Restitution, Public Policy and the Conflict of Laws

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I. Introduction

In recent times, and particularly during the last few decades, considerable attention has been devoted to restitution in the conflict of laws as a unified topic. Much of this attention has failed to resolve the confusion that reigns in this difficult and complex field. Some of it has added to the confusion. In fact, a cursory comparison of some of the literature with the decided cases leaves one wondering whether they are addressing the same subject. The subject of restitution in the conflict of laws has a long history, although its component parts might traditionally have been referred to by other labels. Yet commentators frequently assume that restitution in the conflict of laws is a 'new' subject. There seems to be a sense that one is able to liberate oneself completely from traditional choice of law categories and rules, and interpose a new choice of law category with a new choice of law rule(s). As a result, the choice of law rules for restitution advocated by some writers do not reflect what the courts are doing in practice. A principal feature of those commentaries is that they overlook the topic commonly known in the conflict of laws as the doctrine of public policy. Commentators simply disregard forum public policy as having a significant role to play in resolving restitution choice of law problems.

The law of restitution is concerned largely with the entitlement to wealth when things go awry, or not as intended, or, as Mansfield put it, when a defendant ought *ex aequo et bono* to disgorge an enrichment to the plaintiff. Restitution corrects the harsh results that might otherwise flow from rigid adherence to other legal doctrines. Modern doctrine may have eschewed the notion of *aequum et bonum*. But most (if not all) legal systems have developed a body of rules to determine when an enrichment ought to be disgorged, and those rules in fact reflect moral judgments. Different communities may make different judgments. When they do, and depending upon the relation between the facts of a case and the forum, it is to be expected that a court may not be willing to subordinate *some* of those moral judgments to those reached by another legal system. In many corners of the conflict of laws, there is a well established doctrine of public policy governing situations in which a court should apply its own law where some foreign law (or the result to which it leads) 'would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.'[2] It should not, then, be surprising that issues can and do arise in claims for restitution where a court will be inclined to apply its own law as a matter of forum public policy. It is a fact that the law reports contain (and are likely to continue increasingly to do so) restitution decisions where forum law was applied on the ground of public policy. Unfortunately, the judges in some of these cases have not always said clearly that they were applying forum law on public policy grounds. As a result, their decisions have not been analysed by commentators as decisions concerned with public policy. The topic of public policy sometimes is mentioned in passing

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2 *Loucks v Standard Oil Co of New York* 224 NY 99 at 111 (1918) per Cardozo J.

by writers concerned with restitution choice of law, but only for completeness' sake and only to dismiss its importance to the greater bulk of cases.

In the United States of America, some writers have paid explicit attention to the impact of public policy on restitution choice of law. Professor Ehrenzweig is a prominent example.[3] However, he placed too much significance on the *lex fori*, and his general thesis (that the *lex fori* is the *prima facie* choice of law rule for restitution — and other — claims) has quite properly been rejected. Also, the topic of public policy is catered for by 'interest analysis', in those American jurisdictions which adopt that and related approaches. A leading approach of this general nature is the test advocated by §221 of the *Restatement (Second) of Conflict of Laws*.[4] §221 requires the court to apply to a particular issue in a claim for restitution, the local law of the state which has the most significant relationship to the occurrence and the parties with respect to that issue, having regard *inter alia* to the contacts with relevant states and the policies of those states and interests in having their law applied. In the writer's view, such an approach has much to commend it.[5] But whatever choice of law approach is ultimately adopted for restitution issues, the doctrine of public policy has an important role to play in indicating circumstances in which the forum state has an overriding interest in applying its own law. There can be no excuse for overlooking it.

Unless the role of public policy in restitution choice of law is addressed, the prevailing confusion will not be eradicated, and may even increase over time. By ignoring public policy, writers misstate the proper field of application of forum law. For example, consider the case of a claim by P against D (between whom there was no pre-existing relationship) to execute a constructive trust over property stolen by D.[6] The property is at all material times situated in a country the law of which does not regard D as constructive trustee (say, because of the absence of a fiduciary relationship). P is likely to fail according to most commentators, who would apply (or give presumptive force to) the law of the 'place of enrichment'[7] or, if the property is land, the *lex situs*.[8] Or imagine a case where D fraudulently induces P to enter into a contract pursuant to which P pays D money which D refuses to repay. The proper law of the contract is the law of a foreign state under which there is no occasion for restitution (say, because P seeks to trace his money into substituted property in D's hands and the proper law of the contract does not recognise a right to trace or a subsisting property interest). Most commentators are likely to apply the proper law of the contract, and P would again fail.[9] But if forum law recognises a right to restitution, it would be surprising to find that the court would apply foreign law in either

3 Ehrenzweig AA, 'Restitution in the Conflict of Laws: Law and Reason versus the Restatement Second' (1961) 36 *NYULR* 1298.

4 Reese, W (reporter), *Restatement (Second) Conflict of Laws*, American Law Institute, St Paul, Minnesota, 1969, §§ 6, 221.

5 In a rapidly shrinking world, tests based on rigid connecting factors (or even presumptive approaches with exceptions based on objective connecting factors) are increasingly likely to point to inappropriate laws. Such tests are not necessarily equipped (except by way of artifice) to take into account conflicts issues on which cases are actually decided, such as the policies behind potentially applicable laws, the interests of states in having their policies applied, and an assessment of which interest should prevail.

6 The word 'execute' is not intended to delimit the kinds of constructive trusts with which this paper is concerned, nor is it intended to suggest a concluded view about the institutional/remedial debate for constructive trusts: cf. *Muschinski v Dodds* (1985) 160 CLR 583 at 612–16.

7 See, e.g., Dicey, AV & Morris, JHC, *The Conflict of Laws*, (12th ed) Sweet and Maxwell, London, 1993, vol 2, 1471, Rule 201(2)(c); McLeod, JG, *The Conflict of Laws*, Carswell Legal Publications, Calgary, 1983, 572; Bird, J, 'Choice of Law' in Rose, F (ed), *Restitution and the Conflict of Laws*, Mansfield Press, Oxford, 1995, 135.

8 See, e.g., Dicey & Morris, n 7, Rule 201(2)(b); McLeod, JG, n 7; Bird, J, n 7.

9 See, e.g., Dicey & Morris, n 7, Rule 201(2)(a); *International Encyclopedia of Comparative Law*, vol III, Zweigert, K & Müller-Gindullis, D, QUASI-CONTRACTS [30-20]–[30-27]; McLeod, JG, n 7; Bird, J, n 7; Brereton P, 'Restitution and Contract' in Rose, F (ed), *Restitution and the Conflict of Laws*, Mansfield Press, Oxford, 1995, 191–203.

scenario. Indeed, the cases discussed herein support the view that the courts do in fact apply their own law in favour of restitution in these and similar situations, at least where the facts of the case have some impact on the forum state. But because there is no mechanism or 'escape hatch' in place to cater for such cases, there are occasions where the courts are compelled to resort to manoeuvres and subterfuge to justify applying their own law in lieu of some foreign law.[10] Thus a tension emerges between theory and what the courts are doing in practice. Decisions explicable on public policy grounds are, in turn, extrapolated into something that they are not. And so the inextricable cycle goes on. All the while, the question is never asked directly: in which cases should a court apply its own law?

The aim of this paper is to introduce a discourse that has better prospects of leading to certainty than current approaches. It is also a goal of this paper to suggest some answers to the question when a court should apply its own law on the ground of forum public policy. But given the state of authority as described above, firm conclusions are difficult to draw.[11] The full range of circumstances falling within the purview of forum public policy needs to be worked out on a case-by-case basis. To achieve the above objectives, it is also necessary to survey the choice of law rule(s) for some kinds of restitution claims where no issue of public policy is involved. This topic alone merits comprehensive treatment, and cannot be fully explored here. Nevertheless, some brief observations and evaluative comments are made at appropriate points below.

Section II seeks to articulate and respond to some of the principal reasons why public policy has been neglected in the field of restitution choice of law. In Section III an overview is given of issues which raise public policy concerns. It should be clarified from the outset that this paper is concerned with 'public policy *externe*', or the rules of public policy that apply in conflicts cases, and not 'public policy *interne*', or the rules of public policy that merely inform municipal law. It is trite law that, just because particular conduct (or the result to which the application of a law leads) infringes public policy *interne*, does not mean that it will necessarily infringe public policy *externe*. Section IV discusses the types of connecting factors (personal or territorial) between the case and the forum that are likely to warrant the application of forum law on public policy grounds. In that section, it is argued that forum law should only and always be applied on public policy grounds where the forum state has an interest in applying its public policy. Decided support is analysed in Sections V and VI, which divide the subject according to whether forum law is applied to deny or uphold restitution. A conclusion follows in Section VII. Also, it should be stated at the outset that the focus of this paper is the conflict of laws, not public international law or the law of inter-governmental or foreign relations. Moreover, the focus of this paper is transnational conflicts, not inter-state conflicts.

II. Three myths

It is necessary to understand the reasons why the topic of public policy has been neglected in the area of restitution in the conflict of laws, and to demonstrate that those reasons should no longer be controlling. Of the many reasons, three principal ones are dealt with here.

10 See, e.g., *National Commercial Bank v Wimborne* (1978) 5 BPR 11,958; *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766; *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717; *Sumitomo Bank Ltd v Thahir* [1993] 1 SLR 735, 785–91, aff'd sub nom *Thahir v Pertamina* [1994] 3 SLR 257 at 269–76.

11 This article does not purport to provide an exhaustive statement of the issues of public policy impinging on claims for restitution, or of the *nexi* between the facts of the case and the forum necessary before forum public policy will be applied. Moreover, this article does not deal with the impact of forum public policy in some subject specific areas, including issues usually treated under discussions on insolvency law and decedents' estates.

First, it has been assumed that a multilateral choice of law rule or rules is the solution for most restitution choice of law problems. Multilateral choice of law approaches (including those which adopt objective or 'proper law' techniques) involve, first, the characterisation of an issue and, second, selection of the law indicated by the connecting factor in the appropriate choice of law rule.[12] Unilateral approaches, on the other hand, focus on whether and when a particular domestic rule will be applied, having regard to the spatial or personal ambit of the rule.[13] Beale's 'place of enrichment' test for 'quasi-contract' in his *Restatement (First) of Conflict of Laws* was decidedly multilateral.[14] Although Beale recognised a public policy exception to his choice of law rules, he did not pay much attention to what impact, if any, it might have on his 'quasi-contract' choice of law rule.[15] Beale's scheme fits neatly within the vested rights model for which he remains infamous.

Although the theory of vested rights has since been discredited, Beale left a legacy which included the demarcation of the ambit of the debate. The assumption has continued to be made in British and Commonwealth countries that a multilateral choice of law rule or series of rules is the solution to virtually all choice of law issues in claims for restitution. Conflicts topics which (even in British and Commonwealth countries) tend to be subjected to unilateral techniques have been neglected in the context of restitution choice of law. This includes public policy, statutes, mandatory laws and foreign penal, revenue and public laws.[16] Some commentators recognise the potential relevance of public policy to restitution choice of law. But, at least implicitly, they reject its relevance to the majority of cases (usually without analysis). They erect public policy as a 'straw man', only to knock it down and dismiss it from further consideration.[17] The extent of their analysis of cases which in fact involved public policy issues (including the cases discussed herein) is either to cite them in support of, or criticise them as contrary to, the multilateral choice of law approach for which they contend. The commentators do not make any reference at all to the relevance of public policy to the outcomes in those cases.

Second, the curious myth has prevailed that public policy has a 'negative' aspect only; namely that public policy only applies to exclude claims to enforce or recognise rights under an 'otherwise applicable' foreign law.[18] As a result of this view, cases that apply

12 Familiar examples are the *lex situs* rule for some property questions, or the *lex loci delicti* rule (and adaptations thereof) for tort questions and the *lex domicillii* rule for some questions pertaining to status, such as essential validity of marriages.

13 See Vischer, F, 'General Course on Private International Law' (1992) I *Recueil des Cours* 21 at 32–43. For examples of 'one-sided' unilateral conflicts rules, see: Sykes, EI, & Pryles, MC, *Conflict of Laws: Commentary and Materials*, (3rd ed) The Law Book Company, Sydney, 1988, 120–2; Mann, FA, 'Statutes and the Conflict of Laws' (1972-73) 46 *BYBIL* 117.

14 Beale, J (reporter), *Restatement (First) of Conflict of Laws*, American Law Institute, St Paul, Minnesota, 1934, §§ 452, 453. See also Gutteridge, HC & Lipstein, K, 'Conflicts of Law in Matters of Unjustifiable Enrichment' (1941) 7 *Cambr LJ* 80 (place in which the payment of money or the vesting of property occurs which constitutes the enrichment). Like Beale, Messrs. Gutteridge and Lipstein seem also to have based their conclusion on 'vested rights' reasoning: see 91–2.

15 Beale, J, n 14, § 612.

16 See, e.g., *River Stave Co. v Sill* (1886) 12 Ont R 557; *Boissevain v Weil* [1949] 1 KB 482, aff'd, [1950] AC 327; *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30; *Douglas Financial Consultants Pty Ltd v Price* [1992] 1 Qd R 243. See also the intellectual property cases referred to in Lee, S, 'Title to Foreign Real Property in Transnational Money Claims' (1995) 32 *Col J Transnat'l Law* 607 at 630, n 132.

17 Commentators tend only to ask the question whether public policy can support the *lex fori* as the exclusive choice of law rule for restitution. Having rejected that (plainly untenable) argument, the possibility is not apparently considered that there may be some middle ground, namely that public policy might justify the application of forum law in *some* cases. For illustrations, see, Zeigert, K, & Müller-Gindullis, D, n 9, [30–18]; Bird, J, n 7, 102–103. See also Barnard, L, 'Choice of Law in Equitable Wrongs: A Comparative Analysis' (1992) 51 *Cambr LJ* 474, at 501–502, who at least makes some attempt at analysis (though arriving, with respect, at the wrong conclusion).

18 See, e.g., Dicey & Morris, n 7, vol 1, at 88–96.

forum law to *uphold* restitution, when a foreign law would deny restitution, have been ignored as relevant to the question of forum public policy. But the view that public policy is only a limitation on an otherwise applicable choice of law is a misconception for several reasons:

* To so regard public policy is to ignore the many cases which respond affirmatively to forum public policy by enforcing rights which do not exist under foreign law;[19]
* Cases concerned with mandatory laws may result in courts applying forum policy, whether affirmatively to afford relief or negatively to deny relief. In this respect, it is unconvincing to treat mandatory laws as *sui generis* by supposing that they involve a 'close connection to the functioning of the State.'[20] In a broad sense, the state is interested in seeing justice done in all litigation conducted in its courts. This includes (but is not limited to) cases where there may be a potential for decisions in private litigation to affect adversely the diplomatic or trading relations between the forum state and some foreign state;
* It would restrict unduly a court's ability to respect the fundamental policy concerns of the forum state to deny to a court the ability to use forum public policy affirmatively to grant relief in appropriate cases. For instance, courts may be called upon to grant restitution (or to award compensation or enjoin conduct) at the instance of a plaintiff who has been the victim of fraud or other unconscionable conduct. In such cases, it should be open to a court to respond to its public policy concerns by affording relief or more favourable rights to relief (where so to do would address those concerns appropriately). The argument that such a view would promote 'forum shopping' should carry little weight. In an era where cross-border misappropriation, fraud, human rights abuses, organised crime and corruption are rife, every possible avenue should be made available to bring the perpetrators of such conduct to account. Rogues are willing to use territorial borders to their advantage. Conflict of laws notions (including 'forum shopping' and choice of law rules) which fail to address such problems ought to be rejected, not embraced. Instead of reasoning that domestic courts should be wary of imposing their notions of justice to resolve disputes arising abroad (because of concerns which can be addressed on *forum non conveniens* applications or out of deference to the sovereignty of other nations, or for some other reason), the view should be taken that domestic courts have a role to play in appropriate cases akin to that of quasi-international courts of justice;
* To argue that public policy should only operate negatively, and not affirmatively, is to maintain an arbitrary and illogical distinction. If P and D enter into a contract induced by D's fraudulent misrepresentation, it does not seem to be in doubt that the forum court would apply its own law to refuse to enforce the contract whatever the proper law of the contract might say.[21] If the forum court will apply its own law to refuse to allow D to enforce the contract (whatever the proper law of the contract might say), is it seriously to be suggested that the court should not be permitted to apply its own law to allow P to recover the benefit if already paid? Is it rational that the question whether the forum public policy against fraud can be invoked should depend merely upon whether or not P has transferred a benefit under the contract before he discovers the fraud? The received wisdom that public policy only operates 'negatively' to disapply an otherwise applicable foreign law is also arbitrary and

19 In addition to the cases discussed below, see e.g., *Sill v Worswick* (1791) 1 Hy Bl 665, 126 ER 379; *Hunter v Potts* (1791) 4 TR 182, 100 ER 962; *Phillips v Hunter* (1795) 2 Hy Bl 402, 126 ER 618; *Lord Portarlington v Soulby* (1834) 3 My & K 104, 40 ER 40; *Cole v Cunningham* 133 US 107 (1890); *Lorentzen v Lydden & Co. Ltd* [1942] 2 KB 202.

