EQUITABLE SUBROGATION TO EXTINGUISHED PROPERTY INTERESTS

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This article explores the equitable remedy of subrogation to extinguished property interests. First, it shows that the remedy does not seek to achieve a single purpose, but rather multiple purposes. Each such purpose is only aimed at protecting a claimant from competing interest-holders whose rights already exist at the time of the subrogation-justifying facts. Building upon that, the article demonstrates that a subrogation claimant obtains a new equitable interest, rather than the actual extinguished interest to which the claimant is subrogated. That new equitable interest has only some of the characteristics of the extinguished interest. Finally, the article explores the consequences of this for how the remedy works in the context of statute, whether a claimant can be subrogated to a property interest that is not completely extinguished, and whether a claimant's interest is a full equitable interest or a mere equity.

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I Introduction

Subrogation is an equitable remedy by which a claimant in effect acquires another's rights against a third party.[1] The remedy is often described through the metaphor that it allows a claimant to 'stand in the shoes' of that third party.[2] A typical example arises where a claimant pays off a debt that it guaranteed. That claimant becomes entitled to stand in the shoes of the creditor and to thus recover directly from the debtor.[3] Where that debt was secured, the claimant also becomes entitled to a property interest securing its claim against the debtor.[4] That is so notwithstanding that the creditor's security interest, to which the claimant is subrogated, will typically have been extinguished when the underlying debt was paid off.

This raises the question of exactly how the remedy works where a claimant is subrogated to an extinguished property interest, such as a mortgage that was discharged with its funds. Does the claimant obtain an interest identical to the extinguished interest for all purposes, as the metaphor of standing in the creditor's shoes would suggest? Or does the claimant instead obtain a new interest,

1 Charles Mitchell and Stephen Watterson, *Subrogation: Law and Practice* (Oxford University Press, 2007) 3 [1.01]. Although subrogation is generally described as a 'remedy', a claimant nonetheless becomes entitled to the remedy 'on well settled principles and in defined circumstances': *Boscawen v Bajwa* [1996] 1 WLR 328, 335 (Millett LJ) ('*Boscawen*'). Note also *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 ('*Bofinger*'), referring to 'rights' of subrogation: at 279 [4], 288 [36], 289 [40], 294 [66]–[67], 295 [71], 296 [75], 298 [80], 298–9 [84] (Gummow, Hayne, Heydon, Kiefel and Bell JJ). See also Stephen Watterson, 'Modelling Subrogation as an "Equitable Remedy"' (2016) 2(2) *Canadian Journal of Comparative and Contemporary Law* 609 ('Modelling Subrogation').

2 See, eg, *Nottingham Permanent Benefit Building Society v Thurstan* [1903] AC 6, 10 (Earl of Halsbury LC) ('*Nottingham Permanent*'); *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (in liq)* (1978) 141 CLR 335, 348 (Gibbs ACJ) ('*Australasian Conference*').

3 See, eg, *Yonge v Reynell* (1852) 9 Hare 809; 64 ER 744, 748–9 (Turner V-C).

4 See, eg, *Gedye v Matson* (1858) 25 Beav 310; 53 ER 655, 656 (Romilly MR).

with only some of the characteristics of the extinguished interest? This has significant consequences, including for how the remedy works in the context of statutes such as the Torrens title statutes, and for how further unsettled questions concerning its operation should be resolved. Those consequences may be determinative of a claimant's ability to recover its funds in the debtor's insolvency.

To determine the nature of the interest created by subrogation to an extinguished property interest, we need to understand what the remedy seeks to achieve. Historically, it was thought that the purpose of subrogation could not be boiled down to 'any narrower principle than that the doctrine will be applied only when the courts are satisfied that reason and justice demand that it should be'.[5] Then, in 1998, the House of Lords accepted that subrogation aims to prevent unjust enrichment.[6] That was never accepted in Australian law,[7] where the prevailing view is that subrogation seeks to prevent unconscionability.[8] More recently, recognising the difficulties with the unjust enrichment explanation,[9] the United Kingdom Supreme Court has also retreated from that view.[10]

5 *Orakpo v Manson Investments Ltd* [1978] AC 95, 110 (Lord Salmon) ('*Orakpo*').

6 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 228 (Lord Steyn), 231–2 (Lord Hoffmann, Lord Griffiths agreeing at 228), 237 (Lord Clyde), 238–9 (Lord Hutton) ('*Banque Financière*').

7 *Bofinger* (n 1) 299–302 [85]–[98] (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

8 *Challenger Managed Investments Ltd v Direct Money Corporation Pty Ltd* (2003) 12 BPR 22257, 22269–70 [50] (Bryson J) ('*Challenger*'); *Highland v Exception Holdings Pty Ltd (in liq)* (2006) 24 ACLC 1576, 1590–1 [94]–[101] (Santow JA) ('*Highland*'). See also Gareth Tilley, 'Restitution and the Law of Subrogation in England and Australia' (2005) 79(8) *Australian Law Journal* 518, 521–2.

9 See generally Rory Gregson, 'Is Subrogation a Remedy for Unjust Enrichment?' (2020) 136 (July) *Law Quarterly Review* 481; Rory Gregson, *Subrogation and Marshalling* (Hart Publishing, 2024) chs 3–7; Lionel Smith, 'Restitution: A New Start?' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing, 2019) 91; Robert Stevens, *The Laws of Restitution* (Oxford University Press, 2023) ch 9.

10 See, eg, *Menelaou v Bank of Cyprus UK Ltd* [2016] AC 176 ('*Menelaou*'), where the usefulness of unjust enrichment to understanding subrogation was questioned: at 197 [59], 207 [106] (Lord Neuberger PSC), 207–8 [107] (Lord Carnwath JSC); *Swynson Ltd v Lowick Rose LLP (in liq)* [2018] AC 313 ('*Swynson*'), in which each of the three judgments analysed the element of 'unjustness' by focusing on previous subrogation cases rather than the more general principles of unjust enrichment: at 324–31 [18]–[35] (Lord Sumption JSC), 336–47 [55]–[90] (Lord Mance JSC), 351–4 [109]–[120] (Lord Neuberger of Abbotsbury PSC). See also at 329–30 [30] (Lord Sumption JSC), describing subrogation within the broader law of unjust enrichment as 'in many ways sui generis'; *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2019] AC 929, describing subrogation following the discharge of a debt as 'arguably based on

However, even accepting that subrogation seeks to prevent unconscionability, it remains necessary to determine 'the principles according to which equity will reach that conclusion'.[11]

One difficulty with doing so is that subrogation is available in a wide variety of circumstances. For example, it encompasses claims by insurers,[12] trust creditors,[13] sureties,[14] lenders who made ultra vires loans to companies,[15] lenders who intended to but did not obtain valid security interests,[16] and trust beneficiaries whose property was wrongfully applied to discharge debts.[17] Consequently, the remedy is typically separated out into two categories: subrogation to subsisting rights, and subrogation to extinguished rights.[18] This usefully recognises that whereas the former category is a true 'substitution' in which a claimant acquires another party's rights, the latter cannot be, since the third party's rights no longer exist. As such, in trying to better understand subrogation, it makes sense to narrow our focus to only one of these categories.

This article explores why subrogation to extinguished rights is available where a claimant is entitled to proprietary relief, and how that informs the operation of the remedy in such cases. Following this introduction, Part II examines the remedy's underlying purpose(s). Other commentators have recently explored this question in English law, but there are issues they have not considered due to their focus on subrogation to extinguished rights more generally. By contrast, this article offers a more advanced understanding by focusing on those cases where a claimant is subrogated to an extinguished property interest. Crucially, it argues that there are multiple and distinct reasons for why the

a different principle' to a cause of action in unjust enrichment: at 965 [68] (Lord Reed DPSC, Lord Hodge JSC and Lord Mance).

11 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 227 [45] (Gleeson CJ). Similarly, see *Yonge v Reynell* (n 3) 748–9 (Turner V-C).

12 *Castellain v Preston* (1883) 11 QBD 380, 388 (Brett LJ).

13 *Re Raybould* [1900] 1 Ch 199, 202 (Byrne J). For a more recent example, see *Naaman v Jaken Properties Australia Pty Ltd* (2025) 281 CLR 635, 642 [9] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

14 See, eg, *Gedye v Matson* (n 4) 656 (Romilly MR).

15 *Re Cork & Youghal Railway Co* (1869) LR 4 Ch App 748, 761 (Hatherley LC).

16 See, eg, *Butler v Rice* [1910] 2 Ch 277, 281–2 (Warrington J) ('*Butler*'), where the claimant was subrogated to a security interest; *Nottingham Permanent* (n 2) 10 (Earl of Halsbury LC) where the claimant was subrogated to a vendor's lien.

17 *Boscawen* (n 1) 331–2, 338–9 (Millett LJ).

18 Mitchell and Watterson (n 1) 4–7 [1.04]–[1.10]. This distinction was first popularised in Charles Mitchell, *The Law of Subrogation* (Clarendon Press, 1994), then using the terminology of 'simple subrogation' and 'reviving subrogation': at 5–7.

remedy may be ordered. Part III draws upon this to determine the nature of a claimant's property interest in such cases. It shows that a claimant acquires a new equitable interest, with only some of the characteristics of the extinguished interest to which it is subrogated. Finally, Part IV explores the consequences of this. These pertain to how the remedy works in the context of property law statutes, whether a claimant can be subrogated to a property interest that is not completely extinguished, and whether a claimant's new interest is a full equitable interest or a mere equity.

II The Purpose(s) of Subrogation to Extinguished Property Interests

Understanding what subrogation to an extinguished property interest seeks to achieve requires us to answer two questions. The first is: why is a claimant entitled to the remedy at all? Accepting that subrogation to an extinguished property interest seeks to prevent unconscionability, the analysis that follows suggests that we should reframe how we think about what exactly that means. Preventing unconscionability in this context should be viewed not as encapsulating a single purpose, but rather as encapsulating multiple and distinct purposes that the remedy seeks to achieve. The second question is: who is the remedy trying to protect a claimant from by conferring proprietary rights upon it? This has been subject to limited consideration to date. However, as will be seen, it is essential to understanding the nature of a claimant's interest arising from subrogation to an extinguished property interest.

