

Bribes and Secret Commissions (yet again)

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“Bribery is an evil practice which threatens the foundations of any civilised society.”

Lord Templeman, Attorney-General for Hong Kong v Reid [1993] UKPC 36

Chapter I: Introduction

A fiduciary who receives a bribe in breach of his duty of loyalty is liable to account for it to his principal.¹ A question that has plagued English courts for well over a century, however, is whether the principal can also assert a proprietary claim over the bribe by way of constructive trust.² The subject has recently been the subject of Supreme Court determination in *FHR European Ventures LLP and others v Cedar Capital Partners LLC* (“*European Ventures*”).³

The significance of the debate centers on the consequences of recognising a proprietary remedy. A constructive trust will allow a principal major interrelated benefits. These include: Priority over other creditors in case of the errant fiduciary’s insolvency; the ability to trace in equity; and the right to claim against third party recipients and volunteers.⁴ A declaration of constructive trust will also allow a principal to claim over any second generation profits (i.e. a well invested bribe or secret commission), which was not always possible within the confines of a personal order to account for profits.⁵

Over the years a general preference emerged for limiting proprietary claims over assets gained by a fiduciary to those situations in which the principal could assert a pre-existing property right over the asset.⁶ The contrast was drawn well in the historic case of *Lister v Stubbs* (“*Lister*”),⁷ where Stubbs, a purchasing agent (and thus fiduciary) for Lister & Co had been bribed by a supplier and subsequently invested the bribe monies in land and other

¹ Malcolm Cope “Ownership, Obligation, Bribes and the Constructive Trust” in Malcolm Cope (ed) *Equity: Issues and Trends* (Federation Press, Sydney, 1995) 91 at 104.

² The issue has been hotly debated over the last thirty years, see Roy Goode “Ownership and Obligation in Commercial Transactions” (1987) 103 LQR 433; Sir Peter Millett “Bribes and Secret Commissions” (1993) 1 RLR 7; Peter Watts “Bribes and Constructive Trusts” (1994) 110 LQR 178; Craig Rotherham “Proprietary Relief for Enrichment by Wrongs: Some Realism About Property Talk” (1996) 19 U NSW Law J 380; Sir Peter Millett “Bribes and Secret Commissions Again” (2012) 71 CLJ 583; Sarah Worthington “Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae” (2013) 72 CLJ 720; Sir Terence Etherton “The Legitimacy of Proprietary Relief” (2014) 2 Birkbeck L Rev 59.

³ *FHR European Ventures LLP and others v Cedar Capital Partners LLC* [2014] UKSC 45.

⁴ *European Ventures*, above n 3, at [1].

⁵ Stripping an errant fiduciary of second generation profits was a major concern in *Attorney General for Hong Kong v Reid* [1993] UKPC 36; [1994] 1 NZLR 1; and a principal reason for recognising a constructive trust, however recently it has been questioned why a personal claim for equitable compensation could not also encompass indirect gains: see *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347 at [89]-[91].

⁶ For example, *Lister v Stubbs* (1890) 45 Ch D 1; *Metropolitan Bank v Heiron* (1880) 5 Ex D 319.

⁷ *Lister v Stubbs* (1890) 45 Ch D 1.

investments. Lister & Co sought an injunction preventing him disposing of the land and other assets, which was only possible if they could establish beneficial ownership.⁸

The Court of Appeal held that the relationship was that of debtor and creditor, not trustee and *cestui que trust*, and that in the absence of Lister & Co holding pre-existing title to the bribe money, a claim could only be brought on the basis of an obligation to account and any such claim would be *in personam*.⁹ After exploring the consequences of recognising a proprietary claim (allowing a principal preferential recovery over creditors and access to second generation profits), Lindley LJ encapsulated the issue:¹⁰

“It appears to me that those consequences shew that there is some flaw in the argument. I am satisfied that they are not sound—the unsoundness consists in confounding ownership with obligation.”

The ideas of ownership and obligation have, particularly since *Lister*, undergone change.¹¹ They are no longer as rigidly divided as they were in 1889. The problem today is the extent to which fiduciary obligations *can* in fact give rise to some form of property right vested in the principal. Over the years a broader understanding of property has increased the scope of the requirement that a principal hold a property right in the asset he is claiming before he can assert a constructive trust.¹² It now encompasses not only rights against fiduciaries who misuse or misappropriate the principal’s property, but rights against fiduciaries who exploit opportunities that should have been undertaken for their principal, and, since *European Ventures*, fiduciaries who take secret commissions.¹³

⁸ At 12 per Cotton LJ.

⁹ *Lister*, above n 7, at 15 per Lindley LJ.

¹⁰ *Lister*, above n 7, at 15 per Lindley LJ.

¹¹ See Sarah Worthington “The Disappearing Divide Between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation” (2007) 42 *Tex Int’l L J* 918; Goode “Ownership and Obligation in Commercial Transactions”, above n 2.

¹² For a discussion of the proprietary base, see Roy Goode “Proprietary Restitutionary Claims” in W Cornish, R Nolan, J O’Sullivan, and G Virgo (eds) *Restitution: Past, Present, and Future: Essays in Honour of Gareth Jones* (Bloomsbury Publishing, London, 1998) 63.

¹³ See *Keech v Sandford* (1726) Sel Cas Ch 61; *Cook v Deeks* [1916] UKPC 10; *Boardman v Phipps* [1967] 2 AC 46; *Bhullar v Bhullar* [2003] EWCA Civ 424; *European Ventures* above 3.

When the scope of the requirement came before the Supreme Court in *European Ventures* it was suggested that the constructive trust could extend over all disloyally acquired fiduciary gains, regardless of the type or source of the gain, or any pre-existing interest that the principal may have had.¹⁴ This conclusion was largely policy based, and in that respect departed from the cases that endeavoured to more clearly link the principal's ownership by way of constructive trust with the fiduciary obligation.¹⁵

This dissertation will ultimately contend that the property right that has traditionally supported a constructive trust over fiduciary gains does not extend to a bribe received in breach of fiduciary duty. Bribes and secret commissions have often been conflated – judges and academics alike have assumed either that both will attract proprietary relief, or that neither will.¹⁶ The decision in *European Ventures* accepted that a secret commission will be subject to a constructive trust and the Supreme Court seemed to assume that conclusion would apply equally to a bribe.¹⁷ This dissertation concludes that while secret commissions do fall within the framework for proprietary relief, bribes do not.

Secret commissions are some form of payment received by a fiduciary who is brokering an agreement between his principal and another party. The secret commission will generally be paid by the other party or a close relation.¹⁸ While the fiduciary will be making a secret profit, the transaction itself will not be illegal or corrupt. A constructive trust can be justified on grounds that if the matter with respect to which the commission was paid was within the scope of the fiduciary remit, the fiduciary's exertions ought to have been on the principal's behalf.¹⁹ The principal has a right to the benefits of the fiduciary's efforts insofar as they relate to matters within the scope of his endeavours on the principal's behalf. In such

¹⁴ *European Ventures*, above n 3, at [36]. Lord Neuberger approved of aligning situations in which an account of profits and a constructive trust would be available, which would appear to extend the reach of the constructive trust to all unauthorised fiduciary gains.

¹⁵ See *European Ventures*, above n 3, at [33]-[45]. Lord Neuberger rejected at [32] any attempt to find an a principled answer and turned to arguments based on principle and policy.

¹⁶ See Peter Watts "Bribes and Constructive Trusts", above n 2; Sir Peter Millett "Bribes and Secret Commissions Again", above n 2; Sir Terence Etherton "The Legitimacy of Proprietary Relief", above n 2; *Mahesan v Malaysia Government Officers Co-operative Housing Society* [1978] 1 MLJ 149; *Reid*, above n 5; *European Ventures* above n 3.

¹⁷ *European Ventures* above n 3, at [33].

¹⁸ See *Lister*, above n 7; *European Ventures*, above n 3.

¹⁹ See Sarah Worthington *Equity* (2nd ed, Oxford University Press, Oxford, 2006) at 131-2.

situations the principal can appropriate the secret commission to avoid any conflict between the fiduciary's duty and personal interest.²⁰ In contrast, bribes are corrupt payments made to induce disloyalty, but received by a fiduciary outside the scope of his retainer. They are inherently subversive so while a fiduciary will be liable to account for a bribe, his principal cannot claim ownership of it on grounds that the bribe should have been taken for his benefit.²¹ This dissertation concludes that the corrupt nature of a bribe puts it outside the scope of the fiduciary's obligations and precludes the principal appropriating the benefit of the fiduciary's actions for himself. As such, no claim to ownership can be justified.

Chapter II looks in more detail at content of the fiduciary obligation and present remedies available to protect it. Chapter III details the cases dealing with unauthorised fiduciary gains, and the evolution of the ownership/obligation dichotomy prior to the decision in *European Ventures*. Chapter IV considers the *European Ventures* decision itself, and whether the Supreme Court were right to conflate bribes with secret commissions and other unauthorised profits. Chapter V analyses the academic commentary on both sides of the debate and the light it sheds on the case law. Chapter VI evaluates the approaches against the Supreme Court's analysis and ultimately concludes that a principled distinction should have been maintained between secret commissions and bribes. The obligations that are said to found ownership of bribes are insufficient to justify prejudicing creditors, and the policy justifications given by the Supreme Court for extending the constructive trust's ambit are insufficient in bribe cases.

²⁰ See *Boardman*, above n 13, for an illustration of this principle in action.

²¹ *Sinclair*, above n 5, at [80].

Chapter II: The Fiduciary Duty

When a fiduciary receives money or property in breach of his duty of loyalty, he is required by law to account for that profit. Equity will not allow him to retain a benefit from his wrongdoing.²² The focus of *European Ventures* was largely on whether a personal remedy will suffice to achieve equity's deterrent purposes, or whether a constructive trust is required.²³ This chapter considers the content of the fiduciary obligation, the range of remedies presently available for a breach of fiduciary duty, the justification for these, and what needs to be shown in order to properly recognise a constructive trust over profits made in breach of a fiduciary's duty of loyalty.

A. The fiduciary obligation

The fiduciary concept is elusive. It centers on the obligation of loyalty and the eschewing of self-interest; as put by Finn:²⁴

“For a person to be a fiduciary he must first and foremost have bound himself in some way to protect and/or to advance the interests of another. This is perhaps the most obvious of the characteristics of the fiduciary office for Equity will only oblige a person to act in what he believes to be another's interests if he himself has assumed a position which requires him to act for or on behalf of that other...”

Because the fiduciary occupies such a position with respect to his principal, the law recognises the duty of loyalty as central to the fiduciary undertaking.²⁵ This core duty is reflected by the sub-duties not to engage in conflicts between personal interest and duty, and not to enter into arrangements that will lead to a conflict between two duties.²⁶ The no-

²² Charles Mitchell *Hayton and Mitchell: Commentary and Cases on the Law of Trusts and Equitable Remedies* (13th ed, Sweet & Maxwell, London, 2010) at 646.

²³ *European Ventures*, above n 3, at [5]-[7], [41].

²⁴ Paul Finn *Fiduciary Obligations* (Law Book Company, Sydney, 1977) at [15].

²⁵ Darryn Jensen “Prescription and Proscription in Fiduciary Obligations” (2010) 21 KLJ 333 at 354.

²⁶ Paul Miller “A Theory of Fiduciary Liability” (2011) 56 McGill LJ 235 at 256.

conflict rule is supported by the no-profit rule. This imposes a duty not to receive any unauthorised profits whilst carrying out the fiduciary role.²⁷

The fiduciary obligation is expressed in proscriptive terms: the duty is to avoid self-interested behaviour, or otherwise improperly exercising the discretionary power vested in the fiduciary.²⁸ As long as a fiduciary does not act in breach of the no-conflict or no-profit rules, he has complied with these obligations.²⁹ There have been attempts to configure prescriptive elements of the fiduciary duty too; however these have not found widespread support in law.³⁰ At best, any obligation to act in good faith can be seen as tenuous and requiring a high standard of proof on the part of the principal asserting such a duty.³¹ As phrased by Parker Hood:³²

“[The] fiduciary obligation is a negative one, stating what the fiduciary should not do... A fiduciary is, thus, acting in his principal’s interests by not acting against them.”

B. Personal Remedies

Remedies for breaches of fiduciary duty seek – insofar as is possible – to negate the effects of the fiduciary engaging in activity he was obliged not to engage in.³³ The presumptive remedy for a breach of the no-conflict and no-profit rules is disgorgement by way of an account of profits.³⁴ Liability is strict; even when fiduciaries act in good faith and for the benefit of their principal they will be called to account.³⁵ Equity’s goal is to protect the fiduciary institution from even the possibility of corruption, and requires accounting for all unauthorised profits to

²⁷ John McGhee (ed) *Snell’s Equity* (32nd ed, Sweet & Maxwell, London, 2010) at 210-11. The no-profit rule gives rise to a personal obligation to account for the profit.

²⁸ Jensen “Prescription and Proscription in Fiduciary Obligations”, above n 25, at 354.

²⁹ Virgo, *The Principles of Equity & Trusts* (Oxford University Press, Oxford, 2012) at 477-479.

³⁰ See Virgo, *The Principles of Equity & Trusts*, above n 29, at 478; Peter Devonshire *Account of Profits* (Brookers, Wellington, 2013) at 37-44; and the discussion by the High Court of Australia in *Breen v Williams* (1996) 186 CLR 71 at 112-13 per Gaudron and McHugh JJ.

³¹ Devdeep Ghosh “Fixing the fiduciary obligation: the Prescriptive-proscriptive dichotomy” (2012) 11 Canberra L Rev 24 at 31.

³² Parker Hood “What is So Special about Being a Fiduciary” (2000) 4 Edin L R 308 at 312.

³³ Jensen “Prescription and Proscription in Fiduciary Obligations”, above n 25, at 354.

³⁴ Peter Devonshire *Account of Profits*, above n 30, at 48.

