement, in a competition with a third party who later acquired rights in relation to the same subject-matter. Either the issue did not arise, or the result would not have been different, according to whether the interest was an “equitable interest” or a “mere equity”.¹¹⁴ If that is correct, then the proper characterisation of C’s pre-court entitlement was arguably a matter of first impression.

Fourthly, past cases, so far as they bear on this priority issue, are slightly more equivocal than Jonathan Parker LJ indicates. In particular, *Boscawen*,¹¹⁵ a case on which he placed much reliance, does not necessarily

111. A reading of *Banque Financière*, *supra* note 1, recently expressly accepted by Lord Clarke in *Menelaou SC*, *supra* note 6 at para 50.

112. See, in particular, *Karasiewicz*, *supra* note 34.

113. See *e.g.* *Menelaou SC*, *supra* note 6; *Tiuta*, *supra* note 4; *Menelaou CA*, *supra* note 93; *Sandher*, *supra* note 93; *Lehman*, *supra* note 28; *Anfield*, *supra* note 36; *Primlake*, *supra* note 28; *Kali*, *supra* note 50. And see *Appleyard*, *supra* note 36 at para 31 (where Neuberger LJ specifically dismisses as incorrect the assumption in the *Omar* and *Karasiewicz* cases that *Banque Financière* introduced any radical new principles into the law of subrogation). And see too *Boscawen*, *supra* note 3 (on which Jonathan Parker LJ placed heavy reliance, where Millett LJ expressly describes subrogation as a “remedy” for “unjust enrichment”).

114. *Cf.* *Boscawen*, *supra* note 3 (where a priority issue did not arise, for reasons given by Millett LJ at 331); see also *Chandiram*, *supra* note 2.

115. *Boscawen*, *supra* note 3.

support the line he took. There are interesting passages of Millett LJ's discussion where he considers *Re Diplock*,¹¹⁶ and the difficulties which the Court of Appeal had found in recognising that the next of kin might be subrogated to charges which the charities had paid off using monies improperly distributed by the deceased's personal representatives. Lord Justice Millett noted the Court of Appeal's evident concerns about the impact of such subrogation rights on third parties. Responding to the view that "insoluble problems" might arise in a case where in the meanwhile fresh charges had been created on the property", Millett LJ said:

[it is not] clear to me why insoluble problems would arise in a case where there had been fresh charges created on the property in the meantime. The next of kin would obtain a charge by subrogation with the same priority as the charge which had been redeemed except that it would not enjoy the paramountcy of the legal estate. A subsequent incumbrancer who obtained a legal estate for value without notice of the interest of the next of kin would take free from it. *It is not necessary to decide whether a subsequent incumbrancer who took an equitable charge only would take free from the interest of the next of kin; the question has not yet arisen for decision, but it is not insoluble.*¹¹⁷

Lord Justice Millett's equivocation in the last sentence concerning the resolution of a competition between any pre-existing subrogation entitlement and a later equitable charge is interesting. It is open to two interpretations. On one view, Millett LJ was recognising that in a competition between two equitable interests, the priority position is more complicated to state, because the "first in time" starting-point is qualified by exceptions that may favour the later interest. However, on another view, Millett LJ might have been registering uncertainty about the proper characterisation of the status of a claimant's pre-court entitlement — more particularly, its classification as an "equitable interest", or as a "mere equity". The latter status would, of course, render it more fragile in a competition with later interests, legal or equitable.¹¹⁸ Although also inconclusive, the terms in which Millett LJ described the "remedy" of subrogation seem consistent with that analysis. On several occasions, he

116. [1948] Ch 465 (CA (Eng)) at 549-50.

117. *Boscawen*, *supra* note 3 at 341 [emphasis added].

118. But *cf.* now the position under the *Land Registration Act 2002* (UK), c 9 ss 28-30, 116 [*Land Registration Act 2002* (UK)]: see *infra* note 120.

spoke of a “pre-existing *equity*” of subrogation, which arose independently of any court order, as the relevant facts occurred, and which a court order would subsequently “satisfy”.¹¹⁹

Fifthly, as previously noted, in *Boscawen*, Millett LJ appeared to draw a distinction between (i) the pre-existing entitlement which the subrogation claimant acquired as the facts happen; and (ii) any order that a court would later make, to “satisfy” the “equity”. This seems important. The strong institutional model, which Jonathan Parker LJ appears to endorse, suggests that a court has no *necessary* role in the process of crystallising a claimant’s subrogation entitlement. The entitlement has already come into being, fully-formed and fully-fledged, just like the entitlement of an assignee pursuant to a voluntary assignment. However, Millett LJ’s analysis is susceptible to a different interpretation, more consistent with the liability model. Adopting this approach, the “pre-existing equity” to which Millett LJ referred is C’s entitlement to bring proceedings to enforce the “liability”, of D and relevant others, to have the court recognise/impose legal relations equivalent to those that previously existed. In these later proceedings, the court has a real, non-trivial role in crystallising the claimant’s subrogation entitlement, by its “order” for subrogation. Furthermore, adopting this approach, it does not follow that because a court will declare that C occupies the position of the paid-off creditor, this necessarily means that, for the purposes of determining the priority of C’s entitlement *vis-à-vis* parties who had acquired competing interests through intermediate transactions, C’s position is to be determined on the assumption that C, at that earlier point in time, had a fully-fledged, fully-crystallised equitable entitlement mirroring the paid-off creditor’s previous entitlement. There is a choice for the law to make, regarding the proper status of the *in rem* entitlement constituted by the “liability *in rem*”. It could be afforded the quality of a full equitable interest, or just a mere equity, depending upon how robustly the courts wish to protect

119. *Boscawen*, *supra* note 3 at 335 and 342.

later parties from undiscovered burdens.¹²⁰

Finally, although Jonathan Parker LJ resisted this rationalisation, once subrogation cases are viewed within the context of the wider law of unjust enrichment, as *Banque Financière* and later authorities require, then the case for the liability model looks more compelling. In contrast, the strong institutional model, if adopted, risks some unfortunate inconsistencies with the wider law. These points are explained in the following sections.

D. Choosing Between the Models: the Position in Principle

It seems to follow that the English courts are at a crossroads when it comes to understanding the nature of C's pre-court entitlement in cases involving *Banque Financière* subrogation. This question cannot be conclusively answered as a matter of authority. There is therefore a choice for future courts, when it comes to determining how, in principle, the *Banque Financière* subrogation remedy truly works.