A *Why Is a Claimant Entitled to the Remedy?*

There has been extensive debate as to why a claimant is entitled to subrogation.[19] In Australian law, that debate has largely focused on whether

[19] See, eg, *Orakpo* (n 5) 110 (Lord Salmon), which suggests that no single explanation is possible. Others have argued that subrogation is based on unjust enrichment: *Banque Financière* (n 6) 236 (Lord Hoffmann); Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, rev ed, 1989) 93–8; Mitchell and Watterson (n 1) 3–4 [1.02]–[1.03]; James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd ed, 2016) 42–5; Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones on Unjust Enrichment* (Sweet & Maxwell, 10th ed, 2022) ch 39; Keith Mason, JW Carter and GJ Tolhurst, *Mason & Carter's Restitution Law in Australia* (JW Carter Publishing, 5th ed, 2025) 256–9 [639]. Others again have argued that subrogation is based on preventing unconscionability: *Challenger* (n 8) 22269–70 [50] (Bryson J); *Highland*

subrogation should be explained by unjust enrichment or unconscionability.[20] However, this risks eliding the separate but related question of what unconscionability actually means in this context. Determining that requires considering the three sets of circumstances that entitle a claimant to be subrogated to an extinguished property interest. Only once each is properly understood can we turn to what, if anything, ties them together so as to explain the remedy's availability as a whole.

First, where a claimant makes a payment that discharges a secured obligation, the claimant will be entitled to subrogation where it was bound to perform that obligation.[21] For example, this will be the case where a claimant is a guarantor of a secured debt,[22] or an indorser of a bill of exchange.[23] This has been explained on the basis that it is necessary to give effect to the principal debtor's obligation to indemnify the surety.[24] Put another way, subrogation in such circumstances seeks to ensure that a debtor is held responsible for secured obligations that are its responsibility to discharge, despite such obligations having been discharged by its surety.

However, that explanation only justifies personal relief in favour of the surety.[25] As to the further entitlement to proprietary relief, that is explained by

(n 8) 1590–1 [94]–[101] (Santow JA); *Bofinger* (n 1) 299–302 [85]–[98] (Gummow, Hayne, Heydon, Kiefel and Bell JJ); Mark Leeming, 'Subrogation, Equity and Unjust Enrichment' in Jamie Glister and Pauline Ridge (eds), *Fault Lines in Equity* (Hart Publishing, 2012) 27, 38–43; JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 366 [9-020].

20 See, eg, *Challenger* (n 8) 22269–70 [50] (Bryson J); *Highland* (n 8) 1590–1 [94]–[101] (Santow JA); *Bofinger* (n 1) 299–302 [85]–[98] (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

21 This was partly codified in the *Mercantile Law Amendment Act 1856* (Imp) 19 & 20 Vict, c 97, s 5, which is enacted in each Australian jurisdiction at a state level: see, eg, *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) s 3. It is generally accepted that this does not affect the scope of the equitable remedy: see, eg, *Bofinger* (n 1) 288 [37] (Gummow, Hayne, Heydon, Kiefel and Bell JJ); Heydon, Leeming and Turner (n 19) 388 [9-305]; John Glover and Andrew Robertson, 'Subrogation' in Patrick Parkinson (ed), *The Principles of Equity* (Lawbook, 2nd ed, 2003) 555, 559 [1505].

22 *Gedye v Matson* (n 4) 656 (Romilly MR).

23 *Duncan Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, 8–9 (Lord Selborne LC) ('*Duncan Fox*').

24 *Yonge v Reynell* (n 3) 748–9 (Turner V-C); *Duncan Fox* (n 23) 12–13 (Lord Selborne LC); *Bofinger* (n 1) 280–1 [8] (Gummow, Hayne, Heydon, Kiefel and Bell JJ); *Bowesco Pty Ltd v Westpoint Management Ltd (in liq) (recs and mgrs apptd)* (2015) 109 ACSR 1, 12 [78] (McLure P) ('*Bowesco*').

25 Consequently, it has been argued that sureties should not always be entitled to proprietary relief in such cases: Mitchell (n 18) 59. Cf Mitchell and Watterson (n 1) 216–20 [8.46]–[8.60],

the fact that, if a secured creditor enforces against the principal debtor and relies upon its security interest, the surety will only be liable for any shortfall following enforcement.[26] Consequently, it is necessary to confer proprietary rights upon the surety to ensure that it is not worse off where the secured obligation is enforced against it rather than against the principal debtor.[27] Alternatively, the proprietary aspect of the remedy can be justified on the basis that it ensures the risk borne by the surety in the debtor's insolvency is no greater than that of the secured creditor, consistently with its having only agreed to act as surety for that specific risk.[28] Both explanations highlight that the conferral of proprietary rights upon the surety protects it in the debtor's insolvency, in circumstances where the creditor itself enjoyed such protection but instead chose to rely upon the personal obligation owed to it by the surety.

Secondly, again where a claimant makes a payment that discharges a secured obligation, it will be entitled to subrogation where it intended to become a secured creditor but received either no security interest or a defective security interest.[29] This used to be explained on the basis that the claimant should be presumed to intend to keep the extinguished interest alive for its benefit.[30] However, that explanation is problematic, because saying that something is presumed to be the case does not explain why such a presumption should arise.[31] As such, the preferable explanation is that a claimant is entitled to the remedy

who adopt a broader view that ties into the availability of proprietary relief for unjust enrichment.

26 See, eg, Lionel Smith, review of Charles Mitchell, *The Law of Subrogation* in (1995) 9(4) *Trust Law International* 133, 134 n 4.

27 *Australasian Conference* (n 2) 348 (Gibbs ACJ); Smith (n 26) 134 n 4 and accompanying text.

28 Smith (n 26) 134. See also Gregson, *Subrogation and Marshalling* (n 9) 127, who explains this by reference to the debtor's other voluntary creditors not bargaining for security over the property.

29 See, eg, *Butler* (n 16) 279–80 (Warrington J), where the owner of land refused to execute the mortgage; *Nottingham Permanent* (n 2) 10 (Earl of Halsbury LC), where the security interest was void under statute; *UCB Group Ltd v Hedworth* [2003] EWCA Civ 1717, [139]–[149] (Parker LJ), where the security interest was voidable due to undue influence and misrepresentation.

30 *Earl of Buckinghamshire v Hobart* (1818) 3 Swans 186; 36 ER 824, 829 (Eldon LC) ('*Earl of Buckinghamshire*'); *Burrell v Earl of Egremont* (1844) 7 Beav 205; 49 ER 1043, 1052 (Lord Langdale MR) ('*Burrell*'); *Patten v Bond* (1889) 60 LT NS 583, 584–5 (Kay J) ('*Patten*'); *Butler* (n 16) 282 (Warrington J); *Ghana Commercial Bank v Chandiram* [1960] AC 732, 745 (Lord Jenkins for the Court) ('*Ghana Commercial Bank*').

31 See also *Banque Financière* (n 6) 234 (Lord Hoffmann); *Challenger* (n 8) 22269 [48]–[49] (Bryson J).

to ensure that it receives all that it bargained for.[32] That rationale originally emerged in the case law as a reason for denying the availability of the remedy.[33] But recognising that presumed intention cannot explain the remedy's availability, the notion of a claimant not obtaining all that it bargained for is better viewed as the reason why a claimant may be entitled to be subrogated to an extinguished property interest in the first place.

Accepting this, that explanation tells us why subrogation is unavailable where a claimant receives a valid property interest that is subsequently lost due to non-registration under statute.[34] This is because, in such a case, the claimant will have received all that it bargained for when it obtained the interest. Such an explanation also tells us why a claimant is not entitled to be subrogated to an extinguished property interest where it only intended to become an unsecured creditor. This is because, where such a claimant does not obtain an effective security interest, it will not have received less than it bargained for since it was never going to obtain security in the first place.[35] It follows that it is correct to say that a claimant who pays off a secured obligation will be entitled to subrogation *unless* it only intended to become an unsecured creditor.[36] Finally, this explanation also supports the availability of subrogation where a claimant bargains for a legal interest but only obtains an equitable interest.[37]

[32] *Burston Finance Ltd v Speirway Ltd (in liq)* [1974] 1 WLR 1648, 1657 (Walton J) ('*Burston Finance*'); *Swynson* (n 10) 353 [118] (Lord Neuberger PSC); *Westpac Banking Corporation v Etex Australia Pty Ltd* [2025] NSWSC 91, [21] (Pike J).

[33] For cases in which it is framed as such, see *Highland* (n 8) 1593–4 [109]–[111] (Santow JA); *Cook v Italiano Family Fruit Co Ltd (in liq)* (2010) 190 FCR 474, 499–500 [115] (Finkelstein J) ('*Cook*'); *Aged Care Services Pty Ltd v Kanning Services Pty Ltd* (2013) 86 NSWLR 174, 184–5 [59] (Gleeson JA) ('*Aged Care Services Appeal*'); *New Galaxy Investments Pty Ltd v Thomson* (2017) 18 BPR 36811, 36834 [118] (Gleeson JA) ('*New Galaxy*'); *Gandel Metals Pty Ltd v Centennial Mining Ltd [No 2]* [2020] FCA 633, [117]–[118] (Middleton J) ('*Gandel Metals*'); *Swynson* (n 10) 330 [31] (Lord Sumption JSC), 345–6 [84]–[86] (Lord Mance JSC).

[34] See, eg, *Burston Finance* (n 32) 1652 (Walton J); *Highland* (n 8) 1594 [111]–[113] (Santow JA).

[35] *Banque Financière* (n 6) 234 (Lord Hoffmann). See also *Cheltenham & Gloucester plc v Appleyard* [2004] EWCA Civ 291, [40] (Neuberger LJ for the Court) ('*Appleyard*'), albeit using the language of unjust enrichment: at [33].

[36] See, eg, *State Bank of New South Wales v Geeport Developments Pty Ltd* (1991) 5 BPR 11947, 11951–2 (Cohen J) ('*Geeport*'); *Re Dalma No 1 Pty Ltd (in liq)* (2013) 279 FLR 80, 90 [32] (Brereton J); *Aged Care Services Appeal* (n 33) 184 [57] (Gleeson JA); *Harmon International Holdings Pty Ltd v Hartford Investments Pty Ltd (in liq)* (2019) 136 ACSR 94, 103 [41] (Rees J) ('*Harmon*'); *Gandel Metals* (n 33) [52]–[64] (Middleton J).

[37] See generally *Appleyard* (n 35). See especially at [63]–[78] (Neuberger LJ for the Court). This issue has not arisen in an Australian case to date.

Thirdly, a claimant will be entitled to subrogation where property is held on trust for it and is wrongly applied by the trustee to discharge a secured obligation.[38] This was originally explained in a manner that also relied upon presumed intention.[39] However, such an explanation is better avoided for the same reasons as above.[40] Consequently, as argued by Robert Stevens, subrogation in such circumstances should instead be understood by analogy to the rationale underlying a trust beneficiary's proprietary claim to traceable proceeds.[41]

Turning to what ties these purposes together, the explanation that each seeks to prevent unconscionability does not tell us why only these purposes, but not others, should entitle a claimant to be subrogated to an extinguished property interest. The same is true of the explanation proposed in the English context by two leading critics of the unjust enrichment explanation, Robert Stevens and Rory Gregson. They argue that subrogation to extinguished rights more generally seeks to ensure that the burden of a debt falls where it should.[42] But as they recognise, that does not explain *why* the burden of a debt should be

38 *Boscawen* (n 1) 338–41 (Millett LJ); *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230, 261–2 [135] (Allsop P); *Cook* (n 33) 493–6 [84]–[97] (Finkelstein J). See also NH Andrews, 'Tracing and Subrogation' (1996) 55(2) *Cambridge Law Journal* 199, 200. Cf James Penner, '"Sort of" Backwards Tracing' in Paul S Davies and James Penner (eds), *Equity, Trusts and Commerce* (Hart Publishing, 2019) 123, 140–8, arguing that subrogation in such circumstances undermines the extent to which third party liability for breach of trust turns on knowledge.