20 See Vischer, F, n 13, at 102 (who so regards mandatory laws as *sui generis*).

21 cf. *Winkworth v Christie Manson and Woods Ltd* [1980] Ch 496 at 501, 510, 514.

illogical for another reason. There is a sense in which the public policy doctrine, though well disguised as such, is in substance a choice of law rule in which forum law is applied to resolve the case having regard to the particular issue involved and the impact of the case on the forum state.[22] The law of the forum is applied 'positively.' In that sense, forum public policy is not applied any more 'positively' in a claim for restitution of a benefit already received, than it is when fraud is raised as a defence to a claim for compensation for reliance or expectation loss for breach of contract or for monies due under a contract.

Third, some cases have been wrongly construed as deciding that courts of equity must apply their own law. Such cases have been marginalised by commentators from choice of law debate by treating them as *sui generis* or erroneous. As a consequence, a valuable resource for principles of forum public policy (and of other choice of law norms) has been ignored. The ignored cases fall into two categories: those concerning foreign land; and those not concerning foreign land.

In cases concerning foreign land, the belief has gained ground that courts of equity only have competence or power to apply their own law. Courts of equity must apply forum law because — so the argument goes — the court is enforcing rights against persons (rights *in personam*) before the court, as to which the court has exclusive jurisdiction. Conversely, courts of equity are said to lack jurisdiction to apply the *lex situs* in claims to enforce rights *in rem* in foreign land because the courts of the *situs* have exclusive jurisdiction to directly determine title to land within its territorial borders. Joseph Story was probably responsible for introducing this misconception into Anglo-American law.[23] During the 1920s and 1930s, the American realist school discredited Story's theory as an informing principle of the law of jurisdiction in general.[24] But his theory has lingered at least in the context of foreign land,[25] with the able assistance of Beale,[26] Westlake,[27] Dicey,[28] Cheshire[29] and others. It has had the impact that, by and large (outside of the field of contracts and express/institutional trusts), the equity cases concerning foreign land have not been regarded as shedding any light on the problem of choice of law.[30] They tend to be pigeonholed into the category of 'Jurisdiction.' In fact, some of these cases

22 Cf. Paulsen & Sovern, 'Public Policy in the Conflict of Laws' (1956) 56 *Colum L Rev* 969 at 981, 989 n 75 and the references contained therein.

23 See Hazard, GC Jr, 'A General Theory of State-Court Jurisdiction' [1965] *Sup Ct Rev* 241 at 261. Story laid down two 'maxims', which he deduced from international law and the exclusiveness of the sovereignty of all nations: that the laws of every state directly affect all property situated, or bind all persons resident, in the territory of that state; and (the corollary) that no other state can by its laws directly affect or bind such property or persons. The foreign land cases upholding jurisdiction were, according to Story, instances of jurisdiction over 'persons', and the foreign land was only 'indirectly affected': Story, J, *Commentaries on the Conflict of Laws*, 8th ed, Little, Brown & Co, Boston, 1883, 21–2 (1st ed 1834).

24 Lorenzen, EG, 'Territoriality, Public Policy and the Conflict of Laws' (1924) 33 *Yale LJ* 736; Cook, WW, 'The Jurisdiction of Sovereign States' (1931) 31 *Colum L Rev* 369. See also Hazard, GC Jr, n 23. As is pointed out, Story's maxims of international law are internally flawed. They assume that the exercise of jurisdiction over the person does not involve at the same time an exercise of jurisdiction over property and vice versa.

25 See, e.g., *Norris v Chambres* (1861) 29 Beav 246 at 253, 54 ER 621 at 624; *Cookney v Anderson* (1862) 31 Beav 452 at 458, 54 ER 1214 at 1216; *Deschamps v Miller* [1908] 1 Ch 856 at 862–4; *Fall v Eastin* 215 US 1 (1909); *Duke v Andler* [1932] SCR 734.

26 Beale, J, 'Equitable Interests in Foreign Property' (1906) 20 *Harv L Rev* 382; Beale, J, n 14, §§ 239, 240; Beale, J, *Conflict of Laws*, Baker, Voolhis & Co, New York, 1935, vol 2, 953–62.

27 Westlake, J, *A Treatise on Private International Law*, 3rd ed, Sweet & Maxwell, London, 1890, 194.

28 Dicey AV, *A Digest of the Law of England with Reference to the Conflict of Laws*, 1st ed, Sweet & Maxwell, London, 1896, 214–15.

29 Cheshire, GC, *Private International Law*, 1st ed, Butterworths, London, 1935, 460–72.

30 Even those who have adverted to the fact that the foreign land cases have choice of law significance tend to regard them as *sui generis* and thus do not take the analysis to its natural conclusion: White, RW, 'Equitable Obligations in Private International Law: The Choice of Law' (1986) 11 *Syd L Rev* 92; and Barnard, L, n 17.

involved not only rulings on jurisdiction (in sense of power-to-decide), but also rulings on choice of law which flowed from distinct, though not mutually exclusive, considerations.[31]

But it is now hoped that, even in the field of foreign land, Story's theory has finally been laid to rest.[32] In the foreign land cases applying forum law, which were concerned with rights *in personam*, forum law was not applied because the courts in question lacked competence or power to apply foreign law. Some of them applied forum law because there was no stated conflict or because they were only concerned with jurisdiction (in the sense of power-to-decide).[33] In others, forum law was the appropriate law, either because forum law was applied on public policy grounds,[34] or because forum law was otherwise the appropriate law — and in that latter instance the fact that the claim was to enforce rights *in personam* (and not *in rem*) was relevant to the choice of law outcome.[35] There is no reason why a court, called upon to enforce a restitutionary right *in personam* relating to foreign land, could not apply either forum law or foreign law as appropriate in accordance with sound choice of law principle. Conversely, in cases involving rights *in rem* in foreign land where relief was refused, the reason for such refusal was not a lack of competence or power to apply foreign law (except in those cases where the action was one *in rem* or involved a remedy *in rem* over the foreign land or where personal jurisdiction was lacking). On the contrary, the courts in some cases involving rights *in rem* in foreign land expressly recognised that the *lex situs* was the governing law and, in all of them, relief was denied for reasons which today would be described in the following terms: *forum non conveniens*; discretionary grounds; no case for relief on the merits; choice of law grounds. Indeed, there are several cases where a foreign *lex situs* was applied in claims to enforce rights *in rem* in foreign land in actions *in personam* or in actions for relief *in personam*.[36] Accordingly, in cases involving foreign land (*a fortiori* other cases), there is no warrant for the view that courts of equity must apply their own law, or that the case-law so requires. Foreign law can be applied if it is the appropriate law in accordance with sound choice of law principle. Moreover, there is no reason why foreign land cases ought to be treated as *sui generis* and excluded from choice of law debate.

There are also cases not involving foreign land, but cases which purport to rely on the foreign land cases to justify application of the so-called '*lex fori*' rule.[37] Writers tend to treat these cases in a similar fashion to the foreign land cases. They construe them as deciding that courts of equity must apply their own law.[38] Conveniently, this interpretation allows commentators to criticise those cases as 'wrong' and dismiss them out of hand. If that is what the cases decided, then it would be right to reject the reasoning employed. But they decide nothing of the sort (or even if they so decide, the outcomes are otherwise justifiable). Close analysis of those decisions reveals that, in many of them, there was good reason for applying forum law. For instance, in some, forum law was the appropriate law including on public policy grounds. Cases which apply the so-called '*lex fori*' rule should not be cast aside as 'straw men' without analysis.

31 See Lee, S, 'Jurisdiction Over Foreign Land: A Re-Appraisal' (1997) 26 *Anglo-Am LR* 273.

32 Note 31.

33 See, e.g., *Arglasse v Muschamp* (1682) 1 Vern 75, 23 ER 322; *Gorash v Gorash* [1949] 4 DLR 296; *Massie v Watts* 10 US (1810) (6 Cranch) 148.

34 See, e.g., *Cranstown v Johnston* (1796) 3 Ves Jun 170 at 183, 30 ER 952 at 959; *Mercantile Investment and General Trust Co v River Plate Trust, Loan, and Agency Co* [1892] 2 Ch 303.

35 See, e.g., *Cranstown v Johnston* (1796) 3 Ves Jun 170; *Scott v Nesbitt* (1808) 14 Ves Jun 438, 33 ER 589.

36 See, e.g., *Martin v Martin* (1831) 2 Russ & M 507, 39 ER 487; *Hicks v Powell* (1869) LR 4 Ch App 741; *Harrison v Harrison* (1872) LR 8 Ch App 342; *Norton v Florence Land and Public Works Co* (1877) LR 7 Ch D 332; cf. *Waterhouse v Stansfield* (1851) 9 Hare 234, 68 ER 489.

37 See, e.g., *National Commercial Bank v Wimborne* (1978) 5 BPR 11,958; *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766; *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86; *Sumitomo Bank Ltd v Thahir* [1993] 1 SLR 735.

38 See, e.g., Bird, J, n 7, at 102–3.

III. Public policy issues

As is shown in more detail below, there are instances where a foreign law having a claim to be applied upholds restitution, but public policy requires the application of forum law to deny relief (or to provide a less favourable right to relief). Claims for restitution under a foreign law will not necessarily fail just because they are not recognised under forum law.[39] But they will fail if relief infringes forum public policy, that is to say, if a forum public policy issue is raised and the forum state has an interest in applying its public policy. Examples of public policy issues which may lead to the application of forum law to deny restitution include the public policy against the deliberate commission of illegal acts, and the public policy against infringement of fundamental human rights, such as freedom of speech.

However, the discussion below demonstrates that there are also inverse cases where forum public policy requires the application of forum law to uphold (or favour) restitution. Foreign law might deny relief when forum law upholds relief. Or foreign law might provide a less favourable right to relief than forum law. In these circumstances, the effect of forum public policy would be to lead to the application of forum law to uphold restitution or to provide a more favourable right to relief than under foreign law. For instance, the public policy against conduct which, in the eyes of the forum, is unconscionable or immoral has this effect (if the forum state has an interest in applying its public policy). Manifestations (or perhaps variants) of this public policy include cases where the enriched person has obtained property: by misappropriation[40] or by fraudulent misrepresentation;[41] by certain types of duress and undue influence, or pursuant to an unconscionable bargain;[42] or by fraudulent or corrupt breach of duty, including arising from a trust, fiduciary duty or relationship of confidence.[43] Another example is where third party transferees have received or retained benefits in circumstances amounting to a fraud on another's rights.[44] If the forum state has an interest in applying its public policy against unconscionable or immoral conduct, then forum law will be applied to uphold or favour restitution irrespective of the connection with another system of law and even though that other system denies restitution (or provides less favourable rights to relief).

Not all claims for restitution raise issues of public policy. For instance, a claim for restitution of benefits transferred under a non-induced mistake ought not, without more, raise a public policy question. Moreover, no question of public policy should arise if some

39 *Perlman v Sartorious* 29 A 852 (Pa 1894); *Batthyany v Walford* (1886) 33 ChD 624, aff'd, (1887) 36 ChD 269 (delictual claim by remainderman against life-tenant for waste to Austrian/Hungarian land, together with restitutionary claim for rents accruable and paid in advance and restitutionary cross-claim for improvements); *Bank of Africa Ltd v Cohen* [1909] 2 Ch 129 (cross-claim).

40 *Cranstown v Johnston* (1796) 3 Ves Jun 170 at 183, 30 ER 952 at 959; *Butterfield v Nogales Copper Co* 80 P 345 (Ariz 1905).

41 *National Commercial Bank v Wimborne* (1978) 5 BPR 11,958.

42 Cf. *Arglasse v Muschamp* (1682) 1 Vern 75, 23 ER 322; *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152; *Société des Hotels Réunis (Société Anonyme) v Hawker* (1913) 29 TLR 578; *Kahler v Midland Bank Ltd* [1950] AC 24 at 44–45.

43 *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766; *National Commercial Bank v Wimborne* (1978) 5 BPR 11,958. cf. also *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] 1 QB 448, 458–61; *Oscanyan v Arms Co* 103 US 261 (1880); *Arab Monetary Fund v Hashim* [1993] 1 Lloyds Rep 543. By corruption, it is intended to refer to the practice of paying/receiving bribes or secret commissions, paid to a fiduciary by a person (briber) in return for the favorable exercise of personal influence by the fiduciary in relation to dealings between the briber and the principal.

44 *Mercantile Investment and General Trust Co v River Plate Trust, Loan, and Agency Co* [1892] 2 Ch 303; *National Commercial Bank v Wimborne* (1978) 5 BPR 11,958; *Hongkong and Shanghai Banking Corp Ltd v United Overseas Bank Ltd* [1992] 2 SLR 495 at 500–1; *Sumitomo Bank Ltd v Thahir* [1993] 1 SLR 735, aff'd sub nom *Thahir v Pertamina* [1994] 3 SLR 257; *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 at 736–7; *Butterfield v Nogales Copper Co* 80 P 345 (Ariz 1905); *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766 at 798.

foreign law with a claim to be applied takes a more stringent view of the defendant's conduct than does forum law (providing that the foreign law or the result to which it leads is not otherwise objectionable). This should be so whether such foreign law allows restitution when forum law does not, or whether foreign law allows a more favourable right to relief than that available under forum law. However, where a defendant has enriched himself by fraud or other unconscionable or immoral conduct, if some foreign law with a claim to be applied denies restitution when restitution is available under forum law, or if forum law is more favourable to the party seeking restitution, then a public policy question will be raised (though whether forum law is ultimately applied will depend on whether the forum state has an interest in applying its public policy).

The invocation of forum public policy should not depend so much on the form, content or rationale of foreign law as it does on the *result* to which foreign law would lead as compared with the relief which is available on the evidence under forum law. Assume that the evidence establishes, for instance, that D has stolen money from P and has used that money to purchase other property (whether land or chattels) and that, under forum law, P would be entitled to an order executing a constructive trust or enforcing a lien over that substituted property. If the forum has an interest in applying its public policy against theft, the denial of restitution under a potentially applicable foreign law would engage forum public policy even though the foreign law only refuses relief because it does not recognise equitable interests or a subsisting property interest in the substituted property, or because no constructive trust is regarded as arising in the absence of a fiduciary relationship. Indeed, the most common setting in which public policy issues arise in restitution cases is where different views are taken on issues such as the recognition of equitable interests, rights to 'trace', whether a 'fiduciary' relationship is necessary, what level of knowledge or notice is required for restitutionary liability, and what defences are available. It is in areas such as these that municipal laws are most likely to differ. It is not necessary for a public policy issue to arise that foreign law denies restitution because (if such a law exists) thieves or fraudsters are never unjustly enriched.

IV. Forum connection

In the field of restitution as well as other areas, the application of forum law on public policy grounds in any given case does not necessarily depend solely on abstract consideration of the public policy behind forum law. It also depends on the intensity of the relation between the facts of the case and the forum.[45] The received wisdom may be that public policy only operates 'negatively' to avoid application of an 'otherwise applicable' foreign law. But as explained above, this view is inaccurate and unhelpful. The public policy doctrine, although well disguised as such, is in substance a choice of law principle (or series of principles). The public policy doctrine describes circumstances in which a forum internal rule will be applied to resolve a conflicts case, having regard both to the policy underlying the forum rule and to the forum's relationship to the facts of the case.[46] The requisite forum connection should not be rigid and inflexible. It can be expected to vary with the particular public policy at stake. The process is not dissimilar to 'interest analysis', in which one first identifies the policy at stake and then considers whether the state in question has an interest in having its policy applied. One difference is that the public policy process concentrates on the question whether the forum state has an interest

45 Kahn-Freund, O, *General Problems of Private International Law*, Sijthoff, Alphen aan den Rijn, 1980, 282; Lloyd, Dennis, *Public Policy*, Athlone Press, University of London, 1953, 91–6; Fawcett, JJ, and North, PM, *Chesire and North's Private International Law*, 12th ed Butterworths, London, 1992, 129–30; Vischer, F, n 13 at 105; cf. Paulsen & Sovern, n 22.

46 Note 45.

in having its public policy applied. Another is that where the forum has an interest in having its public policy applied, that interest will be regarded as overriding and forum law will always be applied. It flows from this that the policies relevant to the process are necessarily limited to fundamental policies of the forum (or 'public policy *externe*').