This is not, of course, an easy question. Indeed, on deeper inquiry, another wrinkle threatens to complicate the picture. So far, the discussion has presented a binary choice between two models: the strong institutional model and the liability model. However, recent unjust enrichment scholarship raises a question whether this is a flawed vision, in ignoring a third, and on some accounts more satisfactory, analytical

120. In fact, in relation to rights affecting *registered* titles to *land*, the *Land Registration Act 2002* (UK), *supra* note 118, which came into force after *Omar*, *supra* note 26 was decided, now seems to render the distinction between full equitable interest and mere equity irrelevant for priority purposes. Thus, s 116 declares for the avoidance of doubt that “in relation to registered land”, a “mere equity” “has effect from the time the equity arises as an interest capable of binding successors in title”; whilst ss 28-30 lay down the basic priority principles which would now apply, without distinction, to determine a priority dispute between a prior full equitable interest/mere equity and a later interest.

possibility: what tends to be called the “power model”.¹²¹ Happily, on closer consideration, this turns out to be a red herring. The power model is ultimately a version of the strong institutional model, and suffers from the same pitfalls. The liability model should be preferred to both.

1. A possible third way: the “power model”?

The availability and nature of proprietary restitutionary responses is undoubtedly one of the most contested and difficult areas of the English law of unjust enrichment.¹²² On any view, the authorities have not developed in a coherent, systematic fashion. Opinions sharply divide about the best interpretation of the existing materials, and the best direction for the law’s future development. One aspect of this debate concerns the precise mechanism by which the law achieves proprietary/specific restitution.

Recent academic accounts have come to distinguish two key

121. A potential source of confusion needs to be anticipated at the outset. Under the “liability model”, a subrogation claimant, C, *might* be said to hold a “power”, in so far as C can, by bringing successful proceedings against D, precipitate a court order that crystallises his subrogation entitlement and affects an alteration in the parties’ legal positions. It might then appear that the “liability model” is merely a “power model”, viewed from the opposite side. However, within this article’s area of concern, this is an unhelpful and misleading equation. The “power” assumed by the “power model” involves something narrower: *i.e.* a power held by C to bring about a change in the legal relations of C and D *by virtue of his own act of will*, and without the necessity for any court order. In short, whereas the “liability model” assumes that a court order is necessary for the crystallisation of C’s subrogation entitlement, the “power model” assumes that C can crystallise his subrogation entitlement, by the exercise of a power vested in him. Alternative terminology, which might more directly capture the essential distinction, would be “court-crystallised”/“claimant-crystallised”.

122. For a survey of some key controversies, see Mitchell, Mitchell & Watterson, *Goff & Jones*, *supra* note 9 ch 37.

conceptual possibilities.¹²³ One approach assumes that the law immediately generates fully-fledged proprietary rights in favour of C: the “immediate rights” analysis. A second assumes that C does not initially acquire such rights, but instead has merely a *power* to bring those rights into being, on his validly exercising the power: the “power (*in rem*)” analysis. Imagine, for example, that D receives an asset from C as a result of some restitution-justifying mistake, and that the law is willing to reverse this defective transaction *in specie*. Might the law achieve this by immediately rendering D a trustee for C, or alternatively, by affording C a power, which brings about that consequence — crystallising D’s status as trustee for C, and C’s status as trust beneficiary — only contingently, upon the power’s exercise?

If the availability of the *Banque Financière* subrogation remedy falls to be justified by reference to the principles of the law of unjust enrichment, then there will certainly be cases where the remedy’s availability must at least sometimes, and to some extent, be “power-contingent”. That is, there will be cases where its availability will assume the exercise of a “power” by C: *e.g.* the rescission by C of a transaction, induced by D’s fraudulent misrepresentation, under which C paid the money that was used to discharge X creditor’s security for D’s debts.¹²⁴ However, some recent scholarship is bolder than this. Prominent accounts have suggested that for reasons of principle and policy, the law’s proprietary restitutionary responses should more generally operate via a “power model” (what Birke Häcker thus calls a “generalised power model”), rather than by an “immediate rights” approach.¹²⁵ Translated to the subrogation cases, this

123. See *e.g.* Birks, *Unjust Enrichment*, *supra* note 22 at 182 and following; Mitchell, Mitchell & Watterson, *Goff & Jones*, *supra* note 9 at 37.25-37.28; Birke Häcker, *Consequences of Impaired Consent Transfers: A Structural Comparison of English and German Law* (Oxford: Hart Publishing, 2013) at 125 and following [Häcker, *Consequences*]; Birke Häcker, “Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model” (2009) 68:2 Cambridge Law Journal 324 [Häcker, “Proprietary Restitution”].

124. See Part IV.D.2, below.

125. See generally Häcker, “Proprietary Restitution”, *supra* note 123; see also Häcker, *Consequences*, *supra* note 123, at 125 and following.

vision of the law might suggest that the *Banque Financière* subrogation remedy should generally operate via a similar “power model”. Accordingly, unlike the model so far presented as the strong institutional model, C would not automatically acquire a fully-formed, vested equitable replica of X paid-off creditor’s security as the subrogation-justifying facts occur. Instead, the crystallisation of those rights in favour of C would depend on C validly exercising a “power”, which he held *ab initio*, to *bring those rights into being*.

This “power model” merits close consideration. However, ultimately, for reasons developed in the following sections, it does not call into the question the conclusions reached here that the liability model remains the better vision for the *Banque Financière* subrogation remedy.

2. The multiple sources of “power-contingency”

When it comes to evaluating the plausibility of the “power model”, it is vital to recognise that the legal materials are, in important respects, “noisy”. There are several reasons why C’s ability to claim a restitutionary remedy for unjust enrichment might be contingent on C’s exercising some form of *de jure* power, to alter his legal relations with D and/or others. Consider the following situation:

- *Example.* C is induced by D’s fraudulent misrepresentation to sell an asset to D. Thereafter, and before C becomes aware of the fraud, D sells the asset, and then uses the money proceeds to discharge a legal charge over his property held by X.

There are at least three reasons why C’s ability to seek a remedy on these facts, founded on the law of unjust enrichment, might be “power-contingent”.

- *Power-contingency 1.* C’s ability to seek *any* restitutionary remedy against D might be found to depend upon C choosing to rescind the sale transaction. D’s fraudulent misrepresentation is likely to render the sale voidable *ab initio*, at C’s election; however, until avoidance, the transaction is legally valid. On that assumption, it might

seem that, for the time being, the contract provides a basis/ground that justifies D's receipt and retention of the benefits obtained under it. Unless the contract can be and is avoided, through C's election to rescind, no unjust enrichment claim can be brought to recover for any benefit accruing to D, by a money claim or otherwise, inconsistently with the contract. Following this argument through, if C's ability to require D to make restitution in respect of the asset immediately received under the fraud-induced transaction is dependent upon C rescinding the transaction with D, then so *a fortiori*, is any entitlement that C might have to be subrogated to X's charge, based on D's subsequent application of what was received from C under that transaction.

- *Power-contingency 2.* A second and distinct form of power-contingency may arise if C wishes to obtain a proprietary remedy against D, and D no longer retains the asset originally received. In such a case, C will probably find it necessary to rely on the law's tracing rules for the purpose of establishing a claim to some different asset in D's hands. In our example, if D had identifiably retained the proceeds of sale, then C might seek to trace from his original asset, into those proceeds, for the purposes of making some form of proprietary claim to the identifiable money fund. On the more complex facts of the example, C might wish to trace the proceeds of sale further into the hands of X, the paid-off creditor, for the purpose of justifying C's claim to be subrogated to X's extinguished security interest.