39 *Boscawen* (n 1) 338–40 (Millett LJ).

40 See also Paul Matthews, 'Tracing through the Back Door? The Doctrine of Proprietary Subrogation' (1997) 3(5) *Trusts and Trustees* 17, emphasising that in such cases it will always be necessary to presume the wrongdoing trustee intended to keep the property interest alive, even where the trustee expressly intended the contrary, such that 'we should have the courage of our convictions and simply abandon' the presumption: at 20–1.

41 Stevens (n 9) 253–4. The purpose of that claim itself remains subject to debate: see, eg, *Foskett v McKeown* [2001] 1 AC 102, 108–9 (Lord Browne-Wilkinson), 127–8 (Lord Millett, Lord Hoffmann agreeing at 115); Ross Grantham and Charles Rickett, 'Tracing and Property Rights: The Categorical Truth' (2000) 63(6) *Modern Law Review* 905, 905–7; Peter Birks, 'Property, Unjust Enrichment, and Tracing' (2001) 54(1) *Current Legal Problems* 231, 251–4; Aruna Nair, *Claims to Traceable Proceeds: Law, Equity, and the Control of Assets* (Oxford University Press, 2018) ch 3; Mohammud Jaamae Hafeez-Baig and Jordan English, *The Law of Tracing* (Federation Press, 2021) ch 2.

42 Stevens (n 9) 253–5; Rory Gregson, 'Subrogation, Marshalling, and Property' in Natalie Mrockova, Aruna Nair and Luke Rostill (eds), *Modern Studies in Property Law* (Hart Publishing, 2023) vol 12, 269, 272–4; Gregson, *Subrogation and Marshalling* (n 9) ch 10. But note that Stevens adopts a different explanation for those cases where a claimant's entitlement to subrogation arises from the misapplication of property held on trust: cf Gregson, *Subrogation and Marshalling* (n 9) 122–5.

borne by the defendant only in those circumstances where the law currently recognises an entitlement to subrogation.[43]

This reflects that, as the law currently stands, there simply is no explanation that ties these purposes together beyond that each involves the discharge of a secured obligation, with a claimant's funds,[44] in circumstances where equity recognises the remedy should be available to fulfil one of three different purposes. However, that does not mean that the term 'unconscionability' is a problematic way of describing the purpose of subrogation to an extinguished property interest. Rather, it simply suggests that the term 'unconscionability' in this context is an umbrella term, which encompasses the plural *purposes* of the remedy. That is important because it emphasises the need, when resolving questions as to how the remedy should work, to consider how such questions align with each of those separate purposes. It follows that, in some circumstances, the remedy might operate differently based upon which purpose it seeks to achieve.

B *Who Is the Remedy Trying to Protect a Claimant from?*

That brings us to the second question necessary to understand what subrogation to an extinguished property interest seeks to achieve. That question is: who is the remedy trying to protect a claimant from? One possibility here is that the remedy seeks to protect a claimant from all competing interest-holders. The other is that the remedy seeks to protect a claimant only from competing interest-holders whose interests already exist at the time of the subrogation-justifying facts — ie the time at which a claimant's funds are applied to discharge the secured obligation.[45]

Which of these possibilities is correct is relevant only to subrogation to extinguished property interests, and, more specifically, to those cases where a

[43] Although Gregson describes this formulation as reflecting a 'distinctive justification', he also acknowledges that the 'reason why, and extent to which, [a defendant] ought to bear the burden of a debt varies from case to case': Gregson, *Subrogation and Marshalling* (n 9) 126, 128.

[44] Including with the traceable proceeds of those funds: Boscawen (n 1) 335 (Millett LJ). Cf *Menelaou* (n 10) 189–92 [26]–[34] (Lord Clarke JSC), 202–6 [84]–[99] (Lord Neuberger PSC), suggesting a causal connection is sufficient. But see at 206–7 [100]–[104] (Lord Neuberger PSC), 211–16 [121]–[132] (Lord Carnwath JSC), suggesting that the outcome in that case can be explained through orthodox trust law and tracing principles.

[45] The notion of subrogation-justifying facts entails accepting that a claimant obtains rights prior to their enforcement in court: see generally Watterson, 'Modelling Subrogation' (n 1). See especially at 620–7, noting that the analysis at those pages is not dependent upon the unjust enrichment explanation of subrogation.

claimant comes into competition with a third party. That is because a debtor's interest in the property will always exist at the time of the subrogation-justifying facts, and will thus be encompassed within the purposes of subrogation regardless of whether they extend to interests that arise after that time. That perhaps explains why this question has not previously been subject to detailed analysis.

Intuitively, the oft-used metaphor that subrogation allows a claimant to stand in the shoes of another suggests that it aims to protect a claimant from any competing interest-holder.[46] That could be further implied by the very word used to describe the remedy, subrogation, which literally means 'substitution'.[47] However, as put by Lord Hoffmann in *Banque Financière de la Cité v Parc (Battersea) Ltd*, in a passage that has since been referred to with approval in several Australian cases, a claimant is subrogated to an extinguished charge as

> a means by which the court regulates the legal relationships between a plaintiff and a defendant or defendants … 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 …[48]

This aptly recognises that the remedy should only confer those rights upon a claimant that are necessary to achieve its underlying purposes, notwithstanding what any metaphor might suggest.

As to what is necessary to achieve those purposes, the limited cases that consider the position of third parties suggest that the remedy aims only to protect a claimant from existing interest-holders at the time of the subrogation-justifying facts. The leading such case is *Drew v Lockett*.[49] There, a guarantor sought to be subrogated to a first mortgage that had been discharged with her

46 For use of that metaphor, see, eg, *Nottingham Permanent* (n 2) 10 (Earl of Halsbury LC); *Australasian Conference* (n 2) 348 (Gibbs ACJ); *Rogers v Resi-Statewide Corporation Ltd [No 2]* (1991) 32 FCR 344, 352 (von Doussa J) ('*Rogers*'); *Aquilina Holdings Pty Ltd v Lynndell Pty Ltd* [2008] QSC 57, [52] (Daubney J); *King v Smith* [2025] WASCA 6, [152], [217] (Hall JA and Smith AUJ).

47 Mitchell and Watterson (n 1) 3 [1.01].

48 *Banque Financière* (n 6) 236, quoted in *Austin v Royal* (1999) 47 NSWLR 27, 31–2 [19] (Cole AJA) ('*Austin*') and referred to with approval in *Cook* (n 33) 498 [106] (Finkelstein J), *Aged Care Services Appeal* (n 33) 183 [53] (Gleeson JA), *New Galaxy* (n 33) 36833–4 [117] (Gleeson JA), *Gandel Metals* (n 33) [85] (Middleton J), *Sev.en Global Investments Pty Ltd v Global Loan Agency Services Australia Nominees Pty Ltd* (2024) 60 WAR 367, 394 [169] (Hill J) ('*Sev.en Global Investments*').

49 (1863) 32 Beav 499; 55 ER 196 ('*Drew*').

property, to which a second mortgagee responded that he should not be bound by any such interest. Sir John Romilly MR rejected that argument because:

> It is to be observed that the second and any subsequent mortgagee is in no respect prejudiced by the enforcement of this equity; when he advances his money he knows perfectly well that there is a prior charge on the property, and if he thinks fit to advance his money on such security, it is his own affair, and he cannot afterwards with justice complain.[50]

Put another way, since the second mortgagee acquired his interest with notice of the prior mortgage anyway, it was only fair that his interest was subject to the claimant's interest arising via subrogation to that prior mortgage. Importantly for present purposes, that says nothing as to whether the claimant should also enjoy priority as against a third party who acquires an interest *after* the first mortgage was discharged, and thus without notice of the existence of that first mortgage. The same is true of the more recent judicial statements that contemplate a claimant's priority against third parties, which also only consider the position of third parties whose interests already existed at the time of the subrogation-justifying facts.[51]

This reflects that, approached from first principles, there is a convincing reason why a subrogation claimant should not enjoy the extinguished interest-holder's priority against third parties who acquire interests after that time. The reason is that, where a third party acquires an interest after the subrogation-justifying facts, that third party cannot be assumed to have acquired its interest with notice of the extinguished interest to which the claimant is subrogated. This point was made, in obiter dicta, in *Redman v Rymer*.[52] That case concerned a claim to be subrogated to a first-ranking charge over land that secured a £2,000 debt, in circumstances where the land was also subject to a second-ranking charge securing a £5,000 bequest to the debtor's legatees. In explaining why the claimants who were subrogated to the first-ranking charge had priority over the legatees, Kekewich J explicitly suggested that the outcome would have been different if a third party had acquired new rights *after* the subrogation-justifying facts:

[50] Ibid 198.

[51] *Crosbie-Hill v Sayer* [1908] 1 Ch 866, 878–9 (Parker J); *Bofinger* (n 1) 281–2 [9]–[10] (Gummow, Hayne, Heydon, Kiefel and Bell JJ); *Bowesco* (n 24) 12 [78] (McLure P).

[52] (1889) 60 LT NS 385, 388 (Kekewich J).

> If I had had someone who came forward and said, 'I have made an advance or made a purchase on the faith of the 2000*l* being paid off, having that reconveyance before me, and finding out there is a clear title, and knowing that the 5000*l* therefore was the first charge,' that argument would be a complete answer to the claim of [the claimants] to stand in the place of [the first-ranking chargee]. Then they would indeed have allowed some person to do that which he would not otherwise have done. They would have lost the equity, even if otherwise entitled to it.[53]

To further illustrate this, consider what would have happened if the second mortgagee in *Drew v Lockett* acquired his interest after the subrogation-justifying facts — ie, after the discharge of the first mortgage. In such circumstances, the second mortgagee could fairly argue that he should not lose out to the claimant, because he would have had no way of knowing about the first mortgage when he acquired his own interest. That is because, at that time, the first mortgage would no longer have existed. On those alternative facts, the claimant would be better placed to protect herself, as she at least would have known of the need to notify prospective competing interest-holders, such as the second mortgagee, of the existence of her otherwise undiscoverable interest.