³⁵ At 22.

ensure that fiduciaries are not incentivised to engage in situations of conflict.³⁶ Such strictures are considered appropriate in order to safeguard public confidence in socially significant institutions and relationships.³⁷

Miller has questioned why a right to an account of profits arises from a proscriptive duty. His concern is that the fiduciary is under an obligation *not* to receive an unauthorised benefit, but that obligation does not confer on the principal a right to receive that benefit.³⁸ He concludes that because the principal has a right to the fiduciary exercising his discretionary power for the principal's benefit alone, the principal must hold an implicit right to the fruits of the exercise of that power.³⁹ In other words, profit making trespasses on the principal's rights and disgorgement corrects a normative imbalance by ensuring the principal receives the profit representing the breach of their rights.⁴⁰ The more common explanation is simply that equity requires accounting for profits to protect the fiduciary institution from any possibility of exploitation.⁴¹

C. Proprietary Remedies

Proprietary remedies for breaches of fiduciary duty are typically explained on one of two grounds. The property based approach assumes that personal remedies are adequate to achieve equity's deterrence goals, so enquires separately whether there is a pre-existing property right to vindicate.⁴² The duty based approach considers that proprietary relief vindicates the fiduciary undertaking, but is also justified on grounds that it better deters fiduciary disloyalty than a personal remedy.⁴³ Courts are concerned with ensuring that defaulting fiduciaries cannot retain any benefit from their wrongdoing, and the constructive trust is a more powerful remedy toward that aim than a personal right to an account of

³⁶ David Cowan, Lynden Griggs, and John Lowry "[T]o say that a Man is a Fiduciary only Begins Analysis' – The Shifting Boundaries of Fiduciary Liability" (1996) 1 Newcastle L Rev 73 at 74.

³⁷ Paul Finn "*Fiduciary Law and the Modern Commercial World*" in Ewan McKendrick (ed) "*Commercial Aspects of Trusts and Fiduciary Obligations*" (Clarendon Press, Oxford, 1992) 7 at 41.

³⁸ Paul Miller, "Justifying Fiduciary Remedies" (2013) 63 UTLJ 570 at 614.

³⁹ At 615.

⁴⁰ Jason Brock "The Propriety of Profitmaking: Fiduciary Duty and Unjust Enrichment" (2000) UT Fac L Rev 185 at 210-11.

⁴¹ McGhee (ed) *Snell's Equity*, above n 27, at 212.

⁴² Craig Rotherham, *Proprietary Remedies in Context: A Study in the Judicial Redistribution of Property Rights* (Hart Publishing, Oxford, 2002) at 40-42.

⁴³ At 187-189.

profits.⁴⁴ A personal remedy for an account will often reach the same result as a proprietary remedy, but this will not be universally true. Proprietary relief allows a wronged party greater rights of recovery against third parties (i.e. knowing recipients and volunteers), and might prevent a particularly egregious wrongdoer from whisking his secret profits away to a numbered Swiss bank account.⁴⁵ But this comes at a cost, especially to unsecured creditors who may face a non-apparent adverse claim to the principal's property in an insolvency.

Justifying the consequences of a proprietary claim is a major focus of this thesis and will be returned to in Chapters V and VI. When proprietary claims are recognised, the pool of assets available for distribution to creditors on an insolvency decreases. The benefits of recognising a proprietary remedy must be balanced against the prejudice that unsecured creditors will suffer.⁴⁶ It is principally for this reason that courts have for so long restricted recognition of a constructive trust to situations where the principal had some pre-existing property right over the money or asset claimed. The rationale is that only a claim to ownership of a specific asset or fund is sufficient to justify removing the asset or fund from the insolvent estate.⁴⁷ The Court of Appeal in *European Ventures* used an extended notion of the principal's proprietary right to recognise a constructive trust over a secret commission, but the Supreme Court bypassed any real attempt at finding a doctrinal basis for recognising such a trust and decided the case on policy grounds alone.⁴⁸

D. Protecting the fiduciary duty

Bribes and secret commissions are a subset of unauthorised fiduciary profits that seriously threaten the institution.⁴⁹ Ensuring proper deterrence is critical to maintaining the integrity of fiduciary relationships, and the Supreme Court's ultimate decision was made on this basis.⁵⁰ What the Supreme Court did not consider was the adequacy of personal remedies in pursuit of this goal. The fiduciary duty of loyalty already enjoys significantly greater protection than

⁴⁴ *European Ventures*, above n 3, at [42].

⁴⁵ See the discussion by Lord Templeman in *Reid*, above n 5, at 10; proprietary remedies also allow a principal to trace and follow to profit, *European Ventures*, above n 3, at [44].

⁴⁶ *European Ventures*, above n 3, at [43]-[44]; *Sinclair*, above n 5, at [83].

⁴⁷ See Peter Birks "Profits in the Property of Wrongdoing" (1994) 24 UWA L Rev 8; Roy Goode Proprietary Liability for Secret Profits – A Reply" (2011) 127 LQR 493 at 494-495.

⁴⁸ *European Ventures*, above n 3, at [35], [40]-[44].

⁴⁹ As put by Lord Templeman in *Reid*, above n 5, at 3: "Bribery is an evil practice which threatens the foundation of any civilised society".

⁵⁰ *European Ventures*, above n 3, at [37]-[44].

other duties,⁵¹ so if an additional presumption of proprietary relief is to be justified, I suggest that the following must be shown:⁵²

- a) There is a principled basis on which to recognise a claim to ownership of the profits in question, and justify prejudice to creditors; and
- b) The fiduciary relationship is not adequately safeguarded by personal remedies.

These aspects of the justification for proprietary relief are reflected to differing degrees in the cases leading up to the decision in *European Ventures*. They are considered in the following chapter, which traverses the development of the property right that has supported a constructive trust over unauthorised fiduciary gains.

⁵¹ Outside the fiduciary context, disgorgement is an unusual remedy usually reserved for “cynical” wrongs. See Craig Rotherham “The Conceptual Structure of Restitution for Wrongs” (2007) 66 CLJ 172 at 173.

⁵² These concerns have arisen (though to differing degrees) constantly throughout the cases and academic commentary, see *Lister*, above n 7, at 15; *Sinclair*, above n 5, at [72]-[83]; *European Ventures*, above n 3, at [33]-[35], [37]-[44]; David Hayton “Proprietary Liability for Secret Profits” (2011) 127 LQR 487; Goode “Proprietary Liability for Secret Profits – A Reply”, above n 47.

Chapter III: Increasing Judicial Willingness to Recognise a Property Interest

At its most basic level, proprietary relief for breach of fiduciary duty is considered justified when the fiduciary's breach involves a misappropriation of the principal's property.⁵³ The law allows an owner the right to dispose of, invest with, and exploit his property in any manner he sees fit – and, absent his consent, he alone is allowed to do those things.⁵⁴ Thus when a fiduciary exercises any incident of ownership in an unauthorised manner, the owner is entitled to assert rights to the fruits of that exercise. They are rightly recognised as his property.⁵⁵ This chapter traverses the development of what has rightly (or wrongly) been considered “property” in the context of unauthorised fiduciary profits.

A. *Lister* – a narrow conception of ownership

When *Lister* was heard, the orthodox concept of ownership was well respected. Both Cotton and Lindley LJ appeared to approve of the notion that if Stubbs *had* in fact dealt with money that could clearly be said to be Lister & Co's property, they could recover it, claim any profits from its investment, and rank in priority to unsecured creditors.⁵⁶ It was only where Lister & Co had no such pre-existing right that the Court's principled objections to a proprietary claim arose:⁵⁷

“One consequence, of course, would be that, if Stubbs were to become bankrupt, this property acquired by him with the money paid to him by Messrs. *Varley* would be withdrawn from the mass of his creditors and be handed over bodily to Lister & Co. Can that be right? Another consequence would be that, if the Appellants are right, Lister & Co could compel Stubbs to account to them, not only for the money with interest, but for all the profits which he might have made by embarking in trade with it. Can that be right? It appears to me that those consequences shew that there is some flaw in the argument.”

⁵³ *Virgo Principles of Equity and Trusts*, above n 29, at 505-507.

⁵⁴ Alistair Hudson *New Perspectives on Property Law: Obligations and Restitution* (Routledge, Oxford, 2013) at 93-95.

⁵⁵ *Virgo Principles of Equity and Trusts*, above n 29, at 507-508.

⁵⁶ *Lister*, above n 7, at 12 per Cotton LJ and 14-15 per Lindley LJ.

⁵⁷ At 15.

Creditors' interests have remained a contentious feature of the debate for well over a century, but compelling a fiduciary to account for all gains made from his breach of duty has not.⁵⁸ Equity has long required fiduciaries (of which agents are a recognised class)⁵⁹ to account for profits and benefits made in breach of their duties, and stripped profits to deter willful default.⁶⁰ As a fiduciary, Stubbs was obliged to deal with his principal's property in a manner that would not involve a conflict with his personal interest.⁶¹

While the debate around bribes received by a fiduciary outside the scope of his agency has remained contentious, later analysis has reconceptualised *Lister* as a secret commission case. Stubbs' profits could (indirectly) be seen as misappropriated property of Lister & Co since they would undoubtedly have been funded by the company's money.⁶² Stubbs' position with respect to Lister & Co, however, is more poignant. He was a purchasing agent with an obligation to negotiate in their best interests. By appropriating the opportunity to obtain the best price possible, he took an opportunity for himself that was within the scope of his agency and should have been taken for his principal.⁶³ Later cases would have allowed Lister & Co to claim the benefit of that opportunity for itself.⁶⁴ At the time, however, the concept of ownership was stricter than we understand it today and Stubbs' profits were not seen as property Lister could claim as its own.

⁵⁸ Andrew Burrows *The Law of Restitution* (3rd ed, Oxford University Press, Oxford 2010) at 690-691.

⁵⁹ Agents are a long recognised class of fiduciary, see *European Ventures*, above n 3, at [5].

⁶⁰ For a discussion on accounting of profits see Lord Cohen's conclusion in *Boardman v Phipps*, above n 13, at 66. Craig Rotherham posits that Lindley LJ's conclusion may have rested on notions of causation or remoteness; *Proprietary Remedies in Context* (Oxford, Hart Publishing: 2002) at 183, n 26.

⁶¹ Gary Watt *Todd & Watt's Cases & Materials on Equity and Trusts* (8th ed, Oxford University Press, Oxford, 2011) at 402.

⁶² This was the analysis given by the Supreme Court in *European Ventures*, above n 3, at [37]; the Court of Appeal in *European Ventures* [2013] EWCA Civ 17 at [34]; and Timothy Youdan *Equity Fiduciaries and Trusts* (University of Victoria Faculty of Law, British Columbia, 1989) at 95.

⁶³ Peter Watts (ed) *Bowstead & Reynolds on Agency* (19th ed, Sweet & Maxwell, London, 2010) at 248.

⁶⁴ See *Phipps v Boardman*, above n 13.

B. *Tyrrell*, *Keech*, and property subject to fiduciary obligations

Tyrrell v Bank of London (“*Tyrrell*”)⁶⁵ and *Keech v Sandford* (“*Keech*”)⁶⁶ are cases heard prior to *Lister* that awarded constructive trusts in accordance with slightly broader concepts of the principal’s property rights.

Tyrrell acted as a pre-promoter (and later solicitor) for the not-yet-formed Bank of London.⁶⁷ Prior to the Bank’s incorporation, Tyrrell was party to informal discussions about the need to find suitable premises. He then became involved in a joint venture with another client, Read, to purchase and on-sell to the Bank a property including a building known as the Hall of Commerce.⁶⁸ His involvement arose shortly after a meeting with Read where the Hall and its potential suitability for the (as yet unformed) Bank were discussed. The day the Bank publicised its forthcoming prospectus, Tyrrell suggested the Hall as premises. His suggestion was received favourably, and he met with Read that same day to finalise the terms of their venture.⁶⁹

Tyrrell was then involved in negotiations which culminated in the Bank (still prior to incorporation) purchasing the Hall of Commerce for £65,000. Both he and Read made a substantial profit on the sale, and retained an interest in the rest of the land.⁷⁰ The House of Lords declared that Tyrrell held his half interest in the Hall of Commerce on trust for the bank,⁷¹ but that he was merely under a personal obligation to account for any gains made in respect of the rest of the land.⁷²

Insofar as it related to the Hall, Lord Westbury considered that Tyrrell was obliged to have taken the benefit of the contract for the Bank rather than for himself.⁷³ Given his position, he

⁶⁵ *Tyrrell v Bank of London* (1862) HL Cas 26.

⁶⁶ *Keech* (1726) Sel Cas Ch 61

⁶⁷ *Tyrrell*, above n 65, at 29-33.

⁶⁸ Peter Watts “*Tyrrell v Bank of London—An Inside Look at an Inside Job*” (2013) 129 LQR 527 at 537-8.

⁶⁹ At 538.

⁷⁰ At 541.

⁷¹ Though by this point, the Bank already had title to the land, see Watts “*Tyrrell v Bank of London—An Inside Look at an Inside Job*”, above n 68, at 554.

⁷² While the extent of his liability to “account” has been debated, Watts’ analysis of the judgments makes it clear that Tyrrell was ordered to personally account for his gains made, at 548.

⁷³ *Tyrrell*, above n 65, at 43.

was obliged to make any exertions with respect to suitable premises on behalf of the bank, rather than on his own behalf.⁷⁴ Explaining Tyrrell's personal obligation to account for his interest in the other land has been more problematic. While the House of Lords noted that the land itself was outside the scope of his retainer with the Bank, his interest in it was viewed by as a corrupt inducement to assist in engaging the Bank in a disadvantageous transaction.⁷⁵ The Bank could not affirm this contract as being pursued on their behalf as Tyrrell's engagement did not extend to investigating other properties for them. His only obligation with respect to that land was not to enter into a transaction designed to subvert his principal's interests. As such, the Bank could not assert ownership of the rest of the land – Tyrrell owed no duty to acquire it on their behalf and was only liable to account personally.⁷⁶

While uncited to the Court in *Lister*, *Tyrrell* was later analysed as supporting the general proposition that a fiduciary's obligation to account for a benefit will only attract proprietary consequences where the fiduciary was obliged to take the benefit for the principal.⁷⁷ Where the subject matter fell outside the scope of the fiduciary remit and he consequently owed no positive obligations to his principal in respect of it, the remedy would be personal rather than proprietary.⁷⁸ *Tyrrell* demonstrated the difference between the two; the scope of Tyrrell's obligations included finding premises for the Bank. Any efforts made toward this end therefore had to be made on the bank's behalf.⁷⁹ Tyrrell was under no such positive obligation toward the content of a subversive bribe; his obligations in that respect were negative.⁸⁰

Keech concerned a market lease held by a trustee for an infant beneficiary. When the lease came up for renewal, the landlord refused to renew it for the benefit of the infant and the trustee took the lease for himself.⁸¹ Lord Chancellor King construed the trustee's obligations

⁷⁴ At 44.