English law is undoubtedly generous in affording rights to unauthorised substitutes in circumstances such as these. However, there is an unresolved controversy as to whether this occurs by the law affording a person in C's position immediately vested rights to the unauthorised substitutes,

or only a more fragile "power *in rem*" to acquire such rights.¹²⁶ In the example, C's ability to bring *any* claim should depend on his decision to "rescind" the transaction with D. There should be no question of his acquiring any vested rights at least prior to that occurring. However, even assuming that such a decision is effectively made by C, adopting the "power" model of rights to unauthorised substitutes, C should not acquire any vested rights to the money proceeds prior to his exercising the assumed "power" to acquire them. The same analysis would seem to dictate that C should acquire no vested security interest by subrogation *at least* prior to his exercising his assumed power to obtain rights in respect of the substitute for those money proceeds: *i.e.* prior to his validly electing to claim a security interest by subrogation, based on the use of that money to pay off D's debts to X. On that assumption, our ability to conceive of C being entitled to a security interest by subrogation in the example might appear at least doubly power-contingent.

- *Power-contingency 3.* A third possible form of power-contingency is that highlighted by the recent literature, already noted, which argues that proprietary/specific restitutionary responses should more generally work via a "power" model.¹²⁷ According to this vision, the law does not/should not generally reverse unjust enrichments *in specie* by means of immediately vested rights; it only does so/should only do so contingently on the exercise by C, the unjust enrichment claimant, of a "power" to acquire such rights. Insofar as the *Banque Financière* subrogation remedy is a proprietary/specific restitutionary mechanism, this vision would suggest that, even without any other reason

126. Cf., *e.g.* the competing visions offered by Lionel Smith, *The Law of Tracing* (Oxford: Oxford University Press, 1997) at 356-61; see also, *e.g.* Peter Birks, "Overview: Tracing, Claiming and Defences", in Peter Birks, ed, *Laundering and Tracing* (Oxford, Oxford University Press, 1995) at 307-11; and more recently in Birks, *Unjust Enrichment*, *supra* note 22 at 198-99.

127. See, in particular, Birke Häcker's illuminating contributions: Häcker, "Proprietary Restitution", *supra* note 123.

for power-contingency, C's acquisition of a "vested" security interest by subrogation should similarly be contingent on C's exercising a "power" to acquire such an interest.

3. Implications of power-contingency for the operation of the subrogation remedy

It is impossible within the confines of this article to explore the validity of the foregoing assumptions; however, neither is it necessary to. Even if it is accepted that the availability of an unjust enrichment claim, and therefore the *Banque Financière* subrogation remedy, is at least sometimes contingent on the exercise of a "power" by C, this insight does not compel us to adopt any particular model of the *Banque Financière* subrogation remedy, and certainly not what has been identified so far as the "power model". Four points require particular emphasis.

First, whether, when, and why the exercise of a "power" by C may be a necessary preliminary to the availability/enforceability of an unjust enrichment claim are much bigger questions for the wider law of unjust enrichment.¹²⁸ In principle, whatever answers are given to those questions within that wider body of law should apply to the *Banque Financière* subrogation remedy in the absence of very good reasons to the contrary; legal consistency/coherence requires this. It follows that if future courts are to afford the remedy in a manner that is faithful to its modern juristic basis — *in the law of unjust enrichment* — they must pay very close attention to what that body of law has to say regarding whether C's entitlement is, in any sense, power-contingent. This will be increasingly important if the boundaries of the subrogation remedy are enlarged beyond their historic contextual applications, under the banner of the *Banque Financière* "generalisation".

128. *E.g.* does C's claim in a particular case require his avoidance of a valid transaction? Does the remedy which C seeks depend on his asserting rights consequent on a successful tracing exercise, and if so, do such rights depend for their crystallisation on the exercise of a "power" by C? Even more dramatically, do proprietary restitutionary mechanisms generally operate via a "power", with C's rights not crystallising at least until the power's "exercise"?

Secondly, the fact that C’s subrogation entitlement exhibits some degree of power-contingency does not *compel* the adoption of a distinct power model. On inquiry, two major questions of principle arise for resolution:

- i. Can C, a subrogation claimant, acquire a fully-formed, vested equitable replica of X’s rights out of court (*Model 1* (= the strong institutional model)), or does he only ever acquire the benefit of a *liability*, of D and relevant others, to have the court impose/recognise legal relations mirroring those that previously existed? (*Model 2* (= the liability model))?
- ii. In what circumstances, if any, does the existence/enforceability of those vested rights (Model 1) or of that liability (Model 2) depend on the exercise of some form of power by C?

To put the same point a different way, there is no logical contradiction between either of the two models presented earlier and some degree of power-contingency. C’s subrogation entitlement might depend, in at least some cases, and to some extent, on the exercise of a power. Nonetheless, that does not determine, as a matter of irrefutable logic, *the nature of the entitlement that crystallises upon the exercise of the relevant power*. In a subrogation case, exercise of the power might bring about the immediate crystallisation, out of court, of fully-formed, vested equitable replicas of X’s rights. Alternatively, it might merely trigger a liability to have a court impose/recognise such relations. In other words, there is no obstacle to the liability model operating, if necessary, in a manner that is conditioned on the exercise of one or more powers by C. Thus, for example, in our earlier example, it might at least depend on C’s having elected to rescind the fraud-induced transaction, under which the asset being indirectly traced into the eventual discharge of X’s security, was transferred to D.

Thirdly, when evaluating the merits of the power model, it is essential to understand its relationship to the other models. As so far described, the strong institutional model embodies an “*immediate rights*” analysis, rather than a “*power*” analysis. Even so, it would be wrong to view the power model as a truly distinct model, which stands diametrically opposed to the strong institutional model. On the contrary, the power model is really a *version* of the strong institutional model. *Ex hypothesi*, C is assumed to acquire fully-formed, vested rights independently of any court order — the hallmark of the strong institutional model. The only material difference lies in whether these rights arise automatically, as the

relevant facts occur (= the “immediate rights” version) or whether their crystallisation is made to depend on C exercising a “power” to bring them into being (= the “power-based” version). The liability model, by contrast, operates in a fundamentally different way. As the subrogation-justifying facts occur, C merely acquires the benefit of a liability to have a court order recognise/impose legal relations equivalent to those that previously existed. C’s rights do not arise automatically, but neither do they arise by virtue of C’s act of will alone: they only finally crystallise *by virtue of the court order*. C can of course *precipitate* their final crystallisation, by bringing a successful claim for a judicial order. However, that is quite different from the *de jure* power that is assumed by the “power model” whereby C can, by his unilateral act of will alone, bring the relevant rights into being.