Importantly, this reasoning applies with equal force regardless of which of the three purposes encapsulated within the prevention of unconscionability justifies subrogation to an extinguished property interest. For example, if we again take the facts of *Drew v Lockett*, it is difficult to see why the claimant's priority should have been determined differently if her basis for subrogation was that she was a lender who received less than she bargained for, or a trust beneficiary whose funds were misapplied by a trustee, as opposed to a surety. The same would be true even if the remedy is expanded in future cases to address additional purposes, because regardless of why a claimant is entitled to be subrogated to an extinguished property interest, the claimant will always be better placed to protect its interest than a competing interest-holder with no means of discovering that interest. It follows that each of the underlying purposes of the remedy must share the common feature of only seeking to protect a claimant from existing interest-holders at the time of the subrogation-justifying facts.

Consequently, the explanation that subrogation to an extinguished property interest seeks to prevent unconscionability should be understood as encapsulating multiple discrete purposes, each of which seeks to protect a claimant

[53] Ibid 388.

against debtors and third parties whose rights exist at the time of the subrogation-justifying facts. That explains why the remedy is available, and why it necessitates a claimant obtaining proprietary rather than merely personal rights. However, it sheds no light on how the remedy should work as against third parties whose rights are created after the subrogation-justifying facts.

III The Nature of a Subrogation Claimant's Property Interest

Establishing what subrogation to extinguished property interests seeks to achieve, we can now turn to the nature of the property interest obtained by a subrogation claimant. There are two views as to this.[54] The first is that a claimant obtains an interest that has the same characteristics as the extinguished interest, for all purposes.[55] That might be because the claimant obtains exactly the same interest as that to which it is subrogated, or because the claimant obtains a new interest that exactly replicates the characteristics of the extinguished interest. The alternative view is that a claimant obtains an interest with only some of the characteristics of the extinguished interest.[56] On this view the claimant's interest has the priority of the extinguished interest only as against competing interests that existed at the time of the subrogation-justifying facts. As against interests arising after that time, the claimant's interest is treated simply as a new interest created by equity.[57] This alternative view can only be correct if a claimant obtains a new interest.

No Australian case has yet explicitly considered this question, and to date only one English case has done so. In *Halifax plc v Omar* ('*Halifax*'), a decision of the English Court of Appeal, Jonathan Parker LJ held that the latter view is correct.[58] Consequently, in a competition between a claimant who was

[54] Roderick J Wood, 'Supplementing PPSA Priorities: The Use and Abuse of Common Law and Equitable Principles' (2014) 56(1) *Canadian Business Law Journal* 31, 56–7.

[55] Ibid 56.

[56] See Watterson, 'Modelling Subrogation' (n 1) 620–64; Stephen Watterson, 'Subrogation, Priority Disputes and Rectification: Mapping a Route through the Thicket' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New Perspectives on Land Registration: Contemporary Problems and Solutions* (Hart Publishing, 2018) 245, 254–68 ('Mapping a Route').

[57] Watterson, 'Mapping a Route' (n 56) 264.

[58] [2002] EWCA Civ 121, [81]–[84] (Jonathan Parker LJ, Laws LJ agreeing at [86], Simon Brown LJ agreeing at [87]) ('*Halifax*'). See also *Day v Tiuta International Ltd* [2014] EWCA Civ 1246, [43] (Gloster LJ) ('*Day*'), affirming that a claimant obtains a new equitable interest, albeit in obiter dicta.

subrogated to an unpaid vendor's lien over a flat in London, and the subsequent equitable lessees of that flat whose lease was created *after* the subrogation-justifying facts, the claimant prevailed on the basis that it held a new equitable interest that arose before the leasehold interest. However, the reasoning in that case is of limited persuasiveness, as it largely focused upon judicial passages from previous cases in which the point was immaterial.[59]

It is thus necessary to approach this issue from first principles, by determining which view better achieves the purposes underlying the remedy. Before doing so, however, we must first establish whether a claimant who is subrogated to an extinguished property interest obtains a new interest, or the very property interest to which it is subrogated.

A *Old Interest Kept Alive or New Interest?*

The earliest reported cases of subrogation to extinguished property interests describe the claimants as being entitled to the same mortgages or charges to which they were subrogated.[60] Consistently with this, several later and oft-quoted decisions describe subrogation as causing the original interest to be 'kept alive'.[61] If understood literally, this must mean that a claimant actually obtains the very interest to which it is subrogated. Alternatively, as explained by Lord Hoffmann, such language might merely be a metaphor for how the remedy works:

> [S]ubrogation 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

[59] Ibid [71]–[84], quoting *Thurstan v Nottingham Permanent Benefit Building Society* [1902] 1 Ch 1, 9–10 (Vaughan Williams LJ), *Nottingham Permanent* (n 2) 10 (Earl of Halsbury LC), 10 (Lord Shand), *Burston Finance* (n 32) 1652 (Walton J), *Boscawen* (n 1) 335, 342 (Millett LJ).

[60] *Earl of Buckinghamshire* (n 30) 829–30 (Eldon LC); *Burrell* (n 30) 1052, 1056 (Lord Langdale MR); *Patten* (n 30) 584–5 (Kay J).

[61] *Butler* (n 16) 282–3 (Warrington J); *Ghana Commercial Bank* (n 30) 745 (Lord Jenkins for the Court). See also *Cuddigan v Poole* (1912) 18 Arg LR 120, 121–2 (A'Beckett J); *Porter v Latec Finance (Qld) Pty Ltd* (1964) 111 CLR 177, 202 (Windeyer J); *Re H&S Credits Ltd (in liq)*; *Tucker v Roberts* [1969] Qd R 280, 285 (WB Campbell J); *Geeport* (n 36) 11954 (Cohen J).

> relations with a defendant who would otherwise be unjustly enriched are regulated as if the benefit of the charge had been assigned to him.[62]

This reasoning is premised on the view that subrogation seeks to prevent unjust enrichment. Despite this, its point concerning how the remedy works has been approved in several Australian cases.[63] That suggests that it can be separated out from the acceptance of the unjust enrichment explanation of subrogation. Interestingly though, the Australian cases that have approved that reasoning have not explained why it can be so separated. To do so, we must start from the proposition that subrogation to extinguished property interests is an equitable remedy rather than a legal one.

Accepting this, the cases in which a claimant is subrogated to an equitable property interest are of little help, as they are consistent with both the literal and metaphorical understanding of the language of keeping the interest alive. Consider *Butler v Rice*, where Mr Butler was unable to obtain a mortgage over land due to the borrower failing to disclose that the land was actually owned by his wife, who refused to execute the mortgage.[64] The availability of subrogation to an extinguished equitable mortgage in that case could be explained either on the basis that the mortgage was literally kept alive for Mr Butler's benefit, or on the basis that he obtained a new equitable interest with the same priority as the extinguished mortgage.

The cases where a claimant is subrogated to a legal property interest, however, show that the literal explanation of the interest being kept alive cannot be correct. Consider *Chetwynd v Allen*, where Mr Mynors loaned £1,000 to Mr Chetwynd, which was used to pay off a legal mortgage in circumstances entitling Mr Mynors to be subrogated to that mortgage.[65] It cannot be that equity literally kept the legal mortgage alive for the benefit of Mr Mynors. That is because, recognising that the legal mortgage must have been extinguished upon the reconveyance of title, that would require equity to directly create new legal

62 *Banque Financière* (n 6) 236 (emphasis omitted). See also *Day* (n 58) [43] (Gloster LJ); Mitchell and Watterson (n 1) 200–4 [8.05]–[8.14], 231–2 [8.91]–[8.93].

63 *Austin* (n 48) 31–2 [19] (Cole AJA); *Taleb v National Australia Bank Ltd* (2011) 82 NSWLR 489, 508 [69] (Bryson AJ) ('*Taleb*'); *Aged Care Services Appeal* (n 33) 183 [53] (Gleeson JA); *New Galaxy* (n 33) 36833–4 [117] (Gleeson JA); *Gandel Metals* (n 33) [85] (Middleton J); *Sev.en Global Investments* (n 48) 394–5 [169]–[170] (Hill J). Cf *Geeport* (n 36) 11954 (Cohen J).

64 *Butler* (n 16) 279–80 (Warrington J).

65 [1899] 1 Ch 353, 353–5 (Romer J) ('*Chetwynd*').

rights.[66] Consistently with this, the language of Romer J in describing the operation of subrogation in that case was that the legal mortgage was 'kept alive *in equity*'.[67] Thus, the language of keeping the interest alive must be a metaphor.[68] Consequently, since a claimant's interest is not literally the same as that to which it is subrogated, the claimant's interest must be a new property interest created by equity.

Two further points follow from this. First, recognising that a claimant obtains a new interest raises the question of exactly when that interest comes into existence. The better view is that this occurs at the time of the subrogation-justifying facts, as opposed to when the interest is subsequently enforced in court. That is because, as explained by Millett LJ in *Boscawen v Bajwa*:

> The equity arises *from the conduct of the parties* on well settled principles and in defined circumstances which make it unconscionable for the defendant to deny the proprietary interest claimed by the plaintiff. A constructive trust arises in the same way. … Nor, in my judgment, is there any justification for the proposition that the [claimant's] right to be subrogated to the [secured creditor's] charge did not arise until the court made the necessary order. The order merely satisfied a pre-existing equity. The [claimant's] equity arose from the conduct of the parties. It arose at the very moment that the [secured creditor's] charge was discharged, in whole or in part, with the [claimant's] money.[69]

Secondly, recognising that a claimant's new property interest is created by equity rather than the common law, it must also be equitable in nature. Of course, that may be a moot point if equity treats that interest as having the characteristics of the extinguished interest for all purposes. If so, that new equitable

[66] See also Mitchell and Watterson (n 1) 236 [8.105].

[67] *Chetwynd* (n 65) 357 (emphasis added). See also *Boscawen* (n 1) 342 (Millett LJ), describing the interest of a claimant who was subrogated to a legal property interest in terms suggesting its interest was equitable; *Bofinger* (n 1) 282 [12] (Gummow, Hayne, Heydon, Kiefel and Bell JJ), referring to the 'charge or equitable lien' that can be created in favour of a claimant who is subrogated to an extinguished Torrens title mortgage, notwithstanding that such a mortgage is legal in nature.

[68] Accepting this, one commentator has further suggested that the very language of 'subrogation' should be abandoned, as it misleadingly suggests there is a substitution rather than the creation of new rights: Neil Samuel Hope, 'The Mystique of "Equitable Subrogation with Respect to Extinguished Common Law Rights": Time for a New Label' (2021) 18(1) *Canberra Law Review* 91, 95.

[69] *Boscawen* (n 1) 335, 342 (Millett LJ) (emphasis added). The first sentence of the passage extracted in the body text was quoted in *Bofinger* (n 1) 301 [94] (Gummow, Hayne, Heydon, Kiefel and Bell JJ). See also Watterson, 'Modelling Subrogation' (n 1) at 620–9.

interest will effectively be treated as if it is legal in nature where the extinguished interest was itself a legal interest. It is to that question that we can now turn.

