Hilary Term
[2017] UKSC 32
On appeal from: [2015] EWCA Civ 629

JUDGMENT

Lowick Rose LLP (in liquidation) (Appellant) *v* Swynson Ltd and another (Respondents)

before

Lord Neuberger, President
Lord Mance
Lord Clarke
Lord Sumption
Lord Hodge

JUDGMENT GIVEN ON

11 April 2017

Heard on 21, 22, 23 and 24 November 2016

Appellant
(Lowick)
Mark Howard QC
David Turner QC
Nicole Sandells
(Instructed by RPC LLP)

Respondents
(Swynson/Hunt)
Hugh Sims QC
Gerard McMeel
James Wibberley
(Instructed by Gardner Leader LLP)

LORD SUMPTION: (with whom Lord Neuberger, Lord Clarke and Lord Hodge agree)

Introduction

1. The distinct legal personality of companies has been a fundamental feature of English commercial law for a century and a half, but that has never stopped businessmen from treating their companies as indistinguishable from themselves. Mr Michael Hunt is not the first businessman to make that mistake, and doubtless he will not be the last.

2. Mr Hunt is a wealthy investor. The judge found that at the relevant time one of his "preferred methods of investment" was to lend money to companies whose business was too risky for them to be able to borrow on normal terms from banks. For this he would charge a substantial arrangement fee and interest at a relatively high rate. Swynson Ltd was a company controlled and beneficially owned by Mr Hunt which was used as a vehicle for such transactions, including the one which has given rise to these proceedings.

3. On 31 October 2006, Mr Hunt caused Swynson to lend £15m to Evo Medical Solutions Ltd (or "EMSL") for a period of a year. The purpose of the loan was to enable EMSL to finance the management buy-out of an American company called Medical Industries America Inc, trading as "Evo", which distributed medical equipment in the United States. Shorn of peripheral detail, the result of the buy-out was that the £15m was spent on buying out the existing owners of Evo. Evo then became a wholly-owned subsidiary of EMSL, whose shares were owned 71.4% by Evo's management, 25% by Mr Hunt and 3.6% by an associate of Mr Hunt who joined its board. Swynson's loan to EMSL was secured by charges over Evo's assets and limited personal guarantees by the management.

4. Before entering into this transaction, Swynson and EMSL jointly instructed a firm of accountants, Hurst, Morrison Thomson, to carry out due diligence on Evo. They subsequently changed their name to Lowick Rose LLP, but I shall refer to them throughout as "HMT". They are now in liquidation. Their report failed to draw attention to some fundamental problems about the company's finances, in particular the insufficiency of its working capital. It is now common ground that that failure was negligent, and that if HMT had carried out their task properly they would have reported the problem and the transaction would not have gone ahead.

5. In the course of 2007, Evo began to experience severe cash-flow problems and EMSL began to default on its interest payments. In July 2007, Mr Hunt was told

that Evo was at risk of collapse without a substantial cash injection. He decided that the only way of recovering his money would be to provide further funding until Evo was restored to financial health, when it could either be floated or sold. To that end he caused Swynson to lend a further £1.75m to EMSL in 2007. A yet further loan of £3m was made in July 2008, as part of a larger transaction, under which Mr Hunt became the controlling shareholder of EMSL with 85% of the equity, leaving 15% in the hands of the management. Evo's financial position did not improve, however, and neither the original nor the further loans were repaid.

6. On 31 December 2008, rather more than two years after the original transaction, the 2006 and 2007 loans were refinanced. Mr Hunt and EMSL entered into a loan agreement under which Mr Hunt personally made a short-term loan of £18.663m to EMSL, secured by fixed and floating charges over its assets and undertaking. The loan was interest-free, although there was a provision for default interest. It was a term of the agreement that EMSL would apply the loan moneys in satisfaction of the outstanding balance of the 2006 and 2007 loans. EMSL duly did this. There were two reasons for these transactions. The first was that under UK tax legislation governing close companies, once Mr Hunt, who already controlled Swynson, acquired control of EMSL in July 2008, Swynson became assessable to tax on the interest payments due from EMSL notwithstanding that those payments were not being made. The second was that Mr Hunt took the view that it was disadvantageous for Swynson to have a large non-performing loan on its books. The result was that the 2006 and 2007 loans were discharged, as Mr Hunt intended. Only the 2008 loan of £3m remained outstanding on Swynson's books.

7. In October 2012 Swynson and Mr Hunt brought the present proceedings in support of a claim against HMT for damages of £16.157m, being the principal amount of all the loans of £19.75m, less sums received under the management's personal guarantees and the value of recoveries from cash and assets in the hands of Evo. The matter came on for trial before Rose J. Liability was conceded in the course of the trial, and by the time that the judge came to give judgment the only outstanding issues related to damages. She found that only the 2006 loan had been made on the strength of HMT's report, but that losses arising from the 2007 and 2008 loans were in principle recoverable as the cost of reasonable steps taken in mitigation, subject to an overall cap of £15m agreed in the letter of engagement.

8. That left for decision the main point taken on damages, and the only one which is presently before this court, which concerned the effect of the discharge of the 2006 and 2007 loans as a result of the refinancing of December 2008. HMT submitted that EMSL having repaid these loans to Swynson, albeit with money borrowed from Mr Hunt personally, Swynson had suffered no loss in respect of them which could be recovered by way of damages. In response, Swynson and Mr Hunt argued four points: (i) that the December 2008 refinancing was *res inter alios acta* and did not affect the amount of Swynson's recoverable loss; (ii) that if the loss was

not recoverable by Swynson it was recoverable by Mr Hunt, on the footing that HMT owed him a duty of care; (iii) that Swynson was entitled to recover on the principle of transferred loss; and (iv) that HMT having been unjustly enriched by Mr Hunt's provision of funds to EMSL to repay Swynson, Mr Hunt was subrogated to Swynson's claims against them.

9. The judge accepted point (i) and awarded damages of £15m on that basis. On point (ii) she held that no duty of care was owed to Mr Hunt personally. Points (iii) and (iv) did not arise having regard to her conclusion on point (i) and she did not deal with them.

10. In the Court of Appeal, Mr Hunt abandoned the argument that a duty of care was owed to him personally. But the other three points remained in issue. The Court of Appeal held by a majority (Longmore and Sales LJJ) that the judge had been right about point (i) (*res inter alios acta*) and dismissed the appeal on that basis. The majority disagreed about point (iv) (unjust enrichment and equitable subrogation). Longmore LJ would have rejected it, while Sales LJ would have accepted it. Davis LJ rejected all three points and would have allowed the appeal. The issues before this court stand as they did in the Court of Appeal. There is, as will be apparent, a measure of overlap between them.

Res inter alios acta

11. The general rule is that loss which has been avoided is not recoverable as damages, although expense reasonably incurred in avoiding it may be recoverable as costs of mitigation. To this there is an exception for collateral payments (*res inter alios acta*), which the law treats as not making good the claimant's loss. It is difficult to identify a single principle underlying every case. In spite of what the latin tag might lead one to expect, the critical factor is not the source of the benefit in a third party but its character. Broadly speaking, collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss. Thus a gift received by the claimant, even if occasioned by his loss, is regarded as independent of the loss because its gratuitous character means that there is no causal relationship between them. The same is true of a benefit received by right from a third party in respect of the loss, but for which the claimant has given a consideration independent of the legal relationship with the defendant from which the loss arose. Classic cases include loss payments under an indemnity insurance: *Bradburn v Great Western Railway Co* (1874-5) LR 10 Ex 1. Or disability pensions under a contributory scheme: *Parry v Cleaver* [1970] AC 1. In cases such as these, as between the claimant and the wrongdoer, the law treats the receipt of the benefit as tantamount to the claimant making good the loss from his own resources, because they are attributable to his premiums, his contributions or his work. The position may be different if the benefits are not collateral because they are derived from a contract

(say, an insurance policy) made for the benefit of the wrongdoer: *Arab Bank Plc v John D Wood Commercial Ltd* [2000] 1 WLR 857 (CA), at paras 92-93 (Mance LJ). Or because the benefit is derived from steps taken by the Claimant in consequence of the breach, which mitigated his loss: *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Ltd* [1912] AC 673, 689, 691 (Viscount Haldane LC). These principles represent a coherent approach to avoided loss. In *Parry v Cleaver*, at p 13, Lord Reid derived them from considerations of "justice, reasonableness and public policy". Justice, reasonableness and public policy are, however, the basis on which the law has arrived at the relevant principles. They are not a licence for discarding those principles and deciding each case on what may be regarded as its broader commercial merits.

12. On the judge's findings, the loss recoverable by Swynson from HMT was that which arose from its inability to recover (i) the 2006 loan which it had made to EMSL on the strength of HMT's reports about Evo's financial strength, and (ii) the 2007 and 2008 loans which it made in a reasonable but unsuccessful attempt to mitigate the loss arising from the 2006 loan. So far as the 2006 and 2007 loans were concerned, that loss was made good when EMSL repaid them. The fact that the money with which it did so was borrowed from Mr Hunt was no more relevant than it would have been if it had been borrowed from a bank or obtained from some other unconnected third party. There was nothing special about the fact that Mr Hunt provided the funds, once one discards the idea that HMT owed any relevant duty to him. The short point is that the repayment of the 2006 and 2007 loans cannot be treated as discharging them as between Swynson and EMSL, but not as between Swynson and HMT.

13. If, in December 2008, Mr Hunt had lent the money to Swynson to strengthen its financial position in the light of EMSL's default, the payment would indeed have had no effect on the damages recoverable from HMT. The payment would not have discharged EMSL's debt. It would also have been collateral. But the payments made by Mr Hunt to EMSL and by EMSL to Swynson to pay off the 2006 and 2007 loans could not possibly be regarded as collateral. In the first place, the transaction discharged the very liability whose existence represented Swynson's loss. Secondly, the money which Mr Hunt lent to EMSL in December 2008 was not an indirect payment to Swynson, even though it ultimately reached them, as the terms of the loan required. Mr Hunt's agreement to make that loan and the earlier agreements of Swynson to lend money to EMSL were distinct transactions between different parties, each of which was made for valuable consideration in the form of the respective covenants to repay. Thirdly, as the Court of Appeal correctly held, the consequences of the refinancing could not be recoverable as the cost of mitigation, because the loan to EMSL was not an act of Swynson and was not attributable to HMT's breach of duty.

Transferred loss

14. The principle of transferred loss is a limited exception to the general rule that a claimant can recover only loss which he has himself suffered. It applies where the known object of a transaction is to benefit a third party or a class of persons to which a third party belongs, and the anticipated effect of a breach of duty will be to cause loss to that third party. It has hitherto been recognised only in cases where the third party suffers loss as the intended transferee of the property affected by the breach. The paradigm case is the rule which has applied in the law of carriage of goods by sea ever since the decision of the House of Lords in *Dunlop v Lambert* (1839) 2 Cl & F 626, that the shipper may sue the shipowner for loss of or damage to the cargo notwithstanding that the loss has been suffered by the consignee to whom property and risk (but not the rights under the contract of carriage) have passed. In *Albacruz (Cargo Owners) v Albazero (Owners)* [1977] AC 774, 847 Lord Diplock, with whom the rest of the Appellate Committee agreed, expressed the rationale of the carriage of goods rule as being that:

> "in a commercial contract concerning goods where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods, an original party to the contract, if such be the intention of them both, is to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into."

The party recovering is accountable to the third party for any damages recovered: *ibid*, p 844.

15. In *Linden Gardens Trust v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, this rationale was extended to contracts generally. A contractor had done defective work in breach of a building contract with the developer but the loss was suffered by a third party who had by then purchased the development. The developer recovered the loss suffered by the purchaser. Lord Griffiths, however, suggested (at p 97) that the result could be justified on what has become known as the "broader ground". This is that the developer had himself suffered the loss because he had his own interest in being able to give the third party the benefit that the third party was intended to have. He could recover the cost of rectifying the defects because it represented what the developer would have to spend to give the third party that

benefit, even though he had no legal liability to spend it. On the broader ground, the principle would not be limited to cases where the loss related to transferred property.