Fourthly, it seems to follow that debates about the relative merits of immediate rights and power-based approaches to proprietary/specific restitution are, in an important respect, a beguiling distraction. There is a more immediately important question of principle when it comes to understanding the subrogation remedy. Simply put: should C ever acquire fully-formed, vested equitable replicas of the paid-off creditor’s rights without any court order, or should the final crystallisation of C’s rights *depend upon a court determination*?

4. The desirability of/necessity for court-dependent crystallisation

Although the point is not easy, the better answer, in light of the function of *Banque Financière* subrogation as an unjust enrichment remedy, is that court crystallisation should be required. The corollary is that the remedy can only operate via the liability model. Wherever subrogation-justifying facts exist, they should only trigger a “liability” to have a court impose/recognise legal relations equivalent to those that previously existed. Those legal relations only finally crystallise upon, and by virtue of, the court’s order; they do not crystallise automatically, or merely by virtue of the exercise of a “power” by C to bring them into being. There are three key points that need to be appreciated, to understand that conclusion.

First, whilst proponents of a “generalised power model” of proprietary/

specific restitution offer several reasons for thinking that the power analysis is superior to the immediate rights analysis,¹²⁹ these arguments are not obviously directed to explaining why C’s rights should crystallise out of court. They seem to proceed on the unexamined assumption that that *can* occur; the focus of attention is on challenging the assumption that C, the unjust enrichment claimant, should acquire vested rights automatically, rather than upon C exercising a “power” to acquire them. In other words, the debate is substantially cast as a narrow debate *about which version of the strong institutional model is correct*.

Secondly, on deeper analysis, some of the strongest arguments that have been offered *against* the immediate rights analysis, and in favour of the power analysis, can be accommodated within a liability model. To give one of the more important illustrations, the power analysis has been supported on the basis that it better reconciles the interests of C, the unjust enrichment claimant, and innocent third parties who assert competing claims to the same subject-matter. The “power *in rem*” that C initially acquires is assumed to have a lesser *in rem* status, prior to its exercise, insofar as it is susceptible to being defeated by/postponed to later bona fide purchasers of any form of competing interest. However, the liability model is equally capable of achieving a similar reconciliation, if desired. As explained earlier, the priority treatment of the liability model is not preordained: there is a choice for the law/the courts to make, regarding whether C’s claim to relief/the corresponding “liability *in rem*” should have the status, for priority purposes, of a full equitable interest or the lesser status of a mere equity.

Thirdly, all of this elaborate discussion is, in any case, a distraction. There are good positive arguments for thinking that *whenever* a subrogation claim arises, all that C should be considered to acquire is the benefit of a “liability”. What is more, these arguments stand opposed to any version of a strong institutional model. They supply reasons for thinking that court crystallisation should be a necessary precondition for C’s rights, which cannot be overcome by making the vesting of C’s rights

129. See, in particular, the arguments offered by Häcker, “Proprietary Restitution”, *supra* note 123. Cf. also the supportive noises of Mitchell, Mitchell & Watterson, *Goff & Jones*, *supra* note 9 at 37.25-27.28.

depend on C exercising a “power” to acquire them (as the power model suggests). If they stand up, the liability model must be preferred. There are two key arguments:

- iii. Above all, whilst the subrogation remedy is not in any real sense a discretionary remedy, significant judicial judgement may well be required, in order to determine its ultimate shape and implications. The liability model seems to offer the most realistic depiction of the court’s role in this respect, but it is also the model that is most respectful of the need of all sides for authoritative resolution of their legal entitlements liabilities. Full substantiation of this first argument is deferred to the last Part of this article.
- iv. Reinforcing this point, the liability model may also be the more coherent, when situated within the wider law of unjust enrichment. It has recently been argued that personal claims in unjust enrichment operate through what amounts to a form of liability model.¹³⁰ The premise is that where the facts establishing a cause of action in unjust enrichment are made out, D does not come under an immediate duty to make restitution to C, who acquires an immediate, correlative claim-right to restitution. Rather, D merely becomes liable to be ordered by a court to make restitution to C. Some key arguments for this vision can also apply to explain why it would be wrong to imagine C acquiring fully-crystallised rights in a subrogation case, without court order.¹³¹ Indeed, it would seem incoherent if personal claims in unjust enrichment operated via a liability model, whereas subrogation did not.

To illustrate this last point, imagine a simple case in which C discharges an unsecured debt owed by D debtor to X creditor, in circumstances where the release of this debt amounts to an unjust enrichment accruing to D, at C’s expense. The liability model of personal claims in unjust enrichment holds that D does not immediately owe a *duty* to make restitution in money of the enrichment that he received: *i.e.* of the monetary value of the discharged liability. He is merely “liable” to be subjected to such a duty, by court order. On the same facts, C might in theory put his claim a different way, arguing that he should be subrogated

130. See especially Smith, *supra* note 53 and its accompanying text.

131. Some of Smith’s arguments will be controversial. Nevertheless, he does appear to be on firm ground in highlighting the difficulties for D and C in an unjust enrichment case, of understanding whether and to what extent D might owe any duty to make restitution to C: see *ibid* at 173-76. The apparent focus of his concern is the “standard” remedy of monetary restitution. However, there is, if anything, even greater potential uncertainty in subrogation cases in relation to the availability, nature and extent of the “remedy”, as explained in Part V, below.

to the unsecured debt which X owed to C.¹³² In light of the common foundation of this alternative claim in the law of unjust enrichment, it would seem anomalous if it yielded a structurally different response — *i.e.* if D came under an immediate, fully-crystallised duty to pay C, which replicated the duty previously owed by D to X, rather than merely incurring a *liability* to be subjected to such a duty by a later court order. What is true of the simple but unusual case of subrogation to unsecured personal rights must also be true of the complex but common case of subrogation to another’s security interest. It would be similarly anomalous if the subrogation “remedy” saw C acquire an immediate, fully-crystallised equitable replica of X’s more complex bundle of rights and powers.¹³³

V. The Role of the Court

It is implicit in Part IV’s analysis that the correct model of the *Banque Financière* subrogation remedy does not just affect the nature and quality of any pre-court entitlement which is held by C, a subrogation claimant; it also has a crucial bearing on the court’s role in the process of effectuating C’s claim. The strong institutional model sees courts in an essentially *confirmatory* or *affirmatory* role: confirming that the facts justify the conclusion that C already holds rights that replicate the paid-off creditor’s, automatically or by virtue of his having validly exercised a “power” to crystallise them. In contrast, the liability model assumes that the court’s decision and resulting orders have a necessary *crystallising* function. The relevant facts trigger a *liability* to a court order, which is enforceable in proceedings brought by C. However, pending such court

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132. See *e.g.* in *Filby*, *supra* note 50 (unsecured overdraft debt). This is ordinarily a redundant argument, insofar as it gives C no advantages over a direct personal claim in unjust enrichment; but that is not always so. See further Mitchell & Watterson, *Subrogation*, *supra* note 4 at 8.32-8.38.
133. Although it is difficult to identify unequivocal explicit recognition of the point in the authorities, the nature of the subrogation remedy, understood as suggested in Part II, above, appears to be that C acquires *prima facie* equivalents of (i) the discharged personal rights to payment that X previously held against D; and (ii) the security interest that X held as security for the satisfaction of those discharged liabilities of D.

order, C's subrogation rights do not have a present and immediately enforceable existence.

