

The Legitimacy of Proprietary Relief

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This article explores the appropriate scope of proprietary relief for breach of fiduciary duty. It focuses on the respective approaches of the common law and equity to proprietary relief as background to the departure of the Court of Appeal in *Sinclair Investments (UK) Limited v Versailles Trade Finance Limited* from that of the Privy Council in *AG of Hong Kong v Reid*. The paper analyses the voluminous academic commentary on those cases. It calls for a better recognition of the coherence of well established equitable principles and of the danger of a lack of coherence introduced or re-introduced by the decision in *Sinclair Investments* in relation to opportunity gains obtained by fiduciaries in breach of their fiduciary duties. It argues that, if there is to be any departure from *Reid*, there must be a sound basis for doing so and one which will leave the law both coherent and internally consistent.

The reasoning of the Court of Appeal in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*¹ has provoked a level of interest and debate among scholars, practitioners and judges, both here and abroad, that some might consider surprising given the apparent limited scope of the controversial issue—namely whether or not a bribe or secret commission received by a fiduciary in breach of duty is subject to a constructive trust in favour of the fiduciary's principal.²

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¹ [2011] EWCA Civ 347, [2012] Ch 453.

² At least eight articles or papers were published on the subject between 1987 and 2010, spanning the period from shortly before *Attorney General for Hong Kong v Reid* [1994] 1 AC 324 up to the decision in *Sinclair*. See for example Roy Goode,

The debate has involved an analysis of case law, principles and policy of the highest quality of scholarship. For every jurisprudential lunge, there has been a parry and riposte, presenting anything but clarity. With a ready concession that any attempt at brevity on this subject is bound to lead to almost universal criticism, the broad themes run something like the following.³

'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; Darrel Crilly, 'A Case of Proprietary Overkill' (1994) 2 RLR 57; Gerard McCormack, 'The Remedial Constructive Trust and Commercial Transactions' (1996) 17 Co Law 3; Peter Millett, 'Proprietary Restitution' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005); Peter Millett, 'Jones v Jones: Property or Unjust Enrichment?' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 265; Andrew D Hicks, 'The Remedial Principle of *Keech v Sandford* Reconsidered' (2010) 69 CLJ 287. Since then an entire issue of *Trusts & Trustees* (18th volume, 10th issue – 2012) and at least a further 15 articles or papers have been published on the subject of which the following are a selection: David Hayton, 'Proprietary Liability for Secret Profits' (2011) 127 LQR 487; David Hayton, 'No Proprietary Liability for Bribes and Other Secret Profits' (2011) 25 Trust LI 3; Roy Goode, 'Proprietary Liability for Secret Profits—A Reply' (2011) 127 LQR 493; Graham Virgo, 'Profits Obtained in Breach of Fiduciary Duty: Personal or Proprietary Claim?' (2011) 70 CLJ 502; Richard Nolan, 'Bribes: A Reprise' (2011) 127 LQR 19; Peter Millett, 'Bribes and Secret Commissions Again' (2012) 71 CLJ 583; David Hayton, 'The Extent of Equitable Remedies: Privy Council versus Court of Appeal' (2012) Co Law 161; David Hayton, 'The Development of Equity and the "Good Person" Philosophy in Common Law Systems' (2012) Conv 263; Tony Molloy, 'Trading with Their Principal's Capital: Bribes and Other Unauthorized Profit Taking by Fiduciaries' (2012) 18 Trusts & Trustees 925; Andrew Kull, 'The Metaphorical Constructive Trust' (2012) Trusts & Trustees 945; William Swadling, 'Constructive Trusts and Breach of Fiduciary Duty' (2012) 18 Trusts & Trustees 985; James Penner, 'The Difficult Doctrinal Basis for the Fiduciary's Proprietary Liability to Account for Bribes' (2012) 18 Trusts & Trustees 1000; Carmine Conte, 'No Proprietary Relief for Breach of Fiduciary Duty' (2012) 128 LQR 184; Paul McGrath, 'Constructive Trusts: an Analysis of *Sinclair v Versailles*' (2012) LMCLQ 517; James Edelman, 'Two Fundamental Questions for the Law of Trusts' (2013) 129 LQR 66; Peter Watts, '*Tyrrell v Bank of London* - an Inside Look at an Inside Job' (2013) 129 LQR 527; Robert Chambers, 'Constructive Trusts and Breach of Fiduciary Duty' (2013) 77 Conv 241; Lionel Smith, 'Constructive Trusts and the No-Profit Rule' (2013) 72 CLJ 260; Sarah Worthington, 'Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae' (2013) 72 CLJ 720; Edward Granger and James Goodwin, 'Secret Profits, Opportunities and Constructive Trusts' (2013) 21 RLR 85.

³ In the following paragraphs (A) denotes the argument attacking proprietary relief and (D) denotes the argument in defence of proprietary relief.

(A): The rule that bribes taken by fiduciaries are subject to a constructive trust is unfair to the creditors of an insolvent fiduciary because it withdraws an asset from the insolvent estate and in effect gives the fiduciary's principal complete security even though other creditors will have been dealing with the insolvent fiduciary in ignorance of the constructive trust and indeed (unlike the fiduciary's principal) may have given value for what the insolvent fiduciary owes them.⁴ (D): It is not unfair because the creditor was never intended to have the bribe in the first place. (A): That is equally true of non-fiduciaries who take bribes, and their bribes do form part of the insolvent estate.

(D): It is the fiduciary relationship that makes all the difference because the law provides that a fiduciary should be stripped of all advantage obtained when he or she puts themselves in a position where their interest may conflict with their duty (the no-conflict rule) or where they make a personal profit out of their position without their principal's knowledge or consent (the no-profit rule). (A): That can and should be done by an account of profit or some other financial mechanism capable of catching all immediate and subsequent gain rather than proprietary relief, invisible to the other creditors while they were dealing with the insolvent fiduciary, which gives the fiduciary's principal an unfair advantage over the other creditors. (D): There are many other situations in which it is incontestable that the law imposes a resulting or constructive trust equally invisible to other creditors of the insolvent fiduciary; and, in any event, it is wrong that the assets available to creditors should include the fruits of the fiduciary's dishonesty, which may include any increase in value in an asset purchased with the bribe.

(A): The nature of relief should not depend upon the fiduciary's degree of misconduct, and indeed the rule for bribes extends to secret commissions and other advantages obtained in breach of the no-conflict rule or the no-profit rule which may be entirely innocent; and, in any event, it could be said that the assets available to creditors are expanded by every creditor in respect of a contractual or tortious wrong committed by the insolvent defendant who has not

⁴ Some would contend that the combination of trusts, tracing and the presumption against wrongdoers combine to turn the principal's claim to a bribe into a super property right which enables the principal to take gains while avoiding losses and the consequences of dissipation by the fiduciary of his or her assets.

made full recompense; and further, as already said, bribes paid to non-fiduciaries form part of the bribee's insolvent estate. (D): As already stated, the whole point is that the law, that is equity, treats the fiduciary's relationship with and duties to the principal differently from those bound by contract or a common law duty of care. (A): That is to beg the question whether or not proprietary relief rather than personal relief should be given for breach of fiduciary duty in taking a bribe or secret commission.