⁷⁵ Or at least, a less advantageous transaction than if the Bank had been aware of the price Read paid for the land. See *Tyrrell* above n 65, at 41 per Lord Westbury and at 59 per Lord Chelmsford.

⁷⁶ At 59 per Lord Chelmsford.

⁷⁷ *Sinclair*, above n 5, [61] and [77].

⁷⁸ Watts' instructive article demonstrates that the law has drawn a distinction between corrupt bribes and other secret profits in which the principal had an interest for more than 150 years.

⁷⁹ *Tyrrell*, above n 65, at 44.

⁸⁰ See Watts, "Tyrrell v Bank of London—An Inside Look at an Inside Job", above n 68, at 555-6.

⁸¹ *Keech*, above n 66.

strictly, and in order to deny any trustee entering into a situation of even possible conflict, ordered the trustee assign the lease to the beneficiary.⁸²

“I must consider this as a trust for the infant, for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust-estates would be renewed to the cestui que use; though I do not say there is a fraud in this case, yet [the trustee] should rather have let it run out, than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to cestui que use.”

The case has been used as support for a broad application of the constructive trust over fiduciary gains. It has been argued that no property need be misappropriated for the fiduciary’s duty of loyalty to be vindicated by a proprietary remedy.⁸³ This is in contrast to a narrower approach restricting the constructive trust to a fiduciary who exploits for himself opportunities that arose from within the scope of his endeavours for his principal.⁸⁴ Recent scholarship has suggested that the remedial principle espoused in *Keech* might have been less far-reaching than it has typically been understood, and that the latter approach ought to be preferred.

Andrew Hicks’ detailed analysis of the circumstances surrounding the judgment in *Keech* suggests that there was a greater possibility than the reported judgment suggests that the landlord would have renewed the lease for the benefit of the infant.⁸⁵ Hicks also explains that in those days, the “tenant right” to a renewal was considered to be a right of property and generally treated as such, even though strictly speaking, it was not one.⁸⁶ The trustee may in fact have taken the lease when it could have been renewed for the beneficiary, and when his duty required him to pursue such renewal. Alternatively his exploitation of the “tenant right”

⁸² At 61.

⁸³ *Reid*, above n 5, at 5.

⁸⁴ Hicks, “The Remedial Principle of *Keech v. Sandford* Reconsidered” (2010) 69 CLJ 287 at 288.

⁸⁵ Hicks, “The Remedial Principle of *Keech v. Sandford* Reconsidered”, above n 85, at 293.

⁸⁶ At 296-7.

was a misuse of the beneficiary's pre-existing property interest.⁸⁷ In the first instance his duty would require him to pursue any renewal for the beneficiary because the renewal was within the scope of his duties to the beneficiary.⁸⁸ In the second, he appropriated the beneficiary's right for himself. Either view of the case supports a proprietary remedy; the first based on the beneficiary's rights in respect of his obligation, the second on the beneficiary's rights in respect of its property.

C. *Boardman v Phipps* – the corporate opportunity doctrine

The decision in *Keech* had a profound effect on the law's response to fiduciaries exploiting opportunities that came to them as a result of their fiduciary position.⁸⁹ The line drawn between ownership and obligation in *Lister* blurred as fiduciary obligations owed in respect of specific property and specific opportunities were recognised as giving rise to ownership. Following *Boardman v Phipps* ("*Boardman*")⁹⁰ the law decisively recognised that where a fiduciary exploits an opportunity within the scope of his remit to his principal, any gains made will be considered his principal's property because he owed a duty to obtain them for his principal and his principal alone.⁹¹

In *Boardman*, a solicitor and another party used their position as agents for a will trust to purchase shares in a company of which the trust held a substantial minority shareholding. They then staged a takeover and earned a significant amount of money for both themselves and the trust.⁹² The trustees could not have purchased the additional shares on behalf of the trust without authorisation from the Court, and the evidence showed that it was unlikely the trustees would have agreed to such a purchase.⁹³ Nonetheless, the agents had not obtained informed consent from the necessary parties or permission from the Court to make the profits on their own behalf.

⁸⁷ At 296-7.

⁸⁸ As above, the scope of Tyrrell's mandate from the Bank included finding premises.

⁸⁹ Hicks, "The Remedial Principle of *Keech v. Sandford* Reconsidered", above n 85, at 298.

⁹⁰ *Boardman v Phipps*, above n 13.

⁹¹ *Worthington Equity*, above n 19, at 132.

⁹² *Boardman v Phipps*, above n 13, at 72-84 per Viscount Dilhorne.

⁹³ At 87-88 per Viscount Dilhorne.

Their role was to advise the trustees on how best to overcome hurdles to the trust making a profit. If opportunities to realise gains from the trust's shareholding arose, they were obliged to exploit them for the trust.⁹⁴ Their duty of loyalty required them to make any profits on the trust's behalf rather than their own.⁹⁵ A constructive trust was awarded over the shares, and they were required to account for their gains made.

Boardman was influential in the growth of the modern corporate opportunity doctrine. This prevents company directors and other fiduciaries from pursuing opportunities that came to them "in the course and by reason of" their position.⁹⁶ If the opportunity is within the scope of the fiduciary's obligation to his principal, then even if the principal cannot pursue it, would not have pursued it, or would not have succeeded in pursuing the opportunity, the fiduciary may not pursue it for himself.⁹⁷ If he does, his duty prevents him from asserting that the opportunity was exploited for his own benefit and the principal can claim ownership of any benefit derived from the exploitation.⁹⁸ The right to have the gains made on the principal's behalf or not at all founds the claim to ownership.

D. A giant leap forward: *Attorney-General for Hong Kong v Reid*

Distinctions between ownership and obligation in the sphere of fiduciary gains were essentially done away with by the Privy Council in *Attorney General for Hong Kong v Reid* ("*Reid*").⁹⁹ Reid was a corrupt prosecutor working for the Hong Kong government who took bribes during his tenure. He purchased land in New Zealand with the bribe money. The land was owned by his wife and solicitor as trustees of a family trust of which his wife and children were beneficiaries.¹⁰⁰ The Hong Kong government sought a declaration that they had

⁹⁴ Worthington *Equity*, above n 19, at 131-2.

⁹⁵ At 111 per Lord Hodson: "[E]ven if the possibility of conflict is present between personal interest and the fiduciary position the rule of equity must be applied".

⁹⁶ Worthington "Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae", above n 2, at 748.

⁹⁷ Worthington *Equity*, above n 19, at 132.

⁹⁸ At 132.

⁹⁹ *Reid*, above n 5.

¹⁰⁰ The facts reported in more detail in *Attorney-General for Hong Kong v Reid* [1992] 2 NZLR 385 (CA).

a caveatable interest in the properties by way of constructive trust, in order to prevent the trustees selling the land. The Privy Council granted it on grounds that:¹⁰¹

“[I]f the bribe consists of property which increases in value or if a cash bribe is invested advantageously, the false fiduciary will receive a benefit from his breach of duty unless he is accountable not only for the original amount or value of the bribe but also for the increased value of the property representing the bribe. As soon as the bribe was received it should have been paid or transferred *instanter* to the person who suffered from the breach of duty. Equity considers as done that which ought to have been done. As soon as the bribe was received, whether in cash or in kind, the false fiduciary held the bribe on a constructive trust for the person injured.”

The decision was applauded on policy grounds,¹⁰² but heavily criticised for lack of substantive reasoning.¹⁰³ Lord Templeman’s reliance on the equitable maxim presupposed that equity would have required the bribe to be transferred *in specie* rather than its monetary value.¹⁰⁴ Unlike the corporate opportunity cases where the fiduciary duty positively requires opportunities within the scope of the fiduciary obligation to be exploited for the principal, and the principal alone, no such duty was identified in *Reid*. As noted in a later case, the analysis “assume[d] what it assert[ed]”¹⁰⁵ when it held that a bribe paid to a “a fiduciary in breach of his duty [is held on] trust for the person to whom the duty is owed”.¹⁰⁶ Lord Templeman did little more than identify other cases where fiduciaries had profited in breach of their duties and the profits had been held on constructive trust.¹⁰⁷ He did not consider whether there might be any principled reason to exclude *Reid* from the ambit of the preceding

¹⁰¹ *Reid*, above n 5, at 3.

¹⁰² See A J Oakley *Constructive Trusts* (3rd ed, Sweet & Maxwell, London, 1997) at 136-7; Millett “Bribes and Secret Commissions Again”, above n 2; Peter Devonshire “Defining the Boundaries of Personal and Proprietary Relief Against Secret Commissions” (2013) 24 KLJ 392 at 402.

¹⁰³ See Ross Grantham “Doctrinal Bases for the Recognition of Proprietary Rights” (1996) 16 OJLS 561; Worthington “Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae”, above n 2; Virgo *The Principles of Equity and Trusts*, above n 29.

¹⁰⁴ Virgo *The Principles of Equity and Trusts*, above n 29, at 520.

¹⁰⁵ *Sinclair*, above n 5, at [78].

¹⁰⁶ *Reid*, above n 5, at 4.

¹⁰⁷ At 5-7.

cases, or why the duty owed (and breached) in *Reid* gave the Hong Kong government a property right as opposed to a personal right to an account of profits.¹⁰⁸

Ultimately *Reid* represented a total conflation of fiduciary obligation and the principal's ownership rights. Any benefit derived by a disloyal fiduciary would vest immediately in his principal.¹⁰⁹ It was a dramatic step away from the previous case law, and the prior focus that had been on ensuring a close link between the fiduciary duty breached and any property rights recognised as vesting in the principal.

E. And a big step back: *Sinclair v Versailles*

Following *Reid* it was generally assumed that the Privy Council decision represented the direction that English law would take.¹¹⁰ This was rejected by the English Court of Appeal in *Sinclair v Versailles* ("*Sinclair*").¹¹¹ The case itself concerned a director who, in breach of his fiduciary duties, circulated money deposited in one company through a series of other companies controlled by him. The result was to artificially inflate their share prices. He then sold some of the shares at a profit.¹¹² The depositors claimed a constructive trust over a property purchased with the proceeds of his share sales. The parties agreed that the case should be treated in the same manner as bribes and secret commissions,¹¹³ which ultimately led to the Court of Appeal affirming *Lister* – partially on grounds that "there [was] a strong case for arguing that *Reid* was unsound".¹¹⁴

Lord Neuberger MR distinguished between a fiduciary enriching himself by depriving a claimant of an asset (be it his own, or one the fiduciary was under an obligation to take for

¹⁰⁸ Notably Lord Templeman's discussion of *Tyrrell* at 5 entirely missed the point that the adjoining property was a bribe in and of itself, focusing rather on dicta of Lord Chelmsford. He also failed to consider at any point why a personal remedy to account would not suffice to achieve equity's desired goal of stripping Reid of his gains, at 3-5.

¹⁰⁹ *Reid*, above n 5, at 4.

¹¹⁰ See Oakley *Constructive Trusts*, above n 102, at 137; Gareth Jones (ed) *Goff & Jones: The Law of Restitution* (6th ed, Sweet & Maxwell, London, 2002) at 703-5; Peter Birks *Unjust Enrichment* (Oxford University Press, New York, 2003) at 30-31.

¹¹¹ *Sinclair*, above n 5.

¹¹² The shares sold were in a different company to that which the depositors' had invested in.

¹¹³ At [56], though this approach was criticised by Etherton C on the Court of Appeal in *European Ventures*, above n 62, at [102].

¹¹⁴ *Sinclair*, above n 5, at [80].

him) and a fiduciary enriching himself by doing a wrong to the claimant.¹¹⁵ The former category would include corporate opportunities and other secret profits made at the principal's expense. The latter category would encompass bribes.¹¹⁶ He held that corporate opportunities and secret profits could be distinguished from bribes on grounds that they represented property that ought to have been that of the principal had the fiduciary properly carried out his duty.¹¹⁷ Conversely, a bribe from a third party "could not possibly be said to be an asset which the fiduciary was under a duty to take for the [principal]" – he would rather be under a duty not to accept the bribe at all.¹¹⁸ The constructive trust could only attach to the cases with a proprietary base (i.e. where the principal had a claim to ownership from the fiduciary obligations he was owed), of which *Reid* was not one.

The depositors in *Sinclair* were not awarded proprietary relief on grounds that the link between their money and the director's ultimate gains were too remote; he owed fiduciary duties in respect of one company but ultimately gained in a different capacity from the sale of another company's shares.¹¹⁹ It was held that his fiduciary duties did not extend to the proceeds of the shares he already owned and thus the depositors could not profit from his wrongdoing.¹²⁰ A better way of explaining the result might be that profiting from an illegal Ponzi scheme fell outside the scope of the director's duty to the depositors. His actions could not be affirmed on their behalf. This would align it with the reasoning given by the Court of Appeal in *Sinclair* for rejecting *Reid*.¹²¹

Lord Neuberger MR acknowledged strong policy reasons in favour of awarding a constructive trust over unauthorised profits, including ensuring a fiduciary cannot retain any benefit from his wrongdoing (i.e. taking a bribe and investing it prudently). Nonetheless he

¹¹⁵ *Sinclair*, above n 5, at [80].

¹¹⁶ While at this point *Lister* was assumed to have been correctly decided and so considered alongside *Reid* as a bribe case, the analysis of *Tyrrell* is instructive; *Sinclair*, above n 5, at [60]-[62].

¹¹⁷ At [80].

¹¹⁸ At [80], [88].

¹¹⁹ At [92], citing Lewison J in the High Court, [2010] EWHC 1614 (Ch) at [81]. This decision, however, has been heavily criticised by theorists who approve of Lord Neuberger's appraisal of the law in *Sinclair* but who believe he misapplied it to the facts. Worthington "Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae", above n 2, suggests at 744 that the gains were made by use of the depositors' money and should therefore be held on trust for them.

¹²⁰ *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd & Ors* [2010] EWHC 1614 (Ch) at [80], affirmed on appeal.