Depending on the public policy concerned, an 'interest' could arise by reason of the personal *nexus* of a party or parties with the forum, or by reason of a territorial *nexus* between the facts and the forum, or a combination of both. Since (as has been suggested above) conflict of laws decisions concerned with restitution have tended to arrive at public policy decisions by indirect means, it is difficult to form definitive conclusions as to precisely when a forum state has an interest in applying any particular public policy. This is a matter which must be worked out on a case-by-case basis, where the issue is openly addressed. Nevertheless, some tentative and non-exhaustive observations can be made as to what interests are sufficient.[47]

Subject perhaps to the extreme cases mentioned below, a forum state should not have an interest in applying its public policy against unconscionable or immoral conduct unless there is a discernible impact on the forum. A forum state may have an interest in discouraging unconscionable or immoral conduct committed (at least in part) within the territory of the forum by forum residents, or to protect forum residents from unconscionable conduct committed (at least in part) within the territory of the forum.[48] Alternatively, a forum state insistent that its territory not be used as a haven for fraud or money laundering may have an interest in applying its public policy because the forum is the place of enrichment or the *situs* of the property in dispute (except perhaps if the forum is merely a transient or fortuitous place of enrichment or *situs*).[49] In some cases, more than one interest may be present.[50] Other interests may be able to be identified as relevant to the public policy against unconscionable or immoral conduct. Moreover, other interests may be relevant to other public policy issues. A forum state has an interest in protecting its nationals and residents from human rights infringements, at least where the detriment or restriction is (or would be) occasioned or imposed in the forum.[51]

A particular issue which needs to be explored further is whether and to what extent the requisite forum connection varies with the egregiousness of the conduct under examination and the extent of departure, from the principles of the forum state, of the result to which application of the foreign rule would lead.[52] It may be that there is an inverse relationship; the more egregious the conduct under scrutiny, and the greater the departure of foreign law from forum law, the lesser may be the required forum connection. There may be cases, for instance, where the conduct under scrutiny or the result to which foreign law would lead may be regarded by the forum as so heinous or immoral that the forum may have an interest in applying its public policy however slight may be the connection with the forum (as long as the jurisdiction of the court is able to be invoked). The courts in such cases

47 The discussion *infra* draws on decisions from a wide variety of common law jurisdictions. But it should be remembered that, although public policies may be similar from state to state, it is a matter for each sovereign state to define for itself the content of its own public policy (though the process may in some areas be informed by public international law).

48 See, e.g., *Mercantile Investment and General Trust Co v River Plate Trust, Loan, and Agency Co* [1892] 2 Ch 303; *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766; cf. *Oscanyan v Arms Co* 103 US 261 (1880) at 276–8 (action by fiduciary on bribe contract); cf. *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] 1 QB 448 at 458–61 (action on contract to exercise personal influence); cf. *Arab Monetary Fund v Hashim* [1993] 1 Lloyd's Rep 543 (where forum did not have an interest in applying its public policy).

49 See, e.g., *Sumitomo Bank Ltd v Thahir* [1993] 1 SLR 735, aff'd sub nom *Thahir v Pertamina* [1994] 3 SLR 257.

50 See, e.g., *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717.

51 *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1987) 8 NSWLR 341, aff'd, (1987) 10 NSWLR 86, aff'd, (1988) 165 CLR 30.

52 cf. the references in n 45.

may have a legitimate concern in not wishing to condone (and in wishing actively to reverse) enrichment by conduct which is universally regarded as heinous or immoral. There may be a sufficient impact on the forum in that, if the court does otherwise, there would be likely to be a pernicious effect on the social fabric of the forum state and/or damage to the external relations of the forum state with other countries (or alternatively the jurisdictional fact(s) may assist in demonstrating an interest). This might include cases of restitution against thieves[53] or against persons who obtain an enrichment by fraudulent misrepresentation or physical violence practiced on (including by murdering) the original owner.[54] Also included may be some situations where public policy is used to deny restitution; for instance where a claimant for restitution was *in pari delicto* with a scheme to commit deliberate criminal acts contrary to the law of the forum or of a 'friendly foreign state',[55] or with a scheme to evade by deception the criminal laws of the forum or of a friendly foreign state.[56] This issue demands further attention as the case law develops.

The interests tentatively offered above should not be construed like a statute. The process of identification of interests should not be subordinated to arid and legalistic debates about whether, say, a party was a 'resident' (at all or as opposed to having some other substantial personal connection) or whether the forum was the 'place of enrichment' (at all or at any specific time). Such debates should give way to consideration of the public policy in question and the rationale underlying that public policy.

V. Forum law denies restitution

1. Deliberate commission of illegal acts

A notable instance of public policy leading to the application of forum law to deny restitution is where the enrichment arises in the course of the commission of an illegal act in which the claimant was *in pari delicto*. The deliberate commission of illegal acts is contrary to public policy, not so much on the ground of comity as the fact that such conduct is immoral. One scenario is where the enrichment arises in the course of commission of an act in the forum state which is an offence by forum law.[57] Although the question of forum connection is unclear, it seems at least arguable that no particular forum *nexus* should be required other than that involved in the commission of the offence and that required for jurisdiction. This is because the rationale of the policy is that the courts are not inclined to lend their aid to a party who founds its cause of action on an illegal and immoral act. This policy objection is not raised for the sake of the party from whom relief is sought but rather because of the courts' unwillingness to lend their aid to the party seeking relief.[58]

Another scenario is where the claimant has deliberately set out to do, or procure the doing of, an act in a 'friendly foreign state' which is illegal by the law of that state and

53 Cf. *Cranstown v Johnston* (1796) 3 Ves Jun 170 at 183, 30 ER 952 at 959; *Butterfield v Negales Copper Co* 80 P 345 (Ariz 1905). cf. also *Massie v Watts* 10 US 148 (1810) (6 Cranch) (jurisdiction only).

54 Cf. *National Commercial Bank v Wimborne* (1978) 5 BPR 11,958.

55 Cf. *Foster v Driscoll* [1929] 1 KB 470 at 510.

56 Cf. *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301.

57 Cf. cases applying public policy *interne: Holman v Johnson* (1775) 1 Cowp 341, 98 ER 1120 and *Pellecat v Angell* (1835) 2 CM & R 311, 150 ER 135 (assumpsit for goods sold and delivered under foreign contracts, where claimant knew of, but did not participate in, the buyer's plan to smuggle the goods into England without paying duty). In *Holman*, 343, 1121, Lord Mansfield seemed to suggest *obiter* that the forum public policy against illegality would be applied irrespective of whether a foreign law upheld relief. The suggestions in *Holman* and *Pellecat* that public policy is not inflamed by violation of revenue laws are obiter and have since been doubted: *Foster v Driscoll* [1929] 1 KB 470 at 516–19; *Regazzoni v KC Sethia* (1944) Ltd [1958] AC 301 at 322, 324, 329, 330; Mann, FA, n 13, at 131–2.

58 *Holman v Johnson* (1775) 1 Cowp 341 at 343, 98 ER 1120 at 1121.

the enrichment arose in the course of carrying out that plan.[59] Again a public policy issue arises in this context more because of the immorality constituted by the contravention of the foreign law than by reason of comity. Indeed, if the forum does not consider the acts immoral (for instance because it considers the foreign law itself to be contrary to public policy), then the public policy principle will not be invoked and the claimant will not be denied relief.[60] Although the necessary forum connection is unclear, it is arguable that no particular forum *nexus* should be necessary (other than that required for jurisdiction).

An English case illustrates the second type of scenario (illegality by foreign law).[61] It involved a contract the common object of which was to smuggle whisky into the United States during Prohibition. The contract was made in England between a spirit merchant (resident in Scotland, and carrying on business in England and Scotland) and several Englishmen. Under the contract, the spirit merchant was to supply the whisky, in Scotland, from where the syndicate were to ship the whisky to the United States for sale there at a large profit. As agreed, one of the syndicate members sent bills of exchange to the spirit merchant to secure the cost price of the whisky. The project failed because of the inability of another member of the syndicate to come up with promised finance. The drawer of the bills of exchange brought proceedings in England against the spirit merchant and other syndicate members claiming restitution of the bills of exchange. The English Court of Appeal denied relief, applying English law. It was held contrary to English public policy to assist a person to recover benefits transferred under a contract, the object of which was to profit from the commission of a criminal offence in the United States, a friendly foreign state, by acts to be committed there. In that case, the decision on public policy was strictly a decision on English municipal law (public policy *interne*), in which United States law was considered as a datum.[62] However, the reasoning suggests that public policy *externe* would have been infringed (and restitution denied by application of forum law) even had the claim fallen for determination under the law of a third country which upheld restitution:

> The ground upon which I rest my judgment that such a partnership is illegal is that its recognition by our Courts would furnish a just cause for complaint by the United States Government against our Government (of which the partners are subjects), and would be contrary to our obligation of international comity as now understood and recognized, and therefore would offend against our notions of public morality.[63]

2. Fraudulent evasion of a law

Similarly, to evade by means of deception the law of the forum or of a 'friendly foreign state' also raises a public policy issue.[64] The question of when the forum has an interest in applying this public policy is unclear, but it is arguable that no particular forum *nexus* should be required other than (if the law allegedly invaded is that of the forum) connecting facts relevant to establishing the fact of the evasion, as well as (in all cases) the nexi required for jurisdiction. A hypothetical illustration of how restitution might be denied in such circumstances is as follows:

59 Cf. *Foster v Driscoll* [1929] 1 KB 470; *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301. Cf. also *De Wütz v Hendricks* (1824) 2 Bing 314, 130 ER 326, where the act was not committed in the territory of the state by whose laws the act was illegal.

60 *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301 at 320, 325, 330; Mann, FA, 'Illegality and the Conflict of Laws' (1958) 21 *Mod L Rev* 130 at 132–4.

61 *Foster v Driscoll* [1929] 1 KB 470.

62 English law was plainly the proper law of the contract. The contract was made in England, mostly between Englishmen, and England was, in part, the place of performance. The proper law of the contract is ordinarily the appropriate governing law for claims between parties to a contract for restitution of benefits transferred pursuant to the contract: see *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152.

63 *Foster v Driscoll* [1929] 1 KB 470 at 510 (per Lawrence LJ). It is suggested that the reference to 'public morality' in this passage is sufficient (without the necessary link to 'comity') to explain the public policy concern.

64 Cf. *Regazzoni v KC Sethia* (1944) Ltd [1958] AC 301; Mann, FA, n 60.

D, a resident of State A, decides to manufacture electrified shields and batons for export to third world dictatorial regimes. By the law of State A, it is a criminal offence to manufacture in and export from State A, 'security' devices. D enters into a partnership with P, a resident of State B, the common object of which is to evade the State A law. The business is established in State B, where the manufacturing and exporting of such products is not illegal, and is run at that end by P. D remains in State A to solicit orders. After a series of highly remunerative sales, D misappropriates the proceeds for himself. P brings proceedings against D in State A for a general accounting of the affairs of the partnership. Under the law of State A, the claim would fail because the transaction was illegal and contrary to public policy *interne*. The claim is maintainable under the law of State B.

Even though State B law would have a claim to be applied,[65] it is arguable that the court should apply forum law to dismiss the claim because of the deliberate evasion of forum law, not so much on the ground of comity, but because of the immorality of the conduct. Similarly, assume that D (after misappropriating the monies) sets up residence in State C and is sued there by P; and that the claim would fail under the law of State C because it has a similar illegality/public policy *interne* defence (which would be invoked by consulting the State A criminal law as a datum). Arguably, the courts in State C should refuse to apply the law of State B and should dismiss the claim (assuming State A is regarded as a 'friendly foreign state'). Arguably, it ought not matter for choice of law purposes that the only forum connection is D's residence in State C, for the forum court is interested not to be seen as assisting P, nor as condoning the immoral and fraudulent evasion of the State A law.[66]

3. Fundamental human rights

Forum public policy may lead to the application of forum law to deny restitution if to allow restitution under a foreign law would be to condone a breach of fundamental human rights. The circumstances in which a forum has an interest in applying its public policy of protecting fundamental human rights are unclear. This may depend upon the particular human right under consideration. It should however be enough if the person affected is a forum citizen and resident and the detriment or restriction is (or would be) occasioned or imposed in the forum. But there may be cases where it is enough that the person whose human rights were or may be infringed is a forum citizen and resident.

In the Australian *Spycatcher* case, the United Kingdom sued Wright, a former British MI5 employee, for an account of profits earned through publishing his memoirs in Australia in alleged breach of his obligation of confidence.[67] Wright, after his retirement from MI5, came to live in Australia where he took up Australian citizenship. It was there (and elsewhere) that he published his memoirs. The United Kingdom Government argued that, under the law of England (where the relationship between the parties had been based),[68] Wright owed an obligation of confidence which prevented him from disclosing, without authorisation, anything learnt by him in the course of his service. That obligation

65 The business was carried on in State B: *Maunder v Lloyd* (1862) 2 J & H 718, 70 ER 1248.

66 It is not suggested that the fact of D's residence is a prerequisite to application of forum public policy. Frequently, but not necessarily, litigation will occur at D's residence by reason of rules of personal jurisdiction. There may be other instances where the forum has an interest in applying the public policy referred to in the text though the court's jurisdiction is enlivened by reason of the submission of the defendant to the court's jurisdiction, or by reason of a 'long-arm' or '*quasi-in-rem*' statute.

67 *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1987) 8 NSWLR 341, aff'd, (1987) 10 NSWLR 86, aff'd, (1988) 165 CLR 30.

68 *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 98, 110, 192–3; (1988) 165 CLR 30 at 49–52.

was argued to be absolute and was said not to depend upon a balancing of the content of what was to be disclosed against the public interest.[69] In the New South Wales Court of Appeal, this argument was rejected on the ground that success under English law, like New South Wales law, depended on a balancing of interests. But there are also suggestions that, even if English law had imposed an absolute duty of silence, forum law would have been applied because to award restitution would be to restrict unduly forum notions of freedom of the press and freedom of speech.

The judgment of Kirby P (as he then was) is particularly illuminating in this regard. His Honour regarded the United Kingdom's claim as an attempt to enforce total silence on Wright in respect of the kind of book he sought to publish (without regard to its contents, nor to any prior disclosure, nor to the public interest in disclosure).[70] He inclined to the view, without deciding, that such a claim was contrary to the 'fundamental public policy' of Australia in protecting freedom of speech and of the press.[71] This point may be somewhat camouflaged because of references elsewhere in the judgment to the '*lex fori*' rule: '. . . as Equity acts in personam and as Mr Wright has submitted to this jurisdiction, it would seem appropriate to apply here the law of this State'.[72] But the separate reference to public policy is unmistakable.

Street CJ seemed to take a similar view. His Honour's first question was to ask whether there was an actionable breach of confidence according to English law.[73] Having found in favour of the British Government on that enquiry, Street CJ then proceeded to inquire into forum law:

> I turn to the second of the three elements that the United Kingdom Government must establish, namely that *the relief which it seeks is of a character which would be recognised in this jurisdiction*. Consideration was given to this particular topic by McLelland J in *United States Surgical Corporation v Hospital Products International Pty Ltd* . . . The relief sought by the United Kingdom against Mr Wright is essentially in personam — a claim to bind his actions wherever he may be. Whilst this entitlement may be established as existing in England according to the relevant principles of English law, it does not necessarily follow that it will be enforced in Australia in the light of relevant principles of Australian law. *If, for example, the foreign right asserted here were a right to enforce a contract to do or refrain from doing something which Australian law either forbids or expressly and absolutely permits, local relief would be withheld. The actual enforcement in Australia of a personal obligation against an Australian citizen and resident must be determined in the light of the relevant principles of Australian law* . . .[74]

Arguably, the requirement that the relief be of a kind available in Australia was intended to address the concern that a claim available under foreign law may infringe forum public

69 The United Kingdom relied on the fact that Wright had signed declarations to that effect under *Official Secrets Act 1911* (UK).

70 *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 138–9. His Honour held (in which respect the High Court affirmed) that the claim was an indirect attempt by the United Kingdom to enforce, in the sovereign territory of Australia, the Official Secrets Act 1911 (UK): at 139–44.

71 See, for example, *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 126, 133, 138–44, 163. Later in his judgment, his Honour went on to find that English law, like Australian/New South Wales law, required governmental plaintiffs to prove detriment to the public interest and that English law allowed the defence of public domain, issues which on the facts he decided against the United Kingdom: at 145–183.

72 *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 151. McHugh JA (as he then was) also referred (without deciding) to the 'generally accepted' *lex fori* view: at 192–3. This reference probably also reflected the concerns identified (in the text herein) by Kirby P and Street CJ.

73 *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 92–93, 98–110.

74 *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 110 (emphasis added).

policy if the result to which foreign law leads would be to restrict unduly freedom of speech and freedom of the press.[75] Street CJ insisted on the application of forum law insofar as it required a balancing of interests. To enforce a duty of total silence according to English law would be to enforce a foreign right to prevent the doing of something which Australian law 'expressly and absolutely permits', namely the exercise of freedom of speech and freedom of the press as understood in the forum. The requirement that forum law 'expressly and absolutely permits' conduct was not used to mean that forum law should apply in every case irrespective of how fundamental the policy on which forum law is based. Rather, it was shorthand for the conclusion in that particular case that public policy was in fact infringed.

Emphasis was placed in the case on the fact that the place of publication of Wright's memoirs was Australia. It is unclear whether this factor was a necessary prerequisite to the application of forum law. Certainly the place of publication was relevant to a domestic law issue in the case.[76] Also, the passage of Street CJ cited refers only to Wright's Australian citizenship and residency.

VI. Forum law upholds (or favours) restitution

1. Obtaining property by fraud, actual undue influence and duress personally perpetrated against original owner[77]

Where property is transferred from plaintiff to defendant, in circumstances where the plaintiff's intention to assign the property is affected by fraud or illegitimate pressure exerted by the defendant, or where the transaction is unfair, or in some cases where there is an inequality of bargaining position between the parties, municipal law may require the defendant to make restitution. The plaintiff may be able to recover the property *in specie* (for instance by a decree of rescission), or there may be a money claim for value of that property or for profits derived by the defendant from the use of the property. In the case of claims for restitution of benefits purported to be transferred pursuant to a contract, the predominant Anglo-Australian view is that the proper law of the contract should apply (irrespective of whether a money award or relief *in specie* is sought).[78] But where the property was not purported to be transferred pursuant to a contract, the appropriate choice of law rule(s) is unclear.