B *Priority of the New Equitable Interest?*

1 *The Purposes of Subrogation*

Whether a subrogation claimant's new equitable interest obtains all or only some of the characteristics of the extinguished interest should be determined in the way that best achieves the remedy's underlying purposes. As established above, each of those purposes only seeks to protect a claimant from debtors and third parties whose interests exist at the time of the subrogation-justifying facts. Thus, we need to consider separately how the alternative views affect competitions with such parties, and with those parties whose interests arise after that time.

(a) Existing Interest-Holders

Starting with existing interest-holders at the time of the subrogation-justifying facts, where a priority competition is governed by the common law, it will ordinarily make no difference whether a claimant's new interest has all or only some of the characteristics of the extinguished interest. That is because, on either view, a claimant who is subrogated to an extinguished property interest will enjoy the priority of the extinguished interest-holder as against such parties. That likely explains why the question has received little attention to date. However, the same is not true where such competitions are governed by statutory property regimes, such as the Torrens title statutes. In such competitions, only the view that a claimant's interest has *some* of the characteristics of the extinguished interest properly achieves the underlying purposes of subrogation to extinguished property interests.

This is best illustrated through an example, which is also represented diagrammatically in the below timeline:

> M1 holds a registered mortgage over Torrens title land, which secures a debt that is guaranteed by C. M2 holds a subsequently registered mortgage over the same land. C discharges the debt to M1, following which M1 removes the mortgage registration.

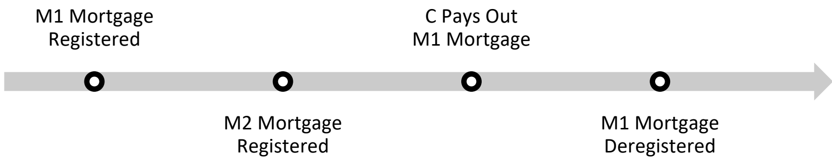

Figure 1

Save for the statute, C would be subrogated to M1's extinguished mortgage and thus enjoy priority over M2. That would achieve the underlying purpose of the remedy in relation to sureties. It would also reflect that, when M2 acquired its mortgage, the existence of M1's higher-ranking mortgage was discoverable via a search of the Torrens register.

However, if a claimant's new equitable interest has the same characteristics as the extinguished interest *for all purposes*, C will no longer prevail against M2. That is because the extinguished mortgage to which C is subrogated is no longer registered, which on this view continues to affect its priority.[70] That frustrates the underlying purpose of the remedy in such circumstances. It also fails to reflect that, when M2 acquired its mortgage, it knew (or should have known) that it was subject to a higher-ranking interest.

By contrast, if a claimant's new equitable interest has the priority of the extinguished interest *at the time of the subrogation-justifying facts*, C will prevail over M2. That is because, when C paid out the mortgage held by M1, that mortgage had priority over M2's interest. Such an outcome is appropriate since there is no compelling reason why M1's registration should need to remain in place in such circumstances, having already fulfilled the function of providing notice to M2 when it acquired its own mortgage.

Importantly, since each of the purposes of subrogation to an extinguished property interest seeks to protect C from existing interest-holders at the time of the subrogation-justifying facts, this reasoning is equally true if C's entitlement to subrogation arises to fulfil the other purposes of the remedy. It follows that only the view that a claimant's interest obtains *some* of the characteristics of the extinguished interest properly achieves the remedy's purposes as against existing interest-holders at the time of the subrogation-justifying facts.

[70] See below n 72 and accompanying text.

(b) Subsequent Interest-Holders

We have established that the purposes underlying subrogation to an extinguished property interest do not necessitate a claimant obtaining priority over third parties whose interests arise *after* the subrogation-justifying facts. It follows that, in such a case, the claimant's priority should be determined on the basis that it holds a new equitable interest. This too weighs in favour of the view that a claimant's interest only has some of the characteristics of the extinguished interest, because on that view the interest arising via subrogation is treated as such.

By contrast, on the view that a claimant's new interest has exactly the same characteristics as the extinguished interest, a claimant could end up either better or worse off than is necessary to achieve the remedy's underlying purposes. Consider, for example, a competition between a claimant who is subrogated to a legal interest and a third party whose interest arises after the subrogation-justifying facts, which is governed by the common law. If the claimant's interest obtains all the characteristics of the extinguished interest, the claimant would enjoy the priority benefits of holding a legal interest. Similarly, on that view, in a competition governed by a Torrens title statute where the extinguished interest remains registered, the claimant would enjoy the benefits of indefeasibility against a third party whose interest arises after the subrogation-justifying facts.[71] That would fail to reflect that the claimant's interest in each of these instances is actually a new equitable interest, and that the reasons for creating that interest do not justify the claimant being any better off than would ordinarily be the case for an equitable interest-holder in such circumstances.

Alternatively, in a competition governed by a Torrens title statute where the extinguished interest is no longer registered, a claimant would be entirely unable to exercise the remedy of subrogation if its interest obtains all the characteristics of the extinguished interest. That is because, on that view, there is nothing left to be subrogated to once the Torrens title mortgage has been deregistered.[72] That frustrates the purposes of subrogation to extinguished

[71] See, eg, *Real Property Act 1900* (NSW) s 42.

[72] See WMC Gummow and JGH Stumbles, 'Faulty Refinancing: Subrogation, Torrens and the PPSA' (2015) 89(8) *Australian Law Journal* 565, 569–70, discussing *Aged Care Services v Macedonian Aged Care & Accommodation Ltd* (2012) 17 BPR 33961, 33971 [83] (McDougall J) ('*Aged Care Services Trial*').

property interests, which justify the creation of a new equitable interest in such circumstances.[73]

Interestingly, the contrary conclusion is drawn by Gregson, who is a leading proponent of the view that subrogation to extinguished rights seeks to ensure that the burden of a debt falls where it should.[74] He argues that in cases where a claimant is subrogated to a legal property interest, the claimant should obtain a legal interest.[75] However, once we recognise that the reasons for subrogation to extinguished property interests are only concerned with existing interest-holders at the time of the subrogation-justifying facts, it does not follow that a claimant's interest must be legal. That is because that question only affects competitions with subsequent interest-holders. As against existing interest-holders, regardless of whether a claimant's new interest is legal or equitable in nature, the claimant will enjoy the priority of the extinguished interest at the time of the subrogation-justifying facts. Thus, on either view, the remedy will ensure that the burden of the debt falls where it should — or, in the preferred terminology in Australian law, that the remedy prevents unconscionable conduct.[76]

Consequently, a claimant's new equitable interest arising via subrogation to an extinguished property interest should have only some of the characteristics of the extinguished interest. That better achieves the purposes of the remedy. It also ensures that, where those purposes do not necessitate a particular outcome, competitions with a subrogation claimant are resolved in the manner that best reflects the equitable nature of its new interest. However, two objections can still be raised against this conclusion.

2 *Further Advances by Competing Interest-Holders*

One objection concerns the issue of further advances by competing interest-holders. This is best explained by adding an extra event to the above example:

> M1 holds a registered mortgage over Torrens title land, which secures a debt that is guaranteed by C. M2 holds a subsequently registered mortgage over the same

[73] It is also not necessary to achieve the policy objectives of property law statutes which require the perfection of property interests, such as the Torrens title statutes: see below Part IV(A).

[74] See, eg, Gregson, *Subrogation and Marshalling* (n 9) ch 10.

[75] Ibid 31–2, 147–8. Cf Stevens (n 9) 254–5, who also adopts this formulation of the purpose of subrogation to extinguished rights but does not express a view on whether a claimant's new interest should be legal or equitable.

[76] See above nn 7–8 and accompanying text.

land. C discharges the debt to M1, following which M1 removes the mortgage registration. On the assumption that the first-ranking interest no longer exists, M2 then makes further advances.

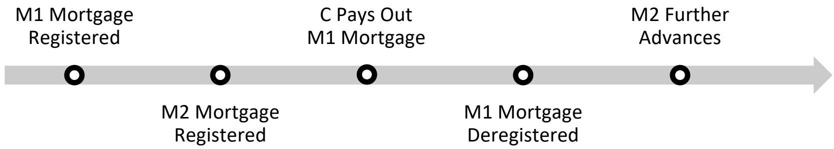

Figure 2

The objection here is that, if C's priority does not depend upon M1's extinguished mortgage remaining registered, M2 may be misled into making further advances in reliance upon M1's deregistration.[77]

One way of dealing with this objection is via the change of position defence.[78] The argument is that, in the above-described circumstances, M2 will be entitled to the defence to the extent that it made such advances on the basis that M1's mortgage was deregistered. However, relying upon the change of position defence may be problematic to the extent that it is understood as only available in response to a claim in unjust enrichment.[79]

As such, the preferable way of dealing with this objection is by reference to the purposes underlying subrogation to extinguished property interests more generally. The argument here is that, since those purposes are only aimed at protecting a claimant from rights that already exist at the time of the subrogation-justifying facts, they do not necessitate a claimant enjoying priority over a competing interest-holder to the extent that the latter has obtained new rights after that time by making further advances. Instead, such an interest-holder should have priority over a subrogation claimant to the extent of those further advances, unless they were made with notice of the subrogation claimant's interest.[80] That best reflects the ordinary priority rules concerning the tacking of

[77] This objection is raised in Wood (n 54) 61–2, discussing this in the context of the Canadian counterparts to the *Personal Property Securities Act 2009* (Cth).

[78] Mitchell and Watterson (n 1) 161 [7.69].

[79] Cf Keith Mason, JW Carter and GJ Tolhurst, who suggest the change of position defence is not strictly limited to unjust enrichment claims and that it extends to subrogation: Mason, Carter and Tolhurst (n 19) 875–8 [2410].

[80] Consistently with this, see *Redman v Rymer* (n 52) 388 (Kekewich J), quoted in Part II(B) above.

further advances by an earlier mortgagee who did not have notice of a later equitable interest.[81]

Returning to the above example, this leads to the conclusion that M2 will have priority to the extent of its further advances, so long as they were made without notice of C's interest.[82] This ameliorates the risk that M2 will be misled by the deregistration of M1's mortgage, and thus does away with the above objection.

3 *Circular Priority*

The other possible objection is that, if a claimant's new equitable interest has only some of the characteristics of the extinguished interest, it is more likely to create circular priority problems.[83] That is because, on this view, a claimant's priority will be determined differently against competing interest-holders who acquire their interests before the subrogation-justifying facts, and those who acquire their interests after that time.

This too should be rejected, for three reasons. First, circular priority problems are not unique to this category of subrogation and can thus arise regardless of which view is correct.[84] Secondly, such problems are rare, and so they should not have an outsized influence on how subrogation to extinguished property interests works in all other circumstances.[85] Thirdly, even where such problems do arise, the most important point in resolving them is to do so in the same manner every time so as to minimise uncertainty.[86] An appropriate solution could thus be to defer the priority of the interest arising via subrogation in the rare circumstances where this is in issue.

