

UNAUTHORISED FIDUCIARY GAINS AND THE CONSTRUCTIVE TRUST

This article challenges the traditional assumption that all cases of unauthorised fiduciary gain warrant the same legal treatment, in particular the imposition of a constructive trust as a disgorgement remedy. It proposes a method of categorising the cases and ranking them based on the strength of the principal's interest. It is suggested that in cases where the principal's interest is not particularly strong, there is room for taking into account the interests of innocent third parties and affording them the necessary protection. For this purpose, the remedial constructive trust supplies the needed flexibility.

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I. Introduction

1 Where a fiduciary makes a secret profit¹ through his fiduciary position without his principal's informed consent, the principal is entitled to choose between two types of disgorgement remedies: (a) a personal remedy of account; or (b) a constructive trust over the secret profit and its traceable proceeds. In so far as Singapore law is concerned, the availability of the constructive trust as a disgorgement remedy has been firmly settled since 1994.² Thereafter the topic has attracted very little attention.³ However, recent judicial pronouncement on the remedial constructive trust hints at the possibility that proprietary

* Earlier versions of this article were presented at the Obligations Group Conference 2015 (Equity) held at the Melbourne Law School and at the HKU-NUS-SMU Symposium 2016 held at the Hong Kong University Faculty of Law. I would like to thank all the participants, especially Elise Bant, Matthew Harding, Michael Bryan, James Penner, Lusina Ho, Rebecca Lee, Kelvin Low and Man Yip for their invaluable comments and encouragement. I am also grateful for the helpful comments from the anonymous referee, as well as the meticulous editing of the draft by Clarice Ting. All errors are my own.

1 The terms "secret profit" and "unauthorised fiduciary gain" are used interchangeably in this article.

2 *Thahir Kartika Ratna v Pertamina* [1994] 3 SLR(R) 312.

3 See, however, Hans Tjio, "Rethinking the Personal and Proprietary Distinction" [1993] Sing JLS 198; Man Yip, "Singapore's Remedial Constructive Trust: Lessons from Australia" (2014) 8 J Eq 1 at 25–30.

disgorgement could be achieved in more than one way.⁴ If we are to pursue the matter in this direction, a natural question to be asked is: How do we determine which kind of disgorgement remedy is most appropriate in any given situation? This question requires us to first rethink the traditional assumption that all cases of unauthorised fiduciary gain should attract the same legal response.⁵ A closer look at the cases reveals that the traditional broad-brush approach fails to take into account potentially relevant differences that may warrant differing legal treatments. This article suggests that the cases could be usefully divided into a number of broad categories and ranked according to the strength of the principal's interest. This would allow us to distinguish cases in which the principal's interest demands utmost protection and cases where there is room for balancing the principal's interest with the interests of innocent third parties. For the latter case, the remedial constructive trust supplies the needed flexibility.

2 The ensuing discussion will proceed in four parts. Part II⁶ provides an overview of the legal developments leading to the recognition of the constructive trust as a disgorgement remedy. To pre-empt any argument that a constructive trust should not even be imposed in the first place, Part III⁷ revisits the common arguments for and against the constructive trust and explains how the constructive trust is superior to a personal remedy in the fulfillment of the aims of fiduciary law. Finally, the main proposals of this article stated earlier are set out in Part IV.⁸ It shall be stressed that the proposals put forth here are neither comprehensive nor intended to be determinative of the issues at hand. They are deliberately tentative, aiming only to identify issues that require more consideration and to hint at possible directions in which Singapore law could develop.

II. The constructive trust receives judicial blessings

3 The question of whether a constructive trust should be imposed to disgorge an unauthorised fiduciary gain has been debated for more than a century. But it was only relatively recently that most major common law jurisdictions approved such use of the constructive trust. This part of the article presents a brief survey of the authorities on this topic. To provide a meaningful overview of this legal development, in particular how the laws of different jurisdictions have influenced each

4 *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801.

5 This was hinted at in *Guy Neale v Nine Squares Pty Ltd* [2015] 1 SLR 1097.

6 See paras 3–10 below.

7 See paras 11–29 below.

8 See paras 30–56 below.

other, the authorities will be presented more or less in chronological order.

