Banque Financiere De La Cite v. Parc (Battersea) Ltd and Others

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(Battersea) Ltd and Others [1998] UKHL 7; [1999] AC 221; [1998] 1 All ER 737; [1998] 2 WLR 475 (26th February, 1998) HOUSE OF LORDS Lord Steyn Lord Griffiths Lord Hoffmann Lord Clyde Lord Hutton OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE BANQUE FINANCIÈRE DE LA CITÉ1

(APPELLANTS) v. PARC

(BATTERSEA) LIMITED AND OTHERS

(RESPONDENTS) ON 26 FEBRUARY 1998 LORD STEYN My Lords, The present dispute arose out of the short term refinancing by the appellant ("BFC"), a Swiss bank, of part of an existing bank loan made available by Royal Trust Bank

(Switzerland) ("RTB") to Parc

(Battersea) Limited ("Parc") for the purpose of buying development land at Battersea Wharf, London, S.W.11. Parc was part of the Omni Group of companies which was controlled by Mr. Werner Rey, a Swiss national. The ultimate holding company was Omni Holding AG ("Holding"). Mr. Markus Herzig was the General Manager of Holding. The refinancing transaction was concluded and completed at the end of September and the beginning of October 1990. The relevant events and circumstances were as follows. (1) The transaction was negotiated by Mr. Rey and Mr. Herzig with officers of BFC. Originally, the parties intended a loan directly from BFC to Parc. That would have brought into operation a disclosure obligation on BFC under Swiss Federal Banking Regulations. In order to avoid this requirement the transaction was restructured by interposing Mr. Herzig as the immediate borrower. (2) BFC lent DM30m. to Mr. Herzig and Mr. Herzig took steps to ensure that the sterling equivalent of this sum was paid directly by BFC to Parc in reduction of the existing loan granted to Parc by RTB. (3) At the request of BFC Mr. Herzig handed a signed letter on the letterhead of Holding to BFC. This letter read as follows: "This is to confirm that we and all companies of our group will not demand any repayment of loans granted to Parc

(Battersea) Ltd., London, until the full repayment of your loan of DM 30,000,000. granted to Mr. M. Herzig, which is secured by a deep discount promissory note amounting to GBP 10,000,000. issued by Parc

(Battersea) Ltd." I will call this letter the postponement letter. (4) On 1 October Parc issued to Mr. Herzig a promissory note for the relevant sum and soon afterwards Mr. Herzig assigned the note to BFC. In April 1991 the Omni Group collapsed. Parc is

insolvent. BFC obtained a judgment for £12m. against Parc representing the sum due on the note, with interest. RTB and Omnicorp Overseas Limited ("OOL"), a company incorporated in the British Virgin Islands, respectively had first and second charges over the Battersea Wharf Property. OOL was a company in the Omni Group and the second charge related to an intra-group debt as it has been described. OOL obtained a judgment for £30m. against Parc. Parc and OOL contended that the debt owed to OOL took priority over the debt owed by BFC by reason of OOL's second charge. BFC asserted that by reason of the letter of postponement and its utilization to obtain the refinancing the rights of BFC took priority over the rights of OOL Parc and OOL had been unaware of the letter of postponement. The judge upheld BFC's contention. The Court of Appeal disagreed and allowed the appeal. The starting point is the letter of postponement, Robert Walker J. (now Robert Walker L.J.) found that it was not binding on Parc or OOL Although they were "companies of our group" within the meaning of the letter Parc and OOL were not bound by its terms either by agency or estoppel. But Robert Walker J. concluded that properly construed the letter of postponement was intended to be directly binding on all companies in the Omni Group. The Court of Appeal came to the opposite conclusion. Morritt L.J. held that the agreement expressed in the postponement letter was intended to be that of Holding alone. This interpretation does not involve an undertaking on the part of Holding to procure the consent of companies in the group: it takes effect as a warranty by Holding. Morritt L.J. relied strongly on the fact that companies in the group were neither consulted nor informed of the letter. Given Mr. Rey's dominance and control of the Omni Group I do not attach much weight to this factor. The letter was badly drafted, and it is certainly capable of more than one interpretation. But ultimately I take the same view as the judge. The context is important. The letter was requested by BFC, and tendered by Mr. Herzig, as a form of security albeit not security involving rights in rem. Moreover, the letter shows that BFC wanted security not from Parc but in respect of intra-group indebtedness. The letter was the result of a negotiation between commercial men. In my view the commercial construction is one that treats the letter as intended to give effective protection in respect of all companies in the group, i.e. it was intended to be directly binding on all companies in the group. And I am reinforced in this view by the fact that Robert Walker J., who was steeped in the realities of the context of the letter, ultimately favoured it. From this conclusion it follows that the expectation of BFC was that the letter of postponement effectively protected BFC against loans granted by group companies to Parc. In the result that expectation has not been fulfilled. In any event, the important point is that BFC would not have lent had it not mistakenly believed that its priority in respect of intra-group indebtedness was secured effectively against subsidiaries of the group. My Lords, both the judge and Morritt L.J. invoked the vocabulary of unjust enrichment or restitution. Nevertheless both courts ultimately treated the question at stake as being whether BFC is entitled to be subrogated to the rights of RTB. On the present appeal counsel adopted a similar approach. That position may have seemed natural at a stage when BFC apparently claimed to be entitled to step in the shoes of RTB as chargee with the usual proprietary remedies. On appeal to your Lordships' House counsel for BFC attenuated his submission by making clear that BFC only seeks a restitutionary remedy against OOL. In these circumstances it seems sensible to consider directly whether the grant of the remedy would be consistent with established principles

of unjust enrichment. OOL committed no wrong: it cannot therefore be a case of unjust enrichment by wrongdoing. If it is a case of unjust enrichment, it must in the vivid terminology of Prof. Peter Birks be unjust enrichment by subtraction. If the case is approached in this way it follows that BFC is either entitled to a restitutionary remedy or it is not so entitled. After all, unjust enrichment ranks next to contract and tort as part of the law of obligations. It is an independent source of rights and obligations. Four questions arise: (1) Has OOL benefited or been enriched? (2) Was the enrichment at the expense of BFC? (3) Was the enrichment unjust? (4) Are there any defences? The first requirement is satisfied: the repayment of £10m. of the loan pro tanto improved OOL's position as chargee. That is conceded. The second requirement was in dispute. Stripped to its essentials the argument of counsel for OOL was that the interposition of the loan to Mr. Herzig meant that the enrichment of OOL was at the expense of Mr. Herzig. The loan to Mr. Herzig was a genuine one spurred on by the motive of avoiding Swiss regulatory requirements. But it was nevertheless no more than a formal act designed to allow the transaction to proceed. It does not alter the reality that OOL was enriched by the money advanced by BFC via Mr. Herzig to Parc. To allow the interposition of Mr. Herzig to alter the substance of the transaction would be pure formalism. That brings me to the third requirement, which was the ground upon which the Court of Appeal decided against BFC. Since no special defences were relied on, this was also the major terrain of debate on the present appeal. It is not seriously disputed that by asking for a letter of postponement BFC expected that they would obtain a form of security sufficient to postpone repayment of loans by all companies in the Omni groups until repayment of the BFC loan. In any event, that fact is clearly established. But for BFC's mistaken belief that it was protected in respect of intra-group indebtedness BFC would not have proceeded with the refinancing. In these circumstances there is in my judgment a principled ground for granting a restitutionary remedy. Counsel for OOL challenged the view that restitutionary liability is prima facie established by submitting that there was no mutual intention that BFC should have priority as against OOL. Restitutionary liability is triggered by a range of unjust factors or grounds of restitution. Defeated bilateral expectations are a prime source of such liability. But sometimes unilateral defeated expectations may be sufficient, e.g. payments made under a unilateral mistake of fact where the ground of liability is the mistake of one party. I would reject the idea that in a case such as the present a test of mutuality must be satisfied. It is now necessary to mention the other factors which the Court of Appeal relied on in concluding that BFC was not entitled to succeed. Perhaps in passing Morritt L.J. commented that neither Parc nor OOL was guilty of any misrepresentation. It is sufficient to say that restitution is not a fault-based remedy. Morritt L.J. then pointed out that BFC failed to take elementary precautions to safeguard their interests. Counsel for OOL conceded that this feature is not a self-sufficient answer to the claim. At one stage he argued that this feature is relevant to the exercise of a discretion but I understood him ultimately to concede that the relief sought is not discretionary. In any event, the neglect of BFC is akin to the carelessness of a mistaken payor: it does not by itself undermine the ground of restitution. On the arguments as presented in the Court of Appeal Morritt L.J. concluded that BFC, if subrogated, would be in competition with RTB Factually this is incorrect. BFC knew that RTB had a first charge over the property. The letter of postponement, and the circumstances of the case, show

that BFC merely expected to receive priority over loans by other companies in the Omni group. This particular obstacle is not a real one. The Court of Appeal considered that subrogation if allowed would place BFC in a better position than if the postponement letter had been binding on Parc and OOL. The Court of Appeal considered the matter from the point of view of BFC seeking to step into the shoes of RTB as chargee. But it has now been made clear that BFC merely seeks reversal of OOL's unjust enrichment at the expense of BFC. BFC merely asserts restitutionary rights against OOL. In the circumstances conceptual difficulties about the remedy sought by BFC disappear. In my view, on an application of established principles of unjust enrichment BFC are entitled to succeed against OOL. But, if it were necessary to do so, I would reach the same conclusion in terms of the principles of subrogation. It would admittedly not be the usual case of subrogation to security rights in rem and in personam. The purpose of the relief would be dictated by the particular form of security, involving rights in personam against companies in the group, which BFC mistakenly thought it was obtaining. It is true that no decided case directly in point has been found. But distinguished writers have shown that the place of subrogation on the map of the law of obligations is by and large within the now sizeable corner marked out for restitution: see Goff and Jones, The Law of Restitution, 4th ed. (1993), pp. 526, 531; Birks, An Introduction to the Law of Restitution, (1985), p. 93 et seq; Burrows, The Law of Restitution, (1993), p. 92; Mitchell, The Law of Subrogation, (1994), p.