16. It is, however, important to remember that the principle of transferred loss, whether in its broader or narrower form, is an exception to a fundamental principle of the law of obligations and not an alternative to that principle. All of the modern case law on the subject emphasises that it is driven by legal necessity. It is therefore an essential feature of the principle that the recognition of a right in the contracting party to recover the third party's loss should be necessary to give effect to the object of the transaction and to avoid a "legal black hole", in which in the anticipated course of events the only party entitled to recover would be different from the only party which could be treated as suffering loss: see *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518, 547-548 (Lord Goff), 568 (Lord Jauncey), 577-578 (Lord Browne-Wilkinson), 582-583 (Lord Millett). That is why, as the House of Lords held in this last case, it is not available if the third party has a direct right of action for the same loss, on whatever basis.

17. In the present case the relevant duty was owed to Swynson but the loss has in the event been suffered by Mr Hunt. Since Mr Hunt did not suffer his loss in his capacity as the owner of property, only the broader principle of transferred loss could be relevant to his case. Like others before me, I consider that there is much to be said for the broader principle. But it is not necessary to decide the point on this appeal because it is plain that the principle cannot apply in either form to the present facts. The reason is that it was no part of the object of the engagement of HMT or indeed of any other aspect of the 2006 transaction to benefit Mr Hunt. That is the main reason why no duty of care was owed to him. It is also one reason why the engagement letter was unassignable without consent. Mr Hunt's loss arises out of the refinancing of December 2008, which had nothing to do with HMT and did not arise out of their breach of duty.

Equitable subrogation as a remedy for unjust enrichment

18. Equitable subrogation is a remedy available to give effect to a proprietary right or in some cases to a cause of action. This is not a case where subrogation is invoked to give effect to a proprietary right. It belongs to an established category of cases in which the claimant discharges the defendant's debt on the basis of some agreement or expectation of benefit which fails. The rule was stated by Walton J stated in *Burston Finance Ltd v Speirway Ltd (in liquidation)* [1974] 1 WLR 1648, 1652 as follows:

> "[W]here A's money is used to pay off the claim of B, who is a secured creditor, A is entitled to be regarded in equity as

> having had an assignment to him of B's rights as a secured creditor … It finds one of its chief uses in the situation where one person advances money on the understanding that he is to have certain security for the money he has advanced, and for one reason or another, he does not receive the promised security. In such a case he is nevertheless to be subrogated to the rights of any other person who at the relevant time had any security over the same property and whose debts have been discharged in whole or in part by the money so provided by him."

Most of the cases are indeed about subrogation to securities, but the principle applies equally to allow subrogation to personal rights: *Cheltenham & Gloucester Plc v Appleyard* [2004] EWCA Civ 291, at para 36; *Commissioners for HM Revenue and Customs v Investment Trust Companies (In Liquidation)* [2017] UKSC 29.

19. In *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 the House of Lords reinterpreted the existing authorities so as to recognise that, subject to special defences, equitable subrogation served to prevent or reverse the unjust enrichment of the defendant at the plaintiff's expense. The argument for Mr Hunt is that HMT has been unjustly enriched at his expense by virtue of the discharge of the 2006 and 2007 loans, the loss on which would otherwise have been recoverable from them by way of damages. Equitable subrogation is invoked as the appropriate remedy to reverse that enrichment.

20. I am prepared to assume for the sake of argument that HMT was enriched, although I regard it as rather contrived to treat someone as enriched simply because a contractual counterparty has suffered no loss by his breaches of duty. I am also prepared to assume that if they have been unjustly enriched it was at Mr Hunt's expense, although that is also an odd assumption to make on the facts of this case. Although Mr Hunt lent EMSL the money which was used to pay off the debt, his loss was not attributable to the benefit thereby conferred on HMT. It was purely incidental, for Mr Hunt had no claim against HMT and was not affected by the reduction of their liability. He was affected only by the eventual insolvency of the borrower. Nonetheless, I make both of these assumptions in order to focus attention on what seems to me to be the critical questions, namely whether the enrichment was unjust and if so whether subrogation is an appropriate way of addressing the fact. As I shall show, these two questions are closely related.

21. Mr Hunt says that it was unjust because he entered into the December 2008 refinancing under a mistake. The mistake in question has been identified on this appeal by reference to a passage from his witness statement which the Judge accepted:

> "It should be obvious from what I have said … that there was no intention on my part or Swynson's part to relieve HMT from any liability due to the refinancing exercise. As far as I was concerned the claim against HMT remained unaffected by this refinancing and was of no concern of theirs. As between me and Swynson the consideration of who technically would be entitled to recover the money from HMT did not matter as I was the owner of Swynson, but it was implicitly understood that the recovery would be held pro-rata according to the unpaid lending advanced."

In fact, no case of mistake was ever pleaded or advanced at trial. This evidence appears to have been given by Mr Hunt and accepted by the judge in support of the argument that she accepted, namely that the repayment of the loan by EMSL to Swynson was collateral ("no concern of theirs"). It is therefore not entirely fair to deploy it in a very different legal context. But I will put aside my reservations on that score and approach the matter as if mistake had been an issue at the trial and this finding had been addressed to it.

22. As with any novel application of the relevant principles, it is necessary to remind oneself at the outset that the law of unjust enrichment is part of the law of obligations. It is not a matter of judicial discretion. As Lord Reed points out in *Investment Trust Companies* (para 39) it

> "does not create a judicial licence to meet the perceived requirements of fairness on a case-by-case basis: legal rights arising from unjust enrichment should be determined by rules of law which are ascertainable and consistently applied."

English law does not have a universal theory to explain all the cases in which restitution is available. It recognises a number of discrete factual situations in which enrichment is treated as vitiated by some unjust factor. These factual situations are not, however, random illustrations of the Court's indulgence to litigants. They have the common feature that some legal norm or some legally recognised expectation of the claimant falling short of a legal right has been disrupted or disappointed. Leaving aside cases of illegality, legal compulsion or necessity, which give rise to special considerations irrelevant to the present case, the defendant's enrichment at the claimant's expense is unjust because, in the words of Professor Burrows' *Restatement* (2012) at Section 3(2)(a), "the claimant's consent to the defendant's enrichment was impaired, qualified or absent." As Lord Reed puts it in *Investment Trust Companies* (para 42), the purpose of the law of unjust enrichment is to

> "correct normatively defective transfers of value by restoring the parties to their pre-transfer positions. It reflects an Aristotelian conception of justice as the restoration of a balance or equilibrium which has been disrupted."

23. In *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, Parc had borrowed money from R on the security of a first legal charge over property, and from an associated company, OOL, on the security of a second legal charge. The plaintiff bank partially refinanced the borrowing from R. For regulatory reasons the refinancing was structured as a loan to the general manager of the group holding company, who in turn lent it to Parc who used it to pay off part of the loan from R. The plaintiff's loan was made on the strength of an undertaking by the general manager that intra-group loans to Parc would be postponed to the plaintiff's loan. The undertaking was intended to bind all the companies of the group, but in fact bound only the holding company because it was given without the subsidiaries' knowledge or authority. OOL accordingly sought to enforce its second charge ahead of the plaintiff. The plaintiff sought to defeat this attempt by claiming to be subrogated to R's first charge. This depended on the contention that OOL would otherwise be unjustly enriched by the indirect use of the plaintiff's money to discharge indebtedness which ranked ahead of theirs. The House of Lords accepted that contention, holding that the plaintiffs were subrogated to R's first charge, but only as against intra-group creditors who would have been postponed had the general manager's undertaking been binding on them.

24. Lord Hoffmann, with whom the rest of the Appellate Committee agreed, distinguished, at p 231H-G, between contractual subrogation (as in the case of indemnity insurance or guarantee) and equitable subrogation, which was

> "an equitable remedy to reverse or prevent unjust enrichment which is not based upon any agreement or common intention of the party enriched and the party deprived."

He identified as the unjust factor in OOL's enrichment the defeat of the plaintiff's expectation of priority over intra-group loans which was the basis on which it had advanced the money. This was so, notwithstanding that that expectation was not shared by OOL who had nothing to do with the transaction and was unaware of it.

25. Lord Hoffmann cited in support of this proposition a number of earlier cases in which a right of subrogation had been held to arise when the expectations of the person paying the money (whether or not shared by the party enriched) were defeated because something went wrong with the transaction. Thus in *Chetwynd v Allen* [1899] 1 Ch 353 and *Butler v Rice* [1910] 2 Ch 277, the plaintiff lent money

to pay off a prior loan secured by a mortgage on property. The plaintiff's expectation that he would obtain a charge to secure his own loan was based on an agreement with the debtor, but was defeated because unbeknown to him the property in question belonged to the debtor's wife. The plaintiff was subrogated to the prior mortgage because otherwise the wife would have been unjustly enriched by the discharge of the debt which it secured. In *Ghana Commercial Bank v Chandiram* [1960] AC 732, the plaintiff bank lent money to the debtor to pay off an existing loan from another bank secured by an equitable mortgage on property. It did this on the footing that it would obtain a legal mortgage over the property. That expectation was defeated because although the legal mortgage was executed it was invalidated by a prior attachment of the property in favour of a judgment creditor. The plaintiff bank was subrogated to the judgment creditor's attachment because otherwise the judgment creditor would have been unjustly enriched by the discharge of the debt which the equitable mortgage secured. In *Boscawen v Bajwa* [1996] 1 WLR 328, the plaintiff Building Society agreed to lend money on mortgage for the purchase of a property. It paid the loan moneys to the solicitors acting for them and the purchaser, to be held on its behalf until paid over against a first legal charge on the property. The solicitors paid it over to the vendor's solicitors to be held to their order pending completion. The plaintiff's expectations were defeated because the vendor's solicitors used it without authority to pay off the vendor's mortgage before completion and the purchase subsequently fell through so that completion never occurred. The plaintiff was subrogated to the vendor's mortgage because otherwise the vendor would have been unjustly enriched by the discharge of the debt which it secured. Likewise, in *Banque Financière* itself, the plaintiff's expectation of priority over intra-group loans was defeated by the general manager's absence of authority to bind the subsidiaries. In the absence of subrogation, OOL would have been unjustly enriched because Parc's debt to R, which would otherwise have ranked ahead of its debt to OOL, was discharged at the plaintiff's expense without the plaintiff's effective consent. As Lord Hoffman observed, at p 235A-B, the plaintiff "failed to obtain that priority over intra-group indebtedness which was an essential part of the transaction under which it paid the money."

26. Where the basic conditions for equitable subrogation apply, the fact that the legal right to which the Claimant is subrogated has been discharged is irrelevant. This is because, as Lord Hoffmann explained at p 236, subrogation operates on a fictionalised basis:

> "In a case in which the whole of the secured 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."

27. In *Cheltenham & Gloucester Plc v Appleyard* [2004] EWCA Civ 291, the Plaintiff Building Society lent money to Mr and Mrs Appleyard to refinance debts owed to the Bradford & Bingley Building Society secured by a first charge on their home, and to BCCI secured by a second charge. The plaintiff put its solicitors in funds and the solicitors paid the outstanding balance of both debts to the respective creditors. The Appleyards executed a legal charge over the property in favour of the plaintiff. But the charge could not be registered as a legal charge at HM Land Registry because BCCI (which was in liquidation) refused to recognise that it had received the money or to consent to the discharge of its own security, and the terms of that security prohibited any charge subsequent to its own. The plaintiffs were held entitled to be subrogated to the legal charge of Bradford & Bingley to the extent of the value of the Bradford & Bingley mortgage at the time it was paid off. This was because otherwise the Appleyards would be unjustly enriched to the extent that their property was burdened with a lesser security.