4 It is convenient to begin with the old English cases, which could fairly be said to be the source of many future disagreements. It was common in the first half of the 19th century for the courts to disgorge unauthorised fiduciary gains by way of a constructive trust.⁹ Thereafter, and for the whole of the 20th century, the constructive trust was shunned and personal remedy gained preference. However, even though there were several Court of Appeal decisions that adopted this position (the most famous of which was *Lister & Co v Stubbs*¹⁰ (“*Lister*”)), there was no clear pronouncement from the House of Lords.¹¹ The decision in *Tyrrell v Bank of London*¹² was so ambiguous that both the proponents and opponents of the constructive trust claimed that it supported their respective positions.¹³ But it was generally thought to lend more weight to the award of a personal remedy.¹⁴ The well-known case of *Boardman v Phipps*¹⁵ (“*Boardman*”) was also far from clear,¹⁶ although the House of Lords was generally understood to have upheld the High Court’s order for the unauthorised gain to be held on a constructive trust for the principal.¹⁷ Thus, although the judicial trend was in favour of the award of a personal remedy, it is fair to say that the matter was far from closed.

9 See cases cited in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250 at [13]–[17].

10 (1890) 45 Ch D 1.

11 For the other Court of Appeal decisions which preferred the award of a personal remedy, see *Metropolitan Bank v Heiron* (1880) 5 Ex D 319; *Powell & Thomas v Evan Jones & Co* [1905] 1 KB 11; and *Attorney General’s Reference (No 1 of 1985)* [1986] QB 491.

12 (1862) 10 HL Cas 26.

13 See, eg, the counsels’ submission in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] 3 WLR 535.

14 See Peter Watts, “*Tyrrell v Bank of London* – An Inside Look at an Inside Job” (2013) 129 LQR 527; cf Peter Millett, “Bribes and Secret Commissions Again” (2012) 71 Camb LJ 583 at 605–608.

15 [1967] 2 AC 46. For a comprehensive and in-depth analysis of this case, see Michael Bryan, “*Boardman v Phipps*” in *Landmark Cases in Equity* (Charles Mitchell & Paul Mitchell eds) (Hart Publishing, 2012) ch 20.

16 For the view that a personal remedy was awarded, see *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] 3 WLR 1153 (CA) at [70], per Lord Neuberger; [2011] 1 BCLC 202 (Ch) at [41]–[47], per Lewison J. See also Peter Birks, “Personal Restitution in Equity” [1988] LMCLQ 128 at 133.

17 For the view that a constructive trust was imposed, see *Sumitomo Bank Ltd v Thahir Kartika Ratna* [1992] 3 SLR(R) 638 at [241] and *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 at 338. See also Peter Millett, “Bribes and Secret Commissions Again” (2012) 71 Camb LJ 583 at 608–610.

5 While the lower courts in England were struggling to determine which line of authorities should prevail as a matter of judicial precedence, many major common law jurisdictions saw developments in favour of the constructive trust. These foreign courts were in the fortunate position of being unconstrained by the inconsistent English authorities.

6 In Australia,¹⁸ *Lister* was applied by the High Court in *Ardlethan Options Ltd v Easdown*¹⁹ and in *Keogh v Dalgety & Co Ltd*.²⁰ However, not long after, the trend shifted in favour of the constructive trust. In *Furs Ltd v Tomkies*²¹ a company director who was tasked with negotiating the sale of a part of the company's business accepted a secret profit from the purchaser. The High Court held that he had breached his fiduciary duty, the result of which was that the secret profit "belongs in equity to the company".²² In *Chan v Zacharia*,²³ the High Court held that a partner who refused co-operation in renewing the lease of the partnership premises but instead obtained a new lease of the said premises for himself held it on constructive trust for those entitled to the property of the dissolved partnership. There were also other important *obiter dicta* from the High Court affirming the constructive trust as the preferred means of disgorging unauthorised fiduciary gains.²⁴ Interestingly, there was very little reference to the contrary English authorities. Thereafter, the Australian courts became pre-occupied with fine-tuning the constructive trust to take into account the interests of innocent third parties.²⁵

7 In Singapore the issue arose for judicial consideration for the first time in *Sumitomo Bank Ltd v Thahir Kartika Ratna*²⁶ ("*Thahir*"). The villain of the story was General Thahir, who was in charge of the day-to-day running of Pertamina, an Indonesian state-owned enterprise responsible for financing and overseeing the construction of a steel industrial complex. He approved on behalf of Pertamina certain

18 For an excellent survey and analysis of the Australian authorities, see Joseph C Campbell, "Are Proprietary Remedies to Recover Bribes Possible?" (2013) 37 Aust Bar Rev 231.