4. And there can be no conceptual impediment to the remedy of subrogation being allowed not in respect of both rights in rem and rights in personam but only in respect of rights in personam. For these reasons, as well as the reasons contained in the speech of my noble and learned friend, Lord Hoffmann, I would allow the appeal. LORD GRIFFITHS My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Hoffmann. For the reasons which he gives I, too, would allow the appeal. LORD HOFFMANN My Lords, This appeal raises, in unusual circumstances, a question on the scope of the equitable remedy of subrogation. The appellant, the Banque Financiere de la Cité ("BFC") made an advance of DM30m. for the purpose of enabling Parc

(Battersea) Ltd. ("Parc") to repay part of a loan from another bank secured by a first charge upon its property. The transaction did not contemplate that Parc would provide any security. It was however an express condition of the advance that other companies in the group to which Parc belonged would not demand repayment of their loans until BFC had been repaid. One such company was Omnicorp Overseas Ltd ("OOL") which was owed £26.25m. secured by a second charge over the property. Unfortunately the persons who negotiated the transaction had no authority to commit OOL to such an undertaking and it was not binding upon it. Parc is insolvent and if BFC has no priority over OOL's second charge, it is unlikely to be repaid. The question is whether, as against OOL, BFC is entitled to be subrogated to the first charge to the extent that its money was used to repay the debt which it secured. The judge, Robert Walker J., decided that the remedy was available. The Court of Appeal, in a judgment delivered by Morritt L.J. decided that it was not. Against that decision BFC appeals to your Lordships' House. The striking feature of

this case, which distinguishes it from familiar cases on subrogation to which it bears a partial resemblance such as **Butler v. Rice [1910] 2 Ch. 278** and **Ghana Commercial Bank v. Chandiram** [1960] AC 732 is that BFC did not contemplate that Parc would provide it with any security at all. As against Parc, it was content to be an unsecured creditor. What was contemplated was a negative form of protection from certain of Parc's other creditors, namely the other companies in the group, in the form of an undertaking that they would not enforce any claims they might have against Parc in priority to BFC. It is this distinction which is principally relied upon by the respondents for their submission, which found favour in the Court of Appeal, that subrogation is not available. To allow BFC to be subrogated to the first charge would mean, it is said, giving it far greater security than it ever bargained for. But there are also other distinctions and for this purpose it is necessary to set out the facts in rather more detail. Parc is an English company owning development land in Battersea and OOL is registered in the British Virgin Islands. They belonged to the Omni Group, based in Switzerland, where the ultimate holding company, Omni Holdings AG ("Holdings"), was incorporated. The principal officers of Holdings were its founder and principal shareholder Mr. Werner Rey and its chief financial officer Mr. Markus Herzig. Parc acquired the Battersea land in 1988 with the aid of a £30m. bridging loan from Royal Trust Bank

(Switzerland) ("RTB"), secured by a first charge, and additional finance from OOL, in respect of which it subsequently obtained a second charge. The RTB loan was partially repaid in 1989 but £20m. was extended until 28 September 1990. Parc was unable to refinance its borrowing on the London market and turned to Mr. Herzig for help. He approached BFC, which had previously lent to the Omni Group. On 14 September 1990 it agreed in principle to advance DM30m. for two months and the necessary arrangements were concluded in haste. A difficulty was that a further loan to a member of the Omni Group would have had to be reported to the Swiss banking authorities. To avoid this, BFC agreed to make the loan to Mr. Herzig personally on the basis that he would pass it on to Parc, which would issue him with a promissory note which he would assign to BFC as security. The principal security was to be the pledge of 35,000 bearer shares in Holdings, which BFC valued at DM40m and, in addition, BFC required the "postponement letter" in respect of the claims of other group companies. This read as follows: "This is to confirm that we and all companies of our group will not demand any repayment of loans granted to Parc

(Battersea) Ltd, London, until the full repayment of your loan of DM 30,000,000.- granted to Mr. M. Herzig, which is secured by a deep discount promissory note amounting to GBP 10,000,000.- issued by Parc

(Battersea) Ltd." Completion took place on 28 September 1990, when Mr. Herzig handed over the pledged shares and postponement letter, signed by himself and another officer of Holdings, and BFC, at the direction of Mr. Herzig, paid DM30m. to RTB for the account of Parc, which was credited with £10.097m. The promissory note was issued by Parc to Mr. Herzig on 8 November 1990 and duly assigned by him to BFC. Its terms were quite different from those of BFC's loan to Mr. Herzig: it was for £11.775m. payable on 28

September 1991, representing an advance of £10m and interest at a fixed rate of 17.75 per cent, and unsecured. BFC's loan was DM30m for two months, secured as I have described and bearing interest at 1.25 per cent over 2 months LIBOR from time to time. Mr. Herzig defaulted on repayment of the loan and in April 1991 the Omni Group collapsed. BFC had realised some of the pledged shares before they became worthless and repaid itself about DM5m. but the rest of the advance remains unpaid. Parc still owns the land in Battersea but is in receivership and has no other assets. Mr. Herzig is unable personally to repay. The first issue at the trial before Robert Walker J. concerned the purported effect of the postponement letter. He rejected a submission that it was not intended to have legal effect and this point has not been pursued. He also dealt with a point of construction: were Holdings purporting to contract on behalf of the other group companies or were they merely warranting on their own behalf that they would take whatever steps were necessary to ensure that the other group companies did not make claims in priority to BFC? He declared himself "narrowly persuaded" that the former construction was correct. The main question at the trial then became whether OOL was bound by the postponement letter, either because Holdings (or Mr. Herzig) had authority to contract on its behalf or because it was estopped from denying this. The judge held that OOL (which, like Parc, was administered from London) had not given the necessary authority and had no knowledge of the postponement letter at any time which could have raised an estoppel. There was no appeal against these findings of fact. On the question of subrogation, the judge held that although Parc, like OOL, knew nothing of the postponement letter, it knew enough to permit the presumption of whatever mutual intention was needed to activate the remedy of subrogation. Your Lordships may think this summary of his reasoning somewhat cryptic but I shall in due course expand upon the issues which it raises. He went on to say that BFC did not get all it expected to get in the way of a binding postponement letter and the effect of its failure to bind OOL would, in the absence of subrogation, result in OOL being enriched at BFC's expense. This, he held, would "in the technical sense" be unjust and therefore brought subrogation into play. In the Court of Appeal, Morritt L.J. (with whom Mummery and Beldam L.JJ. agreed) disagreed. He accepted that OOL would be enriched at the expense of BFC but said that such enrichment would not be unjust or unconscionable. His reasons were as follows: (1)The loan was structured to avoid disclosure under Swiss banking regulations. As a result, the loan by BFC was to Mr. Herzig on different terms from the loan by Mr. Herzig to Parc and the idea of a second charge in favour of the Bank over the Battersea property had been considered and for similar reasons rejected. (2)The reason why BFC did not get a binding postponement letter was its own failure to take the elementary precaution of checking that Holdings had the necessary authority. (3)There had been no misrepresentation or sharp practice on the part of the recipient of the enrichment, OOL. (4)There was a conceptual problem about the subrogation of BFC to part of the debt secured by the charge in favour of RTB, which would have prejudiced the security of RTB in respect of the rest of its debt. It was also said to be contrary to a Priority Agreement executed on 13 February 1990 which had confirmed RTB's priority over OOL's second charge. (5)Subrogation would give BFC the rights of a first mortgagee over the Battersea land. This would give it rights for which it had never bargained--indeed, the possibility of even a second charge had been considered and rejected--and would place it in a more

favourable position than if the postponement letter had been binding. My Lords, the subject of subrogation is bedeviled by problems of terminology and classification which are calculated to cause confusion. For example, it is often said that subrogation may arise either from the express or implied agreement of the parties or by operation of law in a number of different situations: see, for example, Lord Keith of Kinkel in Orakpo v. Manson Investments Ltd. **[1978] A.C. 95**,

119. As a matter of current terminology, this is true. Lord Diplock, for example, was of the view that the doctrine of subrogation in contracts of insurance operated entirely by virtue of an implied term of the contract of insurance **(Hobbs v. Marlowe [1978] A.C. 16**, 39) and although in Lord Napier and Ettrick v. Hunter **[1993] A.C. 713** your Lordships rejected the exclusivity of this claim for the common law and assigned a larger role to equitable principles, there was no dispute that the doctrine of subrogation in insurance rests upon the common intention of the parties and gives effect to the principle of indemnity embodied in the contract. Furthermore, your Lordships drew attention to the fact that it is customary for the assured, on payment of the loss, to provide the insurer with a letter of subrogation, being no more nor less than an express assignment of his rights of recovery against any third party. Subrogation in this sense is a contractual arrangement for the transfer of rights against third parties and is founded upon the common intention of the parties. But the term is also used to describe an equitable remedy to reverse or prevent unjust enrichment which is not based upon any agreement or common intention of the party enriched and the party deprived. The fact that contractual subrogation and subrogation to prevent unjust enrichment both involve transfers of rights or something resembling transfers of rights should not be allowed to obscure the fact that one is dealing with radically different institutions. One is part of the law of contract and the other part of the law of restitution. Unless this distinction is borne clearly in mind, there is a danger that the contractual requirement of mutual consent will be imported into the conditions for the grant of the restitutionary remedy or that the absence of such a requirement will be disguised by references to a presumed intention which is wholly fictitious. There is an obvious parallel with the confusion caused by classifying certain restitutionary remedies as quasi-contractual and importing into them features of the law of contract. In this case there was plainly no common intention as between OOL, the party enriched, and BFC, the party deprived. OOL had no knowledge of the postponement letter or reason to believe that the advance to Parc of the money provided by BFC was otherwise than unsecured. But why should this necessarily exclude subrogation as a restitutionary remedy? I shall refer to five authorities which in my view demonstrate the contrary. In Chetwynd v. Allen **[1899] 1 Ch. 353** one Terrell had in 1891 lent Mr. Chetwynd £2,000 secured upon mortgages over two properties: a house called Cedars, which belonged to his wife, and a riding school, which was his own. Mrs. Chetwynd had consented to the mortgage over her property. In 1892 Mr. Chetwynd borrowed £1,200 from one Mynors, saying that it was to pay off Terrell's mortgage on Cedars and promising him a transfer of that mortgage. He did not disclose that Cedars belonged to his wife or that Terrell's mortgage was for a larger sum and was over the riding school as well. Mr. Chewynd applied £1,000 of Mynor's money in part repayment to Terrell. Mrs. Chetwynd, who had known nothing of the transaction with Mynors,