(D): The case law supports proprietary relief. The fiduciary's obligation is to obtain any benefit, if at all, for his or her principal, and equity considers that as done which ought to be done; and so the bribe is treated as an authorised investment to which the principal has a proprietary claim. (A): That is an amalgam of correct and incorrect propositions: the no-conflict rule and the no-profit rule are not in question, but the issue of proprietary relief rather than personal relief is. (D): *Keech v Sandford*⁵ and *Boardman v Phipps*⁶ are classic examples of proprietary relief for such breaches of duty. (A): On proper analysis neither they nor any other case is clear authority for proprietary relief in respect of bribes or secret commissions received by a fiduciary. (D): It is clear that in some 'opportunity' cases, that is where the fiduciary has made a profit from the opportunity presented by his position as a fiduciary, the court has recognised a constructive trust. (A): That is true, but they do not extend to the receipt of a bribe; and, in any event, they really all need to be looked at again because they are a jurisprudential mess and they should be interpreted as recognising a constructive trust only where the benefit was intended for the principal. (D): It is clear that the existing case law has recognised a constructive trust of an 'opportunity' benefit obtained by a fiduciary even where the principal would not or could not have obtained the benefit for himself or herself. (A): That is true, but the point was not sufficiently argued or understood, or the language of constructive trust must have been used loosely and not in a proprietary sense or, if none of those, they must be regarded as having been wrongly decided.

Sitting judges do not have the luxury of throwing their hands up in despair at this relentless and seemingly endless debate. Part of the

⁵ (1726) Sel Cas Ch 61.

⁶ [1967] 2 AC 46.

problem is that virtually all of the contributors to the debate have taken one side or the other, without any attempt to try to find some middle ground. One of the few exceptions is Professor Sarah Worthington, who, in a recent paper, has suggested a model for proprietary remedies for disgorging fiduciary gains designed to accommodate what she perceives to be the best of the applicable principles, policies and jurisprudence.⁷ I agree with her approach in seeing the heart of the problem and its solution in a rationale of the ‘opportunity’ cases.⁸ I shall return to her thesis at the end for I believe that, if (which is certainly not my primary position) *Reid*⁹ is indeed to be jettisoned, her suggested model is the nearest that anyone has so far promoted to achieve a reasonable and workable solution in the light of the various points that have been made in the debate.

It would be utterly impossible for me in this paper to deal with all of the arguments and case law that have been lobbed at the opposing camps. I wish to take a broader and, I hope, simpler perspective of the debate and its context. The thesis of this paper is that a principal reason for the interest and controversy aroused by *Sinclair* is that it plays out a modern confrontation between those who espouse an essentially restrictive and tightly principled common law view of proprietary relief and those who favour more fluid, flexible equitable principles grounded on concepts of unconscionability and fiduciary relationships.

That is not at all to say that the rival camps fall into two neat groups of those with a common law background and those steeped in equity. On the contrary, one of the most impressive features of modern legal scholarship in this country and elsewhere is the span of expertise of leading scholars, particularly restitution scholars, over both common law and equity. One of the inevitable (and laudable) consequences of that wide span of expertise, however, is the inevitable drive to seek a more principled justification (and, in the absence of justification, jettisoning) of different rules, remedies and other legal consequences

⁷ Sarah Worthington, ‘Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae’ (2013) 72 CLJ 720.

⁸ This is consistent with what I said in *FHR European Ventures LLP v Mankarious* [2013] EWCA Civ 17, [2013] 3 WLR 466.

⁹ [1994] 1 AC 324.

applicable to the same facts under common law and equitable principles. As Professor Burrows has said:

... on the assumption that fusion [of common law and equity] is a good thing, we as academics, judges and practitioners are simply not doing enough to eradicate the needless differences in terminology used, and the substantive inconsistencies, between common law and equity. In other words, to use a rather hackneyed phrase, I am calling on all lawyers to take fusion seriously.¹⁰

The issue which arises on proprietary relief, particularly surrounding bribes, is whether and to what extent and in what manner, harmonisation is in truth achievable in view of the radically different history of the jurisprudence at common law and in equity.

Let us start with the position at common law. It has a very restrictive approach to proprietary relief although precisely how restrictive is subject to considerable dispute. The standard remedy which claimants are awarded for unjust enrichment at the claimant's expense is a personal restitutionary award of money representing the benefit which the defendant has wrongly obtained.

It is possible at common law both to follow an asset, and to trace it into a substitute, in the possession of the defendant.¹¹ Tracing has been described as a process rather than a claim or remedy, that is to say it is the process by which the law identifies something as being a substitute for the claimant's original asset and a substitute for that substitute.¹² It is not possible to trace at common law through a mixed fund.¹³

It is a matter of great debate, however, whether the common law recognises any proprietary relief beyond the recovery of an asset owned by the claimant which the claimant can follow at common

¹⁰ Andrew Burrows, 'We Do This At Common Law But That in Equity' (2002) 22 OJLS 1.

¹¹ See generally: Lionel Smith, *The Law of Tracing* (Clarendon Press 1997) 162ff.

¹² *Foskett v McKeown* [2001] 1 AC 102, 127-8 (Lord Millett); Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2010) 117, 123.

¹³ *Taylor v Plummer* (1815) 3 M&S 562, 575. What is meant by the expression 'a mixed fund' is not entirely clear. It appears to mean that the common law cannot trace money which is paid into a bank account and mixed with other money in that account: see the discussion in Smith, *The Law of Tracing* (n 11) 165.

law into the hands of the defendant.¹⁴ In particular, it is hotly disputed whether there can be a restitutionary proprietary claim for unjust enrichment. William Swadling¹⁵ and Professor Graham Virgo¹⁶ are the leading academics who deny that there can be any such claim and would confine proprietary relief to the vindication of a pre-existing title. The reasoning of the House of Lords in *Foskett v McKeown*¹⁷ supports that approach. In that case trust money was used, in breach of trust, to pay some life insurance premiums. The House of Lords held that the beneficiaries were entitled to a proportionate beneficial interest in a trust of the £1m insurance proceeds after equitable tracing. The explanation given by the majority was that the claim was justified as a pure property claim, vindicating pre-existing property rights, as opposed to reversing unjust enrichment.¹⁸

Many academics, including Professor Andrew Burrows¹⁹ and the authors of Goff and Jones (Professor Charles Mitchell, Professor Paul Mitchell and Dr Stephen Watterson),²⁰ disagree with that approach and the reasoning (although not the result) in *Foskett v McKeown* and argue that there can be a restitutionary proprietary claim for unjust enrichment. They point to the reasoning of the House of Lords in *Lipkin Gorman v Karpnale Ltd*²¹ as showing the link between a law of restitution based on unjust enrichment and an

¹⁴ It is a matter of debate whether common law proprietary rights can be asserted in the traceable proceeds of a common law proprietary asset: see the discussion in Smith, *The Law of Tracing* (n 11) 321ff.

¹⁵ William Swadling, 'A Claim in Restitution?' (1996) LMCLQ 63; and see also William Swadling, 'Policy Arguments for Proprietary Restitution' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Thomson Reuters Australia 2008) ch 18.