The task for this last Part is to substantiate the argument that the liability model offers the best interpretation of the court's involvement. To anticipate the conclusions that follow, two key considerations strongly favour that vision. First, the liability model seems to offer the best reconciliation of: (i) the universal instinct that C acquires some form of "entitlement" to the subrogation remedy as the relevant justifying facts occur; and (ii) the undeniable fact that, whilst subrogation is not a "discretionary" remedy, outside of the simplest cases, it may not be possible, without court determination, conclusively to determine whether and on what assumptions subrogation is permissible, the form and extent of the entitlement, and/or its wider implications. Second, reflecting this, the liability model also offers the more realistic account of the parties' positions in the period before any court order is made. Unlike the strong institutional model, the liability model does not require any counter-intuitive assumption that, even before any court's determination, C's rights already had a present, fully-formed existence. It allows instead for the more realistic, transparent recognition that the legal relations that are "crystallised" by the court's order can be dated back to the circumstances that justify their recognition, with binding effect at least on those who are bound by the "liability" to the remedy. However, it also means that this legal consequence is not a matter of irrefutable logic. It remains a matter for principled judicial determination, as it should be, how far, and for what purposes, any backdating assumptions should be allowed to run.

A. Forms of Court Order in Subrogation Cases

An obvious place to begin any inquiry into a court's involvement in subrogation cases might seem to be with the orders that courts typically make, in cases involving *Banque Financière* subrogation. Generally speaking, these take two key forms. Unfortunately, on closer inquiry, these orders are inconclusive: they are compatible with either vision of the subrogation remedy. Surer guidance must be found elsewhere.

1. Declaratory orders

In practice, claimants invariably seek a “declaration” as to their subrogation entitlements. These declaratory orders¹³⁴ are susceptible to more than one interpretation.

Adopting a purely “confirmatory” (or “purely declaratory”) analysis, these declarations are not technically constitutive of C’s subrogation rights. Indeed, they are technically unnecessary. *Ex hypothesi*, C already has the rights thus declared, and can in theory take steps lawfully to enforce them without any declaration being made. The role of a declaratory order in this sense is to confirm, in a form that does not admit of later dispute, that C *has the relevant rights*. However, strictly speaking, the rights declared pre-date and exist independently of the court’s order. They do not derive from the court’s order, any more than they would in a case where a court was asked to — and did — pronounce upon the legal effect of an assignment.

This confirmatory interpretation is substantially the analysis required by the strong institutional model. In contrast, the liability model requires a different interpretation, which sees the court’s declaration as at least partly “constitutive” of C’s subrogation entitlement. There is a sense in which it is partly confirmatory: it is awarded on the basis that the facts have generated a liability on D and relevant others, to a court order being made in proceedings brought by C. However, the court’s order is also unavoidably constitutive. The court’s determination, given legal expression via the declaration, is necessary to finally crystallise, in favour of C, rights against D and relevant others that replicate the rights that X previously held.

Viewed in isolation, these declaratory orders seem equivocal. Nonetheless, the language of some prominent recent decisions, which talk in terms of a court “remedy of” or “order” for subrogation, which “satisfies” or “vindicates” or “enforces” a pre-existing equity, might be thought to imply that these orders are viewed as “constitutive” of C’s rights — *i.e.* as right-crystallising.¹³⁵ Reference can also be made to Lord

134. See the cases cited, *supra* note 29.

135. See the cases cited, *supra* notes 83-90.

Justice May's words in *Filby v Mortgage Express (No 2) Ltd*: “[t]he essence of the remedy is that the court declares the claimant to have a right having characteristics and content identical to that enjoyed [by the paid-off creditor]”.¹³⁶ Such modes of expression seem far less apt to describe a court order which is merely affirming.

2. Consequential enforcement orders

Alongside declaratory orders, the courts also commonly make what might be called “enforcement orders”. These are the entirely conventional orders that can be sought from a court by holders of conventional security interests, depending upon the bundle of rights/powers conferred by an interest of that nature and the ordinary mode(s) of their enforcement — *e.g.* orders for possession, for the appointment of a receiver, or for sale. Where such orders are sought by subrogation claimants, the range of potential orders should, in principle, mirror those available in respect of the security interest to which C is subrogated; *e.g.* if C is found to be subrogated to an unpaid vendor's lien, then the range of orders that a court may make are the more limited orders ordinarily available to a lien-holder.¹³⁷ Nothing more needs to be said about these orders. They are inconclusive as between the two models of the *Banque Financière* subrogation remedy, and relatedly, the two models of declaratory order. They can be conceived of as enforcing the rights that are confirmed (on one model) or constituted or crystallised (on the other model) by the court's declaration.

B. Determining the Existence and Extent of Any Subrogation Entitlement

Rather surer pointers to the “correct” role of the courts in subrogation cases can be found in two different forms. One, considered in the following section, concerns how the courts determine the *implications* of

136. *Filby*, *supra* note 50 at para 63.

137. As indicated by *Thurstan*, *supra* note 29 (“[t]he defendant society, having only an equitable charge, was not entitled to take possession of the mortgaged property. The proper remedy of the society was to obtain a receiver” at 13, per Romer LJ).

C’s subrogation entitlement, particularly for events occurring before the court’s order is given. The other, examined here, concerns the basis on which the courts determine the existence and extent of C’s subrogation rights, which are then declared and enforced. This is a complex issue, on which many chapters could be written,¹³⁸ but there are nevertheless several key points that can usefully be extracted. What they boil down to is that it may not be possible, without a court’s order, to determine conclusively whether and on what assumptions subrogation is permissible, and the nature and extent of a claimant’s entitlement — except in the most simple cases. The sheer number of issues on which a court decision may be required presents a real challenge for a strong institutional model. It points firmly, if not conclusively, towards the liability vision — with its vision of nascent entitlements finally crystallised only by a court order.