In non-contractual cases, and where the plaintiff seeks a decree of rescission, some

75 In this regard, it seems that Street CJ (like Kirby P) had in mind the issues of public interest and public domain. This is borne out (in part) by the fact that it was conceded that a relationship of confidence had arisen between the parties: at 184. It is also borne out by the fact that Street CJ seemed to consider that the question whether a relationship of confidence had arisen was an issue for English law, because that issue was not proximately related to the forum policy concern: at 98, 110.

76 The ruling of a majority of the New South Wales Court of Appeal was that a governmental plaintiff cannot maintain a claim for breach of confidence resulting from the disclosure of information in Australia by an Australian citizen and resident unless disclosure is contrary to the public interest of Australia. The conflict of laws issues in the case included which law determined whether the claimant had to show that disclosure was contrary to the public interest (and also whether it was a defence to show that the information was already in the public domain)? But the question 'whose public interest?' (Australia, the United Kingdom, or both) was strictly a question of municipal law.

77 This section is intended to deal with 'subtractive unjust enrichment': cf. Birks, *An Introduction to the Law of Restitution*, Clarendon Press, Oxford, 1985, 22 *et seq*, 40 *et seq*.

78 *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152; *Benaim & Co v LS Debono* [1924] AC 514; *International Encyclopaedia of Comparative Law*, vol III, Lando, CONTRACTS [24–218]; Dicey & Morris, n 7, Rule 201(2)(a); Bird, J, n 7, 119–30, 135; Brereton, P, n 9, 142 *et seq*; Stevens, R, 'The Choice of Law Rules of Restitutionary Obligations' in Rose, F (ed), n 9, 191–202. See also American authorities discussed in Stumberg, GW, *Principles of the Conflict of Laws*, 3rd ed, Foundation Press, Brooklyn, 1963, 363–6; and Zaphiriou, GA, *The Transfer of Chattels in Private International Law*, University of London, 1956, 92–6. There is, however, some support for the '*situs* rule': Beale, J, n 14, §§ 218, 239, 257; Beale, J, *Conflict of Laws*, n 26, at 938–9, 953–4, 977–8, 981, 982; Stumberg, GW, ibid; Zaphiriou, GA, ibid (in limited circumstances).

have argued that the *lex situs* should apply because the decree re-vests equitable title in the plaintiff.[79] Beale, the leading advocate of the *situs* rule, was a renowned 'vested rights' theorist. But the reasoning adopted in support of the *situs* rule is also erroneous on other grounds. Advocates of the *situs* rule overlook the significance of the distinction between rights *in rem* and rights *in personam*. As the foreign land cases show, although rights *in rem* should usually be determined in accordance with the *lex situs*, rights *in personam* should not necessarily be subjected to the *lex situs*. Absent questions of tracing, or notice or purchasers for value, a decree of rescission enforces rights *in personam* because it is a right exigible against a particular person (and not against an indeterminate number of persons).[80] For present purposes it is sufficient to suggest that claims to enforce rights *in personam* (including a right to rescission) could be catered for within the framework of a §221 *Restatement (Second)* approach (which seeks to ascertain the local law of the state which has the most significant relationship to the occurrence and the parties, with respect to the particular issue in dispute and having regard to contacts with, and policies and interests of, relevant states).[81] Such an approach may sometimes lead to the application of the law of the *situs*. But it would also be able to cater for cases where some other state has a stronger (or the only) interest in having its law applied. For instance, if the property (even land) the subject of the decree of rescission is situated in State A, and the parties to the litigation are both resident and domiciled in State B, where the transaction was entered into and where the facts giving rise to the entitlement to the decree occurred, State A may have no (or no compelling) interest in having its law applied as compared with State B.

Also deserving of rejection (in situations where there is no contractual relationship) are choice of law tests which have been suggested for restitutionary money claims, including the *lex situs* (in cases involving land) and the 'law of the place of enrichment' (in cases not involving land).[82] The origins of each rule (at least in the common law world) are intertwined with vested rights thinking.[83] Such rules may also be fortuitous and, even with a flexible exception based on objective techniques, are not necessarily capable of addressing the difficult questions of competing policies and interests which influence choice of law outcomes.

But whatever a potentially applicable foreign law might say, enrichment by certain kinds of conduct will raise issues of forum public policy (though whether forum law is ultimately applied will depend upon whether the forum state has an interest in applying its public policy). This includes claims for restitution of benefits (or their value) the transfer of which was induced by the transferee's fraudulent misrepresentation. It should also include claims for restitution of benefits obtained by other types of equitable fraud, including unilateral mistake, actual undue influence[84] and unconscionable or 'catching'

79 See n 78; and Stevens, R, n 78, at 182–3. This view is apparently also adopted by those who would apply the *lex situs* to restitution issues relating to land: Dicey & Morris, n 7, Rule 201(2)(b); McLeod, JG, n 7 (presumption); Bird, J, n 7 (with flexible exception). See also *Warner v Florida Bank & Trust Co* 160 F2d 766 (5th Cir 1947).

80 The proposition in the text assumes that the defendant obeys the decree. For a valuable discussion on the nomenclature of rights *in personam* and rights *in rem*, see Cook, WW, 'The Powers of Courts of Equity' (1915) 15 *Colum L Rev* 37 at 37–54.

81 See Fratcher, WF, *Scott on Trusts*, (4th ed) Little, Brown & Co, Boston, 1989, vol VA, 629–31.

82 Dicey & Morris, n 7, Rule 201(2)(b), (c); McLeod, JG, n 7 (presumption); Bird, J, n 7, 135 (subject to flexible exception).

83 See Beale, J, n 14, §§ 452, 453; Gutteridge, HC, & Lipstein, K, n 14 at 91–2.

84 Although it is unclear, the writer's view is that no public policy issue is raised by cases concerned merely with the question whether there should be a presumption of undue influence where there is no evidence of actual duress or actual undue influence. This is because (absent evidence of actual duress or actual undue influence) failure to rebut such a presumption indicates that the plaintiff did not act out of his/her own independent judgment, not that the plaintiff in fact exercised actual pressure or actual undue influence. *Warner v Florida Bank & Trust Co* 160 F2d 766 (5th Cir 1947) does not provide an unequivocal answer to the question whether cases concerned with the presumption of undue influence necessarily raise a public policy issue, because there foreign law was applied in circumstances where there was minimal connection with the forum and the forum state may not have had an interest in applying its policy.

bargains.[85] Cases of enrichment by some kinds of duress should also raise public policy concerns, including[86] threats to prosecute;[87] and (threats of) physical violence.[88] On the other hand, public policy should not necessarily be aroused just because forum law gives (but foreign law does not) special protection to certain persons or classes of persons (such as married women or infants) as a prophylaxis against coercion or improvidence.[89]

Admittedly, decided support is difficult to find for the upholding of restitution by application of forum law on public policy grounds in cases where the deprived owner seeks restitution against the rogue pursuant to doctrines of the kind referred to in the preceding paragraph.[90] This is probably because the laws of most legal systems require the rogue to give up the ill-gotten gain, and because the rogue frequently transfers the property to third parties and will have become insolvent, and because many such cases settle out of court. But support is to be found in the oft-quoted passages in the foreign land cases that the court will entertain 'jurisdiction' (including to rescind a transaction) where the defendant has enriched himself by fraud 'or other conduct which, in the view of a Court of Equity in this country, would be unconscionable.'[91] Some support is also to be derived from contract and tort cases.[92] Also, there is support at least for the public policy against fraud to be found in the cases discussed below concerning benefits obtained in fraudulent breach of duty, and proprietary claims against the fraudster who has changed the form of the property (as well as proprietary claims against third party transferees), and other cases involving claims against third party transferees taking in fraud of another's rights, or other kinds of equitable fraud.[93]

Although the question of forum connection is unclear, the view was advanced in Section IV that it should be a sufficient interest if the conduct was committed (at least in part) within the territory of the forum and either the person deprived or the enriched person are forum residents; alternatively, if the forum is the place of enrichment or *situs* of the property in dispute (except perhaps if the forum is merely a transient or fortuitous place of enrichment or *situs*). However, some kinds of conduct may be regarded as so obnoxious that the forum has an interest to apply its public policy however slight the forum *nexus*. This might include a situation where a person obtains property by fraudulent misrepresentation personally perpetrated on the original owner. Such conduct is universally condemned. Arguably, it would impact adversely on the social fabric of the forum (if not on the forum's external relations with other states) if the forum were seen as condoning

85 Cf. *Arglasse v Muschamp* (1682) 1 Vern 75, 23 ER 322 (no stated conflict between English and Irish law).

86 It is unclear whether economic duress raises public policy concerns. *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152 does not provide a definitive answer to that question, because in that case forum (English) law was applied as the proper law of the contract.

87 Cf. *Kaufman v Gerson* [1904] 1 KB 591 (contract case); *Société des Hotels Réunis (Société Anonyme) v Hawker* (1913) 29 TLR 578 (bill of exchange case).

88 Cf. *Kahler v Midland Bank Ltd* [1950] AC 24 at 44–5 (tort).

89 The text intends to refer to municipal law rules of the general nature illustrated by cases such as *Bank of Africa Ltd v Cohen* [1909] 2 Ch 129 and *Male v Roberts* (1800) 3 Esp 163, 170 ER 574.

90 But cf. *National Commercial Bank v Wimborne* (1978) 5 BPR 11,958.

91 *Deschamps v Miller* [1908] 1 Ch 856 at 863. For rescission examples, see: *Durham v Scrivener* (1924) 259 SW 606 at 611–12. Cf. *Arglasse v Muschamp* (1682) 1 Vern 75, 135, 237, 23 ER 322, 369, 438; *Kildare v Eustace* (1686) 1 Vern 405, 419, 423, 428, 437, 23 ER, 546, 559, 561, 565, 571; *Angus v Angus* (1736–7) West t Hard 23, 25 ER 800; *Duke v Andler* [1932] SCR 734. In the foreign land cases, it is sometimes difficult to tell whether the courts use the word 'jurisdiction' in the sense of 'power-to-decide' or 'equitable cognisance', or both. Frequently, the use of the word carries both meanings at the same time: the court had power to decide the case if it could issue a decree *in personam* or otherwise act *in personam*; the claim was one over which the court had equitable cognisance according to its own law, because the *lex fori* was the appropriate law for one of a number of reasons: eg. no stated conflict; public policy; the *lex fori* was otherwise the appropriate law. Some cases are, however, concerned only with jurisdiction in the sense of 'power-to-decide'.

92 See n 87, n 88.

93 As well as the cases referred to below, see *Winkworth v Christie Manson and Woods Ltd* [1980] Ch 496 at 501, 510, 514.

such conduct wherever the fraud was committed, and wherever the enrichment was situated, and wherever the parties were resident. In such cases, where a foreign law having a claim to be applied denies restitution, the forum state may have an interest to apply its public policy to uphold restitution whenever the jurisdiction of its courts is properly invoked.

An example might be as follows:

> P, resident in State X, engages D, ordinarily resident and domiciled in State Y, to carry out a construction project for P in State X under a contract governed by the law of State X. P advances to D a pre-payment by depositing it into D's bank account in State Z. D, who never intended to carry out the work, repudiates the contract and refuses to refund the pre-payment. P sues D for restitution in State Y the law of which requires D to make restitution of the pre-payment. By the laws of State X and Z there is no occasion for restitution.[94]

Ordinarily, the proper law of the contract would be applicable to resolve claims for restitution of benefits transferred under a contract. But here, to apply the law of State X (or for that matter the law of State Z) would lead to a result obnoxious to forum public policy against fraud. In those circumstances, the courts of State Y should apply forum law to uphold restitution.[95] It should be a sufficient interest that D is domiciled or resident in the forum, or that the court has jurisdiction over the action. Arguably, the same result should follow in that example if P sues instead in a forum the law of which upholds restitution, where D is not resident/domiciled, and where jurisdiction is able to be attracted, say, by reason of D's transient presence, or submission, or under a 'long-arm' or 'quasi-in-rem' statute.

Some types of duress, such as physical violence, are perhaps also to be regarded as so morally opprobrious that some minimal forum *nexus* will be sufficient (for instance that sufficient to establish jurisdiction).[96] This is because such extreme cases of duress should be treated, for choice of law purposes, no differently from cases of enrichment by fraud perpetrated personally on the original owner. Duress of the person, for instance, is universally condemned. Arguably, for a court to condone such conduct would have a pernicious effect on the fabric of the forum state and there would also be a real possibility of injuring the forum's external relations with other countries.

2. Benefits obtained in fraudulent breach of duty[97]

There is a growing consensus that, as a general rule, claims for restitution of benefits obtained in breach of fiduciary duty or breach of confidence or (where available) breach of contract, should be resolved in accordance with the law governing the pre-existing relationship between the parties (whether or not a §221 *Restatement (Second)* approach is adopted). In the case of enriched trustees, this means the appropriate trust choice of law

94 This situation could arise if, say, P sought to execute a constructive trust over the monies situate in State Z and the laws of States X and Z do not recognise equitable interests, or because P seeks to 'trace' the pre-payment into other property substituted for the pre-payment, and the laws of States X and Z do not recognise a right to 'trace' or a subsisting property interest.

95 Cf. *National Commercial Bank v Wimborne* (1978) 5 BPR 11,958 (discussed below).

96 Although the particular result in *Kaufman v Gerson* [1904] 1 KB 591 has been criticised for want of forum connection (see, eg. Fawcett, JJ, and North, PM, n 45, at 130) it serves to illustrate the possibility that some kinds of pressure may so inflame forum public policy that the forum has an interest in applying its public policy however slight may be the forum *nexus*.

97 The text intends to deal with some of the cases described by Birks as cases of enrichment by 'wrongdoing', and not enrichment by subtraction from the claimant: cf. Birks, P, n 77, at 26.

rule, probably the law governing the administration of the trust.[98] In practical terms, this will be the law designated by the settlor to govern matters of administration,[99] or in the absence of an effective designation, the law with which the administration of the trust is most closely connected.[100] In the case of other fiduciaries or confidants, this means the law governing the relationship out of which the enrichment arose. Where the parties have chosen a law, that choice will ordinarily be respected.[101] Where there is no designation of a law, the predominant view seems to be that the law of the place where the pre-existing relationship was centred should govern.[102] The proper law of the contract should ordinarily govern claims for restitution of benefits obtained in breach of contract.

However, where the benefit has been obtained in fraudulent breach of duty owed to the claimant, and forum law upholds restitution (or is more favourable to the claimant), the application of forum law will be required on the ground of public policy if the forum has an interest in applying its public policy against fraudulent breach of duty.[103] As suggested in Section IV, it should be a sufficient interest if the conduct was committed (at least in part) within the territory of the forum and either the person deprived or the enriched person is a forum resident; alternatively, if the forum is the place of enrichment or *situs* of the property (except perhaps if the forum is merely a transient or fortuitous place of enrichment or *situs*). Other interests may suffice.

A New South Wales case illustrates the application of forum law by reason of the public policy against fraudulent breach of duty.[104] A Connecticut company (United States Surgical Corporation) (USSC) granted an exclusive Australian distributorship to a New South Wales company (Hospital Products International) (HPI), controlled by a former New Yorker who had formerly been the New York distributor for USSC. In New South Wales, USSC sought restitution from HPI of profits earned by selling USSC's products (and products reproduced from the USSC product) under different packaging. The New South Wales Supreme Court did not decide between the law of New York/Connecticut and New South Wales law because each upheld restitution.[105] But the language of the court suggests that, had the law of New York/Connecticut (where the relationship between the parties was centred) denied restitution, New South Wales law was to be applied as a matter of forum public policy:

98 See Cavers, DF, 'Trusts *Inter Vivos* and the Conflict of Laws' (1930) 44 *Harv L Rev* 161 at 164; *Scott on Trusts*, n 81, at 384, 623, 625–629; Graveson, RH, *Conflict of Laws*, (7th ed) Sweet & Maxwell, London, 1974, 537–538; *Hague Trusts Convention*, Art VIII; cf. Barnard, L, n 17, at 482–485.

99 *Hague Trusts Convention*, Art VI; *Kolentus v Avco Corporation* 798 F2d 949 (7th Cir 1986).

100 *Hague Trusts Convention*, Art VII.

101 *Smith v Commonwealth National Bank* 557 A2d 775 (Pa Super Ct 1989); *Kolentus v Avco Corporation* 798 F2d 949 (7th Cir 1986).