¹⁶ Graham Virgo, *Principles of the Law of Restitution* (2nd ed, OUP 2006) ch 20 and 21; Graham Virgo, *The Principles of Equity and Trusts* (OUP 2012) para 9.1.2.

¹⁷ [2001] 1 AC 102.

¹⁸ And was stated to be the current law in *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2012] 3 All ER 425, especially at [62]-[98].

¹⁹ Andrew Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 LQR 412; Andrew Burrows, *The Law of Restitution* (3rd edn, OUP 2010) ch 8.

²⁰ *Goff & Jones: The Law of Unjust Enrichment* (8th edn, Sweet & Maxwell 2011) ch 37-40.

²¹ [1991] 2 AC 548.

indirect receipt by the defendant of the claimant's property. In that case the plaintiff solicitors could trace money in their client account into cash drawn out by one of the partners and paid to the defendant's club. They were entitled to a monetary award for value received by the club (subject to the defendant's partial defence of change of position) on the basis of (so say Burrows and Goff & Jones) the club's unjust enrichment at the plaintiffs' expense.²² The tracing analysis showed that the defendant's enrichment was 'at the claimant's expense'.

They argue that tracing into an unauthorised substitute asset, properly analysed, gives rise to a new claim rather than the perpetuation of a pre-existing title. As a clear example of a successful restitutionary proprietary claim for unjust enrichment, they point to *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd.*²³ In that case, Gouling J held that a mistaken payment by the claimant to the defendant (which was subsequently wound up for insolvency) was held on constructive trust for the claimant.

There is no single theory which fits all the cases,²⁴ and this is not the place for me to express my own view on this issue. It is an important issue but it is a distraction from and complicates the much narrower issue which was the subject of *Sinclair* and *FHR European Ventures* and is the focus of this paper. What is important to note for the purpose of this paper is that even those restitution scholars who contend that there can be a restitutionary proprietary claim in response to the defendant's unjust enrichment insist on the need for a rigorous analytical and sound policy justification for such relief as opposed to the usual personal monetary claim to reverse the defendant's unjust enrichment. Those scholars, particularly Professor Burrows, who argue for proprietary relief for unjust enrichment, insist on at least two essential requirements for such relief. Before turning to them, it is important to recall that, unlike restitution for a civil wrong, such as breach of fiduciary duty, restitution for unjust

²² Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (OUP 2012) 57; see also Mitchell, *Goff & Jones* (n 20) 8-34 to 8-36 and 8-86ff. Professor Virgo adopts a different interpretation and says that the claim was founded on the vindication of property rights and had nothing to do with unjust enrichment: Virgo, *Principles of the Law of Restitution* (n 16) 570.

²³ [1981] Ch 105.

²⁴ Mitchell, *Goff & Jones* (n 20) 37-24.

enrichment is based upon subtractive enrichment, that is a subtraction from the claimant. The defendant must have been enriched at the claimant's expense, which will only have occurred if the benefit obtained by the defendant is from the claimant directly or, in certain specified circumstances, by way of another person.²⁵ We are, therefore, well outside the area of a cause of action for gains made by a fiduciary in breach of fiduciary duty otherwise than by wrongly acquiring the trust property.

Professor Burrows' two essential pre-requisites for proprietary restitutionary relief for unjust enrichment (in addition to an unjust factor justifying any relief at all) are that (1) the defendant's enrichment must traceably exist in a surviving asset²⁶ and (2) proprietary relief must not be inconsistent with (in Professor Burrows' words—'destroy') the law of insolvency.²⁷ The first requirement, the need for a proprietary base to the claim, needs no further explanation. Professor Burrows has said that one can deduce from the second requirement the policy or principle that the law can justifiably create proprietary rights where, analogously to a secured creditor, the unjust enrichment claimant has not taken the risk of the defendant's insolvency; or expressed differently, proprietary restitution should only be granted where there is an analogy between the restitution claimant's position and that of a secured, rather than an unsecured, creditor.²⁸ It is said that examples of the application of this policy or principle are cases of subtractive enrichment where the claimant's consent to the defendant's enrichment has been impaired by mistake or duress or undue influence or ignorance and so the claimant never intended the defendant to be enriched at all.²⁹ Cases said to exemplify the grant of proprietary relief in such circumstances are *Chase Manhattan Bank NA v Israel-British Bank*

²⁵ Burrows, *A Restatement of the English Law of Unjust Enrichment* (n 22) section 8.

²⁶ In the case of subrogation, the defendant's property claimed by the claimant must have been previously subject to an interest which was discharged with property formerly owned by the claimant.

²⁷ Others, such as Professor Robert Chambers and Professor Peter Birks, have argued for another requirement: that there must be no period of time when the defendant has an unrestricted beneficial ownership of his or her enrichment.

²⁸ Burrows, *The Law of Restitution* (n 19) 176.

²⁹ *ibid* 178.

*(London) Ltd, Banque Financiere de la Cite v Parc (Battersea) Ltd*³⁰ and *Foskett v McKeown*.

There are two other important points which permeate academics' analysis of restitution for unjust enrichment. One is the absence of any room for judicial discretion. The second, which is related, is the absence of any requirement for unconscionability in the defendant's conduct. The categories of unjust enrichment are objective and established, such as mistake, duress, undue influence, exploitation of weakness, incapacity, and failure of consideration.³¹ It is for that reason that restitution scholars criticise Lord Browne-Wilkinson's qualification in *Westdeutsche*³² of the reasoning of Gouling J in *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*. Lord Browne-Wilkinson considered that a constructive trust in respect of a mistaken payment can only arise if and when the defendant's conscience is affected. He acknowledged that, on the facts in *Chase Manhattan Bank*, that will have arisen when (but not before) the defendant bank became aware that the payment had been made under a mistake but failed to repay the money.³³ The gloss of a test for restitution for unjust enrichment based on conscience has been criticised as lacking justification in terms of both principle and policy and as also introducing an unacceptable element of uncertainty.

For the same reasons, the possibility of a remedial constructive trust, that is to say one imposed in the discretion of the court rather than arising automatically as a matter of law, is also opposed. Such a constructive trust had been mooted by Lord Browne-Wilkinson in *Westdeutsche*, but has been consistently rejected as unprincipled and practically unsound by restitution scholars across the board.

In summary, so far as relevant to this paper, it can be seen from this relatively brief account of a large and difficult area of the law that the following important principles permeate the approach of academic scholars to restitution for unjust enrichment: (1) there

³⁰ [1999] 1 AC 221.

³¹ For others, see Part 3 of the Restatement in Burrows, *A Restatement of the English Law of Unjust Enrichment* (n 22).

³² [1996] AC 669, 714.

³³ Lord Browne-Wilkinson's analysis has been followed by the High Court of Singapore in *Re Pinkcrocade Educational Services Pte Ltd* [2002] SGHC 186.

must be subtractive enrichment of the defendant from the claimant, usually directly from the claimant; (2) either (on one view) there can be no proprietary restitutionary claim, or (3) a restitutionary proprietary claim will lie but only if (a) there is a continuing proprietary link from the claimant to a surviving asset in the possession of the defendant, and (b) the claim does not subvert the law of insolvency; and in any event, (4) there is no requirement of unconscionable conduct by the defendant, nor (5) does a restitutionary claim for unjust enrichment or any relief for it turn on the court's discretion.