1. The court’s general approach to the remedy

An important preliminary point is that, whilst *Banque Financière* subrogation is commonly described as an “equitable remedy”, a court, when asked to determine C’s subrogation entitlement, is not exercising a strongly discretionary jurisdiction. The courts do not claim any broad or unbounded discretion to grant or deny C the “remedy”, or even to shape it, as the justice of the case requires.¹³⁹ The *Banque Financière*

138. See *e.g.* Mitchell & Watterson, *Subrogation*, *supra* note 4 chs 3-9.

139. See, most emphatically, *Filby*, *supra* note 50 (“[w]ithin [the unjust enrichment framework] the remedy is discretionary in the sense that at each stage it is a matter of judgment whether on the facts the necessary elements are fulfilled”; however, “[i]f ... they are fulfilled, there is no residual general discretion to withhold the remedy nor to modify it simply to avoid harsh reality”; the flexibility “[does] not extend, and should not extend, to an unrestrained palm tree discretion” at paras 62, 67, per May LJ); see also, *e.g.* *Appleyard*, *supra* note 36 (a “flexible remedy, which nonetheless must be applied in a principled fashion” at para 34, per Neuberger LJ); *Boscawen*, *supra* note 3 (“it is not a remedy which the court has a general discretion to impose whenever it thinks it just to do so. The equity arises from the conduct of the parties on well settled principles and in defined circumstances [...]” at 335, per Millett LJ); and *Banque Financière*, *supra* note 1 at 237, per Lord Clyde.

subrogation remedy, where recognised, follows from the reasoned application of established principles to the case at hand. It would also be wrong to read too much into broad suggestions sometimes encountered that subrogation is a “flexible” or “adaptable” remedy,¹⁴⁰ which the court can “fashion”.¹⁴¹ On examination, the flexibility which is referred to is simply a reflection of the diverse contexts in which the remedy might be sought and the many factual nuances of individual cases, which mean that the application of those established principles will not necessarily yield a single, uniform outcome.

2. Identifying subrogation-justifying facts

Secondly, the *Banque Financière* decision has brought a step-change in the English courts’ approach to the identification of subrogation-justifying facts. Pre-*Banque Financière*, the cases, so far as susceptible to any rational explanation, typically proceeded in a categories-focused manner, on the basis of principles narrowly formulated by reference to those categories, and subject to analogical extension.¹⁴² Post-*Banque Financière*, the picture looks rather different. In principle, a court, in rationalising subrogation, is engaged in an exercise of explaining, using the principles supplied by the wider law of unjust enrichment, why the discharge of X creditor’s rights would *prima facie* constitute an “unjust enrichment” of D and others, at C’s expense, so as potentially to require reversal via the subrogation “remedy”. Consistently with this, in *Banque Financière*, the House of Lords made explicit use of the familiar analytical framework of the law of unjust enrichment, with its core inquiries into whether the defendant was relevantly “enriched” “at the claimant’s expense”, whether there were circumstances rendering this an “unjust”

140. See *e.g. Filby*, *supra* note 50 (“[t]he remedy is flexible and adaptable to produce a just result” at para 62); see also *Appleyard*, *supra* note 36 at para 34.

141. *Cf. Sandher*, *supra* note 92 at para 15.

142. See *e.g.* the former principle, authoritatively represented by the decision in *Chandiram*, *supra* note 2 (“where a third party pays off a mortgage, he is presumed, unless the contrary appears, to intend that the mortgage shall be kept alive for his own benefit” at 745).

enrichment, and whether there was any applicable defence/bar. Later cases have increasingly followed this lead.¹⁴³ One necessary caveat is that this framework merely represents an abstract, organising framework, and not a set of concrete principles susceptible to immediate, direct application to the case at hand. Each component of the inquiry brings into play a substantial volume of detailed common law doctrine, which remains, in key respects, subject to ongoing judicial development and significant interpretative controversies.¹⁴⁴

3. Identifying the nature and extent of C’s subrogation entitlement

Thirdly, whilst it would be wrong to regard the nature and extent of C’s subrogation entitlement, where *prima facie* justified, as radically inchoate or undetermined, it would also be wrong to assume the reverse: *i.e.* to assume that C simply occupies the position of, or at least equivalent to, an equitable assignee of the paid-off creditor’s security, in all circumstances and in every respect. The modern “remedy” operates by generating *new* equitable rights in favour of C, which *prima facie* replicate the characteristics and content of the former creditor’s rights.¹⁴⁵ However, that is merely the *prima facie* position, justifiable only to the extent that this is an appropriate mode for reversing the “unjust release” of the legal relations that previously existed.

It is inherent in that underlying remedial objective that C cannot

143. See most recently *Menelaou* SC, *supra* note 6. See previously *Menelaou* CA, *supra* note 92; *Sandher*, *supra* note 92; *Lehman*, *supra* note 28; *Anfield*, *supra* note 36; *Primlake*, *supra* note 28.

144. See most recently *Menelaou* SC, *supra* note 6, which primarily raised a question as to what must be shown to establish that another’s debt was discharged “at the claimant’s expense”, in a sense sufficient to justify the subrogation remedy.

145. See *e.g.* the very clear statements to this effect in *Filby*, *supra* note 50 (“[t]he essence of the remedy is that the court declares the claimant to have a right having characteristics and content identical to that enjoyed [by the paid-off creditor]” at para 63, per May LJ); and more recently, *Tiuta*, *supra* note 4 at para 43, per Gloster LJ. See also *Muirhead*, *supra* note 92 at 426-28, per Evans LJ.

obtain *greater* rights by this mechanism than those previously held by X, the paid-off creditor. However, by the same token, the principles that support the remedy's availability may well also dictate that C should be afforded different — *i.e. lesser* — rights, in one or more respects, than X previously held; and sometimes, that he should have no rights by subrogation at all.¹⁴⁶ This may be the result of the application of *inter alia*: (i) familiar “equitable” defences and bars;¹⁴⁷ (ii) defences, bars and other limiting principles that are characteristically available to defeat or limit any cause of action in unjust enrichment;¹⁴⁸ and (iii) additional considerations that reflect the peculiar *proprietary* nature of relief ordinarily sought, when C claims to be subrogated to an extinguished security interest.

To give some obvious examples, even when C was responsible for discharging X's security interest, the cases show that there may be valid reasons why: (i) it would be inappropriate to afford C the advantages

146. As recognised by Lord Hoffmann in *Banque Financière*, *supra* note 1 at 236. See for a full account, Mitchell & Watterson, *Subrogation*, *supra* note 4 ch 8, recently adopted with approval in *Tiuta*, *supra* note 4 at para 43, per Gloster LJ; see also Mitchell, Mitchell & Watterson, *Goff & Jones*, *supra* note 9 at 39.29-39.40.

147. As assumed in *Appleyard*, *supra* note 36 at para 44. These include: laches/acquiescence (discussed in *Appleyard*); and “he who seeks equity must do equity” and “must come with clean hands” (recently examined in *Tiuta*, *supra* note 4).