¹²¹ *Sinclair*, above n 5, at [80].

considered those policy concerns would best be dealt with by extending the rules of equitable compensation.¹²² He was concerned that extending the ambit of the constructive trust to cases without a proprietary base was not justified as a matter of law and would prejudice creditors unfairly.¹²³

Sinclair ultimately concluded that *Lister* represented English law, not *Reid*. For the court to recognise a constructive trust, a close proprietary link must be shown between the fiduciary's breach of duty and the money or property claimed by the principal. A two limb test was affirmed; that link would be found where the money or property was:¹²⁴

- a) Beneficially owned by the principal; or
- b) Derived from opportunities beneficially owned by the principal.

Sinclair did not state the exact parameters of "beneficial ownership" or "opportunities beneficially owned",¹²⁵ but it clearly rejected the all-inclusive approach taken in *Reid*. *Sinclair* demonstrated the Court's intention to reinstate a close link between the principal's pre-existing rights in specific property or opportunities, and any gains over which ownership was asserted.¹²⁶ Its reasoning excluded bribes from the constructive trust's ambit; corruption will always fall outside the scope of a fiduciary's remit and thus cannot be said to be something he was under a duty to take for his principal.¹²⁷

¹²² At [89].

¹²³ At [90].

¹²⁴ At [89].

¹²⁵ At [89].

¹²⁶ At [88]-[92].

¹²⁷ At [80], [88].

Chapter IV: *European Ventures* Considers Secret Commissions

Sinclair was a dramatic departure from *Reid*, and it left English law in stark contrast with the rest of the Commonwealth.¹²⁸ Given the judicial and academic passions stirred by *Sinclair*, the extent of the requirement that a principal hold a pre-existing right or interest to make a successful proprietary claim was ripe for Supreme Court determination.¹²⁹

The Supreme Court's opportunity arose in the form of *European Ventures*, a case with strikingly similar facts to *Lister*. A company, Cedar, was employed to advise an investor group on a hotel purchase. Largely unknown to the investor group,¹³⁰ Cedar was to receive a €10 million commission from the hoteliers. Cedar knew that the hoteliers were looking to sell for a price in excess of €200m and ultimately the investor group purchased the hotel for €211.5m.¹³¹

A. The Court of Appeal judgment

The Court of Appeal's task was to determine whether a secret commission could be classified as property "derived from an opportunity beneficially owned by the principal" within the second limb of the *Sinclair* test.¹³² The three members of the Court, Etherton C, Lewison and Pill LJ held that it could be.

1. Broadening the ambit of the *Sinclair* test

¹²⁸ *Reid*, above n 5, still governs New Zealand law; the Canadian courts have gone a step further and embraced the remedial constructive trust to remedy all manner of unconscionability since *Korkontzilas v Soulos* (1997) 147 DLR (4th) 214; and the Full Federal Court of Australia rejected *Sinclair* in *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6.

¹²⁹ Millett "Bribes and Secret Commissions Again", above n 2; Worthington, "Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae", above n 2; Hayton "Proprietary Liability for Secret Profits", above n 52; Goode "Proprietary Liability for Secret Profits – A Reply", above n 47.

¹³⁰ Sufficiently unknown that the Court of Appeal considered the "limited disclosure" made was "not enough to deprive the fee of €10 million payable under the Exclusive Brokerage Agreement of its character as a secret profit": *European Ventures* (CA), above n 62, at [5].

¹³¹ At [2]–[9].

¹³² *Sinclair*, above n 5, at [89]. It was also argued that *Sinclair* was wrong to follow *Lister*, but the Court of Appeal considered itself constrained by *Sinclair* and left that determination to the Supreme Court: *European Ventures* (CA), above n 62, at [16].

Lewison LJ examined the second line of ‘diverted opportunity’ cases, finding that Cedar’s commission could fall within that class but that the strict language of “beneficial ownership” of opportunities was inappropriate.¹³³ He concluded:¹³⁴

“In the present case the exclusive brokerage agreement was part of the overall arrangement surrounding the purchase of the hotel...In my judgment the *exploitation of the opportunity by Cedar* was such as to attract the operation of the rule with the consequence that Cedar held the benefit of the contract on a constructive trust for the Investor Group. Thence it is possible to trace into the money paid under that contract which Cedar likewise held on a constructive trust for the Investor Group.”

Pill LJ also had little difficulty placing the case into the second limb of the *Sinclair* test on grounds that the investors were denied “the opportunity to have purchased the hotel for up to €10 million less than they paid for it”.¹³⁵ He noted that there was a more tenuous link between the investors and the commission than in some other opportunity cases,¹³⁶ but found support for a broader approach to “beneficial ownership” of an opportunity in *Boardman*.¹³⁷

Etherton C concluded that “the obligation of Cedar, which was the exclusive negotiator for the claimants, was to negotiate the best purchase price for them, that is to say the lowest possible price”.¹³⁸ By pursuing that opportunity for himself rather than for the investors, he was in breach of his duty of loyalty and would hold the commission on trust for the investors.¹³⁹ Ultimately the Court of Appeal confirmed that the *Sinclair* test could extend to secret commissions, and took a broader view than *Lister* of what could be considered property of the principal.

¹³³ At [57].

¹³⁴ At [59]; The “Rule” in question being that the benefit should have been acquired on behalf of the principal rather than on the fiduciary’s behalf.

¹³⁵ At [67].

¹³⁶ At [69].

¹³⁷ *Boardman*, above n 13, at 107 per Lord Hodson, cited in *European Ventures (CA)*, above n 62, at [71]-[73].

¹³⁸ At [106].

¹³⁹ At [109]-[110].

2. *Distinguishing European Ventures from the previous authorities*

European Ventures was factually very similar to *Lister*, and Etherton C distinguished the two cases on a number of grounds. He noted that the payment specified in the Exclusive Brokerage Agreement was enforceable by Cedar, whereas it was unclear whether Stubbs could have enforced any payment from the suppliers.¹⁴⁰ Cedar's commission was to be paid within five working days of the investors' payment for the hotel (so clearly funded the commission), whereas it was unclear what temporal connection there was between payment for goods and payments to Stubbs.¹⁴¹ Cedar also breached its obligation to negotiate the best possible price for the investors by withholding information about the commission.¹⁴² Etherton C pointed out that there was no "evidence or assertion by Lister that, if it had known of the bribe or secret commission being received by Stubbs, it would have been placed in a more commercially advantageous position".¹⁴³

Etherton C concluded that Cedar diverted the opportunity to purchase the hotel at the best possible price from the investors by failing to disclose its commission.¹⁴⁴ Cedar had an obligation to ensure that opportunity was exploited for the investors and the investors alone. Exploiting the opportunity on its own account meant that the commission could be subject to a constructive trust within the bounds of *Sinclair*.¹⁴⁵ His final recommendation was that the Supreme Court "overhaul" this area of law, reconcile the competing policy concerns, and provide a coherent framework for proprietary relief in the area of fiduciary breaches.¹⁴⁶

¹⁴⁰ While Stubbs' payments were called "bribes", in reality there was little to distinguish them from the facts in *European Ventures*, and certainly Stubbs' payments were not illegal like the bribes in *Reid* or the gains made in *Sinclair*. There is nothing to suggest they were *unenforceable*, or even that the issue was considered.

¹⁴¹ While this is a fair point, the Supreme Court in *European Ventures*, above n 3, at [39] and [43] noted that "elementary economics" would suggest that the benefit of the transaction to the principal was reduced by a secret commission. This will be true regardless of the temporal connection between the payment and receipt of the commission; if Lister & Co were not funding Stubbs' commissions, Varley & Co would have had no motive to act gratuitously.

¹⁴² *European Ventures* (CA), above n 62, at [105]-[107].

¹⁴³ At [104], though this too was rejected by the Supreme Court *European Ventures*, above n 3, at [39] and [43] who held that commissions will almost always reduce the benefit of the transaction.

¹⁴⁴ *European Ventures* (CA), above n 62, at [110].

¹⁴⁵ At [59] per Lewison LJ and [110] per Etherton C.

¹⁴⁶ At [116].

At this point, it was clear that a principal held a sufficient proprietary interest in a secret commission to bring it within the *Sinclair* framework, but the same was not true of a bribe.

B. The Supreme Court judgment

Four weeks after the hearing, Lord Neuberger delivered the single judgment of a seven-member Supreme Court.¹⁴⁷ His focus was on the equitable rule (“the Rule”) that:¹⁴⁸

“An agent [who] acquires a benefit which came to his notice as a result of his fiduciary position, or pursuant to an opportunity which results from his fiduciary position...is to be treated as having acquired the benefit on behalf of his principal, so that it is beneficially owned by the principal”.

The question was the “limits or boundaries” of the Rule – “[s]pecifically...the extent to which the Rule applies where the benefit is a bribe or secret commission obtained by an agent in breach of his fiduciary duty to his principal”.¹⁴⁹ In so framing the question the Court was purporting to decide both whether secret commissions and bribes would attract proprietary relief and whether the decision in *Reid* was good law. Lord Neuberger did not, however, attempt to distinguish between bribes and secret commissions. It appears that he considered bribes to fall within the category of opportunities resulting from the fiduciary position, but downplayed the critical point from the prior opportunity cases. The opportunity had to be within the scope of the fiduciary’s endeavours for his principal or the proceeds of its exploitation would not attract proprietary relief.¹⁵⁰

After a brief summary of three hundred years of case law and decades of scholarship on the matter, Lord Neuberger concluded that there was no consensus on the ambit of the Rule. Indeed, he proceeded to explain in an arena where equity tended to clash with the common law, he would be surprised to find any.¹⁵¹ Rather than evaluating the validity of the

¹⁴⁷ The appeal was heard on 17-19 June 2014, and judgment handed down 16 July 2014.

¹⁴⁸ *European Ventures*, above n 3, at [7].

¹⁴⁹ At [9].

¹⁵⁰ See *Boardman*, above n 13; *Tyrrell*, above n 65, and *Keech*, above n 66.

¹⁵¹ *European Ventures*, above n 3, at [32].

distinctions he had drawn three years prior in *Sinclair*, or tying the constructive trust to any notion of property, he sought a simpler solution and turned to normative concerns.¹⁵²

1. The Fiduciary Duty

Lord Neuberger's first assessed the fiduciary duty of loyalty, but did not consider the extent to which fiduciary obligations can give rise to property rights. He simply held that the duty of loyalty required paramount protection and recognising a constructive trust was the most effective way to deter breaches.¹⁵³ He relied on his previous conclusion (that there was no legal consensus as to the ambit of the Rule) when coming to his initial position that "simple answer" should be preferred, and all unauthorised profits subject to a constructive trust.¹⁵⁴ He also desired consistency between cases where a fiduciary is called to account personally and cases where the principal is entitled to the benefit itself.¹⁵⁵

Some of his reasoning rejected the idea of any proprietary base as a pre-requisite for proprietary relief, while in other areas he suggested exactly the opposite.¹⁵⁶ He found that in most secret commission cases the principal would have suffered a financial loss attributable to the fiduciary's disloyalty as a matter of "elementary economics".¹⁵⁷ This was one ground on which any prejudice to creditors arising from the recognition of a constructive trust could be justified.¹⁵⁸ In contrast, he also noted that if principals cannot make proprietary claims over bribes and secret commissions, unfaithful agents will have better rights than their principals (and thus be better off). He questioned whether this result was consistent with equity's aims, implicitly rejecting any justification beyond effective deterrence for recognising a constructive trust.¹⁵⁹

¹⁵² At [35]; Lord Neuberger barely considered the possibility of a coherent or principled answer, he simply asserted that there was no "plainly right answer" and moved forward with policy concerns.

¹⁵³ At [41].

¹⁵⁴ At [35]; though obscure points of equity law rarely come neatly packaged with "plainly right answer[s]" and judges still frequently endeavour to reach the conclusion that best accords with legal principle.

¹⁵⁵ At [36].

¹⁵⁶ See his analysis at [38]-[39] vs. comments at [37] and [40].

¹⁵⁷ At [37].

¹⁵⁸ At [37].

¹⁵⁹ At [41].

2. Public Policy

Lord Neuberger also considered broader public policy. Quoting *Reid*, he affirmed that “[b]ribery is an evil practice which threatens the foundations of any civilised society”.¹⁶⁰ He also noted that secret commissions were a particular problem within the contemporary commercial sphere and inadequate deterrence could undermine relationships of trust and confidence.¹⁶¹ Again substantially equating bribes and secret commissions, he suggested that as they will usually have detracted from the monetary benefit to the principal in a given situation, it is fair to consider them the principal’s property.¹⁶²

Lord Neuberger recognised that unsecured creditors of a defaulting fiduciary would necessarily be disadvantaged by a broad approach to proprietary relief, but endorsed the reasoning given in *Reid*.¹⁶³ He held that bribes and secret commissions should never have formed part of the insolvent estate to begin with and were therefore not properly available to creditors.¹⁶⁴ He also balanced prejudice to creditors against the benefits that accrue to a principal when proprietary relief is recognised. He found that the principal’s ability to trace in equity and claim against third party volunteers and knowing recipients outweighed any detriment to creditors.¹⁶⁵

3. Tyrrell

Lord Neuberger saw *Tyrrell* as the final hurdle to recognising a broad application of the constructive trust was *Tyrrell*. The adjoining land (essentially a bribe or inducement to Tyrrell to engage in the corrupt transaction) was subject to a personal account of profits

¹⁶⁰ *Reid*, above n 5, at 3; cited in *European Ventures*, above n 3, at [42].

¹⁶¹ At [42].

¹⁶² At [43]. This leaves significant questions as to the correct treatment of bribes which were nothing but an accretion to the fiduciary’s wealth and did not detract from that of the principal at all, i.e. the bribes in *Reid*.

¹⁶³ *Reid*, above n 5, at 4.

¹⁶⁴ At [43].