28. In *Banque Financière* and the earlier cases cited by Lord Hoffmann the defendants did not share the expectation of the claimant, whereas in *Cheltenham & Gloucester* they did. But in either case the intentions of the defendants were beside the point. The reason was that the claimant had bargained for the benefit which failed, whereas from the defendant's point of view the discharge of the prior indebtedness was a windfall for which they had not bargained. If they had given consideration for it the result would have been different.

29. This point may be illustrated by the other leading modern case, *Bank of Cyprus UK Ltd v Menelaou* [2016] AC 176. The decision is authority for the proposition that a third party who pays the purchase price of property may be subrogated to the vendor's lien for the purchase price, if the purchaser would otherwise have been unjustly enriched. The Menelaou parents proposed to sell the family home to release capital to be spent on (among other things) buying a house for their daughter. To enable this to happen, the claimant bank, to whom the family home was mortgaged, agreed to release its charges on condition that it would receive a charge over the house to be acquired for the daughter. This expectation was defeated because she was unaware of the arrangement and the signature on the charge was not hers. The daughter was enriched, not by the mere fact of acquiring a

house, which she owed to the benevolence of her parents, but by the fact that she acquired it free of the charge which the bank expected to have and without which the transaction should not have proceeded. The main issue on the appeal was whether that enrichment occurred at the bank's expense, given that the money to pay the purchase price had come from her parents out of the proceeds of sale of the family home, and not directly from the bank. Once that question was answered in the bank's favour, it was held that the enrichment was unjust. This was because the bank's consent to the use of the proceeds of the family home to buy the daughter a house had been conditional on it obtaining a charge. That condition had failed and the daughter had consequently been enriched. To reverse the enrichment, the bank was subrogated to the vendor's lien, on the footing that the purchase price secured by that lien had in substance been paid with the bank's money. The daughter's intentions were irrelevant because the absence of a valid charge had been a windfall for her. As Lord Neuberger pointed out (para 70), this was because she did not pay for it. If she had been a bona fide purchaser for full value it might well have been impossible to characterise any enrichment arising from the absence of the intended charge as unjust.

30. The cases on the use of equitable subrogation to prevent or reverse unjust enrichment are all cases of defective transactions. They were defective in the sense that the claimant paid money on the basis of an expectation which failed. Many of them may broadly be said to arise from a mistake on the part of the claimant. For example, he may wrongly have assumed that the benefit in question was available or enforceable or that his stipulation was valid, when it was not. However, it would be unwise to draw too close an analogy with the role of mistake in other legal contexts or to try to fit the subrogation cases into any broader category of unjust enrichment. It is in many ways *sui generis*. In the first place, except in the case of voluntary dispositions, the law does not normally attach legal consequences to a unilateral mistake unless it is known to or was induced by the other party. But it does so in the subrogation cases. This is, as I have explained, because the windfall character of the benefit conferred on the defendant means that it is not unjust to give effect to the unilateral expectation of the claimant. Secondly, where money is paid under a contract, restitution is normally available only if the contract can be and is rescinded or is otherwise at an end without performance (eg by frustration). This is because the law of unjust enrichment is generally concerned to restore the parties to a normatively defective transfer to their pre-transfer position. Subrogation, however, does not restore the parties to their pre-transfer position. It effectively operates to specifically enforce a defeated expectation. Thirdly, as Lord Clarke suggested in *Menelaou* (para 21), the rule may be equally capable of analysis in terms of failure of basis for the transfer. Restitution on that ground ordinarily requires that the expectation should be mutual, whereas this is not a requirement for equitable subrogation. But some cases, such as *Boscawen v Bajwa* and *Cheltenham & Gloucester v Appleyard*, cannot without artifice be analysed in any other way, since the payer does not seem to have been mistaken about anything. His expectation was simply defeated by some subsequent external event. What this suggests is that the

real basis of the rule is the defeat of an expectation of benefit which was the basis of the payer's consent to the payment of the money for the relevant purpose. Mistake is not the critical element. It is only one, admittedly common, explanation of how that expectation came to be disappointed.

31. Two things, however, are clear. The first is that the role of the law of unjust enrichment in such cases is to characterise the resultant enrichment of the defendant as unjust, because the absence of the stipulated benefit disrupted a relevant expectation about the transaction under which the money was paid. The second is that the role of equitable subrogation is to replicate as far as possible that element of the transaction whose absence made it defective. This is why subrogation cannot be allowed to confer a greater benefit on the claimants than he has bargained for: see *Paul v Speirway Ltd* [1976] Ch 220, 232 (Oliver J), *Banque Financière*, at pp 236-237 (Lord Hoffmann), and *Cheltenham & Gloucester v Appleyard*, at paras 38, 41-42 (Neuberger LJ). It can be seen that the fact that all the cases relate to defective transactions is not just an adventitious feature of the disputes that happen to have come before the courts. It is fundamental to the principle on which they were decided.

32. The present case is entirely different from the kind of case with which equitable subrogation is properly concerned. The December 2008 refinancing was not a defective transaction. Mr Hunt intended to discharge EMSL's debt to Swynson. Otherwise he would not have achieved his objective of cleaning up Swynson's balance sheet and reducing its liability to tax. He received the whole of the benefit from the transaction for which he had stipulated: the covenant to repay, the security over EMSL's assets, the tax advantage and the presentational advantage of removing a large non-performing debt from Swynson's books. It is of course true that he did not receive repayment of his loan, because EMSL was (or became) insolvent and its assets were worth much less than the debt. But that was a commercial risk that he took with his eyes open, and it was not what enriched HMT. In these circumstances, subrogation is not being invoked for its proper purpose, namely to replicate some element of the transaction which was expected but failed. It is being invoked so as to enable Mr Hunt to exercise for his own benefit the claims of Swynson in respect of an unconnected breach of duty under a different transaction between different parties more than two years earlier.

33. Mr Hunt's alleged mistake contributes nothing to this analysis. I need not enter into the long-standing controversy about whether a transaction may be set aside on account of a mistake relating to the consequences or advantages of a transaction as opposed to its terms or character, or whether any causative mistake of sufficient importance will do. That issue is discussed by Lord Walker in *Pitt v Holt* [2013] 2 AC 108 at paras 114-123 and by the editors of Goff & Jones, *The Law of Unjust Enrichment*, 9th ed (2016), paras 9-135 - 9-142. But it does not arise here. Mr Hunt is not seeking to set aside the December 2008 refinancing and would not

be entitled to do so. He is trying to invoke a remedy which the law provides for a specific purpose, and to deploy it for a different one. When Mr Hunt entered into the December 2008 refinancing, he did not in any sense bargain for a right to recover substantial damages from HMT. Nor was he mistaken about what he was going to get out of the refinancing. At best, he was mistaken about the effect that the discharge of EMSL's debt to Swynson would have on the latter's claims under the very different transaction which it had entered into in 2006 when it engaged HMT to carry out the due diligence. In fact, however, his evidence does not even go that far. What it shows is that he wrongly believed that he had already bargained for a right to substantial damages from HMT back in 2006. This was because he considered that as the owner of Swynson he was as much entitled under Swynson's contract with HMT as Swynson was. "As between me and Swynson," he wrote in the passage from his witness statement cited by the judge, "the consideration of who technically would be entitled to recover the money from HMT did not matter as I was the owner of Swynson." As a result, he did not think that by discharging EMSL's debt to Swynson two years later he would diminish his own entitlement. As between Swynson and himself, it was "implicitly understood" that whichever of them made the recovery it would be shared between them pro-rata according to the unpaid lending advanced.

34. This was an error, but it does not follow that its consequences constitute an injustice which falls to be corrected by the law of equitable subrogation. Unless the claimant has been defeated in his expectation of some feature of the transaction for which he may be said to have bargained, he does not suffer an injustice recognised by law simply because in law he has no right. Failure to recognise these limitations would transform the law of equitable subrogation into a general escape route from any principle of law which the claimant overlooked or misunderstood when he arranged his affairs as he did.

35. The consequence of a rule as broad as that can be seen by supposing that after Mr Hunt has recovered damages from HMT by way of subrogation, the fortunes of Evo turn and EMSL is in a position to repay the December 2008 loan. It does not matter for present purposes whether or not this was a realistic prospect in December 2008, although the judge's findings on mitigation suggest that it was not unrealistic. If Mr Hunt's argument is correct, the transfer which enriched HMT at his expense was the payment of the loan moneys to EMSL and which EMSL then paid to Swynson. His right of subrogation is said to have arisen from the discharge of the debt which EMSL owed to Swynson. It did not depend on whether or not he was able to recover the money he lent to EMSL. If EMSL were restored to financial health, there would be nothing to stop him from obtaining repayment of EMSL's debt under the December 2008 loan agreement. Subrogation on these facts would then have served to give Mr Hunt an additional right on top of everything the he bargained for in December 2008. This result would hardly do credit to the law. But it is the natural consequence of allowing subrogation to rights arising under a

different transaction from the one which gave rise to the enrichment, instead of confining it to cases where it serves to replicate a missing element of the same transaction.

Conclusion

36. In the result I would allow the appeal. The parties are invited to agree an appropriate order.

LORD MANCE:

Introduction

37. This appeal arises from an unsuccessful management buyout of Medical Industries America Inc, trading as Evo Medical Solutions ("Evo"), made through Evo Medical Solutions Ltd ("EMSL") in 2006. EMSL was set up for the purpose and was owned as to 25% by Mr Michael Hunt through nominees, as to 3.6% by a colleague of his and as to the remaining 71.4% by the management team proposing the buyout.

38. Mr Hunt has at all material times owned and controlled the respondent to this appeal, Swynson Ltd ("Swynson"). The management buyout was enabled by an interest-bearing loan of £15m made on 31 October 2006 by Swynson to EMSL, secured by charges over EMSL's and Evo's assets and repayable on 31 October 2007. As from 28 February 2007, this loan was financed by Swynson by borrowing from Credit Suisse guaranteed by Mr Hunt and secured on his assets.

39. By July 2007 it appeared that Evo was at risk of financial collapse, and on 13 August 2007 Swynson granted a further facility of £1.75m to EMSL, which was fully drawn down by 1 October 2007 and repayable on 31 October 2007. Evo's finances failed to improve and on 4 June 2008 Swynson made a third loan of £3m to EMSL. At or about the same date, Mr Hunt acquired the majority beneficial ownership of EMSL.

40. The appellants, Hurst Morrison Thomson LLP (now known as Lowick Rose LLP) ("HMT") through their partner, Mr Morrison, introduced the management buyout to Mr Hunt in mid-2006, by a proposal letter dated 12 July 2006 followed by a meeting the next day. They undertook by formal engagement letter dated 30 September 2006 to act as Swynson's reporting accountants in the same context and

provided a final due diligence report on 31 October 2006. The engagement letter provided that HMT's maximum liability for advice given in respect of this matter was limited to £15m in aggregate in respect of any claim or claims that Swynson might have against HMT arising out of this engagement. It is conceded that HMT's advice was negligent and that their negligence caused Swynson's decision to enter into the 2006 loan.

41. During the first half of 2008 Mr Morrison asked Mr Hunt if he was contemplating legal action against HMT. Mr Hunt replied that he would find that most unpalatable and said that they should wait and see how things developed following the additional funding provided in October 2007. By 1 July 2008 it was clear that matters had further deteriorated, and Mr Hunt drafted a letter of claim, and disclosed that he had done so to Mr Morrison and had, as an alternative to forcing Evo into liquidation, made the third investment in June 2008. Mr Morrison asked him not to send the letter as it would cause great concern with HMTs' insurers, and Mr Hunt refrained from taking any such step until 24 August 2010, when he wrote referring to the earlier letter and conversation, stated that Evo had from the outset been a "pig in a poke", and and made a formal claim.

42. That claim led in due course to the commencement on 30 October 2012 of the present proceedings, in which Swynson and Mr Hunt were both claimants and sought to recover damages for losses resulting from the management buyout and the making of all three loans in 2006, 2007 and 2008. The losses claimed at trial consisted of the total of the funding provided (£19.75m) less moneys and assets recovered, making a net claim of $16.157m (over HMT's limit of liability under the engagement letter), plus interest.