claimed that she was entitled to Cedars with the benefit of the part repayment to Terrell but free of any claim by Mynors. Romer J. held, at p. 357 that the charge over Cedars and the riding school was, to the extent of £1,000, "kept alive in equity in favour of Mynors." I shall have to return to the question of what that expression means, but the case shows that the remedy of subrogation does not depend upon any common intention between the plaintiff and the party enriched. In **Butler v. Rice [1910] 2 Ch. 277**, Mrs. Rice owned properties in Bristol and Cardiff which were equitably mortgaged to a bank (by deposit of title deeds) to secure a loan of £450. Mr. Rice asked Mr. Butler to lend him £450 to pay off the mortgage on the Bristol property, not mentioning the Cardiff property or the fact that both belonged to his wife. Mr. Butler agreed to lend on a mortgage for £300 over the Bristol property and a guarantee for the rest from Mr. Rice's solicitor. The money was used to pay off the bank but Mrs. Rice refused to execute a mortgage over the Bristol property. She too had known nothing about the transaction before the bank's mortgage was paid off. Warrington J. said, at p. 282 that the question was whether the bank's charge had been "paid off or kept alive" and on that question "the concurrence of the mortgagor is immaterial." He followed Chetwynd v. Allen **[1899] 1 Ch. 353** in holding that Mr. Butler was entitled to the benefit of the mortgage over the Bristol property to secure the £450 he had advanced. In **Ghana Commercial Bank v. Chandiram** [1960] AC 732 the bank made an advance to the owner of property in Accra which was used to pay off his indebtedness to Barclays (D.C. & O.) Ltd, secured by an equitable mortgage. The owner executed a legal mortgage in favour of the Ghana Bank, but this was invalidated by a previous attachment of the property by a creditor. The Privy Council, following **Butler v. Rice** and Chetwynd v. Allen held that the Ghana Bank was entitled to be subrogated to the equitable mortgage which had been paid off. Lord Jenkins said, at p. 745: "It is not open to doubt that where a third party pays off a mortgage he is presumed, unless the contrary appears, to intend that the mortgage shall be kept alive for his own benefit. . ." In **Paul v. Speirway Ltd. [1976] Ch. 220** the plaintiff made a loan to a company in which he had a joint interest in order to enable it to pay the price due under a contract for the purchase of development land. When the company failed, he claimed to be a secured creditor by subrogation to the vendor's lien. Oliver J. found on the facts that the advance to the company was intended to be an unsecured loan and held that this excluded any remedy by way of subrogation, which would give the plaintiff more than he had bargained for. The learned judge rejected the proposition, advanced by counsel for the company, that the remedy of subrogation was available only when the common intention of the parties was (as in the three earlier cases to which I have referred) that the plaintiff should have some security which, for one reason or another, he did not get. He confined himself to the much narrower proposition, at p. 232 that: ". . . where on all the facts the court is satisfied that the true nature of the transaction between the payer of the money and the person at whose instigation it is paid is simply the creation of an unsecured loan, this in itself will be sufficient to dispose of any question of subrogation." In formulating this proposition, the learned judge was clearly confining himself to cases in which the claim was to subrogation to security and not referring to subrogation to a mere debt, as in cases of ultra vires borrowings. The wisdom of the caution shown by Oliver J. was demonstrated by the facts in Boscawen v. Bajwa [1996] 1 WLR 328, which contains a valuable and illuminating analysis of the remedy of subrogation by Millett L.J. The Abbey

National Building Society agreed to make an advance on mortgage to a purchaser of property and paid the money to the solicitors acting for them and the purchaser to hold on behalf of the Abbey National until paid over against a first legal charge on the property. The solicitors paid it over to the vendor's solicitors to hold to their order pending completion but the latter used the money in advance of completion to pay off the vendor's mortgage to the Halifax Building Society. In fact completion never took place: the vendor failed to convey to the purchaser and the Abbey National accordingly obtained no legal charge or other security. It claimed to be subrogated to the Halifax mortgage. It will be seen at once that there was no common intention that the vendor, whose mortgage had been paid off, should grant any security to the Abbey National. As Millett L.J. pointed out, at p. 339, the Abbey National expected to obtain a charge from the purchaser as legal owner after completion of the sale, and, in the event which happened of there being no such completion, did not intend its money to be used at all. This meant that: "[t]he factual context in which the claim to subrogation arises is a novel one which does not appear to have arisen before but the justice of its claim cannot be denied." These cases seem to me to show is that it is a mistake to regard the availability of subrogation as a remedy to prevent unjust enrichment as turning entirely upon the question of intention, whether common or unilateral. Such an analysis has inevitably to be propped up by presumptions which can verge upon outright fictions, more appropriate to a less developed legal system than we now have. I would venture to suggest that the reason why intention has played so prominent a part in the earlier cases is because of the influence of cases on contractual subrogation. But I think it should be recognised that one is here concerned with a restitutionary remedy and that the appropriate questions are therefore, first, whether the defendant would be enriched at the plaintiff's expense; secondly, whether such enrichment would be unjust and thirdly, whether there are nevertheless reasons of policy for denying a remedy. An example of a case which failed on the third ground is Orakpo v. Manson Investments Ltd. **[1978] A.C. 95**, in which it was considered that restitution would be contrary to the terms and policy of the Moneylenders Acts. This does not of course mean that questions of intention may not be highly relevant to the question of whether or not enrichment has been unjust. I would certainly not wish to question the proposition of Oliver J. in **Paul v. Speirway Ltd. [1976] Ch. 220** that, as against a borrower, subrogation to security will not be available where the transaction was intended merely to create an unsecured loan. I do not express a view on the question of where the burden of proof lies in these matters. Oliver J., following the dictum of Lord Jenkins in **Ghana Commercial Bank v. Chandiram** [1960] AC 732, 745 which I have quoted, held that if the plaintiff's money was used to discharge a secured liability, he was presumed to "intend that the mortgage shall be kept alive for his own benefit" and this presumption was applied by Nicholls J. in Boodle Hatfield & Co. v. British Films Ltd. [1986] P.C.C.

176. However, if it is recognised that the use of the plaintiff's money to pay off a secured debt and the intentions of the parties about whether or not the plaintiff should have security are only materials upon which a court may decide that the defendant's enrichment would be unjust, it could be argued that on general principles it is for the plaintiff to make out a case of unjust enrichment. In this case, I think that in the absence

of subrogation, OOL would be enriched at BFC's expense and that prima facie such enrichment would be unjust. The bank advanced the DM30m. upon the mistaken assumption that it was obtaining a postponement letter which would be effective to give it priority over any intra-group indebtedness. It would not otherwise have done so. On the construction of the letter adopted by Robert Walker J., namely that Holdings was purporting to contract on behalf of all companies in the Omni group, the payment was made under a mistake as to Holdings's authority. On the construction adopted by the Court of Appeal the mistake was as to the power of Holdings to ensure that other group companies would postpone their claims. For my part, I prefer the construction adopted by judge. But I do not think that for present purposes it matters which view one takes. In either case, BFC failed to obtain that priority over intra-group indebtedness which was an essential part of the transaction under which it paid the money. It may have attached more importance to the pledge of the shares but the provision of the postponement letter was a condition of completion. The result of the transaction is that BFC's DM30m. has been used to reduce the debt secured by RTB's first charge and that this reduction will, by reason of OOL's second charge, enure wholly to the latter's advantage. I turn, therefore, to the grounds upon which the Court of Appeal decided that the enrichment of OOL would not be unjust. The first four seem to me to carry little weight. It is true that the transaction was structured to pass the money through the hands of Mr. Herzig in order to avoid disclosure under Swiss banking law. But there is no difficulty in tracing BFC's money into the discharge of the debt due to RTB: the payment to RTB was direct. In this respect, the case is stronger than in Boscawen v. Bajwa [1996] 1 WLR

328. Since the money can be traced, the differences in the terms of the loans by BFC to Mr. Herzig and by Mr. Herzig to Parc do not seem to me to matter, although of course on the principle of **Paul v. Speirway Ltd. [1976] Ch. 220**, BFC could not, on the basis of any terms agreed between Mr. Herzig and Parc, assert by way of subrogation greater rights than they bargained for. As for the avoidance of Swiss banking law, it seems to me that there was no evidence that this amounted to an illegality which would disqualify BFC from obtaining equitable relief and I do not think that Morritt L.J. suggested this to be the case. The second ground was that BFC did not take proper precautions to ensure that Mr. Herzig had authority to execute the postponement letter. But there is, so far as I know, no case in which it has been held that carelessness is a ground for holding that a consequent enrichment is not unjust. No doubt Mr. **Mynors (in Chetwynd v. Allen [1899] 1 Ch. 353**) and Mr. Butler (in **Butler v. Rice [1910] 2 Ch. 277**) were careless in parting with their money without bothering to inspect the borrower's title deeds. They relied upon Mr. Chetwynd and Mr. Rice as BFC relied upon Mr. Herzig. But that did not entitle Mrs. Chetwynd or Mrs. Rice to be enriched as a result of their mistakes. As a third ground, Morritt L.J. said that there had been no misrepresentation or sharp practice on the part of the recipient of the enrichment. But neither had there been on the part of Mrs. Chetwynd or Mrs. Rice. Both were found to have known nothing about the transactions which resulted in their indebtedness being paid off. All that could be said against them was that they, in common with OOL, wanted to retain the benefit of their enrichment. Fourthly, there is the "conceptual problem" about BFC and RTB appearing to share the same security. In my view this is not a real problem. BFC does not claim any priority over RTB.