¹⁶⁵ At [44]. This was a fascinating conclusion; Lord Neuberger entirely happy to elevate one kind of personal right (the principal’s entitlement to an account of profits from a defaulting fiduciary) over another (a creditor’s right to repayment) with only the briefest of well criticised analysis for doing so. See Thomas Allan “Bribes and Constructive Trusts: A-G of Hong Kong v Reid” (1995) 58 MLR 87 for a summary of the debate around creditors’ rights.

rather than a constructive trust.¹⁶⁶ Lord Neuberger rejected the decision in *Tyrrell* on a number of grounds,¹⁶⁷ most crucially the assumption that the acquisition of the adjoining land (subject only to a personal account of profits) fell outside the scope of his fiduciary obligation.¹⁶⁸ While Lord Neuberger did not see this as a bar to recognising a constructive trust over a secret commission, this finding has significant implications for bribes. The opportunity to acquire the hotel at the lowest possible price was within the scope of Cedar's obligations to the investors, so its pursuit had to be for their benefit.¹⁶⁹ Tyrrell's receipt of a corrupt inducement to subvert his duty did fall outside the scope of his obligations, but the same must then be true of the bribes paid to *Reid*. In neither case did the fiduciary's duty require him to acquire the benefit for his principal; in both his duty required him not to accept a bribe to subvert his duty in the first place.¹⁷⁰ While the Court of Appeal's analysis of *European Ventures* brought it within a proprietary framework, there is no similar way to analyse bribe cases.

The Supreme Court judgment purported to affirm the deterrence based, public policy approach to proprietary relief over bribes and secret commissions seen in *Reid*. The exact parameters of the decision, however, are unclear.

C. Where the Supreme Court decision leaves bribes

The decision confirmed an extension of the constructive trust to secret commissions, and on the Court of Appeal's analysis this was consistent with previous authority. Proprietary remedies have typically been confined to vindication of a pre-existing property interest, or a claim to ownership due to the content of the fiduciary obligation breached.¹⁷¹ However no analysis was given by the Supreme Court as to any difference between "bribes and secret

¹⁶⁶ *Tyrrell*, above n 65, at 41 per Lord Westbury and at 59 per Lord Chelmsford. See also Watts "Tyrrell v Bank of London—An Inside Look at an Inside Job", above n 68, at 548, 555.

¹⁶⁷ Including that it was not consistent with other contemporary cases, and cases cited in argument were not referred to in any of the three judgments: *European Ventures*, above n 3, at [49].

¹⁶⁸ At [49]. Relying on this dicta after the detailed analysis given in Watts' article, however, was rather tenuous. While not subject to a constructive trust, Tyrrell's benefit from the rest of the land was clearly considered corrupt and in breach of his duties to the bank, hence he was personally liable to account for his gains.

¹⁶⁹ *European Ventures* (CA), above n 62, at [59] per Lewison LJ and [110] per Etherton C.

¹⁷⁰ Goode "Proprietary Liability for Secret Profits – A Reply", above n 47, at 490-2.

¹⁷¹ See *European Ventures* (CA), above n 62, at [59] per Lewison LJ and [110] per Etherton C, who both brought the secret commission within the test laid out in *Sinclair*, above n 5, at [89].

commissions”¹⁷² or the various opportunity cases discussed. Lord Neuberger never once suggested that there might be a substantive difference between bribes and secret commissions, seeming happy that a conclusion in respect of one (secret commissions) would apply to the other (bribes).¹⁷³ Given he concluded that there were substantive grounds for distinguishing the two in *Sinclair*,¹⁷⁴ his conflation of bribes and secret commissions is surprising.

Lord Neuberger also used ideas of property and loss to justify prioritising principals in an insolvency, his language harking back to that used in *Sinclair*.¹⁷⁵ The constructive trust may well be justified on policy grounds alone, but linking a policy-based approach to the more restrictive grounds of property and loss is confusing and unhelpful.¹⁷⁶ The decision leaves open the possibility that fiduciary gains that are not directly or indirectly at the principal’s expense may not justify prejudice to creditors. That again begs the question – what cases ought still fall outside the ambit of this broad, “simple” approach to the constructive trust? The Supreme Court did not consider bribes in any specific way, and there is certainly an arguable case that bribes should not have been conflated with secret commissions.¹⁷⁷ While it is recognised that some fiduciary obligations can give rise to ownership rights, they have traditionally been treated as separate concepts that overlap in some areas.¹⁷⁸

The judgment also seemed to assume that recognition of a constructive trust is the only way by which a principal can disgorge second generation profits and ensure a fiduciary does not

¹⁷² *European Ventures*, above n 3, at [31].

¹⁷³ This approach, and his assertion that in most cases the fiduciary’s benefit will fairly be able to be treated as the property of the principal implicitly suggests that he saw no substantive difference between bribes and secret commissions and considered they ought to be treated identically.

¹⁷⁴ *Sinclair*, above n 5, at [80].

¹⁷⁵ The first limb of the test in *Sinclair*, above n 5, at [89], encompassed property “beneficially owned by the claimant”. Lord Neuberger’s analysis in *European Ventures*, above n 3, at [37] and [43] uses similar language.

¹⁷⁶ *European Ventures*, above n 3, at [37] discussing that as a matter of “elementary economics” the principal will usually have suffered a monetary loss as a result of the fiduciary’s breach, and at [43] using this to justify his claim to ownership and thus priority on insolvency.

¹⁷⁷ This was noted at [34], briefly, before being dismissed. Lord Neuberger himself drew such a difference in *Sinclair*, above n 5, at [80], and academics have done so too. See Goode “Ownership and Obligation in Commercial Transactions”, above n 2; Rotherham “Proprietary Relief for Enrichment by Wrongs: Some Realism About Property Talk”, above n 2; Worthington “Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae”, above n 2.

¹⁷⁸ See Worthington “The Disappearing Divide Between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation”, above n 11.

retain any consequent gains from his wrongdoing.¹⁷⁹ This may not be correct; as noted by Lord Neuberger MR in *Sinclair*, the law of equitable accounting could be extended to capture such benefits.¹⁸⁰ Indeed, by conflating the ambit of the two remedies, it seems clear that the Court held no objection in principle to disgorging all profits obtained in breach of fiduciary duty. It is less clear why a proprietary remedy and its associated consequences is necessary to achieve the deterrence sought if a personal remedy could have been extended to achieve the same public policy aims.¹⁸¹ This is why the two enquiries have traditionally been considered separately; any breach of fiduciary duty will give rise to an account of profits but only disloyalty with respect to specific property or opportunities have traditionally founded a constructive trust.¹⁸²

The next chapter considers the academic discussion of obligation and ownership. It also considers whether the Supreme Court's presumed extension of the existing law to bribes can be justified on theoretical grounds, i.e. whether academic commentary can provide the answers from the judgment.

¹⁷⁹ This seems to be what Lord Neuberger was suggesting in *European Ventures*, above n 3, at [41]. It was also explicitly discussed in other cases, i.e. *Lister*, above n 7, at 15; *Reid*, above n 5, at 4-5; and in *Sinclair*, above n 5, at [89]-[90].

¹⁸⁰ *Sinclair*, above n 5, at [90].

¹⁸¹ At [90]. Chapter VI explores in more detail whether personal remedies will in fact be able to property deter errant fiduciaries, but the ability to disgorge second generation gains would certainly dispel much of the concern espoused in *Reid*.

¹⁸² As discussed in Chapter II, Equity requires deterrence but it does not necessarily require a constructive trust to be recognised to achieve that purpose. The remedy of an account of profits is deterrence based to protect the fiduciary institution.

Chapter V: The Competing Views of Theorists

The previous two chapters have shown that the case law is not consistent. It does not clearly delineate between bribes and secret commissions, or provide a reasoned basis for treating them the same way. This chapter explores the competing views of theorists and the extent to which their approaches to ownership and obligation can assist in determining whether the constructive trust should extend to bribes. It also considers whether – regardless of principle – the fiduciary duty will be adequately protected without wider recognition of the constructive trust.

As noted earlier, the two key approaches to justifying the constructive trust over fiduciary gains are the property-based approach and the duty-based approach. The property based approach looks for a “proprietary base”, while the duty based approach considers any breach of fiduciary duty to justify conferring ownership of gains made in the course of that breach on the principal. When applied to bribes, these two approaches differ. This section examines the obligations that each side of the debate consider give rise to the principal’s property rights, and why they differ with respect to bribes.

A. The duty based approach

The duty-based approach argues for proprietary intervention over all unauthorised profits on grounds that the constructive trust vindicates the fiduciary undertaking and protects the fiduciary institution in ways that personal remedies cannot.¹⁸³ Duty based theorists argue that a constructive trust arises at the point of a fiduciary’s receipt of any profit made in breach of his duty of loyalty (bribe or otherwise). The constructive trust acts prophylactically to prevent him breaching his obligations to his principal.¹⁸⁴

¹⁸³ *Reid*, above n 5, at 3-5.

¹⁸⁴ *Mitchell Hayton and Mitchell: Commentary and Cases on the Law of Trusts and Equitable Remedies*, above n 22, at 667.

Sir Peter Millett has written at length on the importance of the constructive trust to the preservation of the fiduciary relationship.¹⁸⁵ He asserts that a fiduciary receiving a bribe in the course of and by virtue of the fiduciary relationship is under a disability to acquire beneficial ownership of the bribe.¹⁸⁶ His analysis was heavily relied on by the Privy Council in *Reid* when Lord Templeman held that “[a]s soon as the bribe was received, whether in cash or in kind, the false fiduciary held the bribe on a constructive trust for the person injured”.¹⁸⁷ His reliance on the maxim that equity regards as done that which ought to be done, however, has been questioned. Virgo suggests that it was incorrectly applied because there was no obligation to transfer the bribe *in specie* and therefore nothing to which the maxim could attach.¹⁸⁸ Two responses to this criticism have arisen. Millett argues that the law treats the fiduciary as having acted as he was under a duty to act,¹⁸⁹ and Hayton argues that if a principal claims an unauthorised transaction as an authorised one, he necessarily takes the benefit.¹⁹⁰ Both suggest their reasoning is sufficient on which to ground the maxim.

Millett’s thesis is that equity treats the bribe as legitimate and intended for the principal on grounds that the fiduciary is obligated to act in his principal’s best interests, regardless of the briber’s intention.¹⁹¹ He argues that regardless of the source of the bribe or the intentions of the briber as to the bribe’s ultimate destination, the essential mischief is the same; the bribe deprives the principal of his right to the undivided loyalty of his fiduciary and that loyalty should be upheld by a constructive trust.¹⁹² The Supreme Court in *European Ventures* concurred, holding that:¹⁹³

“The notion that the Rule should not apply to a bribe or secret commission received by an agent because it could not have been received by, or on behalf of the principal seems unattractive. The whole reason that the agent should not have accepted the bribe or commission is that it puts him in conflict with his duty to his principal.”

¹⁸⁵ See Millett “Bribes and Secret Commissions”, above n 2; Millett “Bribes and Secret Commissions (Again)”, above n 2.

¹⁸⁶ Millett “Bribes and Secret Commissions (Again)”, above n 2, at 592.

¹⁸⁷ *Reid*, above n 5, at 4.

¹⁸⁸ Virgo *Principles of Equity and Trusts*, above n 29, at 520.

¹⁸⁹ Millett “Bribes and Secret Commissions (Again)”, above n 2, at 585. This, however, still begs the question – how did the fiduciary have a duty to act?

¹⁹⁰ Hayton “Proprietary Liability for Secret Profits”, above n 52, at 492.

¹⁹¹ Millett “Bribes and Secret Commissions (Again)”, above n 2, at 591, 596.

¹⁹² At 603.

¹⁹³ *European Ventures*, above n 3, at [37].

Neither Millett nor Hayton elucidate on the real issue with treating the bribe as the principal's where it was not intended to be so. Rotherham identifies this; there have historically been few ways for property to change hands but by consent (or objectively inferred consent)¹⁹⁴ and courts are wary of interfering in that sphere.¹⁹⁵ As he explains, recognising a constructive trust over a bribe in a case like *Reid* leads to an outcome inconsistent with the intent of the original owner of the bribe and with the intention of the errant fiduciary. This is why bribes present such difficulty.¹⁹⁶

Hayton addresses this in his appraisal of the decision in *Sinclair*; the consent that appears to be lacking is constituted by the fiduciary's express or implied undertaking. By undertaking not to act in his own interests, he is deemed to have consented to hold any profits received by him in breach of that obligation on trust for his principal.¹⁹⁷ The fiduciary undertakes to act solely for his principal's benefit with respect to all matters within the scope of his agency or trusteeship. This is the obligation duty-based theorists would say gives rise to the principal's property right in a bribe.¹⁹⁸

Policy Concerns

Duty-based theorists tend to supplement their reasoning with policy concerns. It is argued that personal remedies are insufficient to properly achieve equity's goal of protecting the fiduciary relationship.¹⁹⁹ They suggest that the constructive trust is the most effective way to

¹⁹⁴ Mitchell Hayton and Mitchell: *Commentary and Cases on the Law of Trusts and Equitable Remedies*, above n 22, at 668.

¹⁹⁵ "Proprietary Relief for Enrichment by Wrongs: Some Realism About Property Talk", above n 2, at 381.

¹⁹⁶ At 382.

¹⁹⁷ Hayton "Proprietary Liability for Secret Profits", above n 52, at 492.

¹⁹⁸ As will be discussed in the next section, the critical problem with this analysis is that bribe-taking does not fall within the scope of such an agency. If bribe-taking is not within the scope of the agency, it is not something the fiduciary can be said to have consented to receive solely on behalf of his principal.

¹⁹⁹ See *Reid*, above n 5; *European Ventures*, above n 3.

ensure defaulting fiduciaries do not retain any benefits – direct or indirect – from their wrongdoing.²⁰⁰

The Supreme Court in *European Ventures* took this approach. Lord Neuberger noted that corruption is antithetical to successful commercial arrangements and is most effectively deterred by allowing a principal a proprietary right with which to disgorge illicit gains.²⁰¹ He also held that principals ought to have the ability to trace in equity against third parties.²⁰² Although this focuses more on the principal's rights than deterring fiduciary disloyalty, cases like *Reid* demonstrate the potential for fiduciaries to alienate their gains in a manner that would put them beyond the reach of recovery absent a proprietary remedy.²⁰³

The constructive trust results in preferential recovery for the principal over the claims of creditors; both unsecured and those with interests secured by a floating charge.²⁰⁴ As such, creditors' interests have formed a large part of the debate over proprietary relief in the fiduciary sphere. The duty-based approach refuses creditors access to disloyal fiduciary gains on grounds that creditors cannot be in a better position with respect to unauthorised gains than the fiduciary.²⁰⁵ This rationale was affirmed by the Supreme Court in *European Ventures*,²⁰⁶ but has been challenged on grounds that insolvent estates frequently include the proceeds of wrongdoing – for example, breaches of contract or tortious duties.²⁰⁷ The mere fact that someone who has cynically breached a contract, for example, may not be entitled to retain the proceeds of their wrongdoing does not give the wronged party priority over other creditors.²⁰⁸ This weakness was acknowledged by the Supreme Court in *European Ventures*, but the Court held that the constructive trust's protection of the fiduciary institution outweighed such concerns.²⁰⁹

²⁰⁰ For example, a well invested bribe, or a bribe alienated to a third party. See Millett "Bribes and Secret Commissions (Again)", above n 2, at 590-1.