Those fundamental principles of restitution for unjust enrichment are quite different from long established principles of equity in the context of proprietary relief. It is possible to some extent to isolate the two different fields of jurisprudence by the separate categorisation of restitution for unjust enrichment and restitution for wrongs, such as breach of fiduciary duty. It is obvious, however, that some factual situations can found both a claim in unjust enrichment and a claim for relief in equity for a civil wrong. Professor Burrows has said in terms that constructive trusts imposed on gains made by equitable wrongs are examples of proprietary restitution reversing unjust enrichment.³⁴ The problem for those seeking some semblance of coherence between the two in practice, as distinct from utopian theory achievable only by Parliament, is that very different policies and principles have permeated the two different legal traditions. Unless those traditions are clearly understood and (where necessary) observed, intermittent steps by the courts to achieve coherence between different categories of legal claim may come at the high price of causing incoherence elsewhere.

There are two obvious but fundamental truths about equity that are relevant to this paper. The first is that proprietary relief is far more widely available in equity than at common law.³⁵ The second is that maintaining the integrity of the fiduciary relationship is a central policy in equity.

³⁴ Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (n 19) 423-424.

³⁵ Ben McFarlane, 'The Centrality of Constructive and Resulting Trusts' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart 2010) ch 6.

Let us look first at the prevalence in equity of proprietary relief. Unlike the position at common law, it is possible to trace in equity into a mixed fund. Further, proprietary relief is given by resulting trusts, constructive trusts, common intention constructive trusts and proprietary estoppel. At the risk of giving so brief a description of these legal mechanisms as to mislead, they can be very shortly described as follows.

I mention first, in order to dispose of it quickly, proprietary estoppel. It does not play an important role in this paper. It is relevant, however, to showing the flexibility of equity in providing proprietary or other relief where there has been unconscionable conduct.³⁶ In particular, it is to be noted that, where proprietary estoppel has been established, the court will grant the minimum relief that will best satisfy the just expectations of the claimant. The court, in its discretion, might order the transfer of property or of an equitable interest in it, or impose a lien or other security interest or order financial compensation without any security interest. In terms of the focus on the defendant's unconscionable conduct, the breadth of the relief that might be granted by the court and the court's freedom to choose between a range of remedies from the purely monetary to the entirely proprietary is the very antithesis of the sharp edged and carefully circumscribed intervention of the common law in cases of unjust enrichment.³⁷

I turn to resulting trusts. These can arise where there is a voluntary payment or transfer of property and no intention to make a gift; where property is purchased in the name of another; and where a change in ownership has not completely disposed of the beneficial interest. Typically, a resulting trust arises where property is

³⁶ See e.g. *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133, 151-152 (Oliver J); although for a more critical analysis and categorisation, see Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) *Current Legal Problems* 267.

³⁷ Nicholas Hopkins, 'Unconscionability, Constructive Trusts and Proprietary Estoppel' in Michael Bryan (ed) *Private Law in Theory and Practice* (Routledge-Cavendish 2006) ch 9.

transferred gratuitously and there is insufficient evidence to determine that the claimant intended to make a gift.³⁸

As to constructive trusts, William Swadling advances with impressive logic and analysis the theory that constructive trusts do not confer substantive rights and are no more than a legal fiction for orders which the court wishes to make in relation to the transfer of property rights.³⁹ For the purpose of this paper, however, I shall adhere to the more conventional view that constructive trusts arise as a matter of law, that is to say as institutional rather than discretionary remedial constructive trusts,⁴⁰ in a variety of situations.

Constructive trusts can be broadly analysed as arising either (1) to give effect to the common intention of the parties, or (2) to deprive the defendant of the gains of his or her wrongdoing, or (3) to reverse a voidable transaction (or, more broadly, unjust enrichment).⁴¹ One

³⁸ *Westdeutsche* [1996] AC 669; *Re Vinogradoff* [1935] WN 68; *Vandervell v IRC* [1967] 2 AC 291; *El Ajou v Dollar Land Holdings plc (No. 1)* [1993] 3 All ER 717; *Lavelle v Lavelle* [2004] EWCA Civ 223, [2004] 2 FCR 418

³⁹ William Swadling, 'The Fiction of the Constructive Trust' (2011) 64 *Current Legal Problems* 399.

⁴⁰ By contrast remedial constructive trusts form part of the law of other Commonwealth jurisdictions such as Australia, New Zealand and Canada.

⁴¹ There will plainly be an overlap between many cases in (2) and (3). In cases of rescission at common law (such as for fraud, duress and mental incapacity) the legal title automatically reverts in the claimant, and in such cases it is possible to characterise the reversion as a proprietary remedy for unjust enrichment. At this point in this paper, I am considering the position in equity (e.g. where there has been misrepresentation, undue influence, unconscionable dealing or breach of fiduciary duty). I do not address here the issue whether Lord Browne-Wilkinson was correct to state in *Westdeutsche* that a constructive trust could not arise unless the defendant's knowledge was such as to make his or her conduct unconscionable. That view has been criticised by several academics: see Mitchell, *Goff & Jones* (n 20) 38-09 to 38-11; but see what I said in 'The Role of Equity in Mistaken Transactions' (Annual Lecture to the Association of Contentious Trust and Probate Specialists, 20 November 2013) available online at:

<www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/chancellor-speech-actaps-annual-lecture-20112013.pdf> accessed 23 March 2014. In *El Ajou v Dollar Holdings plc* [1993] 3 All ER 717, 734 Millett J characterised the trust of an equitable title on rescission as a resulting trust rather than a constructive trust but that characterisation is not universally accepted. Also, I shall not address here the wider role ascribed to resulting trusts by Professor Birks (Peter Birks, 'Trusts Raised to Reverse Unjust Enrichment: the *Westdeutsche* Case (1996) 4 RLR 3) and Professor Chambers (Robert Chambers, *Resulting Trusts* (Clarendon Press 1997))

of the problems with the jurisprudence is that the courts, when holding that there is a constructive trust, do not always clearly identify the type of constructive trust in question.

The first category embraces matters as diverse as the perfection of imperfect gifts, gifts in contemplation of death (*donatio mortis causa*), fully secret and half secret trusts, mutual wills, the common intention constructive trust and the trust which arises on a contract for the sale of land. They are each manifestations of social policy.

That is well illustrated by the common intention constructive trust, which typically arises in the domestic setting where a couple live together in a property, the legal title to which does not reflect the shares which they intended each of them to have or which the court considers that they would have agreed to have if they were fair and reasonable people and had brought their minds to bear on the point.⁴² It may be possible to characterise even this form of trust as grounded in the notion of unconscionability, namely the denial by the legal owner of the beneficial interest which ought fairly and reasonably to be conceded to his or her spouse or partner.⁴³ The trust can be seen as a legal construct devised to meet a particular social problem, which Parliament has failed to tackle.⁴⁴

A constructive trust which has been treated as originating from the same principles, but is better analysed as arising from breach of fiduciary duty, is the joint venture constructive trust. It is best exemplified in *Banner Homes Group Ltd v Luff Developments Ltd*.⁴⁵

There are many different examples of constructive trusts to recover the fruits of the defendant's wrongdoing. They include the recovery of property which the defendant was aware was mistakenly transferred by the claimant; the recovery of property which has been

on the basis that it responds to the claimant's absence of intention that the defendant should receive the property beneficially.