It accepts that RTB was entitled to rely upon its first charge, in priority to BFC, in respect of the whole of its outstanding indebtedness. BFC claims only to be able to rely upon that security against OOL after RTB has been paid. In this respect the case is in my view no different from Chetwynd v. Allen **[1899] 1 Ch. 353**, 357 in which Romer J. said that the unpaid balance of Terrell's debt would take priority over Mynors's claim by way of subrogation to his security. Morritt L.J. regarded this authority as of no assistance because "Romer J. made it plain that his decision was not based on any principle of subrogation." It is true that Romer J., following the submissions of counsel, appeared to distinguish between "keeping the charge alive," or what would now be called subrogation to the security, and "subrogation," by which he seems to have meant subrogation to the debt (and, presumably, the security). But subrogation to the security is precisely the remedy sought in this case and Chetwynd v. Allen therefore seems to me very much in point. In any case, the priority of RTB over BFC can be explained on a wider ground which I shall in due course discuss. This brings me to the fifth reason relied upon by the Court of Appeal and what I regard as the main question in the case, namely the fact that "keeping the charge alive" for the benefit of BFC would give it more than it was entitled to expect. The transaction contemplated that BFC would be an unsecured creditor of Parc; "keeping the charge alive" would give it the benefit of a first charge. This makes it necessary, as I earlier foreshadowed, to examine more closely what is involved in subrogation to a security. In my view, the phrase "keeping the charge alive" needs to be handled with some care. It is not a literal truth but rather a metaphor or analogy: see Professor Birks's An Introduction to the Law of Restitution, (1985) pp. 93-97. In a case in which the whole of the secured debt is repaid, the charge is not kept alive at all. It is discharged and ceases to exist. In a case like the present, in which part of the secured debt is repaid, the charge remains alive only to secure the remainder of the debt for the benefit of the original chargee. Nothing can affect his rights and there is no question of competition between him and the party claiming subrogation. It is important to remember that, as Millett L.J. pointed out in Boscawen v. Bajwa [1996] 1 WLR 328, 335, subrogation is not a right or a cause of action but an equitable remedy against a party who would otherwise be unjustly enriched. It is a means by which the court regulates the legal relationships between a plaintiff and a defendant or defendants in order to prevent unjust enrichment. When judges say that the charge is "kept alive" for the benefit of the plaintiff, what they mean is that his legal relations with a defendant who would otherwise be unjustly enriched are regulated as if the benefit of the charge had been assigned to him. It does not by any means follow that the plaintiff must for all purposes be treated as an actual assignee of the benefit of the charge and, in particular, that he would be so treated in relation to someone who would not be unjustly enriched. This, I interpose, is the real reason why there is no "conceptual problem" about treating BFC as subrogated to part of the RTB secured debt. The equitable remedy is available only against OOL, which is the only party which would be unjustly enriched. As between RTB and BFC, subrogation has no part to play. RTB is entitled to its security and BFC is no more than an unsecured creditor. The same is true as between BFC and any secured or unsecured creditor of Parc other than the members of the Omni group. The transaction contemplated that as against non-group creditors, BFC would incur no more than an unsecured liability, evidenced by the promissory note issued to Mr. Herzig and assigned by him to BFC. As against such creditors, therefore, the

remedy of subrogation is not available. Nor is it available against Parc itself, so as to give BFC the rights of sale, foreclosure etc. which would normally follow from BFC being treated as if it were an assignee of the RTB charge. It follows that subrogation as against OOL, which is all that BFC claims in the action, would not give it greater rights than it bargained for. All that would happen is that OOL would be prevented from being able to enrich itself to the extent that BFC's money paid off the RTB charge. This is fully within the scope of the equitable remedy. I would therefore allow the appeal. Robert Walker J. made a declaration that BFC "is and has since the 28th day of September 1990 been entitled to the benefit of" the RTB charge and the Priority Agreement of 13 February 1990. I think that this declaration goes further than is justified. As against Parc, BFC is not entitled to such a declaration. I would therefore insert after the words "entitled to" the words "be treated as against OOL as if it had." Subject to that amendment, I would restore the declaration made by the judge. LORD CLYDE My Lords, The basis for the appellants' claim is to be found in the principle of unjust enrichment, a principle more fully expressed in the Latin formulation, nemo debet locupletari aliena jactura. The principle is equitable in the sense that it seeks to secure a fair and just determination of the rights of the parties concerned in the case. But it is not a principle which is entirely discretionary in its application so as to enable a court in any case to withhold a remedy where all the necessary elements for its satisfaction have been established, although there may be circumstances where on grounds which may be described as grounds of public policy a remedy may be refused. Without attempting any comprehensive analysis, it seems to me that the principle requires at least that the plaintiff should have sustained a loss through the provision of something for the benefit of some other person with no intention of making a gift, that the defendant should have received some form of enrichment, and that the enrichment has come about because of the loss. The loss may be an expenditure which has not met with the expected return. The remedy may vary with the circumstances of the case, the object being to effect a fair and just balance between the rights and interests of the parties concerned. The obligation to provide the remedy does not rest on any contractual basis but on the general principle of the common law and it may find its expression in a variety of circumstances. The claim which the appellants have eventually come to make is not for a share in the charge which had been effected over the Battersea Wharf in favour of RTB, so as to give them a preference over all creditors of Parc, but only a personal right to rank in priority to OOL, effective only as between RTB and OOL and open to be defeated by any further transactions by Parc, which in the event have not occurred. I would have had difficulty in accepting that the appellants would be entitled to have even a pro tanto right to the charge in circumstances where they did not intend to obtain any such security, indeed such a provision had been deliberately considered and deleted from the documentation. The more modest claim which they now make, however, seems to me to have been made out. The difference between these two positions, which to my mind is critical in the case, can be readily obscured by the use of the term "subrogation." It is agreed that OOL was enriched by the repayment of some £10m. of the RTB loan. The structural arrangements made with Mr. Herzig in order to avoid a breach of the Swiss banking regulations do not seem to me to prevent recognition of the reality of the granting of the funds by the appellants to RTB for Parc's account. Indeed the money was transmitted by them through the Deutsche- Schweizische Bank AG to RTB for the

account of Parc. The appellants were well aware that the money was required for a partial reduction of an existing bank loan. The enrichment which is agreed to have occurred seems to me to have come about through the expenditure which the appellants made. Parc then incurred a direct liability to the appellants through the promissory note which Parc supplied and, ill-drafted as it was, the appellants certainly must have come to expect through the letter of postponement that they would in any question with OOL enjoy a priority to OOL in the enforcing of their own claim against Parc. It does not in my view matter that neither Parc nor OOL knew anything about the letter nor that the letter was ineffective to achieve what the appellants expected. In the circumstances it seems to me to in accordance with principle that they should be accorded the priority which they now claim. For these reasons and for the reasons more fully set out by my noble and learned friend Lord Hoffmann I would allow the appeal. My Lords, the subject of subrogation is bedeviled by problems of terminology and classification which are calculated to cause confusion. For example, it is often said that subrogation may arise either from the express or implied agreement of the parties or by operation of law in a number of different situations: see, for example, Lord Keith of Kinkel in Orakpo v. Manson Investments Ltd. **[1978] A.C. 95**,

119. As a matter of current terminology, this is true. Lord Diplock, for example, was of the view that the doctrine of subrogation in contracts of insurance operated entirely by virtue of an implied term of the contract of insurance **(Hobbs v. Marlowe [1978] A.C. 16**, 39) and although in Lord Napier and Ettrick v. Hunter **[1993] A.C. 713** your Lordships rejected the exclusivity of this claim for the common law and assigned a larger role to equitable principles, there was no dispute that the doctrine of subrogation in insurance rests upon the common intention of the parties and gives effect to the principle of indemnity embodied in the contract. Furthermore, your Lordships drew attention to the fact that it is customary for the assured, on payment of the loss, to provide the insurer with a letter of subrogation, being no more nor less than an express assignment of his rights of recovery against any third party. Subrogation in this sense is a contractual arrangement for the transfer of rights against third parties and is founded upon the common intention of the parties. But the term is also used to describe an equitable remedy to reverse or prevent unjust enrichment which is not based upon any agreement or common intention of the party enriched and the party deprived. The fact that contractual subrogation and subrogation to prevent unjust enrichment both involve transfers of rights or something resembling transfers of rights should not be allowed to obscure the fact that one is dealing with radically different institutions. One is part of the law of contract and the other part of the law of restitution. Unless this distinction is borne clearly in mind, there is a danger that the contractual requirement of mutual consent will be imported into the conditions for the grant of the restitutionary remedy or that the absence of such a requirement will be disguised by references to a presumed intention which is wholly fictitious. There is an obvious parallel with the confusion caused by classifying certain restitutionary remedies as quasi-contractual and importing into them features of the law of contract. In this case there was plainly no common intention as between OOL, the party enriched, and BFC, the party deprived. OOL had no knowledge of the postponement letter or reason to believe that the advance to Parc of the money