²⁰¹ At [42].

²⁰² At [43]-[44] or, as in *European Ventures* itself, have access to equitable tracing to follow the secret profit.

²⁰³ In *Reid*, above n 5, the proceeds of the bribes were held by Reid's wife and solicitor.

²⁰⁴ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 716.

²⁰⁵ *Reid*, above n 5, at 4.

²⁰⁶ *European Ventures*, above n 3, at [43]-[44].

²⁰⁷ Grantham "Doctrinal Bases for the Recognition of Proprietary Rights", above n 103, at 579.

²⁰⁸ Allan "Bribes and Constructive Trusts: A-G of Hong Kong v Reid", above n 165, at 90.

²⁰⁹ *European Ventures*, above n 3, at [44].

The adequacy of personal remedies to achieve proper deterrence is critical. If personal remedies are inadequate to protect the fiduciary institution, the case for recognising proprietary relief is much stronger.²¹⁰ If personal remedies are adequate, the question will simply be one of doctrinal justification, i.e. whether the duty based approach supports a claim to ownership. Both of these will be explored in Chapter VI.

B. The proprietary base approach

At its most basic level, proprietary relief for breach of fiduciary duty is justified where the fiduciary's breach has been a misappropriation of the principal's property.²¹¹ This justification has been explained in restitutionary terms by Daniel Friedmann:²¹²

“The essential attribute of property has traditionally been the existence of a right of exclusive enjoyment, so exploitation of property by another gives rise to an enrichment that is necessarily at the expense of the owner's right.”

It is the right of exclusive enjoyment (and its infringement) which gives a principal the right to recover the misappropriated property or its traceable proceeds. The focus of this approach is identifying the principal's pre-existing rights and vindicating them.²¹³ In the context of bribes and secret commissions, this approach plays a separate role to deterring fiduciary disloyalty. The personal remedies available to principals are generally considered sufficient to achieve equity's deterrent purpose and any proprietary remedy must respond to a pre-existing property right.²¹⁴

²¹⁰ Watts “Tyrrell v Bank of London—An Inside Look at an Inside Job”, above n 68, at 555-7.

²¹¹ *Lister*, above n 7, at 12 per Cotton LJ and 15 per Lindley LJ.

²¹² Daniel Friedmann “Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong” (1980) 80 Colum L Rev 507.

²¹³ Grantham “Doctrinal Bases for the Recognition of Proprietary Rights”, above n 103; Michael Bryan, “The criteria for the award of proprietary remedies: rethinking the proprietary base” in Bryan (ed) *Private Law in Theory and Practice* (Routledge-Cavendish, London, 2007) 271-3.

²¹⁴ Roy Goode “The Recovery of a Directors' Improper Gains: Proprietary Remedies for Infringement of Non-Proprietary Rights” in Ewan McKendrick (ed) *Commercial Aspects of Trusts and Fiduciary Obligations* (Clarendon Press, Oxford, 1992) at 139-140.

Over the years, however, a broader concept of property has been recognised as sufficient to justify a constructive trust over fiduciary gains.²¹⁵ Again, as noted by Friedmann, “a wide range of interests are recognised as forms of property to which a person has no exclusive right but which are nevertheless protected against certain types of interference or invasion”.²¹⁶ In the fiduciary sphere these are now represented by some corporate opportunities²¹⁷ and some secret profits,²¹⁸ where these can be said to be subject to fiduciary obligations.²¹⁹ This analysis can, as the Court of Appeal judgment in *European Ventures* showed, extend to secret commissions.²²⁰

The modern proprietary base approach includes gains made in two discrete situations. It encompasses gains made from the use of property subject to fiduciary obligations, and gains made when a fiduciary wrongfully exploits an opportunity within the scope of his retainer.²²¹ The latter “opportunity” gains fall along a continuum of fiduciary obligations and are where the distinction between bribes and secret commissions arises.

1. Obligations giving rise to ownership

Roy Goode’s thesis has been highly persuasive when considering what fiduciary obligations can or should be considered as giving rise to property rights that the constructive trust should vindicate.²²² He distinguishes between:²²³

²¹⁵ See *Sinclair*, above n 5, at [89] (opportunities in which the principal had an interest); *European Ventures* (CA), above n 62, at [59] per Lewison LJ (secret commissions, framed as the exploitation of certain opportunities).

²¹⁶ Friedmann “Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong”, above n 212, at 507-8.

²¹⁷ *Cook v Deeks*, above n 13; *Boardman*, above n 13; *Bhullar*, above n 13.

²¹⁸ *European Ventures*, above n 3; *Tyrrell*, above n 65 (in respect of the Hall of Commerce).

²¹⁹ See Devonshire’s characterisation of the *Sinclair* judgment; Devonshire “Defining the Boundaries of Personal and Proprietary Relief against Secret Commissions”, above n 102, at 394.

²²⁰ *European Ventures* (CA), above n 62, at [59] per Lewison LJ (secret commissions, framed as the exploitation of certain opportunities).

²²¹ See the distinction drawn in *Sinclair*, above n 5, at [89].

²²² Sir Roy Goode CBE QC is an Emeritus Professor of Law at Oxford University and has been knighted for his services to the law.

²²³ Goode “The Recovery of a Directors’ Improper Gains: Proprietary Remedies for Infringement of Non-Proprietary Rights”, above n 214, at 141.

- a) Actions that a fiduciary was under no specific obligation in respect of, but which he was obliged to undertake, if he undertook them at all, for his principal (i.e. opportunities, the proceeds of which he terms “deemed agency gains”); and
- b) Actions which a fiduciary was under a specific duty not to take (and which have produced some gain, i.e. bribes).

He considers that the former ought to attract a proprietary response on grounds that if the gain was made, it had to have been made for the principal (and thus can be deemed to be the principal’s property).²²⁴ While he acknowledges that gains in the latter situation may be wholly improper, he suggests that there is no basis for proprietary relief. This is because the principal never had any right to it – the profit should never have existed.²²⁵ Virgo concurs, preferring that principals are not given “excessive proprietary protection” and that proprietary relief is only recognised where secret profits have been derived from misusing the principal’s property or where the gains made can be deemed to have been made for the principal.²²⁶

The facts of *European Ventures* were analysed in a similar manner by the Court of Appeal where Lewison LJ asked whether the *exploitation* of the opportunity to purchase the hotel at a lower price was in circumstances where the benefit of that exploitation ought to be considered to be owned by the principal.²²⁷ While Cedar may not have been under a peculiarly fiduciary obligation to investigate the existence of that opportunity, doing so was within the scope of Cedar’s non-fiduciary obligations to the investors. As such, once Cedar ascertained the existence of and decided to pursue the opportunity, its duty of loyalty obliged it to pursue the opportunity for the sole benefit of the investors.²²⁸ The commission can therefore be seen as a deemed agency gain within Goode’s property oriented framework; once the fiduciary obligation requires a particular profit or commission to be made for the principal, the principal’s rights over it have proprietary characteristics sufficient to support a constructive trust.

²²⁴ At 141-2.

²²⁵ Goode “Proprietary Restitutionary Claims”, above n 12, at 70.

²²⁶ Graham Virgo *Principles of Restitution* (2nd ed, Oxford University Press, Oxford 2006) at 607.

²²⁷ *European Ventures* (CA), above n 62, at [59].

²²⁸ At [59]; Hayton “Proprietary Liability for Secret Profits”, above n 52, at 492.

2. *Exploiting property vs. exploiting a position*

Proprietary base theorists dichotomise “exploitation of property or opportunities subject to fiduciary obligations” with “wrongful exploitation of a fiduciary position resulting in unauthorised gains”.²²⁹ This attempt to delineate between the property and duty based approaches instead demonstrates the difficulty in ascertaining what obligations along the fiduciary continuum will give rise to a property right. Misuse of a principal’s property has always attracted proprietary relief, but opportunities are less clear cut.²³⁰ Exploitation of opportunities is often characterised as exploitation of the fiduciary position,²³¹ and the Supreme Court in *European Ventures* seemed to think that a fiduciary taking a bribe was exploiting some form of opportunity.²³²

Proprietary base theorists perpetuate the distinction because it showcases a major problem with *Reid*. Goode referred to *Reid* as “conceptually flawed and indefensible as a matter of policy” because it satisfied neither subpart of the proprietary base approach.²³³ There was no pre-existing interest in the bribe, and no duty to acquire the bribe for the Hong Kong government. Rather, the duty was not to engage in subversion.²³⁴ Where a secret profit would never have existed had a fiduciary properly performed his obligations, Goode strenuously argues that there is no basis on which to treat it as belonging to the principal.²³⁵

The difference between the duty based approach and the proprietary base approach can be seen in the realm of deemed agency gains (or misuse of opportunities). *Reid* was not an opportunity case like *Boardman* or *European Ventures* because his receipt of the bribe fell outside the scope of his endeavours on behalf of his principal.²³⁶ In that sense, his wrong was simply a misuse of his fiduciary position - he did not exploit an opportunity he owed a duty to pursue solely on behalf of his principal. While the opportunities in *Boardman* and *European*

²²⁹ Devonshire “Defining the Boundaries of Personal and Proprietary Relief against Secret Commissions”, above n 102, at 394.

²³⁰ The position in *Lister*, above n 7, illustrates this.

²³¹ See Hicks, “The Remedial Principle of *Keech v. Sandford* Reconsidered”, above n 84, at 291-3 for a discussion of the broad principle the facts in that case were used to support.

²³² *European Ventures*, above n 3, at [7].

²³³ Goode, “Proprietary liability for secret profits – A reply”, above n 47, at 493.

²³⁴ At 494.

²³⁵ At 494.

²³⁶ Worthington “Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae”, above n 2, at 731.

Ventures came about as a result of the fiduciary position, they were – critically – within the scope of the fiduciary’s endeavours on his principal’s behalf.²³⁷ It is the exploitation of opportunities within that scope that sees gains made from those opportunities fall within the proprietary base theory (or as deemed agency gains). Bribes fall outside the scope of the fiduciary obligation, and thus do not attract proprietary relief under this theory.

3. Divergence between proprietary base theorists

The constructive trust results in preferential recovery for the principal over the claims of unsecured creditors, and creditors whose interests are secured with a floating charge.²³⁸ Competing theorists have different views on the implications for creditors of recognising a constructive trust over deemed agency gains.²³⁹

Goode supports his version of the proprietary base theory with unjust enrichment analysis. He argues that while a property right should arise over deemed agency gains, priority over creditors is only justified when the fiduciary’s actions actually cause a loss to the principal (or prevent him from obtaining an asset he would otherwise have obtained).²⁴⁰ Where the defendant is unjustly enriched, it has been argued that the corresponding detriment must subtract from the principal’s wealth to justify proprietary relief.²⁴¹ Otherwise, asks Goode, “[w]hy should they be subordinated to a claimant who had no existing proprietary interest, who has given no value, who may have suffered no loss and who cannot even invoke a reliance interest?”²⁴² While cases like *European Ventures* and *Lister* can be interpreted as

²³⁷ Worthington *Equity*, above n 19, at 132-3.

²³⁸ *Westdeutsche Landesbank Girozentrale v Islington LBC*, above n 204, at 716.

²³⁹ Contrast Worthington “Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae”, above n 2, with Goode “Proprietary liability for secret profits – A reply”, above n 47.

²⁴⁰ See Goode “Proprietary liability for secret profits – A reply”, above n 47; Goode “Property and Unjust Enrichment” in Andrew Burrows (ed) *Essays on the Law of Restitution* (Oxford: Clarendon Press, 1991); Grantham “Doctrinal Bases for the Recognition of Proprietary Rights”, above n 103.

²⁴¹ Sarah Worthington “Three Questions on Proprietary Claims” in Jones, Cornish (eds) *Restitution: Past, Present, and Future: Essays in Honour of Gareth Jones* (Hart Publishing, Oxford, 1998) at 81.

²⁴² Goode “Proprietary liability for secret profits – A reply”, above n 47, at 495.

cases of indirect subtraction,²⁴³ neither *Reid* or *Boardman* can be accommodated within the subtractive unjust enrichment model because the principal has suffered no subtractive loss.²⁴⁴

Goode would not recognise an institutional constructive trust (and its associated proprietary consequences) without subtraction.²⁴⁵ He would award a remedial constructive trust in the case of more remote deemed agency gains (e.g. those made in *Boardman*) where the principal was unlikely to have exploited the opportunity. He recognises the fiduciary obligation as giving rise to a property right (because the fiduciary was under an obligation to pursue it on the principal's behalf or not at all), but not one that would prejudice creditors who have lost out. He would allow incidences of property – i.e. following and tracing against third parties – but also let courts account for creditors' interests.²⁴⁶

Worthington differs from Goode when it comes to creditors. She sets out a three-category approach toward fiduciary gains which distinguishes between opportunities and bribes, arguing that the former will attract proprietary relief but the latter will not.²⁴⁷ Her first category deals with gains derived from the use of the principal's property, her second encompasses gains derived from opportunities within the scope of the fiduciary's field of endeavour on the principal's behalf, and her third contains gains derived from opportunities which arise solely because of the fiduciary's role.²⁴⁸ Her third category, which does not attract proprietary relief, is one where "the principal cannot assert that the fiduciary has done on his own account what his discretion required him to do for the benefit of his principal" (for example, taking a bribe).²⁴⁹

Her second category includes situations like *Boardman* and *European Ventures*, though it does not distinguish on grounds of subtractive unjust enrichment. She argues that the principal can assert ownership and claim priority over creditors whenever the fiduciary took

²⁴³ See Lord Neuberger's comments in *European Ventures*, above n 3, at [43] where he notes that the plaintiff will almost certainly have lost out in a practical sense.

²⁴⁴ Stuart Hoegner, "How Many Rights (or Wrongs) Make a Remedy? Substantial, Remedial, and Unified Constructive Trusts" (1997) 42 McGill LJ 437 at 450.