148. These include: (i) change of position (recognised/assumed in *Gertsch v Atsas*, [1999] NSWSC 898 (Austl) [*Gertsch*]; and contemplated in *e.g. Anfield*, *supra* note 36 at para 31, and *Boscawen*, *supra* note 3 at 341); (ii) *bona fide* purchase (implicit in *e.g. London Allied Holdings Ltd v Lee* [2007] EWHC 2061); (iii) “receipt for good consideration” (allowed in *e.g. National Australia Bank Ltd v Rusu*, [2001] NSWSC 32 (Austl), at paras 44-45, 51); (iv) the objection that the rights being claimed would be inconsistent with a valid contract to which C is a party with X, D or some other; (v) illegality/public policy (as argued for in *e.g. Lehman*, *supra* note 28; *Anfield*, *supra* note 36); (vi) limitation/lapse of time. See generally, Mitchell & Watterson, *Subrogation*, *supra* note 4 ch 7.

of *any* form of security interest, by subrogation;¹⁴⁹ or (ii) it would be inappropriate to recognise in favour of C a security interest which has exactly the same priority status as X’s interest, *inter alia*, (a) because this would be unjustifiably inconsistent with the basis on which C has validly transacted with D, X or relevant others;¹⁵⁰ (b) because a third party, who was subject to X’s interest, can establish a defence that counters any claim by C to equivalent priority for his security interest;¹⁵¹ (c) because this might unjustifiably prejudice the ability of X, the paid-off creditor, to obtain satisfaction for any outstanding liabilities of D;¹⁵² or (iii) where the *enforceability* of any subrogation-based rights needs to be postponed, in light of the basis on which C transacted with D, X or relevant others.¹⁵³

Whatever the nature of C’s subrogation entitlement, there is also — inevitably — an important *quantification* exercise that must be

149. See *e.g.* cases where it would be inconsistent with the basis on which C validly contracted with D, and/or with some other party, to obtain a security interest by subrogation, as in *Paul v Speirway Ltd*, [1976] Ch 220 (Eng); *Banque Financière*, *supra* note 1; *Re Rusjon Ltd*, [2007] EWHC 2943 (Ch).

150. *Cf.*, *e.g.* *Investors Group Trust Co Ltd v Crispino*, [2006] 147 ACWS (3d) 1069 (Ont Sup Ct).

151. See *e.g.* where C has made a binding priority agreement with another creditor, over whom he might otherwise have priority via subrogation to X’s security, postponing his claims to those of that other creditor; or where a junior creditor might establish that he changed his position as a result of the discharge of X’s security, by lending further money or by failing to take enforcement action to realise his security (*cf.* *Anfield*, *supra* note 36 at para 31; and *Armatage Motors Ltd v Royal Trust Corp of Canada* (1997), 34 OR (3d) 599 (CA)).

152. *Cf.* the variety of solutions offered by the courts to this problem: (i) denying C subrogation rights until X is fully paid; (ii) denying C immediately enforceable rights until X is fully paid; (iii) accepting that C might have an immediate subrogation entitlement, but that it ranks immediately after X’s subsisting security. For comprehensive discussion, see Mitchell & Watterson, *Subrogation*, *supra* note 4 at 9.50-9.101.

153. See *e.g.* common cases where a surety agrees with a creditor not to assert subrogation rights *vis-à-vis* the principal debtor until the creditor’s claims have been fully paid.

undertaken.¹⁵⁴ Thus, in a routine case, where C paid off X's security interest, and is found to be entitled to an equivalent security interest by subrogation, this security interest will secure a monetary liability now owed to C by D. This liability — the “subrogation debt” — must be ascertained and quantified, as a necessary precursor to any enforcement action being taken by C, relying on his subrogation rights. This quantification exercise may not be straightforward, even in what might appear to be “simple” cases.

The presumptive “principal” amount of the subrogation debt will certainly be the monetary liability that C discharged; however, there are a number of reasons why it may be less than this, in light of immediate or subsequent events.¹⁵⁵ To give just two examples, where C's subrogation claim relies on monies advanced by way of a loan to D, it is very likely to be necessary for C to give appropriate credit for any repayments of that loan received from D;¹⁵⁶ and the proper measure of D's liability may sometimes be appropriately reduced or extinguished to reflect some qualifying supervening change of position.

Adding yet another layer of complexity, the measure of the “subrogation debt” will also be fundamentally affected by the basis on which the courts determine any liability of D to pay interest. This remains a contested issue.¹⁵⁷ Recent English cases have tended to proceed on the under-examined assumption that the rationale of the subrogation remedy dictates that interest should be calculated and awarded on a “parasitic” basis — *i.e.* C can claim interest at the rate that would otherwise have been chargeable by X, the paid-off creditor, on the debt

154. For fuller discussion, see Mitchell & Watterson, *Subrogation*, *supra* note 4 at 8.145-8.156.

155. *Ibid.*

156. *Cf.*, *e.g.* *Rogers v Resi-Statewide Ltd*, (1991) 105 ALR 145 (FCA); *Muirhead*, *supra* note 92; *Filby*, *supra* note 50 at para 65.

157. See especially Mitchell & Watterson, *Subrogation*, *supra* note 4 at 9.102-9.121, which pre-dates *Sempra Metals Ltd v IRC*, [2007] UKHL 34 (a landmark decision on the availability of compound interest).

that C paid off.¹⁵⁸ However, even this apparently simple starting-point presents complexities. To give some obvious illustrations: (i) as lending rates rarely remain static, it may be necessary to make some (increasingly unrealistic/hypothetical) assumptions about how the paid-off creditor’s applicable interest rate would have changed; (ii) to ascertain the sum on which interest is chargeable from time to time, it may be necessary to give appropriate credit for any relevant payments that C may have received from D (as is likely where C provided the relevant monies as a loan to D); and (iii) the courts have some latitude to find that a lower rate is appropriate, *e.g.* where C provided the relevant monies as a lender, at a lower rate. A very different approach to the interest issue, evident in other authorities, is even more indeterminate. This “independent” approach denies the inevitability of “parasitic” interest awards, and assumes instead that interest can be awarded to subrogation claimants on an appropriate compensatory/restitutionary basis, *selected by the court*.¹⁵⁹

4. Implications

It should be evident from what has just been said that the identification of C’s subrogation entitlement is very far from straightforward. On any analysis, it is certainly not a straightforward question of C obtaining equivalents of X’s rights, as a matter of course, and in all respects. Once this is realised, the liability model emerges as the more obviously appropriate representation of the court’s role in effectuating subrogation rights. It is simply implausible to assume, as the strong institutional model requires, that C held the relevant rights, fully-formed and susceptible to immediate enforcement from the time of the subrogation-justifying facts, and that in any later proceedings, the court is just involved in a (technically

158. See *e.g.* *Western Trust*, *supra* note 2; *Piddington*, *supra* note 28 at 602; *Muirhead*, *supra* note 92; *Filby*, *supra* note 50 at paras 63-67; *Kali*, *supra* note 50 at para 31 and following, 42; *Primlake*, *supra* note 28 at para 62.