provided by BFC was otherwise than unsecured. But why should this necessarily exclude subrogation as a restitutionary remedy? I shall refer to five authorities which in my view demonstrate the contrary. In Chetwynd v. Allen **[1899] 1 Ch. 353** one Terrell had in 1891 lent Mr. Chetwynd £2,000 secured upon mortgages over two properties: a house called Cedars, which belonged to his wife, and a riding school, which was his own. Mrs. Chetwynd had consented to the mortgage over her property. In 1892 Mr. Chetwynd borrowed £1,200 from one Mynors, saying that it was to pay off Terrell's mortgage on Cedars and promising him a transfer of that mortgage. He did not disclose that Cedars belonged to his wife or that Terrell's mortgage was for a larger sum and was over the riding school as well. Mr. Chewynd applied £1,000 of Mynor's money in part repayment to Terrell. Mrs. Chetwynd, who had known nothing of the transaction with Mynors, claimed that she was entitled to Cedars with the benefit of the part repayment to Terrell but free of any claim by Mynors. Romer J. held, at p. 357 that the charge over Cedars and the riding school was, to the extent of £1,000, "kept alive in equity in favour of Mynors." I shall have to return to the question of what that expression means, but the case shows that the remedy of subrogation does not depend upon any common intention between the plaintiff and the party enriched. In **Butler v. Rice [1910] 2 Ch. 277**, Mrs. Rice owned properties in Bristol and Cardiff which were equitably mortgaged to a bank (by deposit of title deeds) to secure a loan of £450. Mr. Rice asked Mr. Butler to lend him £450 to pay off the mortgage on the Bristol property, not mentioning the Cardiff property or the fact that both belonged to his wife. Mr. Butler agreed to lend on a mortgage for £300 over the Bristol property and a guarantee for the rest from Mr. Rice's solicitor. The money was used to pay off the bank but Mrs. Rice refused to execute a mortgage over the Bristol property. She too had known nothing about the transaction before the bank's mortgage was paid off. Warrington J. said, at p. 282 that the question was whether the bank's charge had been "paid off or kept alive" and on that question "the concurrence of the mortgagor is immaterial." He followed Chetwynd v. Allen **[1899] 1 Ch. 353** in holding that Mr. Butler was entitled to the benefit of the mortgage over the Bristol property to secure the £450 he had advanced. In **Ghana Commercial Bank v. Chandiram** [1960] AC 732 the bank made an advance to the owner of property in Accra which was used to pay off his indebtedness to Barclays (D.C. & O.) Ltd, secured by an equitable mortgage. The owner executed a legal mortgage in favour of the Ghana Bank, but this was invalidated by a previous attachment of the property by a creditor. The Privy Council, following **Butler v. Rice** and Chetwynd v. Allen held that the Ghana Bank was entitled to be subrogated to the equitable mortgage which had been paid off. Lord Jenkins said, at p. 745: "It is not open to doubt that where a third party pays off a mortgage he is presumed, unless the contrary appears, to intend that the mortgage shall be kept alive for his own benefit. . ." In **Paul v. Speirway Ltd. [1976] Ch. 220** the plaintiff made a loan to a company in which he had a joint interest in order to enable it to pay the price due under a contract for the purchase of development land. When the company failed, he claimed to be a secured creditor by subrogation to the vendor's lien. Oliver J. found on the facts that the advance to the company was intended to be an unsecured loan and held that this excluded any remedy by way of subrogation, which would give the plaintiff more than he had bargained for. The learned judge rejected the proposition, advanced by counsel for the company, that the remedy of subrogation was available only when the common

intention of the parties was (as in the three earlier cases to which I have referred) that the plaintiff should have some security which, for one reason or another, he did not get. He confined himself to the much narrower proposition, at p. 232 that: ". . . where on all the facts the court is satisfied that the true nature of the transaction between the payer of the money and the person at whose instigation it is paid is simply the creation of an unsecured loan, this in itself will be sufficient to dispose of any question of subrogation." In formulating this proposition, the learned judge was clearly confining himself to cases in which the claim was to subrogation to security and not referring to subrogation to a mere debt, as in cases of ultra vires borrowings. The wisdom of the caution shown by Oliver J. was demonstrated by the facts in Boscawen v. Bajwa [1996] 1 WLR 328, which contains a valuable and illuminating analysis of the remedy of subrogation by Millett L.J. The Abbey National Building Society agreed to make an advance on mortgage to a purchaser of property and paid the money to the solicitors acting for them and the purchaser to hold on behalf of the Abbey National until paid over against a first legal charge on the property. The solicitors paid it over to the vendor's solicitors to hold to their order pending completion but the latter used the money in advance of completion to pay off the vendor's mortgage to the Halifax Building Society. In fact completion never took place: the vendor failed to convey to the purchaser and the Abbey National accordingly obtained no legal charge or other security. It claimed to be subrogated to the Halifax mortgage. It will be seen at once that there was no common intention that the vendor, whose mortgage had been paid off, should grant any security to the Abbey National. As Millett L.J. pointed out, at p. 339, the Abbey National expected to obtain a charge from the purchaser as legal owner after completion of the sale, and, in the event which happened of there being no such completion, did not intend its money to be used at all. This meant that: "[t]he factual context in which the claim to subrogation arises is a novel one which does not appear to have arisen before but the justice of its claim cannot be denied." These cases seem to me to show is that it is a mistake to regard the availability of subrogation as a remedy to prevent unjust enrichment as turning entirely upon the question of intention, whether common or unilateral. Such an analysis has inevitably to be propped up by presumptions which can verge upon outright fictions, more appropriate to a less developed legal system than we now have. I would venture to suggest that the reason why intention has played so prominent a part in the earlier cases is because of the influence of cases on contractual subrogation. But I think it should be recognised that one is here concerned with a restitutionary remedy and that the appropriate questions are therefore, first, whether the defendant would be enriched at the plaintiff's expense; secondly, whether such enrichment would be unjust and thirdly, whether there are nevertheless reasons of policy for denying a remedy. An example of a case which failed on the third ground is Orakpo v. Manson Investments Ltd. **[1978] A.C. 95**, in which it was considered that restitution would be contrary to the terms and policy of the Moneylenders Acts. This does not of course mean that questions of intention may not be highly relevant to the question of whether or not enrichment has been unjust. I would certainly not wish to question the proposition of Oliver J. in **Paul v. Speirway Ltd. [1976] Ch. 220** that, as against a borrower, subrogation to security will not be available where the transaction was intended merely to create an unsecured loan. I do not express a view on the question of where the burden of proof lies in these matters. Oliver J., following the dictum of Lord Jenkins in

Ghana Commercial Bank v. Chandiram [1960] AC 732, 745 which I have quoted, held that if the plaintiff's money was used to discharge a secured liability, he was presumed to "intend that the mortgage shall be kept alive for his own benefit" and this presumption was applied by Nicholls J. in Boodle Hatfield & Co. v. British Films Ltd. [1986] P.C.C.

176. However, if it is recognised that the use of the plaintiff's money to pay off a secured debt and the intentions of the parties about whether or not the plaintiff should have security are only materials upon which a court may decide that the defendant's enrichment would be unjust, it could be argued that on general principles it is for the plaintiff to make out a case of unjust enrichment. In this case, I think that in the absence of subrogation, OOL would be enriched at BFC's expense and that prima facie such enrichment would be unjust. The bank advanced the DM30m. upon the mistaken assumption that it was obtaining a postponement letter which would be effective to give it priority over any intra-group indebtedness. It would not otherwise have done so. On the construction of the letter adopted by Robert Walker J., namely that Holdings was purporting to contract on behalf of all companies in the Omni group, the payment was made under a mistake as to Holdings's authority. On the construction adopted by the Court of Appeal the mistake was as to the power of Holdings to ensure that other group companies would postpone their claims. For my part, I prefer the construction adopted by judge. But I do not think that for present purposes it matters which view one takes. In either case, BFC failed to obtain that priority over intra-group indebtedness which was an essential part of the transaction under which it paid the money. It may have attached more importance to the pledge of the shares but the provision of the postponement letter was a condition of completion. The result of the transaction is that BFC's DM30m. has been used to reduce the debt secured by RTB's first charge and that this reduction will, by reason of OOL's second charge, enure wholly to the latter's advantage. I turn, therefore, to the grounds upon which the Court of Appeal decided that the enrichment of OOL would not be unjust. The first four seem to me to carry little weight. It is true that the transaction was structured to pass the money through the hands of Mr. Herzig in order to avoid disclosure under Swiss banking law. But there is no difficulty in tracing BFC's money into the discharge of the debt due to RTB: the payment to RTB was direct. In this respect, the case is stronger than in Boscawen v. Bajwa [1996] 1 WLR

328. Since the money can be traced, the differences in the terms of the loans by BFC to Mr. Herzig and by Mr. Herzig to Parc do not seem to me to matter, although of course on the principle of **Paul v. Speirway Ltd. [1976] Ch. 220**, BFC could not, on the basis of any terms agreed between Mr. Herzig and Parc, assert by way of subrogation greater rights than they bargained for. As for the avoidance of Swiss banking law, it seems to me that there was no evidence that this amounted to an illegality which would disqualify BFC from obtaining equitable relief and I do not think that Morritt L.J. suggested this to be the case. The second ground was that BFC did not take proper precautions to ensure that Mr. Herzig had authority to execute the postponement letter. But there is, so far as I know, no case in which it has been held that carelessness is a ground for holding that a consequent enrichment is not unjust. No doubt Mr. **Mynors (in Chetwynd v. Allen [1899] 1 Ch.**