²⁴⁵ Roy Goode "Property and Unjust Enrichment", above n 240, at 219-220.

²⁴⁶ At 219-220.

²⁴⁷ Worthington "Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae", above n 2.

²⁴⁸ At 730.

²⁴⁹ At 735.

the benefit of an opportunity within the scope of his duty to his principal.²⁵⁰ This gives a reason not only for the fiduciary not to have the profit, but for his principal *to* have it. She distinguishes this category with her third, which encompasses bribes. Where the fiduciary's only obligation was *not* to acquire the secret profit, she contends that a principal cannot assert ownership – the obligation must give a positive reason for the principal *to* have the profit, rather than merely a reason for the fiduciary not to have it.²⁵¹ On this basis she draws a conceptual distinction between bribe cases and those involving corporate opportunities or secret commissions. In any case where she finds the principal has a positive right to have the gain, Worthington considers prejudice to creditors will be justified.²⁵²

English law does not recognise a remedial constructive trust,²⁵³ so Goode's preferred option is not a possibility that can be explored.²⁵⁴ Among proprietary base theorists, the principal question is whether there is sufficient justification for recognising a constructive trust in secret commission or opportunity cases.

The next chapter will evaluate the duty and proprietary base theories and conclude which provides the better principled claim to ownership of wrongful fiduciary gains. The justification must be supported by a better reason for a principal to receive the gains than the fiduciary's creditors. The next chapter will also consider the adequacy of personal remedies to achieve equity's deterrent purposes.

²⁵⁰ At 731.

²⁵¹ At 731.

²⁵² At 749-50.

²⁵³ The Court of Appeal rejected a claim based on the remedial constructive trust in *Re Polly Peck International plc (No. 2)* [1998] 3 All ER 812, holding that the courts do not have a discretion to adjust property rights in the manner suggested.

²⁵⁴ This was also recognised by the Supreme Court in *European Ventures*, above n 3, at [47].

Chapter VI: Reconciling the competing theories

English law does not recognise any constructive trust other than the institutional trust. As such, any constructive trust arising over unauthorised fiduciary gains will carry the full consequences of such a trust, including priority over creditors.²⁵⁵ There is no remedial halfway house,²⁵⁶ so ensuring the right answer is reached is paramount. Hence this paper suggests that the approach ultimately adopted must demonstrate that:

- a) There is a principled basis on which to recognise a claim to ownership of the profits in question, and therefore prejudice to creditors; and
- b) The fiduciary relationship is not adequately safeguarded by personal remedies.

A. A principled basis on which to recognise a proprietary remedy

The constructive trust has historically been available only to vindicate property rights.²⁵⁷ The question at hand is whether the obligations the law recognises as giving rise to property rights apply to bribes. This section concludes that they do not. The proprietary base theory is the best basis on which to recognise obligations as giving rise to ownership, because the fiduciary will have had positive obligations to acquire the money or property in question for his principal.²⁵⁸ The duty based approach is fundamentally flawed and cannot support a principal's claim to ownership of a bribe.

The duty based approach is concerned with vindicating the fiduciary duty,²⁵⁹ but it begs the question – what is necessary to do that? Equity is not concerned with doing “absolute justice” to the principal;²⁶⁰ only with protecting the fiduciary relationship and ensuring that a fiduciary is stripped of his illicit gains.²⁶¹ If this can be achieved by a personal remedy, equity

²⁵⁵ *European Ventures*, above n 3, at [1], [45].

²⁵⁶ As there is, for example, in Australia. See *Grimaldi Mining*, above n 128.

²⁵⁷ *Rotherham Proprietary Remedies in Context: A Study in the Judicial Redistribution of Property Rights*, above n 42, at 39-40.

²⁵⁸ *Worthington Equity*, above n 19, at 132.

²⁵⁹ Millett “Bribes and Secret Commissions (Again)”, above n 2, at 592.

²⁶⁰ Sarah Worthington *Proprietary Interests in Commercial Transactions* (Clarendon Press, Oxford, 1997) at 147.

²⁶¹ Hudson, *Equity and Trusts* (Cavendish Publishing, London, 2003) at 577.

should not go further and interfere with property rights.²⁶² Rarely will a case like *Reid* arise where gains alienated to a third party will not be captured by a personal remedy. When such a situation does arise, Jensen cautions that:²⁶³

“[I]t will not suffice to say that, if, in the particular circumstances of the case the claimant’s success in depriving the defendant of its unjust enrichment depends on the imposition of the proprietary consequences of trusteeship upon the defendant, then the proprietary response must be preferred.”

Jensen’s point is that there must be a principle on which to recognise property rights.²⁶⁴ All that is required to achieve equity’s goals that the fiduciary *not* conflict and *not* profit is the stripping of the fiduciary gains – ensuring their ultimate destination is with the principal is not strictly necessary without a better reason (a proprietary base).²⁶⁵ Miller elaborates; the broad fiduciary mandate is negative, and it is difficult to find positive entitlements to the principal from that negative mandate.²⁶⁶ The principal’s positive entitlement arises from the fiduciary pursuing opportunities that arise from within the scope of his *non*-fiduciary duties to act for his principal. If he pursues an opportunity within that scope (i.e. a lower price for the hotel in *European Ventures*), his duty of loyalty requires him to pursue it single-mindedly for his principal.²⁶⁷ His peculiarly fiduciary duties protect the exercise of the discretionary power vested in him to affect his principal’s interests.²⁶⁸

Sir Peter Millett’s broad duty-based approach is problematic in the context of bribes. There is never any duty on the fiduciary to obtain a bribe for the benefit of the principal. The fiduciary cannot be treated as having acted as though he was obliged to act because his obligation in such a situation was *not* to act.²⁶⁹ His obligation was not one that arose, as in *Boardman*, to pursue the opportunity for his principal rather than himself, his obligation was – and

²⁶² Worthington *Equity*, above n 19, at 134-5.

²⁶³ Darryn Jensen “Reigning in the Constructive Trust” (2010) 32 Syd LR 87 at 93.

²⁶⁴ At 93.

²⁶⁵ Miller “Justifying Fiduciary Remedies”, above n 38, at 614.

²⁶⁶ At 614.

²⁶⁷ Alistair Hudson *Equity and Trusts*, above n 261, at 402-3; Worthington *Equity*, above n 2, at 132.

²⁶⁸ Miller “Justifying Fiduciary Remedies”, above n 38, at 612.

²⁶⁹ Goode “The Recovery of a Directors’ Improper Gains: Proprietary Remedies for Infringement of Non-Proprietary Rights”, above n 214, at 141

remained throughout the transaction – to cease his action.²⁷⁰ Even framing the duty as a positive one to act the principal's best interests cannot provide a duty for the constructive trust to vindicate because the principal's best interests will be served by the fiduciary complying with his paramount obligations *not* to profit or conflict, and withdrawing himself from the situation of conflict.²⁷¹

Bribes are paid for the purpose of commissioning disloyalty.²⁷² There is no way for a principal to affirm or claim the benefit of a transaction including a bribe because – even if the fiduciary did not act contrary to the principal's interests – the transaction was inherently subversive and outside the scope of the fiduciary remit. Reid was paid a bribe to act contrary to the Hong Kong government's objective that wrongdoers be punished. Tyrell was bribed to involve his principal in a disadvantageous transaction. If either had complied with their duty, they would not have engaged with the third party briber.²⁷³ The situation is not like that in *Boardman* or *European Ventures* where, once having engaged in the transaction the fiduciary can still obtain the benefit for the principal (i.e. the principal asserts that the fiduciary acted in his best interests rather than the fiduciary's own).²⁷⁴ In such cases it is possible to remedy any possibility of mischief by appropriating the benefit to the principal. In the case of a bribe the mischief can only be avoided by the fiduciary avoiding the situation to begin with. Once he has entered into a fundamentally disloyal transaction his duty is not to hand over the bribe to his principal, it is to desist.²⁷⁵ Equity will still require him to disgorge his profits to deter wrongdoing, but this will be a personal remedy.²⁷⁶ In bribe cases there is no positive duty for the constructive trust to vindicate; the approach favoured by Sir Peter Millett and the Court in *Reid* vindicates a fiction.

²⁷⁰ This responds to the nature of the duty. Prescriptive obligations demand that the fiduciary achieve a particular outcome for another person. Liability arises from the failure to produce that. Proscriptive obligations prohibit a fiduciary engaging in certain transactions, see Jensen "Prescription and Proscription in Fiduciary Obligations", above n 25.

²⁷¹ John McGhee (ed) *Snell's Equity*, above n 27, at 190: "The fundamental obligation is to desist from acting in a way that involves a conflict between duty and interest".

²⁷² At 216.

²⁷³ At 182. The duty is proscriptive; "It tells the fiduciary what he must not do. It does not tell him what he ought to do".

²⁷⁴ Worthington *Equity*, above n 19, at 132.

²⁷⁵ McGhee (ed) *Snell's Equity*, above n 27, at 190.

²⁷⁶ *Devonshire Account of Profits*, above n 30, at 43.

The better theory with which to recognise proprietary relief is the proprietary base theory. It rightly draws a distinction between bribes and secret commissions, and affords different responses according to the nature of the fiduciary obligation in the particular case. While secret commissions can rightly be put within the proprietary-base framework, bribes cannot and doing so is going a step too far.

Creditors

The proprietary-base theory is also the best basis on which to deny creditors access to a fiduciary's wrongful gains on insolvency.²⁷⁷ Neither involves subtractive unjust enrichment, but it is still possible to draw a distinction between bribes (i.e. *Reid*) and more remote deemed agency gains (i.e. *Boardman*).²⁷⁸ In the former, there is no positive obligation-based claim to ownership of the bribe – it should never have been made to begin with. In the latter, making the profit was not wrong but the fiduciary making it on behalf of anyone other than his principal was.²⁷⁹ As such, the principal can assert that the profit could only ever have legitimately existed as his property. On this basis even remote deemed agency gains provide a better claim to ownership than a mere personal right. Bribes, however, should never have legitimately existed at all,²⁸⁰ so when they do the principal should have no better claim to them than unsecured creditors.

The proprietary base approach provides the best justification for recognising a constructive trust. Either the property once belonged to the principal, it would have been the principal's but for the fiduciary's wrongful act, or the profit could only ever have legitimately existed as his property.²⁸¹ The rationale for allowing priority on an insolvency for more remote deemed agency gains is that the gain – if made – had to be made for the principal.²⁸² Such gains could only ever have existed as the principal's property, and thus should fall outside the insolvent estate.

²⁷⁷ See *Reid*, above n 5; *European Ventures*, above n 3; *Sinclair*, above n 5. All assume that an entitlement to the asset (whatever the grounds of entitlement) justifies priority.

²⁷⁸ Worthington, "Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae", above n 2, at 735.

²⁷⁹ At 732.

²⁸⁰ At 735.

²⁸¹ See discussion of the proprietary base theory in Chapter V.

²⁸² See discussion of deemed agency gains in Chapter V.

B. Protecting the fiduciary obligation

The Supreme Court in *European Ventures* ultimately decided that there was no clear or correct principled basis on which to award proprietary relief, and turned to policy concerns.²⁸³ While this paper has concluded differently, it will still consider whether the fiduciary institution will be vulnerable to exploitation without a constructive trust available in all situations of fiduciary breach. The extra protection given by a constructive trust ensures that a principal is able to claim second generation profits made with the proceeds of a fiduciary's wrongdoing,²⁸⁴ trace against third parties,²⁸⁵ and obtain priority in an insolvency context.²⁸⁶ Will equity's deterrence purposes be served absent widely available proprietary relief?

1. Claiming priority on an insolvency

This is most easily disposed of; when a fiduciary is insolvent, his estate belongs to his creditors. The dispute is no longer between the wronged principal and the wrongdoer, it is between the wronged principal and a number of innocent parties.²⁸⁷ There is no deterrent purpose served by penalising creditors.

2. Deterrence and profit stripping

The remedy of an account of profits is tailored toward deterring fiduciary breaches.²⁸⁸ It has been suggested that this purpose will not adequately be met if the fiduciary is able to retain the proceeds of investments made with bribe money.²⁸⁹ It has also long been assumed that only a proprietary remedy will give a principal access to second generation profits.²⁹⁰ This is a major justification for wider-spread recognition of the constructive trust – absent the ability to strip *all* profits, fiduciaries will not be adequately deterred from wrongdoing.²⁹¹

²⁸³ *European Ventures*, above n 3, at [32].

²⁸⁴ See *Reid*, above n 5.

²⁸⁵ *European Ventures*, above n 3, at [44].

²⁸⁶ At [43].

²⁸⁷ Burrows *The Law of Restitution*, above n 58, at 687-8.

²⁸⁸ *Devonshire Account of Profits*, above n 30, at 44-48.

²⁸⁹ See *Reid*, above n 5, at 4-5.

²⁹⁰ See *Lister*, above n 7; *Reid*, above n 5.

²⁹¹ See *Reid*, above n 5, at 4-5.

This assumption, while providing a strong reason in favour of wider spread proprietary relief, may be unfounded. Although there have been no cases specifically dealing with the phenomenon, *Sinclair* recognised that there is no reason in principle why a personal action to account could not encompass the proceeds of investment of unauthorised fiduciary gains.²⁹² In fact, given the prophylactic purpose of an account of profits, it would be entirely consistent to ensure that a defaulting fiduciary account for second generation gains.²⁹³

Worthington has considered how this might be achieved, tying her analysis to issues of causation. If the gains could not have been generated but for the fiduciary's disloyalty, they should theoretically be recoverable in a personal action.²⁹⁴ She uses the example of a lottery ticket; if the principal's use of the bribe allowed such a spurious purchase, he ought to account for the gains. If it did not (i.e. where the lottery ticket cost \$10), his gain would not have sufficient nexus to his breach to allow the principal recovery.²⁹⁵ Birks used a different example in the context of wrongs, suggesting that a principal could plausibly assert a claim over an entire business if it was shown that the in a casual sense, the business grew from one capital injection (that capital injection being the proceeds of wrongdoing).²⁹⁶ While Birks disapproved of such an outcome, personal actions for account over business profits have been awarded before and subject to concepts of remoteness and causation to limit injustice.²⁹⁷

Ultimately the use or investment of bribes taken by a fiduciary from a third party could follow a similar path. If a personal action to account already possesses the potential to effectively strip profits from a disloyal fiduciary, a major facet of equity's deterrent purpose will be met without resorting to the constructive trust.