⁴² The modern law, which is not without controversy, is to be found primarily in *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 and *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776.

⁴³ Sir Terence Etherton, 'Constructive Trusts: a New Model for Equity and Unjust Enrichment' (2008) 67 CLJ 265.

⁴⁴ *Stack v Dowden* (n 42) [40]-[46] (Baroness Hale).

⁴⁵ [2000] Ch 372.

stolen from the claimant or obtained by fraud or undue influence; the recovery of property received by the defendant in the knowledge that it was transferred to him or her by another person in breach of that person's fiduciary duty; the recovery of property acquired by an agent for himself or herself which he or she had been authorised by the principal to purchase for the principal; and the recovery of property acquired by a fiduciary as a result of breach of fiduciary duty—either the trust property itself or other property acquired through the wrongful exploitation of an opportunity which presented itself due to his or her fiduciary position.

Where a voidable transaction is set aside, the conventional view is that the property transferred by the claimant to the defendant pursuant to the transaction is subject to a constructive trust in favour of the claimant.⁴⁶

There are six broad points that must be made at this point on the basis of such cases. The first is that many of those situations giving rise to a resulting or constructive trust could equally well be categorised as giving rise to a claim for restitution for unjust enrichment.

Secondly, it is not surprising, therefore, that, amongst many others, restitution scholars⁴⁷ ask the question whether such cases accord or should accord with the principles governing the award of proprietary relief for unjust enrichment and whether they are consistent with cases in which other proprietary remedies have been awarded or withheld on similar facts.

Thirdly, there are well-established lines of cases where equity imposes a constructive trust to capture property in the hands of the defendant which neither came from the claimant nor falls within the types of case where the defendant's enrichment is deemed to be at the claimant's expense even though obtained from someone other than the claimant.⁴⁸ Such cases fall, therefore, outside the scope of any claim for unjust enrichment. More to the point, they show the

⁴⁶ As I have said earlier, some would characterise the third type of constructive trust as restitution of unjust enrichment.

⁴⁷ For example: Mitchell, *Goff & Jones* (n 20) 38-33, 38-36.

⁴⁸ See section 8 in Part 2 of the Restatement in Burrows, *A Restatement of the English Law of Unjust Enrichment* (n 22).

historically wider reach of equity, both in terms of claim and type of relief, than restitutionary claims for unjust enrichment.

Fourthly, in many cases where equity has imposed a constructive trust, unlike the cause of action for restitution for unjust enrichment, proof of the defendant's unconscionable conduct is essential.⁴⁹

Fifthly, many of these cases exemplify a core policy of equity to accord special value to fiduciary relationships, that is to say to impose sanctions for breach of fiduciary duty that give the fullest protection to those to whom fiduciary obligations are owed, both (1) by recouping to the most perfect extent any benefits obtained by a fiduciary from breach of the fiduciary relationship and also (2) acting as a deterrence.⁵⁰ This is properly described as both a legal and a social policy. It has no equivalent at common law. It is not part of the law of restitution for unjust enrichment. It sits alongside the other laws of this country, including our insolvency laws. It is plainly open to Parliament to qualify its application. Parties can do so by agreement, as is often done in commercial fiduciary relations. The extent to which it would be appropriate for the courts to do so at any one moment in our history as a matter of perceived social or economic policy is at the least debatable.⁵¹

Sixthly, as is obvious, in every one of those (many) cases where a constructive trust arises the claimant is in a better position than unsecured creditors if the defendant is insolvent.

The current debate about the proper extent of proprietary relief in equity has been ignited by the issue of bribes. The law on this was long thought to have been settled both in this country and throughout other common law countries by the decision of the Privy Council in *Attorney General of Hong Kong v Reid*, which considered the Court of Appeal in *Lister v Stubbs*⁵² to have been plainly wrong in failing to acknowledge that the bribes received by an agent were held on constructive trust for the principal. The Court

⁴⁹ Indeed, for Lord Browne-Wilkinson, that was the unifying principle of the constructive trust: *Westdeutsche* [1996] AC 669, 705.

⁵⁰ *Bray v Ford* [1896] AC 44, 50-51 (Lord Herschell).

⁵¹ Without the court having the benefit of evidence such as would be obtained by Parliament or the Law Commission.

⁵² (1890) 45 Ch D 1.

of Appeal in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*,⁵³ however, decided to follow *Lister* rather *Reid*. That was, on the face of it, rather curious. As I pointed out in *FHR European Ventures LLP v Mankarious*⁵⁴ it was not strictly necessary to reach the decision on the facts of that case for the Court of Appeal to hold that it should follow *Lister* rather than *Reid*. The effect of doing so was to bring the law of England and Wales out of kilter with other current and former Commonwealth countries, including, of course, New Zealand, the country for which the Privy Council was the final court of appeal in *Reid*. Moreover, bribery, of all social ills, is one which both the Law Commission and the UK legislature now recognise as particularly pernicious, meriting a modern and comprehensive criminal code.⁵⁵

The analysis in *Sinclair* rests on a threefold categorisation of situations in which a fiduciary obtains a benefit in breach of fiduciary duty: (1) where the benefit is or was an asset belonging beneficially to the principal (category 1); (2) where the benefit has been obtained by the fiduciary taking advantage of an opportunity which was properly that of the principal (category 2); and (3) all other cases (category 3). In the case of categories 1 and 2, but not category 3, the benefit is held on constructive trust for the principal. According to the reasoning in *Sinclair*, bribes received by the fiduciary fall within category 3.

It is not necessary or appropriate now to repeat everything that I said about that categorisation in *FHR European Ventures*.⁵⁶ It is sufficient to make the following three uncontroversial statements. The fact that bribes were held to fall within category 3 rather than category 2 shows that some ‘opportunity’ cases fall within category 2 and others within category 3. The explanation for the difference given by Lord Neuberger MR, who gave the only reasoned judgment in *Sinclair*, is that opportunity cases in category 3, unlike those in

⁵³ [2011] EWCA Civ 347, [2012] Ch 453.

⁵⁴ [2013] EWCA Civ 17, [2013] 3 WLR 466, [102].

⁵⁵ Law Commission, *Reforming Bribery* (Law Com No 313, 2008), leading to the Bribery Act 2012.

⁵⁶ I shall not repeat what I said in *FHR European Ventures* about *Fawcett v Whitehouse* (1829) 1 Russ & M 132, *Re Morvah Consols Tin Mining Co (McKay's Case)* (1875) 2 Ch D 1, and *Bagnall v Carlton* (1877) 6 Ch D 371, all of which are relevant to this issue but none of which were cited in *Lister* or *Sinclair*.

category 2, are not ‘properly [those] of the beneficiary’⁵⁷ and are not ‘beneficially owned by the claimant’.⁵⁸ Those expressions represent his gloss on the case law and are not to be found in the cases themselves.