43. In the meantime, however, the consequence of Mr Hunt's acquiring of majority ownership of EMSL in addition to his ownership of Swynson had been that Her Majesty's Revenue and Customs began to treat Swynson as receiving the interest which EMSL should have paid, but was not in fact paying, to Swynson. At the Revenue's official interest rate of 6.25% pa and the corporation tax rate of 28% applicable at the time, the resulting tax charge on the 2006 and 2007 loans was some £293,125 per annum. Swynson also remained exposed on its borrowings from Credit Suisse. In these circumstances, on the advice, it appears, of his accountant, Mr Hunt determined to lend EMSL the money to pay off Swynson. He did so under a loan agreement dated 31 December 2008, which recited that, due to the financial circumstances of the borrower the loan was to be non-interest bearing, and clause 3.2 of which provided that:

> "The Borrower shall use all money borrowed under this agreement

> (i) To pay certain of the Borrower's existing loans to Swynson Limited (but for the avoidance of doubt not the Second Additional Loan made available on 4 June 2008);
>
> (ii) To pay for costs incurred in connection with the repayment of this agreement and
>
> (iii) for general working capital purposes
>
> and not for any other purpose."

On this basis, EMSL was able to and did pay Swynson the sums due in respect of the 2006 and 2007 loans.

44. In the courts below, Mr Hunt's claim against HMT failed, on the ground that HMT undertook and owed no duty to him personally. There is no appeal against that conclusion. In relation to Swynson, HMT unquestionably owed and breached duties in both contract and tort. But HMT submit that the effect of the transaction of 31 December 2008 was and is to repay the loans given by Swynson to fund and support the management buyout. So no loss has, in the event, been suffered by Swynson, and Swynson can have no claim against HMT with regard to them. That is the submission.

(a) Mitigation and res inter alios acta?

45. HMT's submission failed at first instance before Rose J and in the Court of Appeal before Longmore and Sales LJJ, with Davis LJ dissenting. Rose J and the majority in the Court of Appeal held that the transaction effected on 31 December 2008 fell to be regarded as *res inter alios acta*, as between Swynson and HMT. They considered, clearly correctly, that the transaction did not constitute mitigation by Swynson of its damage, since Swynson was in no position to, and did not effect, the transaction itself. But they regarded the transaction as in fact avoiding loss in a way which should only be brought into account, if it arose out of HMT's breach of duty and in the ordinary course of business. They cited in this connection from Viscount Haldane LC's speech in *British Westinghouse Co Ltd v Underground Electric Railways Co Ltd* [1912] AC 673, 690.

46. It can readily be accepted that there was a causal link between Mr Hunt's action in funding EMSL to repay Swynson and HMT's negligence, and also that Mr

Hunt was not acting in the ordinary course of business, but in the grip of a continuing and somewhat disastrous course of events brought about by that negligence. But, as has been held, Mr Hunt himself has no claim against HMT for negligence, and his action brought about the repayment of the loan granted to Swynson independently of any action by Swynson itself. In the passages cited, Viscount Haldane LC was speaking of loss mitigated by the claimant him- or itself in circumstances where there was no obligation to mitigate loss. Here, the payment off of the indebtedness was not undertaken by or at the request of Swynson. It was initiated by Mr Hunt in his personal capacity deciding that it would suit Swynson's and his own interests to procure repayment by EMSL of its indebtedness to Swynson. Swynson and Mr Hunt are distinct legal personalities, and Mr Hunt's conduct cannot be attributed to Swynson.

47. The majority in the Court of Appeal also sought to support its reasoning by reference to the principle recognised in cases such as *Parry v Cleaver* [1970] AC 1 as governing collateral receipts, such as the proceeds of insurance, benevolent payments, disablement and pension payments. Whether such receipts should be brought into account was there said by Lord Reid, at p 13H, to depend on "justice, reasonableness and public policy", and to involve a distinction which in his view at p 15E depended "not on their source but on their intrinsic nature". In some cases, such payments can be seen to have been effectively purchased or paid for by the claimant, so that it would be unfair to deprive him of their benefit. In other cases, such as insurance, whosoever has paid the premium, it is clear that insurers' liability is intended to be secondary, and subrogation will ensure that any recovery flows back to compensate the insurer. None of such cases resembles the present, where it is suggested that the court can ignore what is, in its intrinsic nature, a repayment of the loan under and by virtue of which the loss has been incurred.

48. Longmore LJ noted that, if Mr Hunt had simply given Swynson the amounts of the outstanding 2006 and 2007 loans, no one could have suggested that HMT would have benefitted by this. That is clear. But the reason is that the gift would not have discharged the outstanding loans, and would have been a purely gratuitous or benevolent addition to Swynson's assets which was clearly not intended or apt to discharge HMT. Longmore LJ said it would be a triumph of form over substance if a different result occurred "merely because the payment is made through EMSL". But the difference is in the nature of the payment, to which Lord Reid referred in *Parry v Cleaver*. Mr Hunt's loan to EMSL was intended to and did lead to actual payment off of the first two loans which Swynson had made to EMSL.

49. Sales LJ, agreeing on this point with Davis LJ, also accepted (para 55) that, if EMSL had suddenly become able to repay and had repaid as a result of winning the lottery or being left a large sum in a will, then Swynson could to that extent no longer have a claim against HMT. But he considered that considerations of justice, reasonableness and public policy made the present case different. This was because

HMT's negligence had put Swynson and Mr Hunt in an invidious position, in which Mr Hunt had felt he had to provide funding "to shore up Swynson's position" on uncommercial terms which were not in the ordinary course of business. So, although Mr Hunt did not act out of pure benevolence, the position was analogous to cases of benevolence reviewed in *Parry v Cleaver*. Again, however, there is all the difference between a benevolent act which benefits a claimant (here Swynson) collaterally in an amount equivalent to a loss which it has incurred and satisfaction of the claimant Swynson's loss, by Mr Hunt's funding of EMSL to repay Swynson.

50. For these reasons, I do not consider that the result reached by Rose J and by the majority of the Court of Appeal can be justified by reference to the primary ground on which they put it. This conclusion is also consistent, in my opinion, with the Court of Appeal's reasoning and conclusion in *Preferred Mortgages Ltd v Bradford & Bingley Estate Agencies Ltd* [2002] EWCA Civ 336; [2002] PNLR 35, and with the reasoning of, in particular, Stephenson LJ in *London and South of England Building Society v Stone* [1983] 1 WLR 1242; 1261D-1262A. The latter case involved a claim by lenders against negligent valuers (who had failed to spot subsidence) for the difference of £11,880 between the amount advanced and the amount which would have been lent upon a proper valuation. The borrowers' ultimate repayment of the original advance out of the proceeds of the eventual sale of the house was ignored in the latter case by concession (per O'Connor LJ at p 1248H), the rationale being (per O'Connor LJ at p 1249E-F) that the repayment had in effect only been achieved out of the lenders' own further advances totalling £29,000, made to cover repairs necessary to make good the subsidence which the valuers had negligently failed to spot. The lenders therefore continued to suffer, and to be entitled to recover, loss up to the cap imposed by the difference between the amount advanced and the amount which would have been advanced on a proper valuation. The Court of Appeal's reasoning and decision in that very different factual situation do not affect the present, where Swynson's loss as lender has been fully extinguished by the repayment which Mr Hunt procured of the first two EMSL loans.

Swynson's alternative grounds: (b) transferred loss and (c) unjust enrichment

51. There are however two further grounds on which Swynson submits that the result reached below can and should be upheld. One is unjust enrichment, which, it is submitted, operates by preserving Swynson's rights against HMT for the benefit of Mr Hunt as subrogee to the extent necessary to indemnify him against his outlay paying off Swynson's loan. This basis was accepted in the Court of Appeal by Sales LJ, but would not have been accepted by Longmore and Davis LJJ, as an alternative basis for the result reached. The other, transferred loss, was mentioned in, but not considered in depth by any member of, the Court of Appeal.

(b) Transferred loss

52. Recovery for transferred loss can, in my view, be addressed quite briefly. The normal principle is that a claimant in an action for breach of contract cannot recover damages in respect of loss caused by the breach to some third person not party to the contract: see *The Albazero* [1977] AC 774, 846 B-C per Lord Diplock. But there are, as Lord Diplock went on to say, exceptions. One exception, recognised and applied in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* and *St Martins Property Corp Ltd v Sir Robert McAlpine Ltd* ("*St Martins"*) [1994] 1 AC 85 exists where it was in the contemplation of the parties when the contract was made that the property, the subject of the contract and the breach, would be transferred to or occupied by a third party, who would in consequence suffer the loss arising from its breach: see *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68 and the narrow ground of decision expressed by Lord Browne-Wilkinson at p 114G-H in *St Martins*, in which all members of the House joined. In such a situation, the claimant is seen as suing on behalf of and for the benefit of the injured third party and is bound to account accordingly: see *St Martins*, per Lord Browne-Wilkinson at p 115A-B and *McAlpine Construction Ltd v Panatown Ltd* ("*Panatown*") [2001] 1 AC 518, per Lord Clyde, at pp 530E-F and 532D-E.

53. Another broader principle was suggested by Lord Griffiths in *St Martins*, at p 96F-97D and reviewed inconclusively by Lord Browne-Wilkinson at pp 111F-112F as well as by the members of the House in *Panatown*. This is that a contracting party might itself have an interest in performance enabling it to claim damages without proving actual loss. In both cases the principle was being suggested in the context of contracts for supply, whether of goods or services. In *St Martins* the suggestion was made in circumstances where the claimant had actually incurred costs of repair, but was entitled to recover them from the associated company to which the building had been transferred before the breach. In *Panatown* the property was from the outset owned by an associated company of the company which contracted for its construction, and the construction defects which emerged did not lead to the latter company incurring any outlay. The reason why, in the majority view, the latter company was not entitled to recover damages was not that it had incurred no outlay, but was that there existed a deed of care deed entitling the owning company to make a direct claim against the contractors. Potential difficulties about the theory of performance interest are that it cannot prima facie embrace consequential losses suffered by the company actually (as opposed to contractually) interested in the quality of the property or services and that it is not clear whether or on what basis the company contractually entitled may be liable to account to the company actually interested: see on this latter point per Lord Clyde in *Panatown* at pp 532E-F, 534B-C and 535F.

54. Neither the narrow or the broad version of the transferred loss principle is in my view of assistance to Swynson. As to the narrow principle, it is clear that

Swynson did not contract with HMT on behalf of or for the benefit of Mr Hunt. As to the broad principle, even if accepted, I do not see how it can apply in circumstances where Swynson itself suffered loss through being induced to support the management buyout by lending to EMSL, but the loan was ultimately repaid by EMSL. This is not a case where Swynson had any performance interest other than being indemnified in respect of the loss which it incurred in lending moneys to support the management buyout. That performance interest has been satisfied. The fact that it was satisfied by Mr Hunt making moneys available to EMSL to repay Swynson does not bear on or expand Swynson's performance interest.

(c) Unjust enrichment

55. I turn then to unjust enrichment. Swynson's and Mr Hunt's submission is that relief by way of unjust enrichment is available to preserve Swynson's otherwise discharged claim against HMT for the benefit of Mr Hunt to the extent necessary to meet what are, it is submitted, the imperatives of the circumstances in which Mr Hunt effectively enriched HMT by arranging the repayment of the sums outstanding under the first two loans made by Swynson to EMSL, by reference to which sums HMT's liability would, otherwise, have fallen to be measured. Longmore and Davis LJJ were not prepared to accept this as a potential basis of recovery for two reasons. The first was difficulty in seeing how subrogation could arise in favour of Mr Hunt in respect of a claim by Swynson which had been discharged, "unless", Longmore LJ relevantly added, "the theory of fictionalised assignment expounded by Lord Hoftmann in *Banque Financiere* (see para 20 below) at p 236E solves this particular problem". The second was doubt whether any mistake had been sufficiently demonstrated. Both Longmore and Davis LJ saw the case as involving causative ignorance, rather than any incorrect conscious belief or incorrect tacit assumption, referring for this distinction to *Pitt v Hunt* [2013] 2 AC 108. Sales LJ took a different view and would, if necessary, have recognised Mr Hunt as enjoying a right of subrogation to Swynson's discharged claim against HMT.