159. For a recent case, where the choice of approaches was squarely confronted for the first time, see *Titles Strata Management Pty Ltd v Nirta* [2015] VSC 187 (Austl). For earlier decisions taking an “independent” approach without discussion, see Mitchell, Mitchell & Watterson, *Goff & Jones*, *supra* note 9 at 39.85.

unnecessary) exercise of confirming/affirming their existence. So much potentially stands to be clarified, and turn on a court's judgement/decision, that it seems more realistic to imagine that the court is engaged in a *necessary* exercise of "crystallising" C's nascent entitlement — *i.e.* transforming, *by its order*, the "liability" to the remedy, into an enforceable set of rights. This also seems to be the more appropriate analysis from the point of view of ensuring legal certainty for all sides. The potential indeterminacy of the subrogation "remedy" brings an important degree of uncertainty for those affected by it; furthermore, in routine cases, the affected parties are not merely C and D, the discharged debtor. On appropriate facts, they will also include: X, the paid-off creditor, who might retain outstanding claims against D; pre-existing incumbrancers, who hold superior/subordinate interests in the same property which may be adversely affected by C's claim; and other third parties who have subsequently acquired competing interests in the same subject matter. Due regard for their interests, including their need for clarity about the existence and extent of C's entitlements, further reinforces the case for a necessary stage of court "crystallization".¹⁶⁰

C. Determining the Wider Implications of Any Subrogation Entitlement

There is one final point that must be made. Even once the existence and extent of C's subrogation entitlement is ascertained, there is a further potential source of difficulty: *i.e.* working out the wider ramifications of C's entitlement. This has many possible dimensions, which cannot exhaustively be surveyed here. A few examples must suffice.

In many subrogation cases, C will bring proceedings with a view to taking some form of enforcement action, relying on whatever are found to be his subrogation-based rights. A question then arises whether, in

160. *Cf., e.g.* recently *Kali*, *supra* note 50: the primary driver for extended discussion of what sums could be charged under the claimant's subrogation-based security interest, as interest and costs, was the concerns of an existing junior secured creditor, whose subordinate security interest would be more or less deficient depending on the exact sum secured by the claimant's superior subrogation-based charge.

light of the nature of those rights, the action is justified. That can raise some difficult questions of interpretation and attribution for a court for the purpose of determining (i) the basis on which enforcement action might be taken, pursuant to C's subrogation rights; and (ii) whether an occasion for such action can be "deemed" to have accrued. This is amply illustrated by *Halifax Mortgage Services Ltd v Muirhead*¹⁶¹ ("*Muirhead*"), where the Court of Appeal held that the judge had prematurely made an order for possession in favour of the claimant lender, based on its being subrogated to an earlier charge. No such order should have been made, without first ascertaining what sums, if any, could be deemed to be due under the subrogation-based charge, and potentially in default. This required, *inter alia*, a court determination to ascertain how far sums received by the claimant lender, in repayment of its loan, should be taken to reduce the subrogation debt. The answer, on inquiry, might be that there was no outstanding debt, with the result that any enforcement action, based on that charge, must fail.

The *Muirhead* case illustrates how important a court's determination may be to the practical enforcement of C's rights, even in what may be perfectly routine cases. Even more challenging questions may sometimes arise as to the significance of C's subrogation entitlement for events that occurred *before any court's determination*, and potentially at a time when the parties were unaware of any potential subrogation claim. It seems very likely that these will be susceptible to more appropriate, transparent resolution if the premises of the liability model are accepted. Consider two simple hypotheticals:

- i. C lender takes enforcement action, out of court, by taking possession of D's property, pursuant to what it believes is a valid legal charge.¹⁶² There is in fact no such charge, with the result that C's conduct is *prima facie* unlawful. However, at the time C lender took possession, and unknown to all sides, C was potentially entitled to be subrogated to an earlier legal charge, held by X, which the monies loaned by C had paid off, under which X lender would have had the right to possession. In light of C's potential subrogation entitlement, has C acted wrongfully, in taking possession?
- ii. C lender takes enforcement action, out of court, by appointing a

161. *Muirhead*, *supra* note 92.

162. Cf. the facts of *Thurstan*, *supra* note 29.

receiver, who takes possession of D's property, pursuant to what C believes is a valid charge.¹⁶³ There is in fact no such charge, with the result that the receiver's appointment is obviously challengeable. However, at the time C lender appointed the receiver, C was potentially entitled to be subrogated to an earlier charge, held by X, which C had paid off, under which X lender would have had the right, on certain conditions, to appoint a receiver. In light of C's subrogation entitlement, should the receiver be deemed to have been invalidly appointed?

On what basis should these sorts of question be resolved? The strong institutional model suggests a bold answer: *i.e.* C acquired fully-formed, immediately enforceable replicas of the paid-off creditor's rights as the subrogation-justifying acts occurred; and the legal implications of earlier events should be straightforwardly determined on that basis. However, on closer examination, that is unlikely to be a satisfactory way forward: it seems dangerously conclusive of rather difficult issues. The truer picture — that pending court clarification, the existence, nature and extent of C's subrogation entitlement may well be indeterminate in important respects — suggests that the liability model promises a more appropriate, nuanced solution. Adopting that model: (i) the court's order is a necessary stage in the crystallisation of C's rights; (ii) as a consequence, those rights do not have a present, and immediately enforceable existence, in the period before the court order; (iii) the legal relations that are confirmed and crystallised by the court's order might of course be dated *back* to the circumstances that justified their recognition, with binding effect at least for those who are "liable" to the remedy; (iv) nevertheless, the liability model allows us to see that this legal consequence does not follow as a matter of irrefutable logic; it remains a matter for principled judicial determination how far, and for what purposes, any backdating assumptions should be allowed to run.

VI. Conclusion

Banque Financière's "new" rationalisation of subrogation to "extinguished rights", as an "equitable remedy" designed to reverse "unjust enrichment",¹⁶⁴ forces us to take a fresh look at the nature and operation of this long-standing equitable phenomenon. On closer inquiry, several

163. Cf. the facts of *Tiuta*, *supra* note 4.

164. See Part II, above.

models compete for recognition, but one must ultimately prevail: the weaker institutional conception embodied in the liability model. This model respects the consistent assumption¹⁶⁵ that a subrogation claimant, C, acquires some form of entitlement as *the subrogation-justifying facts happen*. At the same time, it rejects the dangerously bold premise of any stronger institutional conception, that C acquires fully-formed, enforceable equitable replicas of the paid-off creditor’s rights, prior to any court order being made. The better, alternative view¹⁶⁶ is that as the facts happen, D (the discharged debtor) and relevant others (*e.g.* junior secured creditors) merely come under a *liability* to be subjected by subsequent court order to legal relations, equivalent to those that previously existed, if this is necessary to reverse the unjust enrichment that resulted from their release; whilst C acquires a concomitant entitlement to bring legal proceedings to obtain such relief. In a typical case where C is entitled to obtain a security interest by this process of subrogation, this equitable liability/C’s concomitant equitable entitlement certainly has an effect “*in rem*”. Nevertheless, the final crystallisation of that nascent entitlement into an enforceable, vested equitable replica of the paid-off creditor’s security interest, properly depends upon a court’s determination and order.

165. See Part III, above.

166. See Parts IV and V, above.