[81] *Hopkinson v Rolt* (1861) 9 HL Cas 514; 11 ER 829, 838 (Lord Campbell LC). That rule applies even where the earlier mortgagee holds a registered mortgage over Torrens title land: *Matzner v Clyde Securities Ltd* [1975] 2 NSWLR 293, 298–300, 304–5 (Holland J). Cf *Personal Property Securities Act 2009* (Cth) s 58.

[82] If the property is Torrens title land, C could lodge a caveat to ensure that M2 is provided with such notice: see below Part IV(A).

[83] Wood (n 54) 61–2.

[84] See ibid.

[85] As noted above, *Halifax* is the only case in English law, and there are no cases in Australian law, concerning a competition between a subrogation claimant and a subsequent interest-holder: *Halifax* (n 58) [4] (Jonathan Parker LJ). This suggests a low likelihood that further such cases, which *also* involve a third interest-holder whose priority creates a circular priority problem, will arise with any frequency.

[86] See Mitchell and Watterson (n 1) 249–50 [8.144].

Consequently, the better view is that subrogation to an extinguished property interest creates a new equitable interest. As against existing interests at the time of the subrogation-justifying facts, that interest has the priority of the extinguished interest. But as against subsequent interests, it is treated just like any other new equitable interest.

IV Consequences of Such an Understanding of Subrogation to Extinguished Property Interests

There are three major consequences of the above analysis. They concern how subrogation to an extinguished property interest works in the context of property law statutes, whether a claimant can be subrogated to a property interest that has not been completely extinguished, and how competitions with interests arising after the subrogation-justifying facts should be resolved.

A *How Does the Remedy Work in the Context of Property Law Statutes?*

Most subrogation claims in Australian law are likely to arise in the context of statutes that allow for the 'perfection' of property interests via registration.[87] Those of greatest commercial importance are the Torrens title land registration statutes, which are enacted at a state level,[88] and the *Personal Property Securities Act 2009* (Cth).[89] In each instance, it will be necessary to examine the particular statute to determine whether subrogation remains available in its context as a

[87] Perfection is used here to describe the steps required to obtain optimal protection under any statute. For similar usage, see Roy Goode and Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security*, ed Louise Gullifer (Sweet & Maxwell, 7th ed, 2023) 85–8 [2-16]. But see the more specific way in which this term is used within the *Personal Property Securities Act 2009* (Cth) s 21(1).

[88] *Land Titles Act 1925* (ACT); *Real Property Act 1900* (NSW); *Land Title Act 2000* (NT); *Land Title Act 1994* (Qld); *Real Property Act 1886* (SA); *Land Titles Act 1980* (Tas); *Transfer of Land Act 1958* (Vic); *Transfer of Land Act 1893* (WA). These statutes govern over 99% of land in Australia: Brendan Edgeworth, *Butt's Land Law* (Lawbook, 7th ed, 2017) 801 [12.20].

[89] This statute captures a wide range of consensual interests in personal property that it characterises as 'security interests', many of which would not have been described as security interests at common law: *Personal Property Securities Act 2009* (Cth) s 12(1). Note also the examples contained in s 12(2). It also captures some property interests which are deemed to be security interests, regardless of whether they have a security function: at s 12(3).

question of construction. But subject to that, the above analysis tells us several things about how these interactions should work more generally.[90]

First of all, the availability of subrogation to an extinguished property interest should not depend upon whether a statutory registration remains in place *after* the subrogation-justifying facts.[91] That may be counterintuitive given the metaphorical descriptions of how subrogation operates.[92] It may also be contrary to our tendency as Australian lawyers to think of such statutes by reference to the Torrens title system under which registration is the source of title. That may encourage the assumption that, once a registration has been discharged, there is nothing left to which a claimant can be subrogated.[93] However, as demonstrated above, subrogation to an extinguished property interest actually creates a new equitable interest at the time of the subrogation-justifying facts. As such, approached from first principles, it should be immaterial whether a registration remains in place after that time.

This point has arisen, albeit with less frequency than might have been expected, in cases concerning claims to be subrogated to mortgages over Torrens title land. In some such cases, courts have suggested that the remedy will only be available if the registration remains in place.[94] However, those cases should be treated with caution, as each proceeded on the erroneous basis that subrogation actually transfers or keeps alive the original interest, without discussion of the possibility that it might instead create a new interest in equity.[95] The point was also obiter dicta in each of those cases, either because the registration

[90] In the English context, see Mitchell and Watterson (n 1) 238–42 [8.109]–[8.123], 246–8 [8.133]–[8.138], concerning the *Land Registration Act 2002* (UK) and the *Companies Act 1985* (UK) (now superseded by the *Companies Act 2006* (UK)); Watterson, 'Mapping a Route' (n 56) 245–6, concerning the *Land Registration Act 2002* (UK).

[91] Similarly, where other methods of statutory perfection are possible, it should not matter if the extinguished interest remains perfected via those methods *after* the subrogation-justifying facts: see, eg, *Personal Property Securities Act 2009* (Cth) s 21, which provides for perfection by registration, possession, and control.

[92] See above n 2 and accompanying text.

[93] See, eg, Gummow and Stumbles (n 72) 569–70.

[94] *Challenger* (n 8) 22270 [51] (Bryson J); *Taleb* (n 63) 508 [70] (Bryson AJ); *Aged Care Services Trial* (n 72) 33971 [83] (McDougall J).

[95] See *Challenger* (n 8) 22270 [51] (Bryson J); *Taleb* (n 63) 508 [69]–[70] (Bryson AJ); *Aged Care Services Trial* (n 72) 33971–2 [83]–[84] (McDougall J). *Taleb* (n 63) acknowledged that the extinguished interest is not literally kept alive, but did not recognise that subrogation must thus create a new equitable interest: at 508 [69]. Contrary to this, it then emphasised that the mortgage in question remained registered, which would not matter if subrogation created a new equitable interest: at 508 [70]. This suggests that, notwithstanding its statement to the contrary, it viewed subrogation as literally keeping alive or transferring the original interest.

remained in place or because the claim failed anyway for other reasons.[96] In other cases, courts have assumed that the remedy was available despite a mortgage being deregistered.[97] Those cases too are of limited authoritative value, as they contain no discussion of the point due to their focusing on whether there was a prima facie case sufficient to support a caveat, or a genuine dispute sufficient to set aside a statutory demand.[98] That said, since neither of these lines of authority is strictly binding, the latter should be accepted as correct since it aligns with the resolution of this question from first principles.

A more substantive concern is that, if a claimant can be subrogated to an interest where there is no registration, subrogation to an extinguished property interest might undermine the property law statutes themselves. However, this concern falls away when we bear in mind that a claimant's interest only obtains the priority of the extinguished interest *as against* interests that exist at the time of the subrogation-justifying facts. Consider again the above example, in which C obtained the statutory priority of M1's extinguished mortgage as against M2. This does not undermine M2's ability to rely on the register, because for C to obtain such priority, it was necessary for M1's mortgage to be registered when M2 acquired its own mortgage. Thus, M2 is no worse off, as instead of losing out to M1 due to a registration, it loses out to exactly the same extent to C.

This being perhaps the most contentious consequence of the above analysis, it is worth elaborating on why it does not undermine indefeasibility of title under the Torrens title statutes.[99] To explain why the availability of the remedy following the discharge of a registration is consistent with indefeasibility, we must start by recognising that indefeasibility requires that a newly registered interest obtains priority over an unregistered interest, regardless of the registrant's knowledge.[100] Consistently with this, where a claimant holds an equitable interest in land arising via subrogation, and a registrant subsequently

96 *Challenger* (n 8) 22270 [51] (Bryson J); *Taleb* (n 63) 508 [70] (Bryson AJ); *Aged Care Services Trial* (n 72) 33971 [79]–[82] (McDougall J). Consistently with this, *Aged Care Services Appeal* (n 33) 178 [20] (Gleeson JA, Meagher JA agreeing at 176 [1], Leeming JA agreeing at 190 [95]) upheld the trial decision without reference to the relevant comment in *Aged Care Services Trial* (n 72) 33971 [83] (McDougall J).

97 *Grego v D Club Pty Ltd* [2011] WASC 55, [21] (Corboy J) ('*Grego*'); *Harmon* (n 36) 100 [27] (Rees J).

98 See *Grego* (n 97) [48] (Corboy J); *Harmon* (n 36) 94–5 [1] (Rees J).

99 Space precludes also examining the *Personal Property Securities Act 2009* (Cth) here. A more detailed treatment of how that statute interacts with subrogation will be contained in my forthcoming monograph on that statute with Federation Press.

100 See also *Frazer v Walker* [1967] 1 AC 569, 580–1, 585 (Lord Wilberforce) ('*Frazer*').

obtains a registered interest in the land, the registrant will have priority. That is the case regardless of the registrant's knowledge of the subrogation claimant's interest. As explained above, that is because the subrogation claimant will be treated just like any other equitable interest-holder in such circumstances. Thus, it will rank below a subsequently registered interest-holder, pursuant to the provisions of the Torrens title statutes.[101]

Next, as to why it is appropriate for an existing registrant to rank below a claimant who is subrogated to a higher-ranking interest, the correct starting point begins from the proposition that indefeasibility does not protect a registrant from liability for personal wrongs.[102] Thus, for example, a registrant may be made personally liable for knowing receipt,[103] albeit that indefeasibility will protect the registrant against proprietary relief in such circumstances.[104] Applying this to the above example, in which C is subrogated to M1's mortgage and in turn obtains priority over M2, we can say that M2's conscience is personally burdened due to its knowledge, at the time it acquired its own lower-ranking mortgage, that it would be subject to M1's higher-ranking mortgage. Crucially, this knowledge, pursuant to which M2 is personally bound to recognise C's priority, derives from the register itself.[105] Consistently with this, as put by the High Court in *Bofinger v Kingsway Group Ltd*, subrogation 'accepts the state of the [Torrens title] register but enforces against registered proprietors conscientious obligations imposed upon them'.[106] Thus, there is no

[101] See, eg, *Real Property Act 1900* (NSW) s 42.

[102] *Frazer* (n 100) 585 (Lord Wilberforce); *Breskvar v Wall* (1971) 126 CLR 376, 385 (Barwick CJ).

[103] *McFee v Reilly* (2018) 18 Australian Succession and Trusts Law Reports 442, 468 [105]–[108] (Leeming JA).

[104] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 169–71 [193]–[196] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) ('*Farah*'). On the current state of the authorities, however, proprietary relief will be available in a claim for knowing assistance: *Turner v O'Bryan-Turner* (2022) 107 NSWLR 171, 193–6 [104]–[120] (White JA).