56. The basic questions in a claim in unjust enrichment were summarised by Lord Steyn in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 227A-C in terms recently adopted by the Supreme Court in the judgment delivered by Lord Reed in *Commissioners for Her Majesty's Revenue and Customs v The Investment Trust Companies (In Liquidation)* ("*ITC*") [2017] UKSC 29. The four questions are: (1) Has the defendant benefited or been enriched? (2) Was the enrichment at the expense of the claimant? (3) Was the enrichment unjust? (4) Are there any defences? More detailed examination and application of these questions in particular cases has proved controversial: see in particular *Menelaou v Bank of Cyprus* [2014] 1 WLR 854 and its academic aftermath. However, the comprehensive review of their significance in Lord Reed's judgment in *ITC* now provides the essential basis for further consideration and application of the questions.

57. As to the first, there is, in the light of my conclusions on the issue of *res inter alios acta*, no doubt that HMT were, indirectly, enriched by the discharge by EMSL of the loan due to Swynson. The discharge had the immediate effect of reducing (in this case to nil) the damages in respect of the 2006 and 2007 loans which (subject to the overall £15m cap) Swynson could otherwise have recovered from HMT on account of HMT's negligence. A relevant benefit for the purposes of unjust enrichment can consist in the discharge of a debt or (as in *Banque Financière*) of the promotion of a second charge due to the discharge of part of a prior secured debt. In principle, it seems to me that it can consist in the reduction of a loss, which would otherwise be recoverable by way of a claim for damages for breach of contract and/or duty.

58. The second question raises the issue what counts as enrichment "at the expense" of the claimant. That this issue can prove less straightforward is evident from the examination of its conceptual base in paras 37 to 63 in *ITC*. Usually, as Lord Reed points out (paras 46-50) the parties will have dealt directly with one another, but there are situations which are legally equivalent to direct provision and there may be other apparent exceptions or possible approaches, which it is not intended to rule out. The claimant must incur a loss by conferring a benefit on the defendant, but "economic reality" is not the test (paras 59-60). However, the reality, rather than the formal shape, of a transaction, or of a co-ordinated series of transactions, can show that the claimant has conferred a benefit on the defendant, despite the absence of a direct relationship between them.

59. Thus, in *Banque Financière* itself, the transaction was structured so that Banque Financière ("BFC") advanced the relevant moneys to Mr Herzig who on-lent on different terms to Parc; the purpose was to reduce Parc's borrowing from Royal Trust Bank (Switzerland) ("RTB"), which had a first charge over Parc's assets; the moneys was actually remitted directly by BFC to RTB; and BFC believed, on the basis of a postponement letter written by Mr Herzig, that there had been agreement by all relevant companies in the Parc group that the advance made to Parc would have priority over other inter-group lending to Parc, including by OOL. In fact Mr Herzig had no authority to write the letter and so there had been no such agreement. The unintended effect of the advances paying off RTB was therefore to promote OOL's second charge on Parc's assets pro tanto. In these circumstances, BFC was treated, as against OOL, as subrogated to RTB's (otherwise discharged) secured debt to the extent necessary to cover the advance which it had made. BFC's failure to take proper precautions to ensure that Mr Herzig had authority to write the postponement letter was no ground for holding that the enrichment was not unjust: see per Lord Hoffmann at p 235F-G.

60. In reaching this conclusion, all five members of the House held that, despite Mr Herzig's interposition, OOL was enriched at the expense of BFC. Lord Steyn (p 227B-E), Lord Clyde (p 238B-C) and Lord Hutton (p 239E-G) each referred to this

as the "reality". Lord Hoffmann (p 235C-E) with whose reasons Lord Steyn (p 228F), Lord Griffiths (p 228F-G) and Lord Clyde (p 238D-E) also agreed, gave as the reason that there was

> "no difficulty in tracing BFC's money into the discharge of the debt due to RTB; the payment to RTB was direct. In this respect, the case is stronger than in *Boscawen v Bajwa* [1996] 1 WLR 328."

In *Boscawen v Bajwa*, money was advanced by a building society for the purchase of a property and was to be secured by a first charge. The purchaser's solicitors passed the money on to the vendor's solicitors, who, in circumstances not involving any want of probity but to some extent contributed to by the purchaser's solicitors' issue of a dishonoured cheque, used it to discharge a mortgage on the property without any transfer of the property to the intended purchaser ever occurring. The building society was held entitled to be subrogated to the discharged mortgage to the extent of its outlay, on the basis that the moneys were traceable into the discharged mortgage debt. Where claimant's property is traceable into a receipt or property held by the defendant, there is the equivalent of a direct transfer.

61. In the present case, there is also no difficulty in tracing the advance made by Mr Hunt to EMSL into the discharge of Swynson's borrowing from EMSL. It was a term of Mr Hunt's loan to EMSL that it should be used for such discharge: para 7 above. Without more, this discharge would have been a benefit to Swynson alone, and that was no doubt how Mr Hunt saw it at the time. In fact, as I have held, the discharge of EMSL's indebtedness to Swynson had the unforeseen consequence of eliminating any loss which Swynson would be able to show in respect of the 2006 and 2007 loans if it pursued a claim for damages against HMT, and did so moreover in circumstances in which Mr Hunt himself might (as proved to be the case) have no personal claim himself against HMT. But the transfers which Mr Hunt arranged cannot be regarded as received by HMT, or as traceable into any sort of discharge of HMT's liability to Swynson.

62. It can however be argued that, even in *Banque Financière*, the transfers made by Banque Financière were not actually received, or converted into property held, by OOL. OOL was simply enriched by the promotion of its charge, which occurred due to BFC's payment off of RTB's loan. So here, it may be argued, HMT was enriched at Mr Hunt's expense by the payment off through EMSL of Swynson's loan. This is however to over-simplify and there are a number of potentially significant points that need to be considered. First and most importantly, in *Banque Financière* BFC bargained for, and mistakenly believed it was obtaining, priority over other group claims when it provided the moneys to discharge RTB's loan. In the present case, Mr Hunt was not dealing with HMT, or addressing or discharging,

or bargaining either to preserve or to step into the shoes of Swynson for the purposes of, any contractual or tortious claim which Swynson had against HMT.

63. Second, HMT submits that there can be no relevant benefit if all that can be shown is that the defendant "is not liable because a fundamental component of the cause of action against him (namely loss) is missing". But subrogation by virtue of unjust enrichment is an equitable remedy which operates by adjusting relationships on a fictionalised basis. Thus, in *Banque Financière*, part of RTB's secured claim was treated as alive, as against OOL only, *as if* it had not been discharged by payment by BFC, but had been assigned to BFC (see per Lord Hoffmann, p 236E-F). So, here, it seems to me that it could be possible, if the other ingredients of subrogation were all present, to treat Swynson's claim against HMT as alive *as if* Swynson's loss had not been discharged by the payment arranged by Mr Hunt through EMSL, and as if Swynson's claim had been assigned to Mr Hunt. Longmore LJ's qualification recognising the potential relevance of this fictionalised basis of subrogation was to that extent well-founded.

64. Third, Mr Hunt, when advancing to EMSL the money necessary to repay the first and second loans made by Swynson, acquired a countervailing right in law to repayment of those loans by EMSL. The value of that right depended on Evo and its future performance. The December 2008 refinancing was made on the basis that the EMSL loan was "impaired" (see per Rose J, paras 47-48 and Longmore LJ, para 7). Mr Hunt's letter of claim of 24 August 2010 stated that Evo had long been in desperate straits and that it had never in Mr Hunt's view been more than a "pig in a poke". But the management accounts, summarised in the expert report of Ian Robinson produced at the request of Swynson and Mr Hunt for use before Rose J, indicate that there still existed hope that Evo might return to profitable trading in and after 2010. Mr Robinson's opinion was also that as at December 2008 Evo had a net asset value in the order of USD 8m or a value on an earnings basis in the order of USD 4 to 5m. Evo did ultimately yield some realisations (para 42 above), though this fell far short of covering Mr Hunt's loan and the interest on it. In summary, it would seem unrealistic to regard Mr Hunt as suffering no loss at all in December 2008, as a result of advancing the money he did to EMSL to pay off Swynson. With the benefit of hindsight, it seems clear that his loss increased thereafter, as Evo's position continued, despite his efforts, to deteriorate. However, this analysis highlights a feature of Mr Hunt's claim that HMT has been unjustly enriched at his expense. The existence and extent of any enrichment could not be determined by simple reference to the amount that Mr Hunt lent to EMSL in December 2008. They would depend on Evo's and EMSL's subsequent fortunes.

65. A fourth point, arising from some observations of the Supreme Court in *ITC*, concerns the significance of the limited "benefits" intended and obtained from the repayment of the first and second loans made by Swynson to EMSL. These consisted in a tax saving (para 43 above) and the removal of the perceived disadvantage to

Swynson of having an impaired debt on its books: see Rose J's judgment, para 47. In different ways, the existence of a tax liability without receipt of any corresponding income and the impaired debt were both disadvantages resulting from the original management buyout on the basis of HMT's original negligent advice. Their elimination was a step taken by Mr Hunt in the course of dealing with that disastrous investment. But it was a step taken by him personally, albeit in order to benefit his company Swynson. The difficulties on this appeal arise because (a) the step he took had the unforeseen, consequential effect of depriving Swynson of any claim against HMT and (b) the highest that Mr Hunt can put the matter is to say that he himself thereby suffered loss in his capacity as owner of Swynson, in circumstances where, as has been held, he himself had no direct right of action against HMT.

66. A fifth point, which I mention in passing, is that, had Swynson's loan to EMSL been good, the same tax liability would have been incurred but in respect of moneys actually received, while the impairment would have been avoided. Apart from the repayment of the EMSL loan procured by Mr Hunt on 31 December 2008, Swynson's damages claim against HMT could have included the full amount of the interest which EMSL had failed to pay to Swynson (which would no doubt have been taxable in Swynson's hands as a business receipt, even if EMSL had paid it). Swynson having in fact been repaid by EMSL, Mr Hunt, if he were to have any subrogation claim against HMT, would probably have to give credit, against his gross loss for the purposes of that claim, for the amount of the tax on interest in respect of which he in effect indemnified Swynson (any subrogation recovery by him from HMT in respect of such interest not presumably being taxable). I understood Mr Sims QC for Mr Hunt to accept as much (transcript, 22 November 2016, p 125 ll.22-23.) But, in any event, as Mr Sims went on to point out, this would be likely to be irrelevant, as any such reduction in Mr Hunt's gross claim for subrogation purposes would not reduce it below HMT's maximum liability of £15m as at 31 December 2008, plus interest since then.

67. Turning to the significance of these points for Mr Hunt's claim to be subrogated to Swynson's claim against HMT, in *ITC*, paras 52 to 58, Lord Reed noted that, where the provision of a benefit to a third party is incidental to work done or expenditure incurred in pursuit of a person's own interests, any enrichment may either not be regarded as being at the expense of the person doing the work or incurring the expenditure or may not be regarded as unjust. "One man heats his house, and his neighbour gets a great deal of benefit" - the classic example given by Lord President Dunedin in *Edinburgh and District Tramways Co Ltd v Courtenay* 1909 SC 99, 105 - clearly involves circumstances in which it would be "absurd", as the Lord President said, to suppose that the former could claim a contribution from the latter. The case of *TFL Mangement Services v Lloyds Bank plc* [2013] EWCA Civ 1415 was wrongly decided for this reason, as the Court held in *ITC* and as the

Scottish jurisprudence cited by Lord Reed at para 55 in *ITC* presciently suggested nearly two centuries ago.