19 (1915) 20 CLR 285.

20 (1916) 22 CLR 402.

21 (1936) 54 CLR 583.

22 *Furs Ltd v Tomkies* (1936) 54 CLR 583 at 592.

23 (1984) 154 CLR 178, applying *Keech v Sandford* (1726) Sel Cas Ch 61.

24 See, eg, *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342 at 350; *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 107–108, *per* Mason J.

25 See, eg, *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, noted in Lusina Ho, "Bribes and the Constructive Trust as a Chameleon" (2012) 128 LQR 486.

26 [1992] 3 SLR(R) 638, noted in Hans Tjio, "Rethinking the Personal and Proprietary Distinction" [1993] Sing JLS 198.

contracts with two German companies, Klockner and Siemens, in return for bribes from these companies. The bribes, totalling about US\$80.5m, were deposited into a bank account with Sumitomo Bank in Singapore in the joint names of General Thahir and his wife. When General Thahir passed away, the bank account became vested in Mrs Thahir alone. The High Court (Lai Kew Chai J) held that the money was impressed with a constructive trust when it was received by General Thahir and remained so when it became vested in Mrs Thahir as she was not a *bona fide* purchaser for value. The Australian authorities were not cited but the High Court gave the following reasons for departing from the prevailing English position. First, on the ground of pragmatism a proprietary remedy was to be preferred for its deterrent effect.²⁷ Second, to confine the remedy to a personal one would result in “undesirable and unjust” consequences, one of which is the unusually lenient remedy for a blatant breach of fiduciary duty.²⁸ Lai J said:²⁹

... I am unable to accept, if I can help it, that a fiduciary, such as General Thahir ... who accepts illicit bribes is not declared as a constructive trustee and is only liable to account whereas an honest fiduciary, such as Mr Boardman, whose intervention and activities had resulted in a benefit to the *cestui que trust*, is declared to be a constructive trustee. In my view a court in Singapore when exercising its equitable jurisdiction must reflect the mores [*sic*] and sense of justice of the society which it serves.

The learned judge went on to add that even if those reasons were insufficient, the imposition of a constructive trust could nonetheless be justified on the special facts of the case, specifically that General Thahir was a public servant responsible for a public project and that the corruption was on a grand scale.³⁰ Unsatisfied with the High Court’s decision, Mrs Thahir appealed.

8 Meanwhile, an important legal development was also unfolding in New Zealand. The case of *Attorney-General for Hong Kong v Charles Warwick Reid*³¹ (“*Reid*”) was in the making.³² The story began in Hong Kong where Reid, a former public prosecutor, used his official position to obstruct the prosecution of certain criminals in return for bribes. The money was used to purchase three freehold properties in

27 *Sumitomo Bank Ltd v Thahir Kartika Ratna* [1992] 3 SLR(R) 638 at [216].

28 *Sumitomo Bank Ltd v Thahir Kartika Ratna* [1992] 3 SLR(R) 638 at [241].

29 *Sumitomo Bank Ltd v Thahir Kartika Ratna* [1992] 3 SLR(R) 638 at [241].

30 *Sumitomo Bank Ltd v Thahir Kartika Ratna* [1992] 3 SLR(R) 638 at [242].

31 [1994] 1 AC 324.

32 *Attorney-General for Hong Kong v Charles Warwick Reid* [1994] 1 AC 324, noted in Peter Watts, “Bribes and Constructive Trusts” (1994) 110 LQR 178; Darrel Crilly, “A Case of Proprietary Overkill” (1994) 2 RLR 57; and Peter Birks, “Property in the Profits of Wrongdoing” (1994) 24 UWAL Rev 8.