Those expressions do bring about some appearance of an alignment with the restriction on restitutionary proprietary claims in unjust enrichment in that, actually (category 1) or conceptually (category 2, with Lord Neuberger’s gloss), the benefits in categories 1 and 2 represent the original traceable property of the claimant. I say ‘conceptually’ in the case of category 2 because I very much doubt that any restitution scholar would go so far as to say that a proprietary restitutionary claim for unjust enrichment could extend to such an ‘opportunity’ gain or, if it did, what would be the proper jurisprudential basis for distinguishing it from other opportunity gains in category 3.

That highlights the real problem created by the analysis in *Sinclair*, namely a sound basis for distinguishing in equity between one type of opportunity case and another against a background in which, unlike the common law, (1) equity facilitates proprietary relief in a wide variety of circumstances; (2) in particular, equity will impose a constructive trust to capture the benefits obtained by the defendant through equitable wrongdoing; (3) such a constructive trust will extend to benefits which have not come from the claimant’s principal but from the defendant’s own endeavours; (4) the paradigm case of the constructive trust for wrongdoing is that imposed on a fiduciary for breach of duty, the extent of the remedy (both for an account of profit and proprietary relief) being intended both to deprive the defendant of wrongdoing to the fullest extent and to act as a deterrence to others in a like position.

There are four well established types of opportunity case where a constructive trust has been imposed to recoup to the claimant the benefit of the defendant’s breach of fiduciary duty: the agency cases, the joint venture cases, the financial dealing cases, and the company director cases. All four may be seen as examples of the same theme of the intervention of equity by way of constructive trust in cases

⁵⁷ *Sinclair* (n 53) [88].

⁵⁸ *ibid* [89].

where the defendant has used the opportunity presented by his or her fiduciary position to obtain a benefit from third parties.

The principle underlying the agency cases is that it is a fraud on the part of an agent who is engaged to acquire property for his principal to deny his trust of the property and to claim the property for himself or herself.⁵⁹ The agent will hold the property on constructive trust for the principal.

The joint venture cases, exemplified by the so-called *Pallant v Morgan*⁶⁰ equity and most notably the decision in *Banner Homes*,⁶¹ were summarised in general terms as follows by Lord Scott (with whom three of the other members of the Appellate Committee agreed) in *Cobbe v Yeoman's Row Management Ltd*:⁶²

A particular factual situation where a constructive trust has been held to have been created arises out of joint ventures relating to property, typically land. If two or more persons agree to embark on a joint venture which involves the acquisition of an identified piece of land and a subsequent exploitation of, or dealing with, the land for the purposes of the joint venture, and one of the joint venturers, with the agreement of the others who believe him to be acting for their joint purposes, makes the acquisition in his own name but subsequently seeks to retain the land for his own benefit, the court will regard him as holding the land on trust for the joint venturers.⁶³

I explained in *Crossco No.4 Unlimited v Jolan Limited*⁶⁴ why, in my view, *Banner Homes* and the other cases in which the *Pallant v Morgan* equity has been applied are best interpreted as cases in which the court, pursuant to the imposition of a constructive trust, deprives the defendant of an advantage obtained in breach of trust.

⁵⁹ See the classic statement in *Rochefoucauld v Boustead* [1897] 1 Ch 196, 206; and see Peter G Watts (ed), *Boustead & Reynolds on Agency* (19th edn, Sweet & Maxwell 2010) para 2-037 and the cases cited there.

⁶⁰ [1953] Ch 43.

⁶¹ [2000] Ch 372.

⁶² [2008] UKHL 55, [2008] 1 WLR 1752.

⁶³ *ibid* [30].

⁶⁴ [2011] EWCA Civ 1619, [2012] 2 All ER 754.

The paradigm of what I have broadly described as the financial dealing cases is *Boardman v Phipps*.⁶⁵ It has been regarded since it was decided nearly 50 years ago as the definitive case on the duty of fiduciaries not to enter into transactions which involve or may involve a conflict between their personal interests and their obligations to those to whom they owe fiduciary duties. It has been impressed on the minds, if not the hearts, of generations of students. The House of Lords upheld the decision of Wilberforce J at first instance. The facts are too well known to require setting them out here. The important points, for the purpose of this paper, are that the opportunity for the defendants to purchase the shares for themselves arose because and only because of their position as representatives of the trustees and the information they had acquired as such about the company's affairs; the shares purchased by them in breach of their fiduciary duty could not have been purchased by the trust itself without an order of the court because they were not an authorised investment; the defendants acted in the honest but mistaken belief that they could purchase the shares; and they improved, through their own efforts, the business of the company and thereby benefited the trust, which kept its minority shareholding in the company, as well as themselves. For the reasons that I gave in *FHR European Ventures*, I consider it is quite clear that the order of Wilberforce J, upheld in the House of Lords, gave effect to the claim in the writ that the shares acquired by the defendants in breach of their fiduciary duty were held on constructive trust. That point had been regarded as unclear by the first instance judge and the Court of Appeal in *Sinclair*, even though Professor Burrows had specifically pointed out in his book on restitution that in *Boardman* constructive trust terminology was used.⁶⁶

The last category of opportunity case which I have mentioned comprises the company director cases. These are cases in which constructive trusts have been recognised to bind company directors

⁶⁵ *Boardman* (n 6). This is the broadest category, for which my description is inadequate. *Keech v Sandford* (1726) Sel Cas Ch 61 (trustee of lease obtained a renewal of the lease for his own benefit) may be said to fall within it; although to the contrary see Andrew D Hicks, 'The Remedial Principle of *Keech v Sandford* Considered' (2010) 69 CLJ 287 and William Swadling, 'Constructive Trusts and Breach of Fiduciary Duty' (2012) 18 Trusts & Trustees 985, 990-991.

⁶⁶ I do not agree, therefore, with the doubts on this point expressed by Darrel Crilly, 'A Case of Proprietary Overkill' (1994) 110 LQR 178.

who divert to themselves contracts or corporate opportunities which ought properly to be taken up, if at all, by their companies.⁶⁷ A classic example is *Bhullar v Bhullar*⁶⁸. In that case, the Court of Appeal was clear that a property acquired by the directors in breach of their duty to their company was held on constructive trust for the company whether or not the company would have taken up the opportunity for itself.⁶⁹

There are, therefore, at least four types of case in which, according to long established equity jurisprudence, the benefits gained by fiduciaries otherwise than by way of subtraction from their principal's property will be held on constructive trust for the principal. At least two of those categories directly, and a third indirectly, have been endorsed by the House of Lords.⁷⁰ There being no subtractive benefit in those cases, they could not have been the subject of a common law claim for unjust enrichment let alone a proprietary restitution claim for unjust enrichment.

The *Sinclair* case has been followed by a slew of learned articles and other commentary, including two notable public debates at Cambridge and London between father and son, Lord Peter Millett and Richard Millett QC. It is not difficult to see why it has generated such passion. The supporters and opponents of *Sinclair*, like those who previously (before and after *Reid*) vented their views about *Lister*, fall broadly into two camps: those whose primary scholarship lies in the field of the common law, especially restitution, and those

⁶⁷ See David Hayton, Paul Matthews and Charles Mitchell, *Underhill & Hayton: Law of Trusts and Trustees* (18th edn, LexisNexis Butterworths 2010) paras 27.39ff and the cases cited there.