353) and Mr. Butler (in **Butler v. Rice [1910] 2 Ch. 277**) were careless in parting with their money without bothering to inspect the borrower's title deeds. They relied upon Mr. Chetwynd and Mr. Rice as BFC relied upon Mr. Herzig. But that did not entitle Mrs. Chetwynd or Mrs. Rice to be enriched as a result of their mistakes. As a third ground, Morritt L.J. said that there had been no misrepresentation or sharp practice on the part of the recipient of the enrichment. But neither had there been on the part of Mrs. Chetwynd or Mrs. Rice. Both were found to have known nothing about the transactions which resulted in their indebtedness being paid off. All that could be said against them was that they, in common with OOL, wanted to retain the benefit of their enrichment. Fourthly, there is the "conceptual problem" about BFC and RTB appearing to share the same security. In my view this is not a real problem. BFC does not claim any priority over RTB. It accepts that RTB was entitled to rely upon its first charge, in priority to BFC, in respect of the whole of its outstanding indebtedness. BFC claims only to be able to rely upon that security against OOL after RTB has been paid. In this respect the case is in my view no different from Chetwynd v. Allen **[1899] 1 Ch. 353**, 357 in which Romer J. said that the unpaid balance of Terrell's debt would take priority over Mynors's claim by way of subrogation to his security. Morritt L.J. regarded this authority as of no assistance because "Romer J. made it plain that his decision was not based on any principle of subrogation." It is true that Romer J., following the submissions of counsel, appeared to distinguish between "keeping the charge alive," or what would now be called subrogation to the security, and "subrogation," by which he seems to have meant subrogation to the debt (and, presumably, the security). But subrogation to the security is precisely the remedy sought in this case and Chetwynd v. Allen therefore seems to me very much in point. In any case, the priority of RTB over BFC can be explained on a wider ground which I shall in due course discuss. This brings me to the fifth reason relied upon by the Court of Appeal and what I regard as the main question in the case, namely the fact that "keeping the charge alive" for the benefit of BFC would give it more than it was entitled to expect. The transaction contemplated that BFC would be an unsecured creditor of Parc; "keeping the charge alive" would give it the benefit of a first charge. This makes it necessary, as I earlier foreshadowed, to examine more closely what is involved in subrogation to a security. In my view, the phrase "keeping the charge alive" needs to be handled with some care. It is not a literal truth but rather a metaphor or analogy: see Professor Birks's An Introduction to the Law of Restitution, (1985) pp. 93-97. In a case in which the whole of the secured debt is repaid, the charge is not kept alive at all. It is discharged and ceases to exist. In a case like the present, in which part of the secured debt is repaid, the charge remains alive only to secure the remainder of the debt for the benefit of the original chargee. Nothing can affect his rights and there is no question of competition between him and the party claiming subrogation. It is important to remember that, as Millett L.J. pointed out in Boscawen v. Bajwa [1996] 1 WLR 328, 335, subrogation is not a right or a cause of action but an equitable remedy against a party who would otherwise be unjustly enriched. It is a means by which the court regulates the legal relationships between a plaintiff and a defendant or defendants in order to prevent unjust enrichment. When judges say that the charge is "kept alive" for the benefit of the plaintiff, what they mean is that his legal relations with a defendant who would otherwise be unjustly enriched are regulated as if the benefit of the charge had been assigned to him. It does not by any

means follow that the plaintiff must for all purposes be treated as an actual assignee of the benefit of the charge and, in particular, that he would be so treated in relation to someone who would not be unjustly enriched. This, I interpose, is the real reason why there is no "conceptual problem" about treating BFC as subrogated to part of the RTB secured debt. The equitable remedy is available only against OOL, which is the only party which would be unjustly enriched. As between RTB and BFC, subrogation has no part to play. RTB is entitled to its security and BFC is no more than an unsecured creditor. The same is true as between BFC and any secured or unsecured creditor of Parc other than the members of the Omni group. The transaction contemplated that as against non-group creditors, BFC would incur no more than an unsecured liability, evidenced by the promissory note issued to Mr. Herzig and assigned by him to BFC. As against such creditors, therefore, the remedy of subrogation is not available. Nor is it available against Parc itself, so as to give BFC the rights of sale, foreclosure etc. which would normally follow from BFC being treated as if it were an assignee of the RTB charge. It follows that subrogation as against OOL, which is all that BFC claims in the action, would not give it greater rights than it bargained for. All that would happen is that OOL would be prevented from being able to enrich itself to the extent that BFC's money paid off the RTB charge. This is fully within the scope of the equitable remedy. I would therefore allow the appeal. Robert Walker J. made a declaration that BFC "is and has since the 28th day of September 1990 been entitled to the benefit of" the RTB charge and the Priority Agreement of 13 February 1990. I think that this declaration goes further than is justified. As against Parc, BFC is not entitled to such a declaration. I would therefore insert after the words "entitled to" the words "be treated as against OOL as if it had." Subject to that amendment, I would restore the declaration made by the judge. LORD CLYDE My Lords, The basis for the appellants' claim is to be found in the principle of unjust enrichment, a principle more fully expressed in the Latin formulation, nemo debet locupletari aliena jactura. The principle is equitable in the sense that it seeks to secure a fair and just determination of the rights of the parties concerned in the case. But it is not a principle which is entirely discretionary in its application so as to enable a court in any case to withhold a remedy where all the necessary elements for its satisfaction have been established, although there may be circumstances where on grounds which may be described as grounds of public policy a remedy may be refused. Without attempting any comprehensive analysis, it seems to me that the principle requires at least that the plaintiff should have sustained a loss through the provision of something for the benefit of some other person with no intention of making a gift, that the defendant should have received some form of enrichment, and that the enrichment has come about because of the loss. The loss may be an expenditure which has not met with the expected return. The remedy may vary with the circumstances of the case, the object being to effect a fair and just balance between the rights and interests of the parties concerned. The obligation to provide the remedy does not rest on any contractual basis but on the general principle of the common law and it may find its expression in a variety of circumstances. The claim which the appellants have eventually come to make is not for a share in the charge which had been effected over the Battersea Wharf in favour of RTB, so as to give them a preference over all creditors of Parc, but only a personal right to rank in priority to OOL, effective only as between RTB and OOL and open to be defeated by any further transactions by Parc, which in the event have not

occurred. I would have had difficulty in accepting that the appellants would be entitled to have even a pro tanto right to the charge in circumstances where they did not intend to obtain any such security, indeed such a provision had been deliberately considered and deleted from the documentation. The more modest claim which they now make, however, seems to me to have been made out. The difference between these two positions, which to my mind is critical in the case, can be readily obscured by the use of the term "subrogation." It is agreed that OOL was enriched by the repayment of some £10m. of the RTB loan. The structural arrangements made with Mr. Herzig in order to avoid a breach of the Swiss banking regulations do not seem to me to prevent recognition of the reality of the granting of the funds by the appellants to RTB for Parc's account. Indeed the money was transmitted by them through the Deutsche-Schweizische Bank AG to RTB for the account of Parc. The appellants were well aware that the money was required for a partial reduction of an existing bank loan. The enrichment which is agreed to have occurred seems to me to have come about through the expenditure which the appellants made. Parc then incurred a direct liability to the appellants through the promissory note which Parc supplied and, ill-drafted as it was, the appellants certainly must have come to expect through the letter of postponement that they would in any question with OOL enjoy a priority to OOL in the enforcing of their own claim against Parc. It does not in my view matter that neither Parc nor OOL knew anything about the letter nor that the letter was ineffective to achieve what the appellants expected. In the circumstances it seems to me to in accordance with principle that they should be accorded the priority which they now claim. For these reasons and for the reasons more fully set out by my noble and learned friend Lord Hoffmann I would allow the appeal. LORD HUTTON My Lords, The case made on this appeal by the appellant, the Banque Financiere de la Cité ("BFC"), is that there is an equitable principle that where a lender advances a sum of money to another person intended to be a secured loan, and the money is used by that person to discharge a debt owed by him to a secured creditor, the lender is entitled to be subrogated to the charge of that creditor if his security proves to be defective. The appellant further contends that its claim comes within the ambit of this principle. In some circumstances such a principle is applied by equity. It was applied in **Ghana Commercial Bank v. Chandiram** [1960] AC 732 where, in the context of that case, the lender's security having proved to be defective, Lord Jenkins said, at p. 745: "It is not open to doubt that where a third party pays off a mortgage he is presumed, unless the contrary appears, to intend that the mortgage shall be kept alive for his own benefit: see **Butler v. Rice**." The issue on this appeal is whether, in the unusual circumstances of this case, the appellant can rely on this principle. The facts giving rise to the appellant's claim have been set out by my noble and learned friend Lord Hoffmann and I need not repeat them. It is clear that one of the elements which gives rise to the right to subrogation is the unjust enrichment of the defendant at the expense of the plaintiff. In Orakpo v. Manson Investments Ltd. **[1978] A.C. 95**, 104C Lord Diplock stated: "My Lords, there is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based upon the civil law. There are some circumstances in which the remedy takes the

form of 'subrogation', but this expression embraces more than a single concept in English law." It is not disputed by the respondent, Omnicorp Overseas Limited ("OOL"), that it had been enriched by the reduction of the debt owing to Royal Trust Bank

(Switzerland) ("RTB") secured by a first charge held by RTB on the freehold property of Parc