New Zealand, two of which were in the names of him and his wife while the third was conveyed to his solicitor. The Attorney-General for Hong Kong lodged caveats over these properties but the attempt to renew them was refused by both the High Court and the Court of Appeal on the ground that the Government of Hong Kong had no equitable interest in the properties.³³ In other words, Reid did not hold the proceeds of the bribe on trust for the Government of Hong Kong. On appeal, the Privy Council held otherwise, preferring the Singapore High Court's decision in *Thahir* to the contrary English authorities.³⁴ The Privy Council stressed the evilness of bribery as a policy concern and added that the imposition of a constructive trust accords with established principles:³⁵

The decision in *Lister & Co v Stubbs* is not consistent with the principles that a fiduciary must not be allowed to benefit from his own breach of duty, that the fiduciary should account for the bribe as soon as he receives it and that equity regards as done that which ought to be done. From these principles it would appear to follow that the bribe and the property from time to time representing the bribe are held on a constructive trust for the person injured.

The *Reid* decision laid down the law in both New Zealand and Hong Kong. It remains the law in both of these jurisdictions.³⁶

9 In the following year, the Singapore Court of Appeal, in *Thahir Kartika Ratna v Pertamina*,³⁷ dismissed Mrs Thahir's appeal and upheld the High Court's decision. The Privy Council's decision in *Reid* was approved in its entirety and therefore formed part of Singapore law. It is interesting that just a few months earlier the right of appeal to the Privy Council was abolished.³⁸ But even if an appeal was possible, it would certainly have been a futile effort in light of the Privy Council's stance on the matter as exemplified in *Reid*.

10 Finally, we return to look at the more recent legal development in the UK. The *Reid* decision, although not binding on the English courts, provided some momentum for departing from the then prevailing preference for a personal remedy.³⁹ However, instead of following *Reid*, in *Sinclair Investments (UK) Ltd v Versailles Trade*

33 *Attorney-General for Hong Kong v Charles Warwick Reid* [1992] 2 NZLR 385.

34 *Attorney-General for Hong Kong v Charles Warwick Reid* [1994] 1 AC 324.

35 *Attorney-General for Hong Kong v Charles Warwick Reid* [1994] 1 AC 324 at 336.

36 In Hong Kong, *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 was subsequently applied in *Secretary for Justice v Hon Kam Wing* [2003] 1 HKLRD 524.

37 [1994] 3 SLR(R) 312.

38 Judicial Committee (Repeal) Act 1994 (Act 2 of 1994).

39 See, eg, *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 and *Daraydon Holdings Ltd v Solland International Ltd* [2005] Ch 119.

*Finance Ltd*⁴⁰ (“*Sinclair*”) the Court of Appeal held that a constructive trust would arise only if the unauthorised gain is: (a) beneficially the principal’s; or (b) derived from an opportunity or a right which was beneficially or properly that of the principal.⁴¹ When the issue was revisited in *FHR European Ventures LLP v Cedar Capital Partners LLC*⁴² (“*FHR*”), the Supreme Court rejected the *Sinclair* formulation and held that a constructive trust arises in all cases of unauthorised fiduciary gain. Interestingly, Lord Neuberger, who delivered the judgment of the Supreme Court, was also the one who delivered the lead judgment in *Sinclair*. Stressing that there is no plainly right or wrong answer to the issue, the Supreme Court gave three main reasons grounded on principle and practicality for preferring the constructive trust. Firstly, disgorgement by way of a proprietary remedy is consistent with the principle of undivided loyalty in agency and fiduciary law.⁴³ Secondly, treating all cases of unauthorised fiduciary gain alike for the purposes of imposing a constructive trust avoids the need to draw difficult distinctions.⁴⁴ Thirdly, this approach aligns the availability of the constructive trust with the availability of a personal remedy.⁴⁵ The final two points were clearly reflective of the court’s emphasis on simplicity and certainty in the law. With *FHR* the major common law jurisdictions are now aligned in their treatment of unauthorised fiduciary gains. The longstanding contest over the admission of constructive trust into fiduciary law has finally come full circle in favour of the constructive trust.

III. Justifying the constructive trust

11 Although the recent authorities are firmly in favour of proprietary disgorgement by way of a constructive trust, the somewhat

40 [2011] 3 WLR 1153.