⁶⁸ [2003] EWCA Civ 424, [2003] 2 BCLC 241.

⁶⁹ *ibid* [41] (Jonathan Parker LJ). For a review of the pre-*Reid* opportunity cases, and the principle that it is irrelevant to the relief in those cases whether the principal would or could have taken advantage of the opportunity, see Paul McGrath, 'Constructive Trusts: an Analysis of *Sinclair v Versailles*' (2012) LMCLQ 517; and on that same point see Sarah Worthington, 'Fiduciary Duties and Proprietary Remedies (n 7) 728.

⁷⁰ The House of Lords in *Cobbe* and the House of Lords in *Boardman* recognising the joint venture cases and the financial dealing cases respectively; and the House of Lords in *Cobbe*, by recognising the *Pallant v Morgan* equity through the joint venture cases also in effect recognising the agency cases.

whose primary scholarship lies in the field of equity and trusts.⁷¹ The former are broadly speaking in favour of *Lister* and *Sinclair*. The latter are broadly speaking in favour of *Reid*. For common law and restitution scholars, personal monetary relief is the primary remedy and proprietary relief must be strictly principled and take subject to the underlying principles of the insolvency laws. For the scholar steeped in the study of equity and trusts, on the other hand, leaving aside the wide reach of equity in cases of proprietary estoppel, proprietary relief in the form of resulting and constructive trusts is 'a given' in an extensive variety of situations; there is no principle of such relief taking second place to monetary compensation; and the integrity of fiduciary relationships and the precise fulfilment of fiduciary obligations are central to the jurisprudence.

I do not intend to address the many excellent and thought provoking articles that have been published on this debate that has been rumbling on since well before *Reid*, and which most commentators thought had been put to rest by the decision in that case. I do believe, however, that clarity of vision can be distorted by the detail of the reasoning, the references to past cases and the numerous attempts to support, distinguish or discredit one case after another in this hot debate. The following are, to my mind, broadly uncontroversial but important points which should provide some enlightenment.

- (1) There is no self-evident answer to the question whether it is more socially or economically desirable to enlarge the assets available to the general body of creditors by denying proprietary relief in respect of bribes taken in breach of fiduciary duty than to permit such proprietary relief. This is a social and economic question, on which there can be legitimate differences of view of equal weight. The Privy Council in *Reid* was fully aware⁷² of the rival arguments which were set out in Peter Millett's 1993 article on 'Bribes and Secret Commissions',⁷³ which referred to and addressed the views (against proprietary relief) of Peter Birks in his *Introduction to the Law of Restitution* (1985) and Roy

⁷¹ I acknowledge, of course, that, like all generalisations, there are exceptions. As I noted earlier in this paper, there are scholars versed in both areas of jurisprudence.

⁷² *Reid* (n 9) 337.

⁷³ (1993) 1 RLR 7.

Goode's 1987 article on 'Ownership and Obligation in Commercial Transactions'.⁷⁴ The Board of the Privy Council, which included Lord Templeman, Lord Goff and Lord Lloyd, made clear its preference in declining to follow *Lister*.

- (2) Where there are rival social or economic policies on which there is no reasonably clear national preference, the courts, unlike Parliament and the Law Commission, are not generally well placed to choose between them although sometimes they are compelled or feel compelled to do so.⁷⁵ By contrast, the courts often can, and then should, do a great deal to advance consistency, predictability and accessibility, which are core ingredients of the Rule of Law.⁷⁶
- (3) It is not possible sensibly to distinguish the receipt of bribes by a fiduciary from other categories of opportunity benefits obtained by a fiduciary in breach of trust unless the leading cases of *Keech v Sandford*⁷⁷ and *Phipps v Boardman*⁷⁸ are taken otherwise than at face value.⁷⁹ That is why such

⁷⁴ (1987) 103 LQR 433.

⁷⁵ See the view expressed by Baroness Hale in *Stack v Dowden* (n 42) [46] that, there being no prospect of Parliament legislating for a statutory scheme on the property rights of couples in the event of a relationship breakdown, the courts had to develop the legal principles and policy.

⁷⁶ Lord Bingham in *The Rule of Law* (Penguin 2010), put forward 8 principles underlying the concept of the Rule of Law. He summarised its core as being that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered by the courts. Some legal philosophers have seen the Rule of Law as meaning that the law itself has certain inherent qualities, such as clarity, prospectivity, stability, openness and access to an impartial judiciary (see Joseph Raz 'The Rule of Law and its Virtue' (1977) 93 LQR 195, and *The Authority of Law* (1979). Lon Fuller's requirements were generality, public promulgation, stability, consistency, fidelity to purpose and prohibition of the impossible (see Lon Fuller, *The Morality of Law* (Yale University Press 1964)).

⁷⁷ Hicks (n 65).

⁷⁸ Darrel Crilley, 'A Case of Proprietary Overkill' (1994) 2 RLR 57.

⁷⁹ And, for that matter, *Fawcett v Whitehouse* (1829) 1 Russ & M 132; see Crilley *ibid*. And see also Professor Peter Watts' extensive analysis of *Tyrrell v Bank of London* (1862) 10 HL Cas 26, a case cited in both *Sinclair* and *FHR European Ventures*: Peter Watts, 'Tyrrell v Bank of London - an Inside Look at an Inside Job' (2013) 129 LQR 527.

impressive intellectual endeavour has been devoted to doing so by those who dislike *Reid*.

- (4) Even if it is correct on close analysis to discount those leading cases as examples of constructive trusts of benefits obtained by fiduciaries otherwise than from their principals in breach of duty, that still leaves the issue of making a principled distinction between the bribe cases and the remaining established opportunity cases, namely the agency cases, the joint venture cases and the company director cases. It leaves the issue whether, if a principled distinction can be made, that will leave the law more predictable, consistent and accessible. There was no attempt in *Sinclair* to relate the categories to the different types of constructive trust which I described earlier. All this inevitably raises the question whether the expressions which emerged for the first time in *Sinclair* as marking a principled distinction, namely the description of opportunities within category 2 as ‘properly that of the beneficiary’⁸⁰ or ‘beneficially owned by the claimant’,⁸¹ are a practical and helpful test as opposed to the statement of a conclusion.
- (5) It leaves the issue, addressed in *FHR European Ventures*, whether bribe and secret commission cases are all the same kind of opportunity case and so fall within category 3 or, if they are different, what would make them different and whether that would be easily deducible from the test to be applied.
- (6) Against the background of the concerns in (3), (4) and (5) Professor Lionel Smith must surely be correct in his view that the no-profit rule is the only single unifying rule.⁸² The issue at the heart of the present debate, which at the end of the day is one of policy, is whether the simplicity of a single rule with

⁸⁰ *Sinclair* (n 53) [88].

⁸¹ *ibid* [89].