68. In such situations, the questions whether a benefit was obtained "at the expense of" the claimant and whether it would be "unjust" for the defendant to retain it are likely to be difficult to separate. If a person with a view to obtaining a small benefit for himself at the same time unintentionally and by mistake incurs a much larger loss in conferring a much larger benefit on a third party, the picture changes, and one is again potentially in the field of unjust enrichment. The particular features of the present appeal, on which attention must necessarily focus, are that it concerns deliberately structured transfers (by Mr Hunt to EMSL and EMSL to Swynson) which had unforeseen, consequential effects on Swynson's separate relationship with a third party, HMT, and/or on Mr Hunt, as noted, particularly, in paras 62 and 65 above.

69. In these circumstances, I turn to consider whether there is here an "unjust" factor, which may make it appropriate to recognise the benefit conferred on HMT by the repayment of the first and second Swynson loans as giving rise to a claim by Mr Hunt. The primary case now sought to be advanced is that Mr Hunt was labouring under a mistake when he advanced the money to EMSL to pay off the loans. In the alternative, it is submitted that the unjust factor can be found in the failure of the "basis" on which Mr Hunt made such advance, or, in the further alternative, upon a more general policy-based approach recognising the suggested unfairness of what has happened. I do not see these two alternative submissions as adding in the present case to the primary submission or offering any real prospect of success if it fails. In the present case, the basis of the advance could hardly be said to fail, if there was no relevant mistake. Likewise, it is difficult to see any reason why Mr Hunt should have a remedy in respect of an advance if he made it without any mistake, particularly when it offered his company, Swynson, some advantage.

70. Having said that, there are cases which can be analysed as accepting such a subrogation claim simply in order to redress the defeat by unforeseen events of an expectation of benefit on the basis of which the claimant made a payment: see eg *Banque Finanière and Cheltenham & Gloucester plc v Appleyard* [2004] EWCA Civ 291. The underlying rationale of subrogation to redress unjust enrichment may well be to redress the defeat of such an expectation, mistake being only one context in which this can occur. But in each case, the nature of the expectation or mistake is also critical in determining whether there exists a subrogation claim to redress any enrichment. This brings one back to the closeness of its relationship with the right to which the subrogation claim relates.

71. The first problem which arises on this appeal regarding mistake is that it was not explicitly pleaded, leading to a submission by HMT that it would be unfair to

treat it as a basis on which this appeal could or should be decided against them. This makes it necessary to examine the way in which the case was put and has developed. The first relevant reference in the pleadings is in the reply dated 14 June 2013, where in para 35d the defence plea that HMT owed no separate duty to Mr Hunt was addressed, and Swynson advanced three heads of positive case: in summary, *res inter alios acta*, equitable subrogation and transferred loss. The second was put simply on the basis that "Swynson suffered the losses claimed herein before any refinancing and is entitled to recover the same for itself and Mr Hunt on the basis that Mr Hunt should be treated in equity, by way of equitable subrogation or otherwise, as entitled to his pro rata share".

72. Then, in its skeleton argument dated 8 May 2014 for the trial which began on 14 and continued to 23 May 2014, Swynson gave notice that it relied in support of its claim of subrogation on both *Banque Financière* and *Menelaou*. At trial, Mr Hunt gave apparently uncontradicted evidence, which Rose J in any event expressly accepted to the following effect:

> "It should be obvious from what I have said … that there was no intention on my part or Swynson's part to relieve HMT from any liability due to the refinancing exercise. As far as I was concerned the claim against HMT remained unaffected by this refinancing and was of no concern of theirs. As between me and Swynson the consideration of who technically would be entitled to recover the money from HMT did not matter as I was the owner of Swynson, but it was implicitly understood that the recovery would be held pro-rata according to the unpaid lending advanced."

73. In written closing submissions dated 21 May 2014, Swynson submitted (para 27) that:

> "Mr Hunt should be entitled to a subrogation remedy, having regard to the implied common intention of Hunt & Swynson [viz that after what was called the "refinancing" any recoveries would be shared as them in accordance with their outstanding and unpaid lending], on the principles analogous to the insurance cases, or to the remedy on the equitable principles of unjust enrichment as set out in *Banque Financière* [1999] AC 221; see as to the former at 231E, and as to the latter 234G-H, 227B-C &228D-E. As for the latter basis for the remedy, Mr Hunt's decision to step in and take over some of the lending to EMSL was not intended to give HMT (or more substantially its insurer) a windfall. No-one could possibly suggest there was

> any discussion, intention or agreement that HMT would benefit by reason of Mr Hunt's desire to give Evo an interest free loan and save Swynson from paying deemed interest. In these circumstances HMT would be unjustly enriched at his expense if it was held that any claim against it should be reduced by the extent to which he took over the lending previously owed to Swynson."

74. Rose J recited the three heads of case which were advanced, decided the case on the basis of *res inter alios acta*, and did not need to consider the other two heads: see paras 49 and 55 of her judgment.

75. In the Court of Appeal the matter was put squarely on the basis that it had been "a mistake to make the 2008 Partial Refinance in order to relieve HMT of liability" (skeleton dated 11 May 2015, para 29) and that "Mr Hunt made a mistake in the way he structured this back in 2008" (transcript of opening, p 55B-C). In response on this head of claim, counsel for HMT submitted that there had been no pleading of mistake and that Mr Hunt's evidence, accepted by the judge (para 68 above), did not establish a mistake. Asked directly by Sales LJ at this point whether she was saying that the argument was not available, counsel replied that HMT did "not have to put it that high, but yes" (transcript, p 67D-F). So HMT were, if necessary, taking a point on admissibility. In further submissions about the case of subrogation based on unjust enrichment, which it was accepted was before the judge, counsel submitted that there was lacking that "missing right which required subrogation in order to fix the gap". When Sales LJ suggested that

> "the missing right is Mr Hunt thought that he was going to make this loan but there would still be the benefit of the cause of action against HMT,"

the reply was that that was

> "not enough for subrogation. For subrogation, there needs to have been a right bargained for and not achieved."

76. The Court of Appeal did not deal formally with the admissibility of the case based on mistake. But, having heard these submissions, it gave a judgment on 25 June 2015 in which all three members of the Court dealt on the merits with the issue of unjust enrichment based on the case of mistake which Swynson had advanced before it. Longmore and Davis LJJ rejected that case on its merits, for reasons summarised in para 55 above, while Sales LJ would have accepted it.

77. In these circumstances, I conclude that the Court of Appeal determined that the case based on mistake was fairly open to Swynson, and should be addressed on its merits, although the majority concluded that it should fail on the evidence. I see no basis on which to reach a different conclusion on the question whether the case was and is open. Indeed, I would myself have reached the same conclusion. The case on mistake needs to be addressed on its merits accordingly.

78. In my opinion it is clear that Mr Hunt was labouring under a form of mistake when he was advised to and did arrange to fund EMSL to pay off Swynson's first and second loans. Not only did he have no intention thereby to relieve HMT of any liability, he gave positive evidence which Rose J accepted that "As far as I was concerned the claim against HMT remained unaffected by this refinancing and [*the refinancing*] was of no concern of theirs" (para 72 above). The fact that he did not think it important whether the claim against HMT was Swynson's or his does not seem to me to matter in assessing whether he was acting under a mistake. It clearly belonged to one or other. What matters is that he mistook the significance of payment off of the Swynson loans.

79. In *Pitt v Holt* [2013] 2 AC 108, Lord Walker, in a judgment with which all members of the Supreme Court agreed, addressed suggestions in prior caselaw that a line fell to be drawn between mere causative forgetfulness or ignorance and a mistaken conscious belief or mistaken tacit assumption, concluding as follows in para 108:

> "I would hold that mere ignorance, even if causative, is insufficient, but that the court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference."

80. In the present case, I consider that, contrary to the view taken by the majority of the Court of Appeal, the accepted evidence, recited in paras 71 and 78 above, is of a conscious belief on Mr Hunt's part that funding the repayment of the Swynson loans would have no effect on any claim against HMT. At the very least, however, it establishes a tacit assumption. This belief (or assumption) has been shown to be mistaken (a) as regards a negligence claim by Mr Hunt personally against HMT, by Rose J's judgment and (b) as regards a claim by Swynson against HMT, by the Supreme Court's present judgment. As to (a), if he had had a claim in his own name, then he would have been able to recover in full from HMT. His repayment of the Swynson loans would in this context have constituted a step taken in continuing mitigation of the effects of HMT's breach of duty towards him. As to (b), if Swynson had retained a claim against HMT, Mr Hunt would, as Swynson's owner, have been

covered indirectly in respect of any loss arising to him from the December 2008 arrangements.

81. How far Mr Hunt was acting under advice in the arrangements he made is not known. It is certainly possible to suggest that it was in a general sense careless to make them without considering their implications. At least in so far as his mistake was to think that Swynson would, if necessary, retain its claim against HMT despite the December 2008 arrangements, it could be said in response that the mistake was understandable, since the Supreme Court has concluded that it was shared by both courts below. But, even if it were right to conclude that any mistake by Mr Hunt involved carelessness, that by itself is no bar to equitable relief, unless the circumstances show that Mr Hunt deliberately ran, or must be taken to have run, the risk of being wrong: see *Banque Financière*, 235E-G per Lord Hoffmann (cited in para 58 above) and *Pitt v Holt* [2013] 2 AC 108, 114, per Lord Walker. It seems clear that Mr Hunt did not intend to run or believe that he was running any such risk. Nonetheless, the arrangements he in fact made did involve the risk that he might himself have no direct claim, while paying off EMSL's debt to Swynson meant that Swynson could no longer claim to have suffered loss recoverable from HMT, with the result that there was no basis on which either Swynson or Mr Hunt could claim any substantial damages from HMT.

82. Was any mistake causative? Like Sales LJ (para 59), I do not think that there is any chance that Mr Hunt would have made the payments in the way he did had he thought that they might have the effect of eliminating the liability of HMT in respect of the 2006 and 2007 loans. The advantages for Swynson in terms of tax and standing (para 43 above) would have been dwarfed by the loss of a claim for £15m (plus interest) against HMT. He could not conceivably have allowed any claim by Swynson to be fatally undermined in this way.

83. Was Mr Hunt's mistake one in respect of which equity should grant relief, by way of subrogation keeping alive for that purpose Swynson's claim against HMT to the extent that it was discharged by the payment off of the two Swynson loans? It is necessary to consider, first, in respect of what type of mistake such relief may be available. In this connection, Lord Walker in *Pitt v Holt*, paras 114-145, addressed a distinction suggested in prior authority between a mistake about the nature or characteristics of a transaction and the consequences or advantages to be gained by entering into it. After close analysis of authority, he concluded (para 122):

> "I can see no reason why a mistake of law which is basic to the transaction (but is not a mistake as to the transaction's legal character or nature) should not also be included, even though such cases would probably be rare. … I would provisionally conclude that the true requirement is simply for there to be a

> causative mistake of sufficient gravity; and, as additional guidance to judges in finding and evaluating the facts of any particular case, that the test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction."

Lord Walker was speaking in the particular context of the equitable jurisdiction to set aside a transfer for mistake. Mr Hunt has no possible claim to set aside the transfers which he arranged. If one takes Lord Walker's approach, admittedly out of context, and applies it to the present context, it highlights a difficulty which Mr Hunt faces in showing any sufficient connection between the transfers to which he directed his attention and the relationship between Swynson and HMT under which HMT benefitted as a result of those transfers.