102 *Arab Monetary Fund v Hashim* [1993] 1 Lloyd's Rep 543 at 566 (employee); *BJ McAdams, Inc v Boggs* 439 F Supp 738 (ED Pa 1977) (employee); *Maunder v Lloyd* (1862) 2 J & H 718, 70 ER 1248 (partner); *Koster v (American) Lumbermens Mutual Casualty Co* 330 US 518 at 521, 531 (1947) (director); *Aaron Ferer & Sons Ltd v Chase Manhattan Bank* 731 F2d 112 (2nd Cir 1984) (agent); *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766 at 796, 798 (distributor); *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at 98, 110, 192–3, (1988) 165 CLR 30 at 49 (person in service of Crown); *Attorney-General for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129 at 138, [1988] 1 NZLR 166 at 172 (ibid). See Professor Reese's seminal §221 in Reese, n 4. Cf. also Barnard, L, n 17, at 503–6, who argues for an 'equitable wrong' classification.

103 Although it is unclear, it is suggested that breach of purely prophylactic duties (cf. *Keech v Sandford* (1726) Sel Cas Ch 61) do not invoke considerations of forum public policy where the fiduciary did not in fact act for the purpose of benefitting himself or someone other than the beneficiary or otherwise act out of some improper purpose. Thus if an appropriate foreign law required evidence of improper purpose, it may be that such law ought to be applied.

104 *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766.

105 *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766 at 796–9. On appeal, it was common ground that there was no material difference between the potentially applicable laws: [1983] 2 NSWLR 157 at 192; (1984) 156 CLR 41 at 88.

> In some circumstances a court of equity will apply equitable principles as administered by itself to found relief against a defendant subject to its jurisdiction in relation to a transaction governed by foreign law, even if similar principles form no part of that foreign law . . . .
>
> An examination of the instances among these cases of the enforcement of equities other than in respect of the performance of contracts, reveals no precise statement or extended discussion of the conditions (apart from the amenability of the defendant to the process of the court) which attracts the principle that the court will grant relief in accordance with equitable principles as administered in the forum.
>
> However, since the rationale of the availability of relief in such cases is that the court acts in personam to regulate the defendant's conscience, *it would seem sufficient that the defendant while resident within the forum was guilty of conduct which, by offending against those principles, gave rise to the occasion for such regulation* . . . .
>
> *Accordingly, if in the present case HPI, being incorporated and resident in New South Wales, was guilty of conduct in New South Wales which according to equitable principles administered in New South Wales was fraudulent or otherwise unconscionable, then that might well be a sufficient justification for this Court to apply those principles in granting relief.* On this view, although the fact that the proper law of the agreement between HPI and USSC was the law of New York/Connecticut means that the validity and the operation of that agreement, as an agreement, must be determined exclusively according to the law of New York/Connecticut, it would not follow that every incident of the relationship between the parties of which that agreement is one element must be so determined, or that the availability of any particular remedy arising out of facts of which the relationship is one element, must be so determined.[106]

The passage recognises that it would be contrary to forum public policy to apply the otherwise appropriate foreign law to defeat claims for (*inter alia*) restitution where the defendant has enriched itself by fraudulent breach of duty, at least by acts committed in the forum where the defendant is resident in the forum at the time of the breach.[107] Although McLelland J observed that it was 'sufficient' that the defendant offend against the principles of equity administered in the forum whilst resident there, this was only so because he found that HPI's conduct was 'fraudulent or otherwise unconscionable.' His Honour was not suggesting that courts of equity must apply the '*lex fori*' in all cases where the court is called upon to act *in personam* (or to enforce a right *in personam*) in relation to a defendant over which the court has personal jurisdiction.

McLelland J continued:

> A possible view is that the question of the existence and scope of the fiduciary duties relied on should be determined in accordance with the law of New York/Connecticut, and the question of the appropriate remedy for any proved breach thereof determined in accordance with the law of New South Wales. Another possibility is that USSC would be entitled to succeed as against HPI if it could establish the existence of the alleged fiduciary duties (or a right to a constructive trust) under either system of law (although I think that New South Wales law alone would apply in determining the question of the existence of derivative constructive trusts affecting property in the hands of the other defendants).[108]

Although this passage is somewhat elliptical, it seems likely that McLelland J was merely reiterating the same argument in a different way. Thus, on the facts before his Honour, had New York/Connecticut law recognised a fiduciary relationship when the law of the forum did not, or framed the duty in a such a way as to uphold restitution when forum law did otherwise, then New York/Connecticut law would have been applied to such issues because the relationship between the parties was centred there. The mere fact

106 *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766 at 796–8 (emphasis added).

107 The place of enrichment was also the forum, but McLelland J did not need to address the significance of that fact.

108 *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766 at 798.

that the foreign law places higher standards on the defendant than forum law would not offend forum public policy (unless the foreign law or the result to which it leads is otherwise obnoxious). On the other hand, had New York/Connecticut law not recognised a fiduciary relationship or a right to restitution flowing from a breach thereof, when forum law did, then forum law would be applied. This is because to apply foreign law to those issues would be contrary to forum public policy, having regard to the defendant's fraudulent conduct and the impact on the forum state on the facts before his Honour.

To interpret the passage in any other way would be to impute gross error to McLelland J, a conclusion which is not warranted particularly having regard to his Honour's earlier comments quoted above. As to the first sentence of the passage, his Honour cannot be taken to have suggested that the existence or scope of fiduciary duties are always to be determined by, say, the law of the place where the relationship between the parties was centred (when it is foreign). For, as McLelland J's earlier comments demonstrate, such foreign law must give way to forum law when forum public policy is engaged. This would happen, for instance, where the case is one of fraudulent breach of fiduciary duty, where forum law is more favourable to restitution than foreign law and where the forum has an interest in applying its public policy against fraud. Similarly, as to the second sentence, his Honour should not be taken to have suggested that the law which upholds restitution should always be applied. If forum law upholds restitution in a case of, say, non-fraudulent breach of fiduciary duty, but there is no liability to make restitution under some foreign law which would otherwise apply, then that foreign law ought to be applied.

3. Bribery

The practice of bribery raises a public policy issue. If the forum has an interest in having its public policy against bribery applied, forum law will be applied to uphold (or favour) restitution. This should be true whether or not the conduct amounts to a criminal offence in any particular country. A typical scenario is where a fiduciary receives bribes from a third party in return for the exercise of personal influence by the fiduciary in relation to dealings of the third party with the principal. Under the law of many common law countries, the principal may, at his election, seek restitution of the amount of the bribe from the agent (bribee) or from the third party (briber).

Ordinarily, claims by a principal for restitution of benefits received by the fiduciary in breach of duty ought be subjected to the law governing the principal/fiduciary relationship. Similarly, claims by one party to a contract against the other for restitution of mistaken overpayments should ordinarily be governed by the proper law of the contract. These propositions apply where the benefit or overpayment constitutes a bribe, just as they apply to other benefits/overpayments.[109] This should be true whether or not a §221 approach is adopted. However, because of the forum public policy against bribery, forum law should be applied to uphold restitution of bribes irrespective of what the proper law of the principal/fiduciary relationship or the proper law of the principal/briber contract might say, provided the forum has an interest in applying its public policy.

It would appear that the public policy against bribery is a local policy. Bribery is (apparently) not regarded as so morally opprobrious or universally condemned that a court has an interest in applying its public policy against corruption however minimal may be the forum connection.[110] In some countries, rightly or wrongly, corruption is an ordinary part of commercial life. There would need to be some adequate connection with the forum before a court could regard the forum as having an interest in applying its public policy

109 *Arab Monetary Fund v Hashim* [1993] 1 Lloyd's Rep 543.

110 But cf. *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 at 330, a case not involving a stated conflict, where the Privy Council observed: 'Bribery is an evil practice which threatens the foundations of any civilised society.'

in preference to that of a country where players in that market know of and rely on the practice of bribery. As suggested in Section IV, perhaps it is sufficient if either: (a) the principal or the enriched party (whether briber or bribee) is a forum resident (at least at the time of commission of the corrupt acts) and the personal influence was exerted in the forum;[111] or (b) the forum was the place of enrichment or *situs* of the property (except perhaps if the forum was only transiently or fortuitously the place of enrichment or *situs*).[112] In such circumstances, claims for restitution of bribes (against briber or bribee) should be upheld by forum law irrespective of whether a foreign law having a claim to be applied denies restitution. There may be other forum *nexi* which suffice.

A Singapore case illustrates the application of forum law on public policy grounds to uphold a claim against an employee for restitution of bribes where the forum was the place of enrichment.[113] Pertamina, an Indonesian state owned enterprise, had the responsibility of developing an industrial steel complex in Indonesia. Pertamina engaged two German contractors to work on the project. The contractors paid bribes to an employee of Pertamina, General Thahir, who was an Indonesian national and resident. The bribes were paid in return for preferential treatment for the contractors in relation to their dealings with Pertamina. The bribes were credited to General Thahir's account with a bank in Singapore. Thahir later transferred the funds to a joint account[114] with his wife in the same bank, where they remained for some twenty years until Thahir's death.

Pertamina sought restitution of the bribes in Singapore interpleader proceedings instituted by the bank against *inter alia* Thahir's estate.[115] Indonesian law had a strong claim to be applied because Thahir's enrichment arose in the course of an employment relationship which was based in Indonesia, where Pertamina and Thahir were resident and where Thahir carried out his duties.[116] However, the Singapore High Court and Court of Appeal applied Singapore law to uphold the claim (to recover the bribe as monies had and received to Pertamina's use).[117] Each court resorted to the 'place of enrichment' rule to reach this result.[118] But the fact that Singapore was the place of enrichment could not have been enough, by itself, to justify that result. Let us assume that the place of enrichment was some third country, under the law of which there was no occasion for restitution, and that Indonesian law upheld restitution of bribes. Is it seriously contended that the Singapore courts (if jurisdiction could be attracted) would (or should) have applied the law of that third country to deny restitution? Alternatively, let us assume that there had been no bribe contract, but that Thahir received from the German contractors *ex gratia* payments which did not in fact lead to any preferential treatment for the contractors. Is it suggested that the Singapore courts would have (and should have) applied their law if it upheld restitution and if the law of the place where the employment relationship was based (Indonesia) denied it? Surely this cannot be so. Singapore law was applied in the case under discussion because of the forum's public policy against bribery; and because the forum had an interest

111 Cf. *Lemenda Trading Co Ltd v African Middle East Pertoleum Co Ltd* [1988] 1 QB 448 at 458–61 (contract case); *Oscanyan v Arms Co* 103 US 261 at 276–8 (1880) (contract case); *Arab Monetary Fund v Hashim* [1993] 1 Lloyd's Rep 543 (forum had no interest in applying its public policy).

112 *Sumitomo Bank Ltd v Thahir* [1993] 1 SLR 735, aff'd sub nom *Thahir v Pertamina* [1994] 3 SLR 257.

113 Note 112.

114 *Sumitomo Bank Ltd v Thahir* [1993] 1 SLR 735 at 761, 770.

115 *Sumitomo Bank Ltd v Thahir* [1993] 1 SLR 735 at 756. Pertamina also brought equitable claims against Thahir's widow based on her 'knowing receipt' of trust assets and to trace the trust assets into her hands.

116 Moreover, negotiations for the bribe contract took place, and the bribe contract was concluded, in Indonesia (and Germany) and Thahir exercised his corrupt influence in Indonesia: *Sumitomo Bank Ltd v Thahir* [1993] 1 SLR 735 at 769. Also, at least some of the bribes constituted cheques handed to Thahir in Indonesia which he then deposited into the Singapore bank: *Sumitomo Bank Ltd v Thahir* [1993] 1 SLR 735 at 778, 779.

117 The High Court held that Thahir's estate was also liable under Indonesian law: id at 812–17. But both at first instance and on appeal, the decision on choice of law was treated as determinative of the outcome: see [1994] 3 SLR 257 at 281.

118 [1993] 1 SLR 735 at 785–7; [1994] 3 SLR 257 at 269–76.

in applying its public policy — Singapore was not only the place where the enrichment was received, but also it was and remained the place of enrichment at the time of litigation some twenty years later.[119] Had this public policy element not been present in the case, the application of Singapore law could not have been warranted.

In an English case, restitution of a bribe was denied in circumstances where foreign law was applied.[120] But this was because the forum had no interest in having its public policy against bribery applied. The Arab Monetary Fund ('AMF'), based in Abu Dhabi, claimed from its agent (Hashim), and also from two building companies, restitution of bribes paid by the building companies to the agent's Swiss bank account. The bribes induced the agent to exert influence to ensure that the AMF awarded an Abu Dhabi building contract to the building companies (an English company and its Gulf subsidiary). Abu Dhabi law was the appropriate law as to both claims; in the case of the building companies because of an express choice of law in the building contract; and in the case of the agent because at the time of the enrichment both the AMF and the agent were resident in Abu Dhabi and the enrichment was connected with a pre-existing relationship between the parties (principal/agent) which arose and was performed there.

The English company and Hashim had a personal connection with England at the time of the litigation and there is some suggestion that the bribe contract was concluded there. English law upheld restitution, but the English court applied Abu Dhabi law under which there was no occasion for restitution. No public policy argument was made in the case.[121] But in any event there was no basis in the case for the forum imposing its notions of domestic law over those of Abu Dhabi law. The bribe was paid in Switzerland, and the personal influence was exerted in Abu Dhabi, where the AMF was resident. At that time, the briber (English company and its Gulf Subsidiary) and bribee (Hashim) each had substantial personal connections with Abu Dhabi and each relied on the fact, of which the AMF was well aware, that secret commissions were an ordinary part of commercial life in Abu Dhabi.[122]

4. Other unconscionable or immoral conduct

A public policy issue will be raised where a defendant's enrichment was obtained by other kinds of unconscionable or immoral conduct, and forum law upholds restitution when foreign law does not, or forum law provides a more favourable right to relief than foreign law. Again, whether in these circumstances forum law is applied will depend on whether the forum state has an interest in applying its public policy against unconscionable or immoral conduct. A fertile source of public policy issues in this context is the field of constructive trusts.[123] Some constructive trusts should be put to one side for present purposes. This section is not concerned with constructive trusts insofar as they involve the

119 See [1993] 1 SLR 735 at 788, 790, where Lai Kew Chai J emphasised that the property in dispute was in the forum. Perhaps it was also significant that Thahir had purposefully availed himself of the bank in Singapore as a part of a scheme to avoid detection. See [1994] 3 SLR 257 at 275 (Thahir 'had been actively using Singapore as the collection centre for the bribes'). At first instance, his Honour had the opportunity to decide the public policy point, which was argued before him, but unfortunately failed to do so: at 763, 812.

120 *Arab Monetary Fund v Hashim* [1993] 1 Lloyds Rep 543.

121 *Arab Monetary Fund v Hashim* [1993] 1 Lloyd's Rep 543 at 566 (column 2).

122 *Arab Monetary Fund v Hashim* [1993] 1 Lloyds Rep 543 at 555, 559–62, 575.

123 It is this field with which the present section is concerned, though it is not intended to suggest that only claims to execute constructive trusts can arouse public policy concerns. The same public policy concerns could arise in restitutionary money claims at common law, say, against a thief, or in a claim in equity to compel a constructive trustee who knowingly received property to account for the value of the property. Moreover, the text does not intend to delimit the kinds of conduct which may arouse public policy concerns. Query in this respect: deliberate or malicious damage to property; 'powerlessness' (cf. Birks, n 77, at 141, 174); and discriminatory confiscation of property by foreign governments (*Banco Nacional de Cuba v First National City Bank of New York* 270 F Supp 1004 (SDNY 1967), 406 US 759 (1972), 478 F2d 191 (2nd Cir 1973); *Banco Nacional de Cuba v Chase Manhattan Bank* 505 F Supp 412 (SDNY 1980), aff'd except as to measure of recovery, 658 F2d 875 (2nd Cir 1981).

determination of rights *in rem* in property. Nor is this section concerned with constructive trusts arising or enforced upon breach of a fiduciary or confidential relationship. These are dealt with elsewhere in this paper. This section is concerned with constructive trusts which arise to prevent a defendant, who has obtained or retained title to property in circumstances amounting to 'fraud or unconscionable conduct', from setting up legal title to that property in order to deny another's beneficial interest in such property. Constructive trusts which arise because the defendant has induced the plaintiff to assign his property to the defendant by fraudulent misrepresentation, undue influence and related doctrines have been dealt with in a separate discussion above, although on one view they are really just another manifestation of equity acting (including by imposing a constructive trust) to prevent fraud or unconscionable conduct.

The appropriate choice of law rule(s) for constructive trusts (of the kind considered in this section) is unclear. Historically, the courts have usually applied their own law in constructive trust cases. One reason why forum law is commonly applied is that few constructive trust cases involve stated conflicts between opposing laws, with the result that forum law is applied in its residual function. Another reason why forum law has been applied is forum public policy. To allow a defendant, by recourse to foreign law, to keep an enrichment obtained or retained by fraud or other unconscionable conduct infringes forum public policy if the forum has an interest in applying its public policy.[124] This is demonstrated by the oft-quoted statements in the foreign land cases which speak of courts of equity entertaining 'jurisdiction' over claims arising from fraud 'or other conduct which, in the view of a Court of Equity in this country, would be unconscionable.'[125] Thus there has been little need to develop a separate choice of law rule for constructive trusts. Where a public policy issue is present, the courts tend to decide the case in accordance with forum law without separately addressing whether there is a choice of law 'rule' for constructive trusts which might otherwise have applied. The further question is usually irrelevant.