(Battersea) Limited ("Parc") in Battersea, London ("the Battersea property") so that OOL's second charge over the Battersea property was made more valuable. But the argument advanced on behalf of OOL, which was rejected by Robert Walker J. but was largely accepted by the Court of Appeal, was that there were a number of features of the transaction involving BFC, Mr. Herzig, Omni Holdings AG and Parc which resulted in the payment of about £10m. to RTB on 28 September 1990, which took the case outside the ambit of the doctrine of subrogation and which defeated BFC's claim against OOL. One of the submissions advanced to the House by Mr. Kosmin on behalf of OOL was that OOL had not been enriched at BFC's expense. A claim based on unjust enrichment cannot succeed unless the plaintiff can establish that the defendant was unjustly enriched at its expense: see per Lord Goff of Chieveley in Lipkin Gorman v. Karpnale Ltd. [1991] 2 AC 548, 578C. Mr. Kosmin submitted that OOL had not been enriched at the expense of BFC but at the expense of Mr. Herzig. BFC did not lend to Parc but deliberately lent to Mr. Herzig who then lent an equivalent sum to Parc. Moreover Mr. Herzig lent to Parc on different terms in that, whereas BFC's loan to Mr. Herzig was for a short period of two months and was secured by a pledge of shares, Mr. Herzig's loan to Parc was for a period of 12 months and was unsecured. Accordingly it was argued that having chosen to lend to Mr. Herzig, BFC could not subsequently claim that OOL had been enriched at its expense. Both Robert Walker J. and the Court of Appeal rejected this submission. The findings of Robert Walker J. at pp. 23 and 24 of his judgment made it clear that the understanding and intention of BFC was that the loan to be made by it was a loan to enable Parc to make partial repayment of a debt owing by it to a bank. Therefore I consider that Robert Walker J. and the Court of Appeal were right to hold that the reality was that OOL was enriched at the expense of BFC. Before considering Mr. Kosmin's further submissions it is necessary to refer to the terms of the letter of 28 September 1990 sent to BFC by Omni Holding AG ("the postponement letter"): "This is to confirm that we and all companies of our group will not demand any repayment of loans granted to Parc

(Battersea) Ltd., London, until the full repayment of your loan of DM 30,000,000-- granted to Mr. M. Herzig, which is secured by a deep discount promissory note amounting to GBP 10,000,000 -, issued by Parc

(Battersea) Ltd." I agree with Robert Walker J. and the Court of Appeal that the postponement letter was intended to have legal effect, and I did not understand Mr. Kosmin to dispute this conclusion. Robert Walker J. held that the intended effect of the postponement letter was an agreement by Omni Holding AG ("Holding") on its own behalf and as agent for all the other companies in the Omni group that all of those companies would not demand any repayment of loans granted to Parc until the full repayment of BFC's loan to Mr. Herzig, but the judge further held that Holding did not

have authority to contract as agent on behalf of OOL and the other companies in the group. The Court of Appeal held that the only undertaking contained in the letter was an undertaking by Holding on its own behalf which did not bind OOL. The letter was drafted in terms which are imprecise and lacking in clarity, but for the reasons stated by Robert Walker J. I incline, on balance, to the view that the letter was intended to constitute an undertaking by Holding both on its own behalf and as agent for the other companies. But even if the letter constituted only an undertaking by Holding on its own behalf, I consider that its terms were such and the relationship, as known to BFC, between Holding and the other companies in its group (all of which were controlled by Mr. Rey) was such that the letter gave rise to the expectation by BFC that all the members of the Omni group would postpone their claims against Parc until the loan made by BFC had been repaid to it. The claim made by BFC that it is entitled to subrogation to RTB's charge on Parc's Battersea property is advanced on the basis that it expected the letter of postponement to give it security for its loan, but this expectation was disappointed because it transpired that OOL was not bound by the letter. Therefore the question arises whether, if the letter had been enforceable against OOL, the letter would have given the bank a "security", so that the letter can now be regarded as a "defective security". In my opinion it can, because BFC expected that by reason of the letter its loan would be repaid in priority to the debts owing by Parc to the companies in the Omni group, and I consider that if the letter had operated in that way, it would have given BFC protection which can be regarded as a form of security. Another principal argument advanced on behalf of OOL was that any enrichment of OOL at the expense of BFC was not unjust. A number of reasons were advanced in support of this contention. One reason related to the security which BFC did receive in respect of its loan and to a security which it decided not to require. In the discussions prior to the making of the loan to Mr. Herzig BFC stipulated for, and obtained, security in the form of a pledge of 35,000 bearer shares in Holding (with an initial margin of cover of about 160 per cent), and this pledge of shares would have constituted ample security for the loan if the Omni group had not become insolvent. Moreover, whereas the bank had originally required a second charge to be granted to it over Parc's Battersea property, it subsequently agreed not to require such a charge. Therefore it was submitted that the remedy of subrogation should not be granted to a lender who had got all that it bargained for in lending to the borrower. In particular, a new lender who lends on an unsecured basis will not be entitled to be subrogated to the security of an earlier lender. In support of this submission Mr. Kosmin relied on the judgment of Oliver J. in **Paul v. Speirway Ltd. [1976] 1 Ch. 220**, 233B where he said: "As it seems to me, where a court, upon a review of the facts, comes to the conclusion that what was intended between the parties was really an unsecured borrowing, there is no room for the doctrine of subrogation. That really is analogous to the situation envisaged in the judgment which I have just read, because to apply the doctrine of subrogation in such a case would in fact be putting the lender in a better position than he is bargaining to be put in when he advances money." It was submitted that, equally, a new lender who bargains for and gets his own security should not be subrogated to the security of an earlier lender merely because its security turned out to be inadequate. Linked to this submission was the further submission that there was no mutual intention on the part of BFC and Parc that BFC should be subrogated to the rights of RTB. My Lords, I agree with the view of my noble and learned friend Lord

Hoffmann that the concept of mutual intention, whether actual or presumed, can be artificial in a case such as the present one, where the claim to subrogation arises because the security intended by the lender has proved to be defective. In my opinion in such circumstances the doctrine of subrogation is to be applied unless its application will produce an unjust result. This view finds strong support in the judgment of Nicholls J. in Boodle Hatfield & Co. v. British Films Ltd. **[1986] P.C.C. 176**, where, after referring to the judgments in the Orakpo case, he stated at p. 182: "First, one of the ways (because I do not think that Lord Diplock meant that this was the only way) in which the implication of subrogation to the existing security rights of the vendor may be displaced is by the express terms in the contract made between the lender and the borrower being inconsistent with the acquisition by the lender of the security rights. Secondly, the failure of the lender and the borrower to address themselves to the question whether the lender will acquire the security rights of the vendor will not of itself negative the application of the doctrine of subrogation. A lender who advances money to enable a borrower to complete and who stipulates for a legal charge to be given when his loan is made is unlikely to consider what his security position will be if the legal charge produced is invalid; that is, whether in that event he will acquire a lien by subrogation. But the view of both Lord Diplock and Lord Keith was that such a lender may acquire the pre-existing security rights by subrogation. Thirdly, and of overriding importance, the equitable doctrine of subrogation will not be applied when its application would produce an unjust result. One of the circumstances in which subrogation may lead to an unjust result is if, without the implication of subrogation, the lender obtained all that he bargained for." And at p. 183: "Moreover, I do not think that the absence of any agreement or even discussion regarding security leads to the conclusion that there was by implication a common intention that the lender should have no security. The explanation for the absence of any discussion on this subject is the simple one, that neither party considered what the plaintiffs' position would be if the cheque was not met. Mr. Smith did not consider this, because he was relying on the assurance of a person who was well known to his firm. Obviously he was taking a risk that the cheque might not be met after all. But I do not think that from this I should infer that he was agreeing to waive or release any rights which the plaintiffs otherwise would have had in respect of the financial assistance they were providing to their client." . . . "As to the argument that the plaintiffs obtained all they bargained for, it is important to remember that subrogation applied in this case unless excluded. Accordingly, the question is not: did the plaintiffs bargain for the transfer to them of the vendor's security rights? Rather it is: did the bargain made by the plaintiffs with the defendant exclude that transfer, either expressly or impliedly? Unless this is kept in mind, consideration of whether the plaintiffs obtained what they bargain for is likely to mislead rather than assist in a case where, at the time, in the course of one short conversation neither party directed his mind to the crucial question." This view is also supported by the judgment of Oliver J. in **Paul v. Speirway Ltd. [1976] Ch. 220**, 232B where he said: "I think respectfully that the wide general formulation in Coote on Mortgages, 9th ed. (1927), vol. 2, p. 1377 and in **Ghana Commercial Bank v. Chandiram** [1960] AC 732 is the right one, and that where the given circumstances exist subrogation applies unless the contrary appears. The real divergence here, as it seems to me, is on the strength of the evidence which is required to demonstrate a contrary intention." A further submission was that as BFC had not