⁸² Lionel Smith, ‘Constructive Trusts and the No-Profit Rule’ (2013) 72 CLJ 260. Even Dr Andrew Hicks, who has subjected *Keech v Sandford* to a penetrating reappraisal accepts that ‘the broad remedial principle also had the advantage of generating a neat doctrinal symmetry which furthered the goals of certainty, coherence and the appearance of legitimacy’: Hicks (n 65) 313.

the same proprietary and personal remedies available in every case should be qualified in some cases so as to restrict the availability of a proprietary remedy. The question is whether the coherence and predictability that accompany uniformity and simplicity should be sacrificed in the interests of some greater policy consideration.

- (7) There remains the general issue as to when it is appropriate for a court of England and Wales (or for that matter the Supreme Court) to refuse to follow a decision of the Privy Council and to prefer an earlier decision of the Court of Appeal of England and Wales which has been expressly disapproved and not followed in a subsequent Privy Council case.⁸³ It seems obvious, if only because of the involvement of Lords Templeman, Goff and Lloyd in the decision in *Reid*, that, if *Sinclair* had come before the House of Lords' Appellate Committee at the same time or shortly after *Reid*, the Appellate Committee would not have preferred *Lister* to *Reid*. Moreover, in considering that issue, it must be relevant to ask whether it is material that, in reaching its decision, the board of the Privy Council was acting as the final court of appeal from a member of the commonwealth and a common law country, the law of which was for all relevant purposes the same as that of England and Wales.⁸⁴ That itself raises questions about the role that the Privy Council formerly assumed and now assumes for itself in providing a harmonising lead on matters such as trust law in common law countries.⁸⁵ That is itself a sub-topic of a wider issue about the desirability of harmonising the laws in countries which trade with each other and can affect that trade, which is certainly something that bribery and corruption can do. It must also be relevant to ask in that context whether it makes

⁸³ See the discussion by Professor Richard Nolan in 'Bribes: A Reprise' (2011) 127 LQR 19; and see also David Hayton, 'The Extent of Equitable Remedies: Privy Council versus Court of Appeal' (2012) Co Law 161.

⁸⁴ New Zealand has, as I have said, recognised the remedial constructive trust, but the decision in *Reid* was as to the existence of an institutional trust.

⁸⁵ *Sinclair*, in following *Lister*, has brought the law of England and Wales out of line with New Zealand, Australia, Singapore, the United States and Canada: *Grimaldi v Chameleon Mining NL (No. 2)* [2012] FCAFC 6, paras 569ff (on this point, para 582).

any difference that Parliament has not sought to legislate in the intervening period of just under 20 years to achieve the legal, economic and social change for which Professor Goode was contending in his 1987 article and which the Privy Council in *Reid* rejected. What Parliament has done in the meantime is to legislate for a comprehensive criminal code on bribery and corruption, with an extra territorial reach, as a serious evil affecting our society here and abroad.

Of all those points, those in (4), (5) and (6) most clearly expose the weakness of the analytical legitimacy of *Sinclair* and all its supporters so far in the perfectly laudable attempt to provide a sound principled basis for proprietary relief or its absence in the case of bribes and other opportunity gains in breach fiduciary duty. The distinction between categories (2) and (3) in *Sinclair* is not supported by any clear line or useful test and does not explain the decided cases or the proper basis for saying any of them were wrongly decided. A broad consensus to that extent does seem to be emerging among commentators.⁸⁶

Professor Sarah Worthington is, I would respectfully suggest, the only person so far to have focused in a positive way on that issue as a trigger for formulating a possible framework for reconciling the two warring camps. In a recent penetrating analysis,⁸⁷ which questions assumptions and assertions by both sides of the debate and seeks to revert to first principles, Professor Worthington has distinguished between the no-conflict rule and the no-profit rule to mark a principled divide between proprietary and non-proprietary relief. She proposes dividing a fiduciary's disloyal gain into the following three categories, the first two of which entitle the principal

⁸⁶ William Swadling, a firm anti-*Reid* scholar, has candidly accepted that Lord Neuberger's 'concession to what may be called "the opportunity doctrine" may well prove the Achilles' heel of *Sinclair*, for it is difficult to see any principled reason to distinguish gains made through the use of an opportunity "belonging to" the principal, and those made otherwise. Both are breaches of obligations of fidelity, and the notion that the "opportunity" belongs to the principal and is therefore pre-existing "property" is nothing more than a metaphor': Swadling (n 65) 993. See also Robert Chambers, 'Constructive Trusts and Breach of Fiduciary Duty' (2013) 77 Conv 241; Edward Granger and James Goodwin, 'Secret Profits, Opportunities and Constructive Trusts' (2013) 21 RLR 85.

⁸⁷ Worthington (n 7).

to proprietary relief and the third of which gives rise only to a personal claim:

- (1) gains derived from use of the principal's property (regardless of the nature of the use);
- (2) gains derived from opportunities which are within the scope of the fiduciary's endeavour on the principal's behalf (i.e. gains involving 'conflicts of duty and interest', but with it then being irrelevant that none of the principal's property was used in acquiring the gain);
- (3) any other gains derived from opportunities which are not within the scope of the fiduciary's endeavour and do not involve use of the principal's property.⁸⁸

As Professor Worthington explains, under this model the cases falling only within category (3) are exceptionally rare, but they would include *Reid. Lister*, on the other hand, would fall within category (2) as would *FHR European Ventures*. Somewhat controversially, to my mind, she would place *Sinclair* in category (1) (on the footing that it is properly to be seen as a case in which the disloyal fiduciary circulated the principal's investment funds around the fiduciary's companies, creating the appearance of hectic trading, and thereby fraudulently inflating the market value of his own companies, which gain he then realised by selling his shares at a greatly inflated price⁸⁹). In short, Professor Worthington's analysis is that *Lister*, *Reid* and *Sinclair* were all wrongly decided but the decision in *FHR European Ventures*⁹⁰ was correct.

Undoubtedly many will take issue with the distinction that Professor Worthington seeks to make between the consequences of breach of the no-conflict rule and breach of the no-profits rule. Her model may

⁸⁸ *ibid* 730. I have re-phrased and shortened the more extensive and sophisticated language of Professor Worthington's third category for the purposes of this paper as I seek only to distinguish disloyal gains which are subject to proprietary relief and those which are limited to personal relief. The actual language of Professor Worthington's third category serves a further function of distinguishing between legitimate and disloyal gains but I am not concerned here with that issue.

⁸⁹ *ibid* 744.

⁹⁰ Professor Robert Chambers also considers that *FHR European Ventures* was correctly decided but on the ground that, properly analysed, it is a category (1) case: see Chambers (n 86).

not please the original principal contenders on both sides.⁹¹ If, however, *Reid* is to be regarded as wrong in its analysis and conclusion, Professor Worthington's model merits careful consideration as a worthy attempt to set the law on a more certain and principled basis consistent with the broad sweep of both common law and equitable principles.

⁹¹ Goode, 'Ownership and Obligations in Commercial Transactions' (n 74); Goode, 'Proprietary Liability for Secret Profits—A Reply' (2011) 127 LQR 493; Millett, 'Bribes and Secret Commissions' (n 73); Peter Millett, 'Proprietary Restitution' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005); Peter Millett, 'Bribes and Secret Commissions Again' (2012) 71 CLJ 583.