Constructive trust cases will arise (though infrequently) when no issue of forum public policy is involved and the further choice of law decision needs to be made. For instance, foreign law may provide restitution but forum law does not (or foreign law may provide a more favourable right to relief).[126] For such cases, the writer's preference is for a test in the nature of the §221 *Restatement (Second)* 'most significant relationship' test, which takes into account the contacts with, and the policies and interests of, relevant states. The law having the most significant relationship to the claim will not necessarily be the *lex situs* (even in cases concerning land),[127] or the 'common domicile' of the parties;[128] although those factors may be given significant weight in particular cases.

Conceivably, an Anglo-Australian court might seek to fit the claim within existing categories. For instance, some constructive trusts may be subjected to choice of law rules

124 This point is ignored by commentators who go about inventing multilateral choice of law rules for constructive trusts without apparently recognising that in many cases the forum has an overriding interest in applying its own law. For instance, Dicey & Morris would apply the place of enrichment test, except apparently when the property is land (when the *lex situs* is said to apply): n 7, at 1097, 1476–1477. Bird, J, n 7, seems to adopt the law of the pre-existing relationship or (if no pre-existing relationship) the place of enrichment or (if the claim relates to land) the *lex situs*; but adds a flexible exception including where another law is clearly more appropriate: at 79–83, 135. See also Stevens, R, n 78, at 216; McLeod, JG, n 7.

125 *Deschamps v Miller* [1908] 1 Ch 856 at 863. This and similar passages use the term 'jurisdiction' in each of its two senses: power-to-decide and equitable intervention on the merits. In other words, the point is both that there is jurisdiction where the remedy is *in personam*, and also that forum law will be applied on public policy grounds where *inter alia* the defendant has enriched himself by fraud or other unconscionable conduct.

126 See, e.g., *Rudow v Fogel* 426 NE2d 155 (Mass App Ct 1981).

127 Note 126. It overstates the significance of the *situs* to regard (as do, e.g., Dicey & Morris, n 7, Rule 201(2)(b); McLeod, JG, n 7; Bird, J, n 7) the *lex situs* as necessarily or presumptively applicable to determine rights *in personam* arising in connection with land.

128 *Ex parte Pollard* (1840) Mont & Ch 239 at 251; Stevens, R, n 78, at 216, citing, *inter alia*, *Pettkus v Becker* (1980) 117 DLR (3d) 257 at 278.

for trusts (or a synthesised rule such as the proper law of the constructive trust).[129] Beale (and his intellectual descendants) have advocated the '*situs* rule' for constructive trusts (especially in cases involving land), on the ground that the question is one of beneficial ownership of property.[130] The *lex situs* may be appropriate in some cases (and note that we are here concerned with constructive trusts to enforce rights *in personam*), including those involving 'knowing receipt' of land by a third party transferee.[131] But the *situs* rule ought not to prevail as a blanket (or presumptive) rule.[132] The origins of the *situs* rule are tainted with Beale's 'vested rights' brush. His *situs* theory also suffered from a failure to appreciate the significance of the distinction between rights *in personam* and rights *in rem*.[133] Unfortunately this confusion has been endorsed by modern commentators who maintain that claims for restitution involving land should necessarily or presumptively be governed by the *lex situs*, even cases concerned with rights *in personam* and not rights *in rem*.[134] Some have advocated the 'law of the place of enrichment' (at least where land is not involved).[135] This rule too should be rejected. At least in the common law world, the origins of the 'place of enrichment' test are also intertwined with the theory of 'vested rights.'[136] It also lacks justification on other grounds. A 'place of enrichment' may be fortuitous and (even with a flexible exception based on objective techniques) does not necessarily allow for difficult questions of competing policies and interests which influence choice of law outcomes to be openly addressed.[137]

129 Cf. constructive trust cases not involving a stated conflict: *Rochefoucauld v Boustead* [1897] 1 Ch 196 at 208; *Gorash v Gorash* [1949] 4 DLR 296 at 298, 301, 302. *The Hague Trusts Convention* may apply to voluntarily created constructive trusts if they are evidenced in writing: Hayton, David, 'The Hague Convention on the Law Applicable to Trusts and on their Recognition' (1987) 36 ICLQ 260 at 262–266; *Recognition of Trusts Act 1987* (UK), s.1(2). 'Proper law of the trust' refers to the law expressly or impliedly chosen by the parties or the system of law with which the trust has its closest and most real connection.

130 See, e.g., Beale, J, n 14, §§ 239, 240; Beale, J, *Conflict of Laws*, n 26, 953–62, and also in 'Equitable Interests in Foreign Property' (1906) 20 *Harv L Rev* 382; *Weston v Stuckert* 329 F2d 681 (1st Cir 1964); Dicey & Morris, n 7, Rule 201(2)(b) (immovables); Zweigert, K & Müller-Gindullis, D, n 9, [30–23], [30–35], [30–36]; McLeod, JG, n 7 (land, presumption); Bird, J, n 7, at 79–82, 116–119, 135 (land, subject to flexible exception).

131 See *Scott on Trusts*, n 81, at 638–640; *Campbell v Albers* 39 NE2d 672 (III App Ct 1942).

132 It is well to remember that Beale had also championed the view that the *lex situs* governed the creation and validity of express, *inter vivos* trusts: Beale, Joseph, *Conflict of Laws*, n 26, 962–964, 1018–1019. That view is now obsolete: see Cavers, DF, n 98, at 161 *et seq*.

133 Beale failed to draw correctly the line between rights *in rem*, to be resolved (ordinarily) by the *lex situs*, and rights *in personam*, to be resolved by some other choice of law principle. Beale incorrectly assumed (as do his intellectual descendants) that as a general rule all equitable interests in property must be determined in accordance with the *lex situs*. Beale recognised an exception where the court is executing (what he referred to as) a constructive trust by way of remedy for 'a mere breach of personal obligation': (1906) 20 *Harv L Rev* 382 especially at 384–6; *Conflict of Laws*, n 26, especially at 954–5. Beale thus accepted that claims to enforce rights *in personam* should not necessarily fall to be determined by the *lex situs*. But he adopted an unduly narrow view of the claims which involved rights *in personam*, namely, where equity is enforcing a 'remedy for a tort or breach of contract': see (1906) 20 *Harv L Rev* 382 at 384; *Conflict of Laws*, n 26, at 954; Beale, J, n 13, § 218, Comment (g). It seems that, according to Beale, all other constructive trusts involved the 'creation of equitable interests in land' and were thus necessarily subjected to the *lex situs*: see, e.g., (1906) 20 *Harv L Rev* 382 at 384, 386; Beale, J, n 14, § 239. Although in a practical sense, some claims to enforce equitable rights *in personam* effectively create or enforce equitable interests in property, Beale's theory is wrong because choice of law analysis has traditionally depended and still depends upon the distinction (as understood by equity lawyers) between rights *in personam* and rights *in rem*; and not on whether the effect of the decree (or obedience to the decree) is to create or adjudicate equitable interests or title in property. This point tends to be overlooked. For a valuable discussion on the nomenclature of rights *in personam* and *in rem*, see, Cook, WW, n 80.

134 See, e.g., Dicey & Morris, n 7, Rule 201(2)(b); McLeod, JG, n 7 (presumption); Bird, J, n 7, especially at 79–83, 135 (subject to flexible exception).

135 Dicey & Morris, n 7, Rule 201(2)(c); McLeod, JG, n 7; Bird, J, n 7, at 79–82, 113–16, 135. See the discussion in Zweigert, K and Müller-Gindullis, D, n 9, [30-4]–[30-14].

136 Beale, J, n 14, §§452, 453; Gutteridge, HC, and Lipstein, K, n 14, especially at 91–2.

137 Some issues in constructive trust cases may be resolved in accordance with the law governing an incidental question. An illustration is where the defendant is charged with knowing receipt of land in fraudulent breach of a will trust and the defence is raised that the defendant was the proper beneficiary of the landed estate under the will. Cf. *Innes v Mitchell* (1857) 4 Drew 57, 62 ER 22.

Whatever foreign law might have a claim to be applied, forum law will be applied to uphold (or favour) restitution if the forum state has an interest in applying its public policy against unconscionable or immoral conduct. Cases which raise public policy issues include those where a defendant stole the property comprising the enrichment, or obtained the property by some other immoral act such as by murdering the owner; or where a defendant has (after taking a transfer of legal title) failed to honour a previous commitment to the original owner to hold the property for that person's or another's beneficial use; or where a defendant has received property transferred in breach of trust or breach of fiduciary duty with (at least actual) knowledge of the breach and in circumstances where the defendant cannot be described as having acted *bona fides*.[138] If the forum state has an interest in applying its public policy, forum law will be applied to issues proximately related to the forum policy.[139] As suggested above, it should be a sufficient interest that the conduct was committed (at least in part) in the forum and the deprived party or the enriched party is a forum resident; alternatively it should be sufficient that the forum is the place of enrichment or the *situs* of the property in dispute (except perhaps if the forum is the place of enrichment or *situs* merely transiently or fortuitously). Other interests may also suffice. Moreover, there may be some cases involving conduct so universally regarded as heinous and morally culpable that the courts should be willing to reverse the defendant's unjust enrichment however slight the forum connection (as long as the court's jurisdiction is properly invoked). Conceivably, this could include cases where the defendant has stolen the plaintiff's property, or has succeeded to property by murdering the deceased.
An example of enrichment by theft might be as follows:

> A is a resident of State X. In that state she has a sizeable account/credit limit with B, a bank which carries on business in State X. C, a resident of State Z, uses the Internet to 'hack' into B's computers thereby obtaining monies which C transfers to an account in State Y in his (C's) name (or in the name of a $2 company controlled by him). Five years later, A and/or B identify the account in which some of the monies remain. They are desirous of seeking restitution of the monies (or what is left of them).

By the laws of States X and Y, there is no occasion for restitution; whereas restitution is available under the law of State Z.[140] A and/or B sue C in State Z, where jurisdiction is able to be attracted by reason of C's residence/presence there. The law of the 'place of enrichment' or the *lex situs* would result in the application of the laws of State X and/or State Y. But it would be surprising to believe that any court would allow C to walk away

138 Whilst it is unclear, it is doubtful whether forum public policy is concerned with anything less than actual knowledge (or reckless disregard) of the breach. Plainly, there should be no public policy issue where the defendant merely had 'constructive' knowledge in the sense of negligent failure to inquire. However, in some cases, 'imputed' knowledge may give rise to the kind of equitable fraud which offends public policy, because the defendant is presumed to have actual knowledge of the fraud by reason of the actual knowledge of a servant or agent: see *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717, on appeal [1994] 2 All ER 685, on remand [1995] 2 All ER 213 (discussed below). The further rider that the defendant's conduct must not have been *bona fides* removes from the purview of public policy those cases where, although the defendant took with knowledge of the claimant's rights, the defendant acted for the purpose of protecting its own legitimate rights and was not otherwise implicated in any fraud *vis-à-vis* the claimant.

139 Forum law will not override an otherwise appropriate foreign law on public policy grounds in relation to an issue which is not proximately related to the forum policy concern. An example is the scenario in note 137. In that example, the principles governing the right to restitution are closely related to forum public policy against fraud. But whether the defendant is in fact the proper beneficiary should be determined by the choice of law principles governing succession to property.

140 This might occur because (say): A and/or B seek to execute a constructive trust and the law of States X and Y do not recognise such trusts because of the absence of a fiduciary relationship; or A and/or B seek to 'trace' into property substituted for the stolen monies, and the law of States X and Y do not recognise a right to trace or a subsisting property interest in the product.

'scot free' with the fruits of his theft. Commonsense suggests that the courts of State Z should apply their own law to uphold restitution because to apply foreign law would offend the forum's public policy against theft.[141]

An English case illustrates the application of forum law on public policy grounds to uphold restitution against a thief.[142] An English creditor agreed to accept arrangements offered by his debtor (also English) to secure the debt. In breach of the arrangement, the creditor proceeded behind the debtor's back and obtained (at an undervalue) a valid title to the debtor's estate on the island of St. Christopher according to the law prevailing there.[143] Although the true value of the estate greatly exceeded the amount of the debt, the creditor claimed that under St. Christopher law he was absolutely entitled to the estate and he refused to treat the estate as security for the debt. The Court of Chancery, applying its own law, allowed the debtor to redeem the estate. There was a strong forum connection in the case. The claim was effectively to execute a constructive trust as between English subjects, domiciliaries and residents[144] in connection with a debtor/creditor relationship between the parties which arose in England, in circumstances where some misleading representations had been made in England. Whatever other choice of law principle might also support the decision,[145] observations in the case suggest that English law was applied because it was contrary to forum public policy to allow the creditor to enrich himself by misappropriating the debtor's property:

> . . . this creditor has availed himself of the advantage, he got by the nature of those laws, to proceed behind the back of the debtor on a constructive notice, which could not operate to the only point, to which a constructive notice ought, that there might be actual notice without willful default: that he has gained an advantage, which neither the law of this nor of any other country would permit. I will lay down the rule as broad as this: this Court will not permit him to avail himself of the law of any other country to do what would be gross injustice . . . I have no scruple to say in this cause, it would be unconscionable to permit the Defendant to avail himself of the laws of [St. Christopher] to procure this estate for any other purpose than to pay him his own debt.[146]

The English forum was sufficiently interested to apply its public policy against theft because the parties (or either of them) were English domiciliaries and residents and (on one view) the fraud was committed in part in the forum. Perhaps it was sufficient that the parties had a common domicile/residence in the forum. But having regard to the strength of the language used, it seems reasonable to infer that the same result would have followed

141 It is not intended to suggest that it is a precondition to the application of forum public policy against theft (or indeed against other unconscionable conduct) that the defendant be a forum resident. In many cases, it may so happen that the defendant is a forum resident, because of the rules of personal jurisdiction. However, arguably a forum should have an interest in applying its public policy against theft (even though the defendant is not a forum resident) however slight the forum connection, such as when the court's jurisdiction is enlivened by the defendant's mere transient presence in the forum, or by reason of the submission of the defendant to the court's jurisdiction, or by reason of a 'long-arm' or '*quasi-in-rem*' statute.

142 *Cranstown v Johnston* (1796) 3 Ves Jun 170, 30 ER 952.

143 The creditor obtained a judgment against the debtor in St Christopher proceedings, notice of which was given by leaving one copy of the writ and pleadings at the freehold and another nailed up at the court-house door. The creditor thereupon purchased the St Christopher estate at an undervalue at a court ordered sale.

144 The creditor was resident in England at all times. The debtor was ordinarily resident in England, and was so resident when the debt between the parties was contracted and at the time of the litigation although he was abroad in between those times.

145 Cf. the passage in *Cranstown v Johnston* (1796) 3 Ves Jun 170 at 182-3, 30 ER 952 at 959: '. . . with regard to any contract made or equity between persons in this country respecting lands in a foreign country, particularly in the *British* dominions, this Court will hold the same jurisdiction, as if they were situated in *England*.' Strangely, Dicey & Morris would appear to argue that St Christopher law ought to have been applied: n 7, Rule 201(2)(b). Some others, by favouring a presumption in favour of the *lex situs*, or by applying the *lex situs* subject to a flexible exception, leave open the possibility that, in cases like *Cranstown*, St Christopher law might be applied: see, e.g., McLeod, JG, n 7; Bird, J, n 7.

146 *Cranstown v Johnston* (1796) 3 Ves Jun 170 at 183, 30 ER 952 at 959.

even if the debtor had been a resident of St. Christopher (or of some third country)[147] and possibly even if the frauds had been committed entirely outside of England.[148] In the writer's view, misappropriation of property is conduct so opprobrious that the forum state should have an interest in applying its public policy merely because its courts are called upon to act.

Another English case involved a claim to execute a constructive trust against a transferee of foreign land who took expressly subject to and paid a reduced price because of the rights of third parties.[149] In this case, English law was applied on public policy grounds to prevent enrichment by equitable fraud, in lieu of a foreign *lex situs*. English residents purchased debentures in a Connecticut company to fund the exploitation of land in Mexico owned by that company. The investment was made in England. The debenture prospectus and debentures were issued in England by an English trustee company, acting as agent for the Connecticut company. By a debenture trust deed executed at least in part in England, the Connecticut company purported to charge the Mexican land in favour of the debenture holders. The charge was never registered in Mexico and was not effective in Mexican law. Later, another English company purchased the Mexican land from the Connecticut company. The contract of sale and the transfer were executed in England. The transfer was duly registered in Mexico. The contract of sale and the transfer were expressed to be subject to the charge and (in both the contract and the transfer) the purchaser expressly assumed liability under the debenture deed. The purchase price was reduced on that account. The English company/purchaser later set up its title under Mexican law to repudiate the debenture holders' interests in the land.