[105] This distinguishes M2 from a knowing recipient who is protected against proprietary relief due to indefeasibility, per *Farah* (n 104) 169–71 [193]–[196] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). In M2's case, the obligation of conscience arises from its knowledge *via the register*, when it acquired its interest, that it would be subject to a higher-ranking mortgage. By contrast, in the case of a knowing recipient, its knowledge of the breach of trust or fiduciary duty does not itself derive from the register.

[106] *Bofinger* (n 1) 282 [12] (Gummow, Hayne, Heydon, Kiefel and Bell JJ), noting, however, that this was obiter dicta. A further question, beyond the scope of this article, is whether a claimant can obtain 'parasitic' protection via registrations not specifically designed to protect its interest, such as where M2 acquires its mortgage following the discharge of M1's mortgage but before M1's registration has been removed: see also Watterson, 'Mapping a Route' (n 56) 266–8.

inconsistency between the availability of the remedy in such circumstances and indefeasibility of title.

Turning to the next consequence of the above analysis, it is that a subrogation claimant cannot 'perfect' its property interest via a statutory registration. This too may be counterintuitive due to the metaphorical description of the remedy as keeping the original interest alive. But when we recognise that a claimant obtains a new interest created by equity to prevent unconscionability, it follows that the relevant statutory mechanisms for protecting such an interest are those available to parties who hold property interests that arise by operation of law. Thus, where a claimant is subrogated to a mortgage over Torrens title land, it can protect its interest by lodging a caveat.[107] That will protect it from the registration of competing interests,[108] and may also provide notice to existing interest-holders who are contemplating making further advances.[109] However, it will not convert the claimant's interest to a legal interest that enjoys the benefits of indefeasibility. That is appropriate, since a claimant cannot obtain such an interest via subrogation outside the context of statute.[110]

Finally, a further consequence of the above analysis concerns the appropriate court order following a successful claim to be subrogated to an extinguished property interest in the context of statute. Again proceeding on the assumption that a subrogation claimant actually obtains the interest to which it is subrogated, orders have been made in some cases against defendants that require them to execute registrable Torrens title mortgages in favour of successful subrogation claimants.[111] However, this too fails to appreciate that the claimant actually holds a new equitable interest that cannot be perfected via registration.[112] This point was not discussed in any of the cases that made such orders, which

[107] See *Bofinger* (n 1) 282 [12] (Gummow, Hayne, Heydon, Kiefel and Bell JJ): 'the charge or equitable lien of the [subrogation claimant] would support a caveat on the subject property.'

[108] See, eg, *Real Property Act 1900* (NSW) s 74H.

[109] See, eg, ibid s 74F(6).

[110] See also Watterson, 'Mapping a Route' (n 56) 260.

[111] See, eg, *Rogers* (n 46) 353–4 (von Doussa J); *Titles Strata Management Pty Ltd v Nirta* [2015] VSC 366, [12] (Daly AsJ). See also *Commonwealth Bank of Australia v Stephens* [2017] VSC 385, [535] (Sloss J) (in obiter dicta). Similarly in English law, see *Castle Phillips Finance Co Ltd v Piddington* (1995) 70 P & CR 592, 602 (Gibson LJ); *Anfield (UK) Ltd v Bank of Scotland plc* [2011] 1 WLR 2414, 2417 [6] (Proudman J).

[112] See also Watterson, 'Mapping a Route' (n 56) 257–60.

are thus of little precedential value as to this point.[113] As such, the appropriate order should instead take the form of a declaration, along with any orders relating to enforcement.

B *Can a Claimant Be Subrogated to a Property Interest That Is Not Completely Extinguished?*

The next consequence of the above analysis concerns whether a claimant can be subrogated to a property interest that was not completely extinguished by the application of its funds to the secured obligation. Such cases might arise where a property interest secures multiple debts, only one of which is discharged with a claimant's funds. In the limited cases where this has occurred, courts have held that such claimants are entitled to be subrogated to the property interest, notwithstanding that it continues to exist to secure other debts.[114] This might also arise where a claimant's funds are applied towards a secured debt but are insufficient to completely discharge it.[115] Subrogation has been allowed in several Australian cases where this has occurred. Interestingly, those cases contain relatively little analysis as to why the remedy is so available, but do establish that the claimant's rights will only be enforceable once the original debt is completely extinguished.[116]

[113] Cf Gregson, *Subrogation and Marshalling* (n 9), which cites the English cases in support of his argument that subrogation to an extinguished legal property interest creates a new legal interest in favour of the claimant: at 148 n 112 and accompanying text.

[114] Most of these cases concern claimants who were guarantors of debts subrogated to property interests that also secured further indebtedness outside the scope of their guarantees: *Goodwin v Gray* (1874) 22 WR 312, 312–13 (Jessel MR) ('*Goodwin*'); *Re Butlers Wharf Ltd* [1995] 2 BCLC 43, 45–7, 56 (Richard Sykes QC, sitting as a Deputy Judge of the High Court) ('*Re Butlers Wharf*'); *Liberty Mutual Insurance Co (UK) Ltd v HSBC Bank plc* [2002] EWCA Civ 69, [1]–[3], [47], [53] (Rix LJ) ('*Liberty Mutual*'). By contrast, one such case concerned an incoming secured lender whose funds were applied towards one of several existing secured creditors' loans, all of which were secured by a single property interest held by a trustee: *Sev.en Global Investments* (n 48) 378–9 [61]–[68], 406–7 [235]–[239] (Hill J).

[115] Similarly, where a claimant's funds discharge the whole of a secured debt, a security interest might continue to exist to secure future indebtedness.

[116] *The Equity Trustees Executors & Agency Co Ltd v New Zealand Loan & Mercantile Agency Co Ltd* [1940] VLR 201, 205–7 ('*Equity Trustees*'); *AE Goodwin Ltd v AG Healing Ltd* (1979) 6 ACLR 481, 488 (Powell J) ('*AE Goodwin*'); *McColl's Wholesale Pty Ltd v State Bank of New South Wales* [1984] 3 NSWLR 365, 368 ('*McColl's Wholesale*'); *Geeport* (n 36) 11953–4 (Cohen J); *Austin* (n 48) 31–3 [19]–[20] (Cole AJA); *Westpac Banking Corp v Adelaide Bank Ltd* (2005) 12 BPR 22919, 22928 [47] (White J) ('*Westpac*'); *Padovan v MGC Group Pty Ltd*

The above analysis helps explain why these decisions are correct in recognising the availability of subrogation in such circumstances. Starting with the purposes of subrogation to an extinguished property interest, the point here is simply that, to the extent the remedy would otherwise be available to achieve each of its underlying purposes, there is no reason why this should not be the case merely because the original interest continues to exist.[117] Put another way, the reasons for protecting sureties, lenders who receive less than they bargained for, and trust beneficiaries whose funds are misapplied by trustees, are equally compelling where the interest to which a claimant is subrogated still exists. As to the nature of the interest created by the remedy, recognising that a claimant who is subrogated to an extinguished property interest obtains a new interest does away with the objection that, in the above-described circumstances, a claimant cannot be subrogated to an interest that continues to exist.[118]

The above analysis concerning further advances also does away with another possible objection to the availability of the remedy in such circumstances. The objection here is that, where an interest has not been completely extinguished, subrogation may be problematic due to the possibility that the original interest-holder will make further advances after the subrogation-justifying facts. However, as shown above, the purposes of subrogation only seek to protect a claimant from rights that already exist at the time of the subrogation-justifying facts. Thus, they do not justify a claimant obtaining priority over a competing interest-holder who makes further advances on the mistaken belief that the interest to which the claimant is subrogated no longer exists.[119] Such reasoning applies with equal force where the interest-holder making further advances is not a third party, but is instead the original interest-holder. Thus,

(in liq) [2011] NSWSC 1080, [30]–[31] (Black J) ('*Padovan*'); *Nguyen v Sage Consultant Group Pty Ltd* (2021) 20 BPR 41989, 42027–8 [261]–[266] (Robb J) ('*Nguyen*'); *Smits v Cugola* [2022] QCA 262, [54]–[58] (Mullins, Bond JJA and Henry J) ('*Smits*'). Compare the above to *Chetwynd* (n 65) 357 (Romer J) and *Banque Financière* (n 6) 235–7 (Lord Hoffmann), which both allowed a claimant to be subrogated to a partly extinguished first mortgage before the balance of the debt was discharged.

117 Similarly, see *AE Goodwin* (n 116) 487 (Powell J) concerning the purpose of the remedy in relation to sureties: at 487.

118 As to the priority of the subrogation claimant's interest as against the original interest, see *Chetwynd* (n 65) 357 (Romer J), *Banque Financière* (n 6) 235–7 (Lord Hoffmann) and *Westpac* (n 116) 22928 [48]–[49] (White J), which held that it ranks below the original interest. Cf *Goodwin* (n 114) 313 (Jessel MR), *Re Butlers Wharf* (n 114) 50–2 (Richard Sykes QC, sitting as Deputy Judge of the High Court) and *Liberty Mutual* (n 114) [47] (Rix LJ), which held that it ranks pari passu with the original interest.

119 See above Part III(B)(2).

where the original interest-holder's advances are made without knowledge of the claimant's interest, it will simply have priority over the claimant to the extent of such advances.[120]

Finally, the above analysis concerning the nature of a subrogation claimant's interest also casts doubt upon two further points contained in the case law. The first is that a claimant cannot be subrogated to a property interest that continues to exist until the secured debt is completely discharged.[121] One explanation that has been given for this is that a claimant cannot obtain an interest that continues to exist.[122] But that cannot survive the recognition that the remedy does not transfer or literally keep alive the original interest.[123] Another explanation is that allowing the enforcement of an interest arising via subrogation, where the original interest continues to exist, could cause prejudice to the original interest-holder's ongoing rights.[124] However, a junior secured creditor is not precluded from enforcing its security interest merely because collateral is subject to a higher-ranking security interest, and it is difficult to see why this concern is any greater in the context of a subrogation claim where the original interest continues to exist.[125] As such, a subrogation claimant's interest should be immediately enforceable in such circumstances, albeit that its rights may be curtailed in the same manner as any other secured creditor who seeks to enforce against collateral that is encumbered by multiple security interests.

The second point that should be revisited, which arises from a single first instance decision, is that a subrogation claimant cannot lodge a caveat over Torrens title land until the secured debt that its funds were applied to is completely

[120] This is consistent with the outcome (albeit not the reasoning) of both *Equity Trustees* where a subrogation claimant had priority over the original interest-holder in respect of further advances which were made after acquiring notice of the claimant's interest, and also *Westpac*, where a mortgagee's priority over a subrogation claimant in respect of further advances only covered those advances made before the mortgagee received notice of the subrogation claim: *Equity Trustees* (n 116), 204, 208–9, 213 (Lowe J); *Westpac* (n 116) 22934–6 [79]–[90] (White J).