84. That brings one back to the submission on which HMT focused in the Court of Appeal (para 75 above), that a mistake relating to the effect on third party rights (Swynson's against HMT) is not enough, because "For subrogation, there needs to have been a right bargained for and not achieved". Before the Court of Appeal, this was developed more specifically as follows (transcript, p 70G-H):

> "… this is critical … a lender cannot claim subrogation if he obtains all security which he bargains for or where he has specifically bargained on the basis that he would receive no security. Now, the bargain that Mr Hunt made in this case was a bargain with EMSL that he would make them a loan and EMSL would repay it. He did not make a bargain with Swynson to take an assignment of Swynson's rights. He did not make a bargain with HMT. There was not even any clause in his bargain with EMSL that asked EMSL to acquire an assignment of Swynson's rights against HMT. There was nothing missing. There is nothing in the contract between Mr Hunt and EMSL, which gives rise to the whole base of this claim. There is nothing missing that he bargained for and did not get."

85. Reference was made in this context before the Court of Appeal to *Banque Finanière* and *Cheltenham & Gloucester plc v Appleyard* [2004] EWCA Civ 291. In neither case, was there of course a "bargain" in the sense of any enforceable right or binding obligation. Otherwise, cadit quaestio. But in *Banque Financière*, BFC thought, however carelessly, that it had arranged priority for its loan. And in *Appleyard*, the lender, C & G, obtained what it thought and intended should be a first charge, but one of two prior chargees did not accept that it had been repaid and

C & G's charge was as a result purely equitable and was recorded as such at the Land Registry (see para 7 in the judgment). In giving the judgment of the court in *Appleyard*, Neuberger LJ identified 13 propositions of law, of which the tenth, relied on by HMT in the present case in the Court of Appeal, read:

> "Tenthly, subrogation cannot be invoked so as to put the lender in a better position than that in which [he] would have been if he had obtained all the rights for which he bargained: see *Banque Financière* at 235D and 236G-273B per Lord Hoffmann. This point was also made by Lindley MR in *Wrexham* [*re Wrexham Mold and Connah's Quay Railway Co* [1899] 1 Ch 440] at 447."

86. The message here, and in the passages cited, is that subrogation cannot improve a lender's position, by giving him more than he expected to get. The lender need not actually to have "contracted for" or "agreed" some benefit which he did not obtain. Thus, it was enough in *Banque Financière* that BFC thought, however carelessly, that it had obtained such a benefit by virtue of the postponement letter. But any transfer of value must have been on the mistaken basis that it would yield a benefit which did not materialise. Subrogation can redress the position where a claimant has bargained for a benefit which does not materialise, by putting the claimant in the position which he expected. Here, Mr Hunt bargained for nothing in relation to Swynson's claim against HMT. The most that he can say is that there was an indirect transfer of value by him to HMT, as the unforeseen and indirect result of the directly intended effects of the actual arrangements he made on a separate relationship pre-dating those arrangements by over two years.

87. That is in my opinion the crux of this appeal. Mr Hunt's loan to EMSL and EMSL's consequent discharge of Swynson's loan were exactly as Mr Hunt specified and intended. They had indirect consequences, evidently overlooked by Mr Hunt or his advisers, for Swynson, for Swynson's separate relationship with HMT, and so indirectly for both Swynson and Mr Hunt: see, in particular, paras 62, 65 and 68 above. These circumstances do not establish any normative or basic defect in the arrangements which Mr Hunt made.

88. In so far as Mr Hunt thought that he might, as owner of Swynson, himself have a claim for breach of contract and/or duty against HMT, he was not mistaken in any way which concerned the relationship between Swynson and HMT or which could give him any arguable claim to be subrogated to a claim by Swynson against HMT. In law, however, the only person with a claim against HMT was Swynson, as Rose J held. Again, the arrangements he made for EMSL to pay off Swynson did not address or concern the relationship between Swynson and HMT, or the consequences of such arrangements for any claim which Swynson might have

against HMT. Again, Mr Hunt never envisaged obtaining any sort of direct interest in any such claim. Further (although I should not be taken as suggesting this is critical to the outcome of the issue of unjust enrichment), the arrangements which Mr Hunt made were not by way of gift, but by way of a loan to EMSL, which in December 2008 had at least some prospect, however remote, of being repaid. What matters is that any transfer of value by Mr Hunt to HMT was not just unintended, it was incidental and indirect and arose from the consequences of Mr Hunt's deliberately structured arrangements on a relationship quite separate from that which the arrangements addressed in exactly their intended way.

89. In these circumstances, I do not consider that Mr Hunt can establish a basis for being subrogated to any claim which Swynson would have had against HMT, had its loss in respect of the 2006 and 2007 loans not been reduced to nil. In a very general sense, I can understand it being said that it is an injustice to Swynson or Mr Hunt and a pure windfall for HMT, if HMT benefits by avoiding paying damages. This is particularly so, when (as I believe to be the case) Mr Hunt made a mistake which was causative in the "but for" sense, that, apart from the mistake, he would not have structured the arrangements in the way he did. But mere "but for" causation is not sufficient: see *ITC*, para 52. Any benefit which HMT has from Mr Hunt's mistake is no more than an indirect and incidental consequence of those arrangements on Swynson's separate and pre-existing relationship with HMT. This is too remote to be the basis for a claim that HMT has been unjustly enriched at Mr Hunt's expense, or for reversal of the consequences of Mr Hunt's arrangements by treating him as having a (fictionalised) interest which he never expected, in respect of a claim by Swynson to recover from HMT a loss otherwise reduced to nil by the arrangements he made. This conclusion can be explained under the scheme indicated in *Banque Financière* either on the basis that there was no sufficiently direct transfer of value from Mr Hunt to HMT, or on the basis that there is no relevant unjust factor, or both. More generally, this conclusion underlines the fact that it is not the role of the law of unjust enrichment to provide persons finding to their cost that they have made a mistake with recourse by way of subrogation against those who may indirectly have benefitted by such a mistake under separate relationships which those making the mistake were not addressing.

90. For these reasons, I have, not without some sympathy for Mr Hunt's position, come to the conclusion that Mr Hunt has no right by way of unjust enrichment as against HMT or by way of subrogation in respect of any claim for damages that Swynson would have had against HMT apart from EMSL's discharge of its indebtedness to Swynson.

Conclusion

91. It follows that I would allow HMT's appeal against the judgment of the Court of Appeal upholding Rose J's judgment in favour of Swynson. The parties should have 21 days in which to make submissions on the form of any order and declarations to give effect to these conclusions and on costs.

LORD NEUBERGER: (with whom Lord Clarke agrees)

The background

92. HMT admit that they were negligently in breach of their professional duty as accountants when advising Swynson in connection with its decision in October 2006 to advance a substantial loan ("the original loan") to EMSL. At that time, EMSL's financial position was significantly worse than HMT had reported it to be, and thereafter it deteriorated further, and EMSL eventually ceased business, and was unable to meet its liabilities. HMT nonetheless contend that they have no liability for damages on the ground that Swynson has suffered no loss, because EMSL repaid Swynson the whole of the original loan in December 2008.

93. On the face of it at any rate, it is hard to see any answer to HMT's contention, which amounts to the simple point that this is a case of avoided loss. The arguments to the contrary are based on the circumstances in which the original loan was repaid. Given that EMSL's finances were in a parlous state at the time, the repayment was only possible because Mr Hunt, the controlling shareholder of Swynson, advanced a new, short term, non-interest-bearing loan ("the new loan") to EMSL for the specific purpose of enabling EMSL to repay Swynson the original loan. Mr Hunt did this for two reasons, namely (i) so long as the original loan was outstanding, Swynson was treated for tax purposes as if it was receiving interest on the original loan, even though no interest was being paid, and (ii) Mr Hunt did not want Swynson to have a non-performing loan on its books. It is also Mr Hunt's contention that he did not appreciate that, as a result of his providing the funds to enable EMSL repay the original loan, Swynson lost the right to recover substantial damages from HMT for their breach of duty without his ever having had a similar right or obtaining such a right.

94. Based on those facts, Swynson and Mr Hunt dispute HMT's contention that it has no liability for their breach of duty on three separate grounds. Those grounds are (i) the repayment of the original loan should be treated as *res inter alios acta*, and should therefore be disregarded when assessing Swynson's claim against HMT; (ii) despite the repayment of the loan, Swynson should be entitled to recover

damages on the basis of the principle of transferred loss, namely the loss which Mr Hunt suffered as a result of making the new loan; and (iii) HMT have been unjustly enriched as a result of the repayment of the original loan, the enrichment was at Mr Hunt's expense, and he therefore should be treated as subrogated to Swynson's claim against HMT.

95. I shall consider these three grounds in turn.

Res inter alios acta

96. Swynson's argument based on *res inter alios acta* was accepted by Rose J at first instance and by Longmore and Sales LJJ in the Court of Appeal. Nonetheless, in agreement with Davis LJ, I consider that this argument should be rejected.

97. Mr Hunt did not advance the new loan in order to mitigate any loss which Swynson was suffering: the new loan was advanced for commercial reasons. Although those reasons would not have existed if the original loan had not been in difficulties, Davis LJ was right when he said at [2016] 1 WLR 1045, para 33, that the argument in this case revolves around avoidance of loss, not mitigation. Therefore, the reasoning in *British Westinghouse Co Ltd v Underground Electric Railways Co Ltd* [1912] AC 673, which was relied on by both Rose J and Longmore LJ, is simply not in point.

98. Further, I do not consider that the reasoning in *Parry v Cleaver* [1970] AC 1 assists Swynson's first argument. In *Parry*, the House of Lords addressed the question whether a plaintiff was bound to bring into account insurance payments, charitable payments, pension payments and the like, which were payable owing to the injury suffered as a result of the defendant's tort, when assessing the damages which could be recovered from the defendant. Lord Reid stated at [1970] AC 1, 13 that the answer should depend on "justice, reasonableness and public policy"; however, this should not be treated by judges as a green light for doing whatever seems fair on the facts of the particular case. Ignoring cases of mitigation, and while it would be wrong to pretend that there could never be any exceptions, it seems to me that the effect of the reasoning in *Parry* is that the types of payments to a claimant which are not to be taken into account when assessing damages, are either those which are effectively paid out of his own pocket (such as insurance which he has taken out, whether through his employer, an insurance company or the government), or which are the result of benevolence (whether from the government, a charity, or family and friends), all of which can be characterised as essentially collateral in nature.

99. In this case, the payment in question was the repayment to Swynson of the original loan by EMSL. Even though that repayment was only effected as a result of the new loan, I rather doubt that it would be appropriate for the purposes of this first argument to look more widely and address the basis upon which Mr Hunt provided the new loan to EMSL. But, even if it is appropriate to look more widely, the new loan was not a gift, but a short term repayable loan, albeit carrying no interest. If such a loan had been provided by someone other than Mr Hunt, the consequent repayment of the original loan would plainly not have been *res inter alios acta*, and, as Lord Reid said in *Parry* [1970] AC 1, 15, the question whether such a transaction should be ignored should depend on its "intrinsic nature" rather than on the identity of the source of the payment.

100. It is true that the money provided in the form of the new loan to EMSL could have been made available to Swynson (or even possibly to EMSL) by Mr Hunt in a way which would not have resulted in Swynson's loss being avoided, but that cannot possibly justify the conclusion that it must therefore be treated as if it had that effect. The fact that a transaction could have been differently arranged does not mean that it must have the same consequences as if it had been differently arranged. As a matter of logic, such a proposition would lead to an impossible situation, and as a matter of experience, it is by no means unusual to encounter cases where a transaction could be structured in two (or more) different ways, each of which would have different consequences - both in law and in commercial reality.

Transferred loss

101. The second argument raised by Swynson is based on the principle of transferred loss; it was expressly not considered by Rose J and all three members of the Court of Appeal rejected it. I think that they were right to do so.

102. The principle of transferred loss applies where there is a contract between A and B relating to A's property which is subsequently acquired by C, and the principle enables A to recover damages for B's breach of contract which injures the property, even though the loss flowing from that injury is suffered by C and not by A. Self-evidently, it is an anomalous principle bearing in mind the well-established conventional rules relating to recovery of damages for breach of contract, namely that, subject to the terms of the contract, scope of duty, foreseeability and mitigation, A can only recover damages in respect of loss which A suffers as a result of B's breach of contract. For that reason, the principle should only apply in defined and limited circumstances.