In interlocutory proceedings for appointment of a receiver of the rents and profits of the land, the English Chancery Division applied English law to recognise that the English purchaser was bound by the charge and was obliged to take all steps necessary to effect the registration of the charge at the *situs*. After referring to *Cranstown v Johnston*,[150] North J observed:

> . . . it would be most *unconscionable* to allow the Defendants [the English company/purchaser] here, who have registered their assignment in Mexico subject to the obligations created in favour of the Plaintiffs, who have obtained the land at a consideration measured to some extent by the existence of those obligations and the taking by the *English Company* [the purchaser] upon themselves of the burden of satisfying those obligations; in my opinion it would be as *unconscionable* as anything could be to say now, because they had registered their transfer before the hypothecation of the Plaintiffs had been registered, they are at liberty to set the Plaintiffs at defiance altogether. It was said that the case I have cited [*Cranstown v Johnston*] went upon fraud. Such a fraud as there was in that case I think would equally exist in the present case . . . .[151]

Public policy apart, Mexican law would have been applicable with the result that restitution would have been denied. Since the case involved competing title to land, and in particular questions of what level of notice was required and the significance of the fact that the transferee was not a volunteer, Mexico had a strong interest in having its law applied to uphold the integrity of its land recordation statute in relation to land situated in

147 The conclusion in the text is also supported by *Butterfield v Nogales Copper Co* 80 P 345 (Ariz 1905) and *National Commercial Bank v Wimborne* (1978) 5 BPR 11,958. cf. also *Cook Industries Inc v Galliher* [1979] ChD 439 at 443 F-H and *Massie v Watts* 10 US (6 Cranch) 148 at 160-2 (1810) (jurisdiction only; no stated conflict).

148 Cf. note 147.

149 *Mercantile Investment and General Trust Co v River Plate Trust, Loan, and Agency Co* [1892] 2 Ch 303.

150 Discussed above in the text accompanying notes 142 to 148.

151 *Mercantile Investment and General Trust Co v River Plate Trust, Loan, and Agency Co* [1892] 2 Ch 303 at 314. North J, in referring to the English purchaser registering the transfer 'before the hypothecation of the Plaintiffs had been registered', was responding to a particular argument advanced on behalf of the purchaser. The plaintiffs had not in fact registered their charge (emphasis added).

Mexico (even though the claim was one to enforce a right *in personam*).[152] The same result is demanded by the '*situs* rule' advocated by commentators. Equally, the application of Mexican law might have been required by the choice of law rules for trusts of immovables.[153]

But the Court applied English law to recognise a right to restitution. The Court was not willing to allow the enrichment of the English purchaser, having regard to the English purchaser's unconscionable conduct and the forum connection. Forum contacts in that case included: the plaintiffs/debenture holders and the defendant/purchaser were forum residents; the debenture holders parted with their capital in the forum, and there executed a deed which purported to grant to them the security interest over the foreign land; the purchaser took a transfer in the forum (where the contract of sale was also made), and later repudiated its obligations there. Arguably, the forum had an interest in having its public policy applied because the fraud was committed in part there and because the parties (or either of them) were resident there;[154] and also (independently) because of the common forum residence of the plaintiffs and defendant.

A Singapore case (discussed earlier) illustrates the application of forum law on public policy grounds to enforce a constructive trust over property (in that case bribes) received by a third party transferee (Mrs Thahir) with actual knowledge that the property was being transferred in breach of fiduciary duty.[155] The trial judge found that Mrs Thahir was 'hand in glove' with General Thahir's dishonest schemes to receive the bribes. In Singapore proceedings, Pertamina claimed against Mrs Thahir *inter alia* a declaration that she held the bribes on constructive trust on the basis that she received them in the knowledge of her husband's breach of fiduciary duty. Public policy apart, Indonesian law had a strong claim to be applied. Pertamina and Mrs Thahir were both Indonesian nationals and residents (although Mrs Thahir decamped to Europe shortly prior to the litigation). The fiduciary relationship out of which the claim arose was based in Indonesia. The corrupt acts took place *inter alia* in Indonesia, where negotiations for the bribe contract took place in part, where the bribe contract was concluded and where Thahir exercised his corrupt influence.[156] In contrast, Singapore had no (or no significant) interest (the public policy against fraud apart) in having its law applied to determine the entitlement to an enrichment sitting in a Singapore bank account between Indonesian litigants arising out of acts committed in Indonesia in breach of a fiduciary relationship based in Indonesia.[157]

The Singapore High Court and Court of Appeal applied Singapore law to uphold the

152 Even though the writ in the *Mercantile Investment* case sought to enforce restitutionary rights *in personam* and not *in rem*, the *situs* state had a strong interest in having its law applied because the claim raised questions of whether and in what circumstances a transferee of land would be charged with knowledge of a prior interest, despite having perfected the transfer under the law of the *situs*. Had the claim been to enforce a right *in rem*, the *lex situs* would have been applied to resolve similar issues: see *Norris v Chambres* (1861) 29 Beav 246, 54 ER 621, aff'd (1861) 3 De GF & J 583, 45 ER 1004; *Hicks v Powell* (1869) LR 4 Ch App 741; *Norton v Florence Land and Public Works Co* (1877) LR 7 ChD 332; *Deschamps v Miller* [1908] 1 Ch 856. The legitimate concern of a *situs* state in, say, protecting subsequent interest holders in land from prior unregistered interests could just as much be interfered with in cases (like the *Mercantile Investment* case and the domestic law case of *Bahr v Nicolay* [*No. 2*] (1988) 164 CLR 604) where the claim seeks to enforce rights *in personam* against third party transferees, as it could in cases involving rights *in rem* against third party transferees.

153 Graveson, RH, n 98, at 533; Wallace, A, 'Choice of Law for Trusts in Australia and the United Kingdom' (1987) 36 ICLQ 454 at 471–3. Even if a 'proper law' choice of law approach were applied (and query in this respect whether the *Hague Trusts Convention* applies to constructive trusts of the kind in the *Mercantile Investment* case: see Articles III, XI(d), XX; s.1(2) of the *Recognition of Trusts Act 1987* (UK); Hayton, David, n 129; von Overbeck, AE, 'Explanatory Report' (1986) 25 *ILM* 593, paragraph 49), there would still have been a strong case for applying the *lex situs* (considerations of public policy apart).

154 See also *Butterfield v Nogales Copper Co* 80 P 345 (Ariz 1905).

155 *Sumitomo Bank Ltd v Thahir* [1993] 1 SLR 735, aff'd sub nom *Thahir v Pertamina* [1994] 3 SLR 257.

156 [1993] 1 SLR 735 at 769.

157 *Aliter* if the dispute had been about title to Singapore land.

claim.[158] At first instance, this was done by applying the '*lex fori*' rule;[159] on appeal, by applying the 'place of enrichment' rule.[160] These were merely devices to enable the courts to apply their own law on public policy grounds. Singapore had a public policy concern to prevent the enrichment of Thahir's widow because she had actual knowledge of Pertamina's rights and participated in the corrupt scheme to receive the bribes and to conceal the fact of payment from detection. In that case, Singapore had an interest in applying its public policy against fraud and bribery because the enrichment was situated in the forum and had been so situate for some twenty years.[161]

5. Theft, fraud, oppression and corruption in proprietary claims

This section deals with claims for restitution which seek to enforce rights *in rem* in property ('proprietary claims'). This encompasses claims, whether for a remedy *in specie* (such as a constructive trust or lien) or for money relief, where the claimant's right to restitution depends on establishing that the defendant has received property in which the claimant asserts a (superior) legal or equitable title. Illustrations include law of priorities claims, as well as claims for restitution which involve the claimant 'tracing' his property into a different form or into the hands of a subsequent transferee. Before the impact of public policy on proprietary claims can be considered, the appropriate choice of law rule(s) (absent public policy issues) need to be addressed. Many commentators writing in the field of restitution in the conflict of laws advocate (or give presumptive force to) a 'place of enrichment' test for restitutionary proprietary claims (save where the claim concerns immovables, where the '*situs* rule' is commonly advocated).[162] These suggested choice of law rules are not entirely accurate.[163]

Absent considerations of public policy, the appropriate governing law for proprietary claims depends upon the type of claim and whether there is a pre-existing relationship between the parties. As a starting point, the *lex situs* should ordinarily govern rights *in rem* in property.[164] This rule is no less applicable because the cause of action is characterised as 'Unjust Enrichment' rather than, say, 'Property' or 'Tort'.[165] The *lex situs* has been applied to law of priorities claims concerning land[166] and chattels.[167] Also, in tracing claims (including restitutionary tracing claims), where property (including money) has been changed into another form and/or transferred to a third party by the original recipient, the traditional choice of law rule for determining rights *in rem* in property usually requires the application of the *lex situs* to determine the proprietary effects of such

158 The High Court held that the widow was also liable under Indonesian law: [1993] 1 SLR 735 at 812–17. But both at first instance and on appeal, the decision on choice of law was treated as determinative of the outcome: see [1994] 3 SLR 257 at 281.

159 [1993] 1 SLR 735 at 787–91.

160 [1994] 3 SLR 257 at 269–76.

161 For other third party transferee cases where forum law was applied to uphold restitution because of the public policy against fraud, see *National Commercial Bank v Wimborne* (1978) 5 BPR 11,958, especially at 11,982, discussed below; *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766 esp at 796–8, discussed above.

162 See, e.g., Dicey & Morris, n 7, Rule 201(2)(b), (c); McLeod, JG, n 7; Bird, n 7.

163 In the race to promulgate a 'new' choice of law rule for 'Restitution' or 'Unjust Enrichment', traditional choice of law categories (including 'Property') have sometimes been overlooked. But see Stevens, n 9, at 180, and 211–216.

164 *Cammell v Sewell* (1860) 5 H & N 728, 157 ER 1371.

165 *Douglas Financial Consultants Pty Ltd v Price* [1992] 1 QdR 243.

166 *Martin v Martin* (1831) 2 Russ & M 507, 39 ER 487; *Norris v Chambres* (1861) 29 Beav 246, 54 ER 621, aff'd (1861) 3 De GF & J 581, 45 ER 1004; *Hicks v Powell* (1869) LR 4 Ch App 741; *Norton v Florence Land and Public Works Co* (1877) LR 7 ChD 332; *Deschamps v Miller* [1908] 1 Ch 856; cf. *Waterhouse v Stansfield* (1851) 9 Hare 234, 68 ER 489.

167 *Macmillan Inc. v Bishopsgate Investment Trust Plc* [1996] 1 WLR 387 at 399–400, 410.

substitutions or transfers.[168] Logic would appear to require the '*situs* rule' to govern issues of title to property in tracing claims, whether the claim is one at law or in equity, and whether the claim is for a remedy *in specie* or a money claim for the value of the benefit received.[169] However, in some cases the *lex situs* ought to be subordinated to another law. For instance, claims to enforce rights *in rem* between parties to a contract (or between parties claiming through a contracting party) should usually be governed by the proper law of the contract, at least to issues not involving ownership of land.[170] Also, tracing claims by or against a trustee should ordinarily be subjected to the law governing the administration of the trust.[171] The advantage of a §221 *Restatement (Second)* approach is that it would be able to cater for the above outcomes (including by paying heed to the above and other specialised rules where appropriate), yet would have innate flexibility to allow for a different outcome in clear cases. For instance, one can imagine circumstances (particularly in proprietary claims concerning money or other movables) where the *lex situs* ought not to be applied because some state other than the *situs* has the only or the most compelling interest in having its law applied.[172]

But irrespective of the result to which foreign law leads, there is support for the view that forum law will be applied on public policy grounds to enforce rights *in rem* if the forum state has an interest in applying its public policy. Fact patterns which raise public policy issues include where the defendant was privy to the theft of the plaintiff's property or to the fraud, oppression, corruption or other unconscionable conduct practised on the plaintiff, or where the defendant took the property with (at least actual) notice and in circumstances where the defendant could not be described as having acted *bona fides*. The occasions are many and varied in which the need may arise for a court to apply its own law on public policy grounds to uphold restitution. For instance, forum law may, when a foreign law does not, recognise a right to 'trace', equitable interests or subsisting property interests. Or forum law may regard a thief as holding the stolen property on constructive trust when foreign law does not. Conversely, forum law may not (when foreign law does) allow a defence to a transferee who took with actual notice of the original owner's rights and who did not take *bona fides*.[173]

By way of forum connection, the *situs* of the property should suffice (except perhaps if the forum is a mere transient or fortuitous *situs*). Alternatively, it should be sufficient if

168 According to traditional rules, this would mean that where substitutions or transfers occurred in more than one jurisdiction, the proprietary effects of those dealings would be governed by the law of each place where the property was situated at the time thereof. There may be reasons, other than public policy reasons, for departing from the traditional *lex situs* rule in cases of successive international transfers of money. It is not possible to address exhaustively that issue here.

169 Cf. *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105 at 115.

170 *North Western Bank, Limited v John Poynter, Son, & Macdonalds* [1895] AC 56 (proper law of contract of agency); *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676 (proper law of contract of sale).

171 Cf. *Campbell v Albers* 39 NE2d 672 (III App Ct 1942). A difficult question is whether tracing claims or law of priorities claims by beneficiaries under an express trust against third party transferees should be characterised as trust or property issues: cf. *Watkins v Watkins* 22 SW2d 1 at 3 (Tenn 1929). However characterised, the *lex situs* is likely to be applied in many such cases unless the trust deed expressly designates some other law.

172 Cf. *Taylor v Plumer* (1815) 3 M & S 562, 105 ER 721 (foreign law not pleaded and proved); cf. *Sumitomo Bank Ltd v Thahir* [1993] 1 SLR 735, aff'd sub nom *Thahir v Pertamina* [1994] 3 SLR 257 (forum law — also the *lex situs* — applied, but only for public policy reasons). It will not do to ignore the '*situs* rule' by simply inventing a new choice of law rule ('Unjust Enrichment'). There needs to be a considered analysis of the occasions on which the '*situs* rule' is inappropriate. It is not the purpose of this article to provide a critique of the '*situs* rule'; but see, eg: Hancock, Moffatt, *Studies in Modern Choice-of-Law: Torts, Insurance, Land Titles*, WS Hein Co, New York, 1984, 351 *et seq*; Weintraub, Russell J, *Commentary on the Conflict of Laws*, 3rd ed, Foundation Press, New York, 1986, 412–460; Carnahan, W, 'Tangible Property and the Conflict of Laws' (1935) 2 *U Chi L Rev* 345; Morris, JHC, 'The Transfer of Chattels in the Conflict of Laws' (1945) 22 *BYBIL* 232; Davis, JLR, 'Conditional Sales and Chattel Mortgages in the Conflict of Laws'(1964) 13 *ICLQ* 53.

173 See, e.g., *Winkworth v Christie Manson and Woods Ltd* [1980] Ch 496 at 501, 510, 514.

the transfer to the third party occurred in the forum and either of the parties to the litigation resides there. There may be other situations in which the forum is interested to apply its public policy. Also, in some particularly heinous cases, it may be that the forum has an interest however slight the forum connection (as long as there is jurisdiction). For instance, it is arguable that within this category fall claims for restitution against thieves, or persons who obtained property by fraudulent misrepresentation or physical violence. If so, it is further arguable that transferees from such perpetrators should be in no better position (for choice of law purposes) than the rogue where the transfer from the rogue to the third party is a mere 'sham' to shield the rogue from liability,[174] or where (even though the transferee was intended to benefit from the transfer) the donee aided and abetted the donor in the perpetration and/or concealment of the theft/deceit/physical violence for their mutual benefit.[175]

In a New South Wales case, forum law was applied on public policy grounds with the result that a tracing claim was recognised as available against a person who effectively obtained another's money by fraudulent misrepresentation (and against a transferee where the transfer was a 'sham').[176] Wimborne, a New South Welshman, undertook subject to contract to build a residential shopping complex in Saudi Arabia for Prince Abdullah-Faisal of Saudi Arabia. Pursuant to an interim agreement made in Saudi Arabia:

* Wimborne agreed to assist in raising finance for the project;
* Wimborne agreed to take a loan of 19 million Swiss franks from a Swiss financier, secured by a bank guarantee to be arranged by the Prince;
* Wimborne undertook to keep the funds in a joint Saudi bank account, to use the funds exclusively for the purpose of the building project and — if a formal building agreement was not entered into by a specified date — to pay out the loan and arrange for the cancellation of the bank guarantee;
* the Prince provided the Swiss financier with the bank guarantee.[177]

Wimborne then entered into a loan agreement with the Swiss financier and received the loan funds in Switzerland into a Swiss bank account. Wimborne never entered into a formal building contract with the Prince and refused to pay out the loan funds to the Swiss financier. The funds were received into, and transferred between, accounts in the Swiss bank held in the names of companies controlled by Wimborne. From there:

* some of the funds were transferred to a Sydney bank account where they were used to purchase Sydney real estate in the names of companies controlled by Wimborne;[178]
* some of the funds were used to purchase gold bullion, which was held for safekeeping in the Swiss bank in the name of one of Wimborne's corporate vehicles;
* some remained in the said Swiss bank account to the credit of one of Wimborne's companies;
* and some were dissipated.

The Swiss financier having called on the guarantee, the Prince claimed in New South Wales a declaration that Wimborne received the loan monies as trustee for the Prince, and

174 Cf. *National Commercial Bank v Wimborne* (1978) 5 BPR 11,958. Cf. also *Cook Industries Inc v Galliher* [1979] ChD 439 at 443 F-H.

175 The same principles should also apply to transferees in appropriate cases based on rights *in personam*, such as 'knowing receipt' cases.

176 *National Commercial Bank v Wimborne* (1978) 5 BPR 11,958.