maintained its original requirement to have a charge on Parcs' Battersea property, and had obtained the security it required, which was the pledge of shares in Holding, BFC would receive more than it had bargained for if it were granted subrogation. I do not accept this submission because, in the events which have happened, there are competing claims by BFC and OOL to priority in receiving payment from Parc's remaining asset, the Battersea property. Therefore, as Robert Walker J. observed at p. 65 of his judgment, to permit BFC to be subrogated to the RTB security, to the extent of its loan to Mr. Herzig, would give rise to a result not dissimilar to that which would have occurred if the postponement letter had operated as BFC had expected. It was also submitted on behalf of OOL that BFC should not be subrogated to RTB's security because it had neglected to take simple steps to ensure that the letter of postponement would operate effectively to bind the other companies of the Omni group. In my opinion this submission is invalid because there is no requirement that before a lender can claim the benefit of subrogation he must show that he took reasonable precautions to ensure that the security for which he stipulated would be effective. It is because the intended security proved to be defective that the need for subrogation arises. It was further submitted that there was no misrepresentation or sharp practice on the part of OOL or Parc, and that this was a consideration which pointed to the conclusion that there was no unjust enrichment of OOL. But in my opinion a remedy for unjust enrichment is granted where the defendant has been enriched at the expense of the plaintiff, and it would be unjust to allow the defendant to retain the enrichment. I consider that for a plaintiff to establish that it would be unjust for the defendant to keep the benefit which he had gained at the expense of the plaintiff, the plaintiff does not need to prove that the defendant was guilty of misconduct. In order for a claim for unjust enrichment to succeed at common law the plaintiff does not have to prove a wrong committed by the defendant against him. In **Lipkin Gorman v. Kaspuale Ltd.** [1991] 2 AC 548, 572E Lord Goff of Chieveley stated: "Furthermore, it appears that in these cases the action for money had and received is not usually founded upon any wrong by the third party, such as conversion; nor is it said to be a case of waiver of tort. It is founded simply on the fact that, as Lord Mansfield said, the third party cannot in conscience retain the money--or, as we say nowadays, for the third party to retain the money would result in his unjust enrichment at the expense of the owner of the money." A separate submission advanced by Mr. Kosmin was that where the creditor who held a charge over the property of the debtor received payment by reason of a subsequent loan made to the debtor by a new lender, the essence of the subrogation granted to the new lender was the acquisition by him of the benefit of the charge held by the creditor who had been paid off: that, as stated by Lord Diplock in the Orakpo case **[1978] A.C. 95**, 104D, there is "a transfer of rights from one person to another, without assignment or assent of the person from whom the rights are transferred and which takes place by operation of law". But in the present case there were two closely linked and inter-related reasons why subrogation should not be granted to BFC. One reason was that the payment of about £10m. which RTB received from Mr. Herzig did not discharge the entire debt owing to it by Parc. A balance of more than £10m. remained owing, and the charge held by RTB remained in being as security for that balance (although it was subsequently repaid to RTB at the end of October 1990 with money advanced by OOL). Therefore it was not conceptually possible for BFC to be subrogated to RTB's charge. Before the Court of

Appeal BFC relied upon the decision of Romer J. in Chetwynd v. Allen **[1899] 1 Ch. 353** in answer to this submission. In his judgment at p. 24 Morritt L.J. referred to the passage at p. 359 in the judgment of Romer J. where he made it clear that his decision in that case was not based on the principle of subrogation, and accordingly Morritt L.J. stated that he did not regard the decision as being of any assistance to BFC. My Lords, I consider that the decision does materially assist BFC, as it establishes that a lender, whose loan is used to discharge part of a sum owing on a mortgage, will be treated by equity as having a charge on the mortgaged property to secure his loan without prejudice to the security given by the mortgage to the first lender. In Chetwynd v. Allen **[1899] 1 Ch. 353** there was a mortgage to Terrell of two properties, the "Cedars", of which Chetwynd's wife, the plaintiff, was the beneficial owner, and the "Riding School" owned by Chetwynd, to secure £2,000 lent to him by Terrell. Mynors subsequently lent £1,200 to Chetwynd on a promise by Chetwynd that he should have a transfer of the earlier mortgage to Terrell, and Chetwynd applied £1,000 of the sum of £1,200 advanced by Mynors in partial repayment of the loan of £2,000 made by Terrell. Romer J. stated, at p. 357: "On these facts I have to consider what Mynors' rights are. Now, in my opinion, when Mynors advanced the £1200 on the representations and promise above mentioned, and the £1000 was applied in part payment to Terrell, the charge on the Cedars and school to the extent of the £1000 was kept alive in equity in favour of Mynors, so far as that could be done without prejudicing Terrell or the plaintiff. So far as Chetwynd was concerned, he could not complain that the charge was kept alive also on the school, seeing that it was by his fraud that the true facts as to Terrell's charge were kept hidden from Mynors. As regards Terrell, he clearly was not prejudiced, for the balance of his mortgage debt had priority over Mynors' charge; and as regards the plaintiff she was not prejudiced, so long as no extra costs were thrown on the Cedars by reason of the original mortgage debt of £2000 being divided as between Terrell and Mynors (and this I can provide for), and provided that as between the school and the Cedars the former remained primarily liable for the debt as between her and her husband." It is somewhat puzzling to read, at the present day, the statement relating to subrogation at the end of Romer J's. judgment, to which Morritt L.J. referred, and which clearly influenced him to hold, erroneously in my respectful opinion, that the decision was not of assistance to BFC. The report of Chetwynd v. Allen **[1899] 1 Ch. 353**, 355 states that after having ruled in favour of the plaintiff, Chetwynd's wife, on a number of points which had been raised, Romer J. reserved for further consideration "the question which had been raised as to the right of the defendant Mynors to be subrogated to the rights of Terrell under the mortgage of June 4, 1891, so far as concerned the £1000 paid off to Terrell out of the £1200 advanced by Mynors to Chetwynd." And at p. 356 it is reported that in the subsequent argument on the reserved question counsel for Mynors submitted that "Mynors is entitled on the principle of subrogation to stand in the shoes of Terrell to the extent of the £1000 paid off to him out of the £1200." I consider that the decision of Romer J. in favour of Mynors was a decision which today would be described as one that Mynors was entitled to the extent of £1000 to a charge upon the "Cedars" under the doctrine of subrogation, and it appears that the decision was treated as an application of that doctrine by Lord Jenkins in the Ghana Commercial Bank case [1960] AC 732,

745. It may be that Romer J. considered at the time of his decision, 100 years ago, that a case should not be regarded as one to which the principle of subrogation applied unless the debt of the first lender was completely discharged and the new lender succeeded to the entirety of the charge held by the first lender. Whilst that is the usual situation where the new lender is entitled to subrogation, it is not the only situation, because as Goff and Jones on the Law of Restitution, 4th ed. (1993) state at p. 593: ". . . subrogation is essentially a remedy, which is fashioned to the facts of the particular case and which is granted in order to prevent the defendant's unjust enrichment." And in **Burston Finance Ltd. v. Speirway Ltd. [1974] 1 W.L.R. 1648**, 1652 Walton J., referring to subrogation, stated: "It finds one of its chief uses in the situation where one person advances money on the understanding that he is to have certain security for the money he has advanced, and, for one reason or another, he does not receive the promised security. In such a case he is nevertheless to be subrogated to the rights of any other person who at the relevant time had any security over the same property and whose debts have been discharged, in whole or in part, by the money so provided by him, but of course only to the extent to which his money has, in fact, discharged their claims." (emphasis added) The second related reason relied on by Mr. Kosmin as to why BFC could not be subrogated in part to RTB's charge, ranking behind the balance of the charge held by RTB, was because this would not, in reality, have constituted subrogation to RTB's rights but a grant to BFC by the court of new rights created specially for the purpose. Mr. Kosmin's submission was that the court had no jurisdiction to confer such new rights. In my opinion this submission is invalid because it fails to take account of the consideration that the doctrine of subrogation applies in a variety of different circumstances where the defendant has been unjustly enriched at the expense of the plaintiff, and where equity considers that it would be unconscionable for the defendant to retain that enrichment. In such a case, as Goff and Jones say, the remedy is fashioned to the facts of the particular case. In the Orakpo case at 104E Lord Diplock stated that some rights by subrogation "appear to defeat classification except as an empirical remedy to prevent a particular kind of unjust enrichment." And in Boscawen v. Bajwa [1996] 1 WLR 328, 335 Millett L.J. referring to subrogation, said: "This is available in a wide variety of different factual situations in which it is required in order to reverse the defendants' unjust enrichment." Therefore, in the present case, where OOL was enriched at the expense of BFC, where it would be unconscionable to permit OOL to retain that enrichment, and where BFC had expected to receive the form of security constituted by the postponement of the demands of OOL and the other companies in the group, I consider that BFC is entitled in the circumstances to the order made by Robert Walker J. (subject to the amendment proposed by my noble and learned friend Lord Hoffmann), the effect of which is that its loan will be repaid in priority to the payment claimed by OOL. As I have observed, the submissions advanced by Mr. Kosmin to this House were largely accepted by the Court of Appeal, and the grounds upon which Morritt L.J. held in favour of OOL can be summarised as follows (in a different order to that stated by the learned Lord Justice). First, the failure of the BFC to obtain the security for which it stipulated, which was an agreement binding on all the companies of the Omni group that they would postpone their demands against Parc, was due entirely to the failure of BFC to take the normal and elementary precautions. Secondly, there had been no misrepresentation or sharp practice on the part of OOL.

Thirdly, there was the conceptual difficulty that BFC could not be subrogated to the rights given by RTB's charge when that charge remained vested in RTB to secure the balance of the debt owing to it, and the decision of Romer J. in Chetwynd v. Allen **[1899] 1 Ch. 353** did not assist BFC. For the reasons which I have stated in considering the submissions advanced by Mr. Kosmin I am unable to agree with these grounds given by Morritt L.J. for dismissing BFC's claim. In addition there was a further reason for dismissing the bank's action given by Morritt L.J., which was a reason advanced to Robert Walker J. and the Court of Appeal by Mr. Kosmin, but which he did not rely upon as a separate ground before the House. This was that the loan was made by the bank to Mr. Herzig, and not to Parc, in order to avoid the impact of the Swiss Federal Banking regulations. The decision of Robert Walker J. at p. 63 of his judgment on this aspect of the case was as follows: "It is clear that the Swiss regulatory authorities took the view that the loan to Mr. Herzig was a breach of the reporting requirement. That breach carried criminal sanctions, though in fact the plaintiff received only a reprimand. The breach did not invalidate the loan. I do not consider that those circumstances are a reason for refusing subrogation, either by themselves or in conjunction with the plaintiff's failure, in its apparent eagerness to oblige Mr. Rey, to make enquiries about intra-group indebtedness." I consider that the conclusion of Robert Walker J. on this point was correct and I agree with his view that the breach of the reporting requirement should not prevent the court from remedying the unjust enrichment of OOL at the expense of BFC. Accordingly I would allow this appeal and restore the order of Robert Walker J. with the proposed amendment.