[121] See above n 116. Note that some of the cases cited therein contain no explanation for why this is correct: *AE Goodwin* (n 116) 488 (Powell J); *McColl's Wholesale* (n 116) 368 (Powell J); *Padovan* (n 116) [30]–[31] (Black J). Cf *Geeport* (n 36) 11953–4 (Cohen J), which discusses the point without taking a view on its correctness.

[122] *Austin* (n 48) 31–3 [19]–[20] (Cole AJA); *Westpac* (n 116) 22928 [47] (White J); *Smits* (n 116) [57] (Mullins, Bond JJA and Henry J).

[123] See also Mitchell and Watterson (n 1) 205 [8.16].

[124] *Westpac* (n 116) 22928 [47] (White J); *Nguyen* (n 116) 42028 [266] (Robb J).

[125] See also Mitchell and Watterson (n 1) 291 [9.89]–[9.90].

discharged.[126] That is because, once we recognise that a claimant's interest arises at the time of the subrogation-justifying facts, it is difficult to see why a subrogation claimant should be unable to lodge a caveat to protect that interest. Indeed, that should be the case even if, contrary to the above, that interest remains unenforceable until a later time. It should also be the case regardless of whether that interest is further characterised as a full equitable interest or a mere equity.[127]

C *Is a Subrogation Claimant's New Property Interest a Full Equitable Interest or a Mere Equity?*

The final consequence of the above analysis concerns how priority competitions with interests created after the subrogation-justifying facts should be resolved. This has already been dealt with to the extent that it was concluded that the remedy creates a new interest by virtue of equity. However, that raises the further question of whether that new equitable interest should be characterised as a 'full equitable interest' or a 'mere equity'.

This point was raised in *Halifax*, but was dismissed with only limited consideration.[128] Subsequently however, the point was taken up and explored in depth by Stephen Watterson. He argues that the precise content of a subrogation claimant's bundle of rights is only crystallised upon the order of a court, and thus that characterising the interest as a mere equity better reflects that its contents are not yet fully formed at the time of the subrogation-justifying facts.[129] It is beyond the scope of what follows to evaluate the merits of that

126 *Nguyen* (n 116) 42029 [272]–[273], 42048 [392] (Robb J).

127 Compare ibid 42048 [392] (Robb J), which suggests that a caveat cannot be lodged to protect a mere equity on the basis of cases concerning different types of interests characterised as mere equities, with Heydon, Leeming and Turner (n 19) 132 [4-210]:

> [O]ne may wonder whether the whole exercise undertaken … to unravel the 'mere equity' involves no more than an elaborate statement that … the normal equitable rules as to priority do not apply. … To accept that conclusion is not to imply that equitable rights are in this way peculiar: many common law and statutory rights may at once be classified in multiple ways for different purposes.

128 *Halifax* (n 58) [84] (Jonathan Parker LJ).

129 Watterson, 'Modelling Subrogation' (n 1) 661–4.

argument.[130] Rather, the below seeks only to emphasise a few further points which draw on the analysis thus far.

First, Watterson's argument can be separated out from the question of what subrogation seeks to achieve. This is because most of the features of the remedy that form the basis of his argument that a claimant's precise bundle of rights is not finalised until a court order is handed down are not dependent upon the law of unjust enrichment.[131] It follows that, although his analysis is premised on the acceptance of the unjust enrichment explanation,[132] it is not strictly dependent upon it. Similarly, since the above-described purposes of the remedy only seek to protect a claimant from existing interest-holders at the time of the subrogation-justifying facts, they too cannot tell us whether its interest should be further characterised as a full equitable interest or a mere equity.

Next, the potential objection that a claimant will be overly vulnerable to subsequent interest-holders if its new interest is characterised as a mere equity is of less concern than it may otherwise appear. That is because in many cases such a claimant will be capable of protecting itself by taking steps under statute, such as lodging a caveat.[133] Even where that is not possible, such a claimant will ordinarily still be capable of protecting itself by promptly commencing court proceedings to enforce its interest.

The final point follows from recognising that one of the bases upon which a claimant is entitled to subrogation to an extinguished property interest is the misapplication of its funds by a trustee to discharge a secured obligation.[134] As noted above, the underlying purpose of this is best viewed as the same as that underlying the equitable claim to traceable proceeds.[135] As such, the point to be made here is simply that, if the proprietary response by the law to the

[130] Potentially contrary to this, albeit in an altogether different context, it has been argued that a defendant can owe a 'duty' to another despite the unknowability of exactly what that duty entails prior to the making of a court order: see generally Dennis Klimchuk, 'The Unknowability Objection' in Evan Fox-Decent, John CP Goldberg and Lionel Smith (eds), *Understanding Private Law: Essays in Honour of Stephen A Smith* (Hart Publishing, 2025) 265; Frederick Wilmot-Smith, 'Must We Know What We Owe?' in Evan Fox-Decent, John CP Goldberg and Lionel Smith (eds), *Understanding Private Law: Essays in Honour of Stephen A Smith* (Hart Publishing, 2025) 277.

[131] Watterson, 'Modelling Subrogation' (n 1) 664–77.

[132] See, eg, ibid 614–19.

[133] See, eg, *Real Property Act 1900* (NSW) s 74F. Cf *Personal Property Securities Act 2009* (Cth) ss 8, 12, which contains no statutory mechanism for protecting 'non-PPS interests' that fall outside the scope of the statute.

[134] See above n 38.

[135] See above n 41 and accompanying text.

misapplication of trust property is to be coherent, the nature of a claimant's interest arising via subrogation in such circumstances should align with the nature of the interest created by the tracing claim.[136]

V Conclusion

Much of the analysis of subrogation in Australian law has focused upon whether the remedy aims to prevent unjust enrichment or unconscionability. That is an important question, but it also risks distracting from further questions such as exactly what we mean by 'unconscionability' in this context, and, relatedly, what type of interest is obtained by a claimant who is subrogated to an extinguished property interest. This article sought to address these questions, and explore their consequences for the operation of the remedy.

Understanding what subrogation to an extinguished property interest seeks to achieve requires us to answer two questions. First, why is the remedy available at all? The circumstances in which a claimant is entitled to be subrogated to an extinguished property interest that was discharged via the application of its funds encompass several purposes. Those pertain to the protection of sureties, lenders who received less than they bargained for, and trust beneficiaries whose property is misapplied. While it is unobjectionable to refer to these collectively as seeking to prevent unconscionability, we should bear in mind that this encompasses multiple *purposes* underlying the remedy, rather than a single purpose. The second question is: who does the remedy seek to protect a claimant from? This question is commonly overlooked, but is essential to determining the nature of the interest created by subrogation to an extinguished property interest. The better view is that the remedy only seeks to protect a claimant from existing interest-holders at the time of the subrogation-justifying facts.

Building upon that analysis reveals that the nature of the interest created by the remedy is a new equitable interest, which only has the priority of the extinguished interest for some purposes. As against existing interests at the time of the subrogation-justifying facts, it has the priority of the extinguished interest at that time. As against interests arising after that time, it is treated in the same manner as other new interests created by equity. That best reflects the proper

[136] This too remains unsettled: compare Lionel D Smith, *The Law of Tracing* (Clarendon Press, 1997) 322–6 with Peter Birks, 'Overview: Tracing, Claiming and Defences' in Peter Birks (ed), *Laundering and Tracing* (Clarendon Press, 1995) 289, 307–11 and Robert Chambers, 'Tracing and Unjust Enrichment' in Jason W Neyers, Mitchell McInnes and Stephen GA Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing, 2004) 263, 302–5.

scope of the reasons why the interest is created in the first place. It also best reflects how priority competitions are ordinarily resolved where a competition falls outside the scope of the reasons underlying the remedy's availability. That includes where such competitions are determined pursuant to property law statutes, which will commonly be the case in Australian law.

The consequences of this are threefold. First, where a claimant is subrogated to an extinguished property interest under a property law statute that requires the 'perfection' of interests via registration, such as the Torrens title statutes, a registration need not remain in place for a claimant to enjoy the priority of the extinguished interest. Relatedly, a claimant will typically not be able to perfect its new interest arising via subrogation under such statutes, and the appropriate court order following the enforcement of that interest will ordinarily be a declaration coupled with orders relating to enforcement. Secondly, a subrogation claimant should not be disentitled to proprietary relief merely because the interest to which it seeks to be subrogated has not been completely extinguished. Furthermore, such an interest should be enforceable, and capable of supporting a caveat over Torrens title land, even before the secured obligation is completely discharged. Thirdly, a claimant's new interest might be further characterised either as a full equitable interest, or a mere equity.

At a higher level of abstraction, this article demonstrates the need to resolve questions concerning equitable subrogation by reference to a clear understanding of its purpose and nature. Failing to do so risks the resolution of such questions according to metaphors that are not intended to literally describe the remedy's operation.[137] As we have seen, Australian courts have followed the lead of English courts and commentators in recognising this. That highlights a related point, which is that English law remains capable of informing the development of equitable subrogation in Australian law. That is to some extent facilitated by the partial retreat from the unjust enrichment explanation in that jurisdiction. But even prior to that, the willingness of Australian courts to continue drawing upon the analysis of English courts and commentators reflects that much of that analysis can be separated out from the question of whether subrogation seeks to prevent unjust enrichment.[138] Consistently with that, this article has drawn upon the work of commentators on English law in exploring the Australian position.

[137] See also William Gummow and Aryan Mohseni, 'The Use and Misuse of Metaphors' (2024) 98(10) *Australian Law Journal* 738, 740–3.

[138] See also MJ Cleaver, 'Equitable Subrogation in Australia and England' (2018) 29(1) *Journal of Banking and Finance Law and Practice* 34, 36, 54–6; Tilley (n 8) 520–2.

Finally, this article highlights a broader point concerning the role of statute in the application and development of equitable doctrines and remedies. As has been seen, the pervasiveness of statute within Australian law is highly relevant to the operation of equitable subrogation. Given the vast majority of cases where a claimant seeks to be subrogated to an extinguished property interest will arise in the context of statute, it would be foolish to try to understand subrogation to extinguished property interests without regard to such interactions. Indeed, the above analysis drew upon such interactions at every stage — in determining the remedy's purposes, the nature of the interest it creates, and the further consequences that flow from that. This reflects that statute and equity are inherently entwined in a single legal system,[139] which should be considered as a whole in determining questions such as how equitable subrogation works.[140]

[139] See generally Mark Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, 2023).

[140] See also J Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 (April) *Law Quarterly Review* 247; Andrew Burrows, 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 (April) *Law Quarterly Review* 232; Elise Bant, 'Statute and the Common Law: Interaction and Influence in Light of the Principle of Coherence' (2015) 38(1) *University of New South Wales Law Journal* 367; Adam Waldman and Michael Gvozdenovic, 'Development of the Common Law by Analogy to Statute' (2023) 97(12) *Australian Law Journal* 912.