177 The guarantee was given by the National Commercial Bank (a Saudi bank), in return for the grant by the Prince of an indemnity and a mortgage over Saudi real estate.

178 Sydney real estate was also purchased out of funds transferred directly from the Swiss financier to Australia in compliance with a Reserve Bank condition which was later lifted.

sought to trace the funds into the bullion, the balance in the Swiss bank account, and the Sydney real estate.

On an application for interlocutory protective relief, it was argued on behalf of Wimborne that Swiss law determined the rights of the parties (because it had been adopted expressly in the loan agreement and the guarantee) and that no trust arose under Swiss law.[179] Holland J rejected this submission, applying forum law to hold that a *prima facie* case had been shown that Wimborne received the loan monies as trustee:

> . . . it is, prima facie, a complete answer to this contention that the plaintiffs are claiming equitable rights and equitable remedies. The Equity Court has long taken the view that because it is a *court of conscience* and acts in personam, it has jurisdiction over persons within and subject to its jurisdiction to require them to act in accordance with the principles of equity administered by the court wherever the subject matter and whether or not it is possible for the court to make orders in rem in the particular matter. In short, *if the defendant is here*, the equities arising from a transaction to which he is a party as ascertained by New South Wales law and the equitable remedies provided by that law will be applied to him. The Equity Court determines according to its own law whether an equity exists, its nature and the remedy applicable . . . .[180]

This reasoning suggests that forum law was applied because it would be contrary to public policy to allow the enrichment of Wimborne (and his puppet companies) effectively by deceit practised on the Prince. As to the real estate, the forum was the situs. But at least insofar as the claims for restitution related to the gold bullion and the Swiss bank account, the forum had an interest in applying its public policy against fraud because New South Wales was the residence of Wimborne (and of his corporate vehicles) and (on one view) the fraud was in part committed in New South Wales.[181] It may even be that, having regard to the particular opprobrium of the conduct (in substance, obtaining the Prince's property by deceit), the Court regarded it as a sufficient interest (insofar as the claims related to the bullion and Swiss bank account) that Wimborne (and his puppet companies) resided in the forum or that the Court had jurisdiction. After all, the frauds were in substance committed outside of New South Wales and, in the passage quoted, Holland J did seem only to place emphasis on the fact that 'the defendant is here.'

A Singapore case (discussed above) illustrates the application of forum law on public policy grounds to uphold a proprietary claim in respect of property situate in the forum.[182] The property in dispute was bribes transferred by the bribee Thahir (now deceased) to his widow. In addition to the claims discussed earlier, Pertamina also brought an equitable tracing claim against Thahir's widow.[183] Public policy apart, there was good reason for applying Indonesian law to this claim. The occasion for payment of the bribes was Thahir's employment with Pertamina based in Indonesia, where Pertamina, Thahir and Mrs Thahir were resident (though she decamped to Europe shortly prior to the litigation). Moreover, negotiations for the bribe contract took place, and the bribe contract was concluded, in Indonesia (and Germany) and Thahir exercised his corrupt influence in Indonesia.[184] Also,

179 *National Commercial Bank v Wimborne* (1978) 5 BPR 11,958 at 11,982. This may reflect the view that the effect of the transaction, in substance (though not in form), was for the Prince to advance monies to Wimborne pursuant to a contractual relationship governed by Swiss law (which would as such have a claim to be applied even though the claim was to enforce a right *in rem*): *North Western Bank, Limited v John Poynter, Son, & Macdonalds* [1895] AC 56; *Aluminium Industrie Vaassen BV v Romapla Aluminium Ltd* [1976] 1 WLR 676 at 687–8. As to a further claim brought by the guarantor against Wimborne for contribution, see 11,980.

180 *National Commercial Bank v Wimborne* (1978) 5 BPR 11,958 at 11,982 (emphasis added).

181 Some of Wimborne's communications emanated from New South Wales. However, the larger part of the deception was practised *inter praesentes* in Jeddah and Zurich by Wimborne and his agent. The communications sent by Wimborne were also received by the Prince in Jeddah and by the financier in Zurich.

182 *Sumitomo Bank Ltd v Thahir* [1993] 1 SLR 735, aff'd sub nom *Thahir v Pertamina* [1994] 3 SLR 257.

183 *Sumitomo Bank Ltd v Thahir* [1993] 1 SLR 735 at 756. Pertamina also brought common law and equitable claims against Thahir's estate and Mrs Thahir based on rights *in personam*: Ibid.

184 *Sumitomo Bank Ltd v Thahir* [1993] 1 SLR 735 at 769.

at least some of the bribes constituted cheques handed to Thahir in Indonesia which he then deposited into the Singapore bank.[185] Indonesian law had a strong interest in having its law applied because the litigation involved Indonesian parties and because the diversion of Pertamina's property occurred substantially by acts committed in Indonesia. On the other hand, considerations of public policy apart, Singapore had no (or no compelling) interest in having its law applied to determine ownership of monies in a Singapore bank account arising between Indonesians based on acts committed in Indonesia.[186]

However, the Singapore High Court and Court of Appeal applied Singapore law to uphold the tracing claim.[187] This was because of three facts: first, forum law upheld restitution; second, Thahir received the bribe monies in corrupt breach of fiduciary duty, and his wife, who acquired an interest in the monies (or choses in action), was privy to the corruption practised by her husband and took an assignment of the bribes as part of their joint scheme to evade detection; third, the bribe monies (or choses in action) were situate in the forum at the time of litigation[188] and had been so situate for some twenty years.[189] Singapore had an interest in having its public policy against fraud and bribery applied because Singapore was the *situs* of the bribes (at least other than transiently or fortuitously). Each court justified the result by resorting to either the '*lex fori*' rule[190] or the 'place of enrichment' rule.[191] The reliance on these various rules was a manoeuvre to mask the application of forum law on public policy grounds. Since some general attention was paid earlier to the use of the so-called '*lex fori*' rule as an escape device, let us concentrate here on the 'place of enrichment' test. Suppose that the bribes had been deposited in a bank account in some third country (other than Singapore and Indonesia). Suppose further that the law of Indonesia upheld restitution, but the law of that third country denied restitution. Is it seriously to be suggested that the Singapore courts (if jurisdiction could be attracted) would have applied the law of that third country merely because it was the 'place of enrichment'? Surely not. It would have been more frank and direct to admit that forum law was applied because of the public policy against bribery and fraud and because the forum had an interest in applying that public policy in that the property was situated in the forum and had been for many years.

In an English case, forum law was applied to a tracing claim where the enrichment had passed through multiple jurisdictions and ended up in the forum.[192] The English court applied its own law, which was favourable to relief, in circumstances where the foreign *lex rei sitae* did not recognise equitable interests and thus denied restitution. A Saudi Arabian resident (El Ajou) owned funds deposited in a Geneva bank, which were under the control of his investment manager. The investment manager was induced by bribes to make improvident investments of his principal's funds with Canadian fraudsters, who misappropriated those and other monies as part of a massive share fraud scheme based in Amsterdam. The Saudi plaintiff's funds were laundered through the hands of various corporate entities and bank accounts from Amsterdam, Geneva, Panama, back to Geneva

185 *Sumitomo Bank Ltd v Thahir* [1993] 1 SLR 735 at 778, 779.

186 *Aliter* if the dispute had been about title to Singapore land.

187 The High Court held that the widow was also liable under Indonesian law: [1993] 1 SLR 735 at 812–817. But both at first instance and on appeal, the decision on choice of law was treated as determinative of the outcome: see [1994] 3 SLR 257 at 281.

188 See [1993] 1 SLR 735 at 788, 790, where Lai Kew Chai J emphasised that the property in dispute was in the forum.

189 It may also have been relevant that the Thahirs had purposefully availed themselves of the bank in Singapore as a part of their scheme to avoid detection: [1994] 3 SLR 257 at 275 (Thahir 'had been actively using Singapore as the collection centre for the bribes'). At first instance, his Honour had the opportunity to decide the public policy point, which was argued before him, but unfortunately failed to do so: at 763, 812.

190 [1993] 1 SLR 735 at 787–91.

191 [1994] 3 SLR 257 at 269–76.

192 *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717.

and then on to London. The funds were invested in an English joint venture to carry out a property development project (in England), and the Canadians later sold their interest in the joint venture to the defendant, an English development company.[193] The chairman of the English development company had been implicated in the original frauds. The Saudi plaintiff claimed an accounting against the English company on the basis that it received the traceable product of his funds knowing that they were transferred in breach of trust.

The English development company argued that the Saudi plaintiff could not show a subsisting equitable title because of the various transfers and substitutions in civil law jurisdictions the laws of which did not recognise equitable ownership. Millett J rejected this argument because foreign law had not been pleaded and proved.[194] But he also thought that English law (which did recognise a subsisting equitable ownership) would have applied anyway.[195] His Honour apparently justified his rejection of the foreign *lex rei sitae* on the ground that the claim did not involve a question of property (requiring application of the *lex rei sitae*), but was a 'receipt-based restitutionary claim', or a claim to enforce a 'restitutionary obligation', and was therefore subject to the choice of law rule for restitution (which he supposed to be the law of the place of enrichment).[196] In apparent support of this view, Millett J cited reference to foreign land cases which spoke of equity 'operating in personam and not in rem.'[197]

To classify the cause of action as part of the law of obligations or of rights *in personam* was a fiction (by the well known 'characterisation' technique) to oust the ordinary application of the *lex situs* rule governing rights *in rem* in property. The suggestion seems to be that, just because the relief sought operates *in personam*, then the right being enforced must necessarily be a right *in personam*. This is erroneous. A claim may be one to enforce a right *in rem* (a right available against an indeterminate number of persons), although the relief is *in personam* (such as a money judgment/decree or an order executing a constructive trust).[198] The foreign land cases cited by Millett J were concerned with the point that the court has jurisdiction to issue a decree *in personam* even though it affects foreign property; not that equity can only (or does only) enforce rights *in personam*.[199] Here, the Saudi plaintiff sought to assert a right *in rem* in the property received by the English defendant by identifying the Saudi plaintiff's property as subsisting through the successive transfers and through the changes in form, even though the relief was the purely personal remedy of an account (and order for payment of monies found to be due).[200] Logically, if one has regard to traditional choice of law rules for adjudicating rights *in rem*, title to the property was required to be tested by the law of each state in which the substitutions and transfers took place as the *lex rei sitae*.

But this was not a solution which Millett J was prepared to accept. The Saudi plaintiff's

193 The Court regarded the relevant enrichment received by the defendant as the Canadians' interest in the joint venture: [1993] 3 All ER 717 at 738.

194 *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 at 736.

195 *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 at 733, 736. The plaintiff's funds had passed through a fiduciary relationship, since they had been under the control of, and wrongfully diverted by, the plaintiff's agent.

196 *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 at 736–7.

197 *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 at 737.

198 See Cook WW, n 80; Scott, M, 'The Right to 'Trace' at Common Law' (1965–66) 7 WALR 463. For other cases employing artifice similar to that referred to in text, see *National Commercial Bank v Wimborne* (1978) 5 BPR 11,958; *Irving Trust Co v Maryland Casualty Co* 83 F2d 168 (2nd Cir 1936).

199 Irrespective of whether the right asserted is one *in personam* or one *in rem*, there is subject-matter jurisdiction over foreign land if the action or remedy is one *in personam*: see Lee, S, n 31. It goes without saying that there is also jurisdiction to grant an *in rem* decree in relation to property in the forum, even if the object of that decree is to enforce an *in personam* decree relating to foreign land. In such a case, equity equally *acts in personam*.

200 The plaintiff also relied on the common law theory of monies had and received (leading to the purely personal remedy of judgment for a sum of money, but based on a right *in rem* subsisting in the property received by the defendant), but this failed as the plaintiff's monies had been mixed with that of other victims of the fraud: at 733–4.

funds were obtained by the fraud of the Canadians, and the English defendant received those funds with knowledge (at least imputed by reason of the knowledge of its chairman) of the Canadians' fraud.[201] Millett J preferred English law because to apply the laws of each civil law jurisdiction (where each transfer and substitution respectively occurred) would infringe the forum's public policy against fraud (here, the enrichment by third party transferees with knowledge that the monies were originally obtained by fraud).[202] In a key passage, his Honour observed:

> [The defendant] is . . . amenable to the court's equitable jurisdiction as regards assets which were formerly in a civil law country but which it has received in England in circumstances which are alleged to render it *unconscionable* for it to retain them . . . . An English court of equity will compel a defendant who is within the jurisdiction to treat assets in his hands as trust assets if, having regard to their history and his state of knowledge, it would be *unconscionable* for him to treat them as his own. Where they have passed through many different hands in many different countries, they may be difficult to trace; but in my judgment neither their temporary repose in a civil law country nor their receipt by intermediate recipients outside the jurisdiction should prevent the court from treating assets in the legal ownership of a defendant within the jurisdiction as trust assets.[203]

Some purport to rationalise the application of English law in this case with the 'place of enrichment' test on the basis that the civil law jurisdictions were 'mere conduits' or 'temporary resting places', and not really places of enrichment.[204] This reasoning props up a fiction.[205] The forum was not the only place of enrichment at all. Facts which were relevant to the decision in *El Ajou* included: forum law favoured restitution; the defendant (an English company) was enriched by imputed fraud by a contract made in the forum; the property in question was situated in the forum at the time of the litigation, wherever it may have been (and in whatever form) before that; the property did not have a transient or fortuitous relationship with the forum in view of its nature and the defendant's on-going involvement in the joint venture. In this case there were two independent interests: the English defendant committed equitable fraud in England by making a contract in England with imputed notice of the Canadians' fraud; and the property was situated in England (other than transiently or fortuitously).[206]

It may well be that, had there been no public policy issue involved in *El Ajou*, a more sophisticated choice of law regime (such as §221 of the *Restatement (Second)*) might also have led to the application of English law. This might have been the case, say, if the defendant had mere 'constructive notice.' The decision may then also be seen as an attempt to grapple with the inadequacies of the '*situs* rule.' But that is not a reason for ignoring the significance of the case on public policy. There may be cases involving a public policy element where the factors pointing to foreign law are stronger than in *El Ajou*. Imagine that, in *El Ajou*, the funds had been situated in Geneva for many years (whether before or after the theft, but prior to being invested in the English joint venture), that the plaintiff was (and perhaps the original fraudsters were) resident in Switzerland and that the defendant was a Swiss company (carrying on business in London and Geneva). In that scenario, considerations of public policy apart, it might be more difficult to conclude that

201 On the facts, Millett J refused to impute the Chairman's knowledge to the defendant because he was only a nominee, but this ruling was overturned on appeal: [1994] 2 All ER 685: on remand, see [1995] 2 All ER 213.

202 It may also be possible to argue that at least some of the civil law jurisdictions did not have an interest (or any compelling interest) in having their law applied.

203 *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 at 737 (emphasis added).

204 See, e.g., Bird, J, n 7, at 113, 141.

205 For another case where the 'conduit' argument was relied on as a manouevre to apply forum law in preference to a foreign *lex situs*, see: *Hongkong and Shanghai Banking Corp Ltd v United Overseas Bank Ltd* [1992] 2 SLR 495.

206 Either of those interests should have been sufficient.

Swiss law ought not to apply. Or imagine that the funds been invested in land, say, in Geneva, before being converted to cash and whizzed off to London? Again, considerations of public policy apart, it might in that case also be more difficult to conclude that Swiss law should not apply.[207] But in either such scenario, forum public policy would require the application of forum (in those examples, English) law if it favours restitution. In the former scenario, there is sufficient forum connection in that the property in dispute is situate in the forum at the time of the litigation (and is not only transiently or fortuitously there). In the second scenario, there is not only the fact that the forum is the *situs*, but also there is the English residence of the defendant and the making in England of the contract to transfer the joint venture interest to the defendant. Other scenarios may also arise where a court, even in applying a more sophisticated choice of law technique than the '*situs* rule', applies its own law on public policy grounds in preference to foreign law.

VII. Conclusion

The question of when a court will apply its own law on public policy grounds in claims for restitution has been overlooked by commentators. Although the courts do not always refer unequivocally to the doctrine of public policy, they have, including by indirect means, in fact applied their own law to either deny or uphold restitution because the result to which foreign law would lead is obnoxious to forum public policy. This paper has sought to prescribe a framework for analysis of the question when forum law will be applied on public policy grounds in restitution cases. The proposed methodology focuses first on whether a public policy issue is raised and, second, on whether the forum has an interest in applying that public policy. Insofar as restitution choice of law rules have been fashioned by commentators without cognisance of the importance of public policy, those rules misstate what the courts are doing in practice, and need to be revisited. Such a process would perhaps afford a convenient opportunity for other choice of law issues to be fully explored (such as the merits of adopting an approach akin to that advocated in §221 *Restatement (Second) of the Conflict of Laws*). But in any event, by addressing frankly and openly the occasions on which forum law will be applied on public policy grounds, much of the confusion which reigns in this difficult and complex field will be eliminated.

207 At any rate, this would seem to follow from the rules propounded by most commentators: see, e.g., Dicey & Morris, n 7, Rule 201(2)(b); McLeod, JG, n 7; Bird, J, n 7.