²⁹² See comments in *Sinclair*, above n 5, at [89]-[90], though no cases were cited to the Court where this had been done.

²⁹³ Worthington "Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae", above n 2, at 742.

²⁹⁴ At 741-2.

²⁹⁵ At 742.

²⁹⁶ See Peter Birks "Property in the Profits of Wrongdoing" (1994) 24 UWALR 8.

²⁹⁷ See *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at [33] and [46] where the Court recognised that at some point the fiduciary's gains would be the product of his own time, skill and efforts, and the connection to his breach of duty would be too remote to allow the principal to recover. The Court was concerned, however, to ensure that the fiduciary was adequately deterred from acting disloyally and would not retain anything that could be construed as an incentive to do so.

3. *Tracing against third parties*

The other facet of equity's deterrent purpose is ensuring that fiduciaries cannot alienate disloyal gains to those close to them, and thus indirectly retain some benefit from their wrongdoing.²⁹⁸ *Reid* is a prime example; the bribes were invested in land held partially by his wife and a solicitor of a family trust of which his wife and children were beneficiaries.²⁹⁹ Without a property right in the initial bribe, the Hong Kong government would have been toothless against the family trust, even though Reid would benefit from knowing his family were provided for.³⁰⁰

The Supreme Court in *European Ventures* seemed to consider that a principal should be able to trace as of right, but third party recipients will not always be close associates of the wrongdoer (as they were in *Reid*). The ability to follow gains that no longer lie with the defaulting fiduciary may therefore be less justified in less egregious circumstances than *Reid*.³⁰¹ Lord Templeman even commented on the possibility that Reid's trustee and wife might be bona fide purchasers or have a legitimate interest in the properties,³⁰² but they would still bear the onus of proof when showing their bona fides.³⁰³ Dietrich and Ridge suggest that given the risks and costs of litigation an innocent recipient might face in challenging a proprietary claim, a constructive trust should not be recognised too readily.³⁰⁴

Nonetheless, a fiduciary potentially retaining significant indirect benefits from wrongdoing by transferring a bribe or its proceeds to a third party is worrisome. There may, however, be other ways of ensuring third parties are unable to benefit from such actions. The following section considers whether an action in dishonest assistance might achieve this goal.

²⁹⁸ *Reid*, above n 5, at 4-5, 10.

²⁹⁹ *Reid* (CA), above n 100.

³⁰⁰ At common law, to trace the property must be identifiable and distinguishable from other property, so money cannot usually be followed: See *Taylor v Plumer* (1815) 3 M&S 562. For a broader discussion of the concept of benefit, see *Kain v Hutton* [2008] NZSC 61.

³⁰¹ In *European Ventures*, above n 3, for example, tracing was simply sought for ease of recovery of the commission.

³⁰² *Reid*, above n 5, at 3.

³⁰³ Joachim Dietrich and Pauline Ridge "The Receipt of What?: Third Party Recipient Liability in Equity and Unjust Enrichment" (2007) 31 MULR 47 at 84.

³⁰⁴ At 84.

Dishonest Assistance

There are two limbs of accessory liability in trust law; knowing receipt of trust property and dishonest assistance in breach of trust.³⁰⁵ If a bribe is not held to be the property of the principal, there can be no accessory claim for knowing receipt.³⁰⁶ What is actually received in such a case will be money that was wrongfully received by the fiduciary, and for which he had a personal obligation to account to his principal – not property subject to a trust and beneficially owned by the principal.

Where the third party recipient was or should have been aware that the money or property they were receiving was alienated from the fiduciary to frustrate another party's recovery, the current ambit of dishonest assistance may provide the principal a remedy. The elements of an action in dishonest assistance are:³⁰⁷

- a) Assistance in a breach of fiduciary duty; and
- b) Dishonesty on the part of the assister.

The first element may be met when a fiduciary takes a bribe or other property not subject to a proprietary claim by the principal, and the third party assists in the fiduciary's alienation of the proceeds. An action in dishonest assistance for breach of trust will not necessarily fail on grounds that no trust property was involved (i.e. in the absence of a proprietary interest in the proceeds of the fiduciary's wrongdoing).³⁰⁸ The Court of Appeal in *Novoship*³⁰⁹ affirmed the comments of Peter Smith J in *JD Wetherspoon*,³¹⁰ who specifically considered whether a claim for dishonest assistance was tenable without trust property:³¹¹

³⁰⁵ *Barnes v Addy* (1874) 9 Ch App 214.

³⁰⁶ See the analysis of knowing receipt in *El Ajou v Dollar Land Holdings Ltd* [1993] EWCA Civ 4 per Hoffman LJ.

³⁰⁷ *Royal Brunei Airlines v Tan* [1995] 2 AC 378.

³⁰⁸ *Novoship (UK) Ltd & Ors v Nikitin* [2014] EWCA Civ 908 at [89]. Nikitin was a third party benefitting from a fraud perpetrated by a fiduciary, and was held liable for dishonest assistance. The Court of Appeal confirmed that an account of profits could be available against a dishonest assistant.

³⁰⁹ At [91].

³¹⁰ *JD Wetherspoon plc v Van den Berg & Co Ltd* [2009] EWHC 639 (Ch). The case held that third parties could be liable for knowingly assisting directors' disloyalty, even where no trust property was involved.

³¹¹ At [518].

“In my view in a case for accessory liability there is no requirement for there to be trust property... Accessory liability does not involve a trust. It involves providing dishonest assistance to somebody else who is in a fiduciary capacity [and] has committed a breach of his fiduciary duties. The consequences of those breaches (as this case shows) might have different consequences. One might be that the fiduciary has received a bribe. Another is that the fiduciary has made a profit in breach of his fiduciary duty. Another possibility is that assets are available into which it can be shown were acquired in breach of the fiduciary duty. Third party recipients are also potential candidates. Finally the breach of fiduciary duty might only sound in damages. In all of those cases I can see no logic or grave difficulty where the fiduciary is involved who has committed a breach of his fiduciary duty that an accessory who acts dishonestly in relation to those breaches should not be liable.”

The biggest question will be whether third party receipt of a bribe or a bribe's proceeds, intended to frustrate a principal's personal claim against the defaulting fiduciary, will meet the requirement of assistance.³¹² It has been held that if the fiduciary's breach of duty is complete before the third party becomes involved, the third party will incur no liability.³¹³ It has been suggested, however, that if dishonest assistance at the time of covering up a fiduciary breach is instrumental in the principal's loss, the third party assistant may incur liability.³¹⁴ If the claim in *Reid*, for example, had been personal, it is possible that the trustees of his family trust could have been liable as assistants in that their receipt of the fruits of his bribe assisted his endeavours to evade liability to account to the Hong Kong government. While they did not assist in the breach of the primary duty of loyalty, they would have assisted in Reid's breach of a secondary obligation to make restitution for his breach.³¹⁵

An illustration of this can be found in *Grupo Torras*.³¹⁶ The Court in that case considered the dishonesty requirement where those accused of dishonest assistance had assisted the laundering of the plaintiff's money, thus aiding the employees' breaching their fiduciary

³¹² Discussed by Charles Mitchell “Assistance” in Peter Birks (ed) *Breach of Trust* (Hart Publishing, Oxford, 2002) at Chapter 6.

³¹³ *Brown v Bennett* [1998] 2 BCLC 97 at 105 per Rattee J (this point upheld on appeal).

³¹⁴ *Twinsectra v Yardley* [2002] UKHL 12 at [107] per Lord Millett; *Grupo Torras SA v Al-Sabah*(No. 5) [1999] EWHC 300 (Comm).

³¹⁵ Robert Chambers “Liability” in Birks *Breach of Trust* (Hart Publishing, Oxford, 2002) at Chapter 1.

³¹⁶ *Grupo Torras SA v Al-Sabah*(No. 5) [1999] EWHC 300 (Comm).

duties. Mance LJ (sitting at first instance) found that “assistance in an overall conspiracy to which he was not party and which involved the misappropriation of monies and, as and when required, the covering or dressing up of their disappearance” was sufficient to qualify as assisting a breach of fiduciary duty.³¹⁷ With respect to the knowledge requirement, the Court found that where an honest person would have insisted on more complete information in the circumstances and a defendant did not, he could be liable for dishonestly assisting the breach.³¹⁸

Lack of a proprietary remedy over all fiduciary breaches will leave a very small subset of claims where disloyal fiduciaries may be able to retain some indirect benefit from their wrongdoing by alienating gains or proceeds of bribery to third parties. The fact that these third parties will need to be innocent, however,³¹⁹ will likely prevent alienation to family or closely associated trusts or companies, and in practice limit the actual benefits enjoyed by the fiduciary from such alienation.³²⁰ Given the subset of claims will be very small indeed, and that without a close (and likely dishonest) relationship between the fiduciary and the third party, the fiduciary is unlikely to derive significant benefit from the alienation, the ability to trace against third parties in equity is unlikely to provide a sufficient reason to impose a constructive trust over all illicit fiduciary profits.

4. Consistency with Parliament’s legislative direction

The Supreme Court in *European Ventures* also noted that Parliament has legislated at length to combat bribery and corruption.³²¹ However their conclusion that the law of proprietary remedies might thus be expected to be particularly harsh toward bribes and secret commissions is no more plausible than the converse, that one might expect Parliament to have legislated protections as far as it thought necessary. Parliament might also be considered in a better position to combat the risk of proceeds of egregious wrongdoing being whisked offshore or alienated to innocent volunteers.³²² Extending the law of constructive trusts to

³¹⁷ At V.3(a)

³¹⁸ At IV.3(g), V.3(a).

³¹⁹ Or at best, no more than negligent. See *Twinsectra*, above n 314, at [127] per Lord Millett.

³²⁰ It will be unlikely that in cases of assistance by close relations to the fiduciary, the objective standard of dishonesty will not be met.

³²¹ *European Ventures*, above n 3, at [42].

³²² As noted by the Court at [42], Parliament has already legislated at length in this area.

cover a minority of situations in which existing doctrines will be insufficient to strip a fiduciary of indirect benefits may be the wrong approach.³²³

5. Conclusion

Extending the reach of the constructive trust to cover bribes received from third parties will almost never be necessary to strip a fiduciary of the benefits of his wrongdoing. If the law at present does not allow an account of profits to fully strip a fiduciary of indirect gains and second generation profits, this can be addressed by extending the personal remedy to do so.³²⁴

A claim in dishonest assistance will be sufficient to deprive the fiduciary of most alienated gains that he is likely to enjoy a real benefit from, and it seems unlikely that he will enjoy a sufficiently significant benefit to justify proprietary relief in the rare case a truly innocent third party receives the proceeds of his wrongdoing.³²⁵ To the extent that this might happen, it should be regarded as an anomaly that does not justify distorting equitable principle.

Contrary to the Supreme Court's conclusion in *European Ventures*, there are not sufficiently compelling policy reasons to extend the scope of proprietary relief to protect the fiduciary institution. Personal remedies will suffice.

³²³ Those situations illustrated above in Chapter VI at "Dishonest Assistance".

³²⁴ See conclusion in Chapter VI at "Deterrence and profit stripping".

³²⁵ See conclusion at Chapter VI at "Dishonest Assistance".

Chapter VII: Conclusion

The Supreme Court in *European Ventures* came to the right conclusion on the facts of the case, as a secret commission can be conceptualised as falling within the proprietary base theory and therefore justifying proprietary relief. The essence of this dissertation is that the Court was wrong to gloss over any possibility that there might be a principled basis on which to distinguish between secret commissions and bribes obtained in breach of fiduciary duty.³²⁶

This dissertation suggests that whatever the outcome, it must be shown that:

- a) There is a principled basis on which to recognise a claim to ownership of the profits in question, and therefore prejudice to creditors; and
- b) The fiduciary relationship is not adequately safeguarded by personal remedies.

The constructive trust vindicates property rights. Over the last century the scope of the rights that can be considered “property” for the purposes of vindication by the constructive trust has broadened significantly.³²⁷ No longer is the law stuck in the days of *Lister* where ownership and obligation are dichotomous; today the law recognises that certain obligations will give rise to rights of property vested in another party. Where the fiduciary obligation to single-mindedly pursue the interests of another arises, it will be one of these. However not all breaches of loyalty will give rise to property rights; the fiduciary must be under a positive duty to the principal with respect to the specific property claimed for a constructive trust to be recognised.³²⁸

The Supreme Court in *European Ventures* were correct that secret commissions can be conceptualised within that framework, but wrong to consider that bribes could be. The only duty a principal will ever be under with respect to a bribe is not to have taken it – a negative

³²⁶ *European Ventures*, above n 3, at [47].

³²⁷ See Chapter III.

³²⁸ See conclusion in Chapter VI at “A principled basis on which to recognise a proprietary remedy”.

obligation that will not confer property rights on the principal.³²⁹ On this basis the law ought still delineate between bribes and other secret profits.

Furthermore the fiduciary duty is adequately protected by the personal remedies available to a principal in cases where proprietary relief is not justified. Equity's deterrent purpose can properly be met by a full account of profits (extending to second generation gains) and claims in knowing receipt.³³⁰ If there is a minor shortfall in the area of truly innocent volunteers receiving proceeds of bribery, it is not sufficient to justify extending the ambit of the constructive trust in a manner inconsistent with the specific fiduciary obligations involved.

Finally, the prejudice to creditors who will necessarily have lost out on an insolvency is best justified where the principal has a strong claim to ownership of the money or property in question. Allowing principals without such a claim access to proprietary remedies purely on policy grounds is to elevate one class of personal debtor over another, in circumstances where there is little benefit to equity's aims and significant prejudice to an arguably more deserving class. As discussed in Chapter V, the proprietary base theory provides a justification for that elevation in some circumstances, but only where the property once belonged to the principal, it would have been the principal's but for the fiduciary's wrongful act, or the gain should never have been made unless it was on the principal's account. In all such cases the principal can assert ownership on the basis of the obligations owed to him. In respect of third party bribes that is not possible within fiduciary law.

³²⁹ See conclusion in Chapter VI at "A principled basis on which to recognise a proprietary remedy".

³³⁰ See conclusion in Chapter VI.

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