103. Examples of such circumstances are described in two decisions of the House of Lords. In *Albacruz (Cargo Owners) v Albazero (Owners)* [1977] AC 774, 847,

following a number of earlier cases starting with *Dunlop v Lambert* (1839) 2 Cl & F 626, Lord Diplock held that the principle applied where "it is in the contemplation of the parties" that cargo "may be transferred" from the contracting shipper to a third party, and it is "the intention of both" the shipper and the contracting shipowner that the contract of carriage is treated as entered into for the benefit of such a third party as well as the shipper. In *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, it was held that the principle applied where a contractor's construction of a building had been defectively in breach of its contact with the developer, but the loss had been suffered by a purchaser of the building from the developer. Lord Browne-Wilkinson explained that at the time of the contract both contractor and developer knew the building "was going to be occupied, and possibly purchased, by third parties and not by [the developer] itself" and that any loss from defective construction work would be likely to be suffered by a future purchaser, not the developer.

104. There is force in the proposition that these two decisions suggest that the law has moved to the point where it is possible to identify the circumstances in which the courts will accept that the principle of transferred loss can be invoked in order to avoid a "black hole" into which what would otherwise be a valid claim for damages has disappeared, to use the metaphor first judicially articulated in this context by Lord Stewart in *J Dykes Ltd v Littlewoods Mail Stores Ltd* 1982 SLT 50, 54 (col 2). The circumstances in which the principle summarised in para 102 above can apply are where (a) at the time of making the contract with A, B would reasonably have anticipated that A would transfer the property to a person such as C and that that person would suffer loss if B breached the contract, so that the contract can be seen as having been entered into by B partly for C's benefit, and (b) there is nothing in the contract or the surrounding circumstances which negatives the conclusion that the principle should apply.

105. The subsequent decision of the House of Lords in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 appears to me to support the notion that the scope of the principle is as I have suggested. In that case, it was decided, albeit by a bare majority, that one circumstance which would negative the application of the principle can be where the third party, C, had his own contractual rights against the contract-breaker.

106. It is fair to say that the *Panatown* decision leaves a number of points open in this difficult area. One of those points is the correctness of another version of the principle, which was first articulated by Lord Griffiths in *Lenesta Sludge*, namely that B could be liable if A retains an interest in B performing his obligations, even though A has transferred away the property. However, it is unnecessary to address that point in this case, because it plainly could not apply in this appeal: following repayment of the original loan, Swynson cannot sensibly claim to have retained an interest in the performance of HMT's duties.

107. I consider that the transferred loss argument on this appeal suffers from two defects. First, this cannot be said to be a case of injury to an asset or property which came into the hands of Mr Hunt, because the loss suffered by Mr Hunt is not the same as the loss which would have been suffered by Swynson if the new loan had not led to the original loan being redeemed. The losses may be very similar in nature (non-repayment of a loan made to EMSL), in cause (EMSL's financial problems), and in quantum (as the new loan was very similar in amount to the original loan and identical to the extent that it was used to pay off the original loan). However, Mr Hunt has suffered loss in relation to the new loan whereas Swynson would have suffered a loss in relation to the original loan.

108. Secondly, the principle cannot apply because, at the time HMT were advising Swynson, it was not reasonably foreseeable that Swynson would have the original loan repaid through the medium of a fresh loan made to EMSL by a third party. Of course, as with most financing arrangements, it was reasonably foreseeable that some sort of subsequent re-financing of EMSL might happen one day, but that is not enough in order for the principle to apply. If it is to apply, Swynson would have to go further and demonstrate that it was anticipated that some such refinancing would occur, so that a person such as Mr Hunt, the new lender, can fairly be said to have been an intended beneficiary of Swynson's contractual rights against HMT. That seems to me to be an untenable proposition in this case.

Unjust enrichment

109. A claim in unjust enrichment based on mistake was not raised on behalf of Swynson or Mr Hunt in front of Rose J, but it was raised in the Court of Appeal, where it was rejected by Longmore and Davis LJJ, but accepted by Sales LJ. I have concerns about a claim based on mistake being raised for the first time on appeal, particularly as the issue of mistake did not play a significant part in the argument or evidence before Rose J, and only assumed importance once the unjust enrichment claim was raised. However, for the reasons given by Lord Mance, I think that it is open to Mr Hunt to advance his unjust enrichment case in this Court, However, I consider that his unjust enrichment claim must fail.

110. As has been stated in a number of cases, most recently by Lord Reed in *Commissioners for HM Revenue and Customs v The Investment Trust Companies (in liquidation)* [2017] UKSC 29, para 24, an unjust enrichment claim can usefully be analysed by reference to four sequential questions, namely:

i) Has the defendant benefitted in the sense of being enriched?

ii) Was the enrichment at the claimant's expense?

iii) Was the enrichment unjust?

iv) Are there any defences?

In effect, the claimant in unjust enrichment has to satisfy the first three questions, and, if they are satisfied, it is then for the defendant to invoke the fourth question.

111. When considering these questions, indeed when considering claims based on unjust enrichment generally, there is an inevitable tension between the desire to achieve justice or fairness in the individual case and the need to adopt or apply an approach which is principled and predictable. Concepts such as enrichment and expense may appear to be relatively uncontroversial, but even those concepts, particularly expense, can raise problems (as in *Bank of Cyprus v Menelaou* [2016] 1 AC 176, paras 69-73 and the *Investment Trusts* case at paras 32-74). And the question whether enrichment is "unjust" can often lead to the risk of unpredictable value judgments unless a relatively structured approach is adopted. Lord Goff made this point in the first case in which the House of Lords accepted the doctrine of unjust enrichment, *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548, 578. And, more recently, Lord Reed made the same point very clearly in the *Investment Trusts* case, para 39.

112. It is also important to remember that the four questions are not statutory or contractual requirements which have to be satisfied before an unjust enrichment claim can succeed. They constitute a useful, summarily expressed, and practical approach to be adopted to an unjust enrichment claim. Further, although they may appear to be self-contained, there can often be a degree of overlap between some of the four questions when applied to a particular set of facts. With that, I turn to consider whether the first three questions set out above are satisfied by Mr Hunt.

113. I consider that Mr Hunt can succeed on the first question. At any rate it is arguable that it is not a natural use of colloquial language to describe HMT as "enriched" because they have (subject to the unjust enrichment claim) been effectively released from a very substantial potential liability for damages for professional negligence. However, in economic terms they have undoubtedly been enriched, and in my view, avoidance of a pre-existing liability must be capable of being "enrichment" for present purposes. It is also true that the enrichment in this case can be described as incidental or collateral, but I think that that is a point better considered in relation to the second and third questions.

114. Turning to the second question, I do not have any difficulty with the fact that there were two stages by which Mr Hunt's money got to Swynson, in that Mr Hunt made the new loan to EMSL and then EMSL used the loan to pay off the original loan made by Swynson. I accept that the normal rule is that the defendant must be directly enriched by the claimant at whose expense the enrichment is said to have occurred, but there can be exceptional cases. It would be inappropriate to discuss this further in the light of Lord Reed's clear analysis in the passages in the *Investment Trusts* case referred to above. However, I consider that in this case, as in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 and in *Menelaou* [2016] 1 AC 176, the fact that the money passed from Mr Hunt to EMSL and then from EMSL to Swynson does not present a problem for an unjust enrichment claim. The new loan was advanced not merely on the basis that it was expected to be used to pay off the original loan: it was required to be used for that purpose.

115. However, the fact that Mr Hunt can be treated as having incurred expense of paying off the original loan is not enough to dispose of the second question in his favour. What Mr Hunt has to establish is that the enrichment of HMT, not the enrichment of Swynson, was at his expense. While the repayment of Swynson's original loan can be said to have be at the expense of Mr Hunt because it was funded by his new loan, and while HMT were enriched, I am unconvinced that HMT were enriched at Mr Hunt's expense. I do not find it easy to reconcile the reasoning of Lord Reed in the *Investment Trusts* case with the notion that the enrichment of HMT was sufficiently directly effected by Mr Hunt's advance of the new loan (even treating it as incorporating the repayment of the original loan) to satisfy the second question. As Lord Reed said in para 52, a claimant is not normally treated as having incurred a relevant loss "where the provision of the benefit was merely an incidental or collateral result of his expenditure".

116. But, even assuming that this is one of those exceptional cases where the second question is satisfied by an indirect payment, I do not consider that Mr Hunt can satisfy the third question. Of course, in the broadest sense, on the facts of this case, it can be argued that it would be "unjust" if HMT could be relieved of a substantial liability and that Mr Hunt and his companies (to treat them as a single entity) could lose a valuable claim. This would be on the basis that this is a result of Mr Hunt deciding to restructure the financing of EMSL as between him and one of his companies, and the benefit to HMT is wholly adventitious and the loss to Mr Hunt and his companies was due to an oversight on the part of Mr Hunt and/or his advisers. But unjustness in the context of unjust enrichment is not, in my view, of the palm tree variety. It must be based on some principle.

117. As Lord Reed explains in para 52 of the *Investment Trusts* case, "situations where the defendant has received a benefit merely as an incidental consequence of the claimant's pursuit of some other objective are … often situations where the

enrichment of the defendant is not … unjust". It is true that in this case Mr Hunt made a mistake in that he assumed that the effect of making the new loan and repaying the original loan would not affect the claim which he and/or Swynson had against HMT. However, while I see the attraction of the contrary view, in my opinion, that is not the sort of mistake which renders it "unjust" for HMT to escape liability for their negligence in the context of an unjust enrichment claim. The purpose of unjust enrichment is to "correct normatively defective transfers of value usually by restoring the parties to their pre-transfer positions", as Lord Reed pithily put it in para 42 of the *Investment Trusts* case.

118. Thus, in the context of an unjust enrichment claim arising out of a transaction, there must, in my view, at least normally (and quite possibly always), be some defect in the transaction itself for the doctrine of unjust enrichment to come into play. In other words, for some reason, including but not limited to a mistake on his part, the claimant must be able to show that he did not get all that he expected or thought that he had bargained for. As Lord Sumption shows in paras 21-29, that analysis is consistent with *Banque Financière* [1999] 1 AC 221 and *Menelaou* [2016] 1 AC 176, and the cases referred to in the judgments in those decisions.

119. In this case, Mr Hunt got precisely what he thought he was getting from the transaction in question, namely repayment to Swynson of the original loan, and a right to recover the new loan from EMSL. It is of course true that he did not appreciate that he was indirectly relieving HMT of a substantial liability to Swynson (without replacing it with some equivalent claim in his favour against HMT), but that cannot be characterised as a defect in the transaction.

120. Unless we were to hold that the facts of this case justify a departure from the normal scope of unjust enrichment cases as described by Lord Reed in the *Investment Trusts* case, para 42, it must follow that Mr Hunt's unjust enrichment claim fails. I can see no good reason for upholding the present unjust enrichment claim given that it is not within the normal scope of such claims. On the contrary: given the absence of any telling reasons justifying such a course, if we held that the claim in this case succeeded, we would risk throwing the law on unjust enrichment claims into serious uncertainty, particularly bearing in mind that we have only very recently confirmed the scope of such claims in the *Investment Trusts* case.

Conclusion

121. For these reasons, and for the reasons given by Lord Sumption and Lord Mance (in relation to *res inter alios acta* and transferred loss) and by Lord Sumption (in relation to unjust enrichment), I consider that neither Mr Hunt nor Swynson has a claim which can be maintained against HMT, and I would therefore allow HMT's

appeal. It is only fair to add that I do not see any significant variation in the reasoning of Lord Sumption and Lord Mance on the unjust enrichment issue. However, given the ability of ingenious lawyers to identify possible differences between concurring judgments, I consider that it is safer to take a course which minimises the risk of such an occurrence in this area of law, given its current stage of jurisprudential development.