41 *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] 3 WLR 1153 (“*Sinclair*”) at [88]–[89]. This case has been the subject of divided opinions. For those in favour, see Sir Roy Goode QC, “Proprietary Liability for Secret Profits – A Reply” (2011) 127 LQR 493 and Graham Virgo, “Profits Obtained in Breach of Fiduciary Duty: Personal or Proprietary Claim?” (2011) 70 Camb LJ 502. For those against (*ie*, in favour of *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324), see Peter Millett, “Bribes and Secret Commissions Again” (2012) 71 Camb LJ 583; David Hayton, “Proprietary Liability for Secret Profits” (2011) 127 LQR 487; and Lionel Smith, “Constructive Trusts and The No-profit Rule” (2013) 72 Camb LJ 260. Within a few months, *Sinclair* was rejected by the Full Federal Court of Australia in *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296. For a neutral comment, see Richard Nolan, “Bribes: A Reprise” (2011) 127 LQR 19.

42 [2015] AC 250, noted in The Hon William Gummow AC, “Bribes and Constructive Trusts” (2015) 131 LQR 21.

43 *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250 at [33].

44 *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250 at [35].

45 *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250 at [36].

simplistic treatment of the issue by the UK Supreme Court in *FHR* is unlikely to quell the *Reid*-dissenters. However, *FHR* would provide a surer ground for acceptance of the constructive trust as compared to *Reid*, which has attracted severe criticisms. These criticisms divert attention from the more important task of fine-tuning the constructive trust to take into account the interests of innocent third parties. This part of the article paves the way for the more important discourse by revisiting the old debate and demonstrating why the imposition of a constructive trust is truly necessary.

A. *Revisiting the debate*

12 It is convenient to focus on the case of bribes, which is often regarded as the weakest case for the imposition of a constructive trust. Traditionally it was thought that a constructive trust is available only if the principal has a proprietary base in respect of the gain. This is obviously absent in the case of a bribe, which is not derived from the principal's asset but received from a third party. The emphasis on a proprietary base featured strongly in the formulation proposed in *Sinclair*. The English Court of Appeal drew support from the House of Lords' decision in *Foskett v McKeown*⁴⁶ ("*Foskett*"), citing it for the proposition that the availability of a proprietary claim is "a matter of property law".⁴⁷ However, that was perhaps reading too much into the case. In *Foskett* the House of Lords merely held that the claim for the traceable proceeds of a pre-existing beneficial interest does not lie in the law of unjust enrichment but in the law of property. It did not say that a proprietary claim could arise only where there is a proprietary base.

13 In his 1993 article, Sir Peter Millett (as he then was) argued that proprietary remedies are available not only to a person who is seeking to recover his own property.⁴⁸ He drew on the vendor-purchaser constructive trust to demonstrate that a proprietary claim could arise from a personal right. Although a purchaser of land (or unique chattel) has only a contractual right to have the title conveyed to him, equity affords him further protection by making him the beneficial owner through the imposition of a constructive trust.⁴⁹ This is because "equity regards as done that which ought to be done".⁵⁰ Because title to the property would eventually be conveyed to the purchaser, equity merely accelerates the transaction. Similarly, applied to the case of bribes,

46 [2001] 1 AC 102.

47 *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] 3 WLR 1153 at [37].

48 Peter Millett, "Bribes and Secret Commissions" [1993] RLR 7 at 19.

49 *Lysaght v Edwards* (1876) 2 Ch D 499.

50 *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233 at [39].

equity regards the fiduciary as having duly performed his duty by handing over the bribe to the principal. The principal thus acquires a beneficial interest in the bribe. Writing more recently, Lord Millett maintained this position and explicitly criticised the *Sinclair* decision for its over-emphasis on finding a proprietary base.⁵¹

14 If we recall, the reasoning advocated by Lord Millett was applied in *Reid* and became part of Singapore law following the unreserved acceptance of *Reid* in *Thahir*. For convenience of reference we shall refer to this as the *Reid* approach. The *Reid* approach encounters objections on many levels.⁵² To begin with, there is some doubt as to whether the vendor-purchaser constructive trust is a real trust or merely a fiction.⁵³ However, even if this was a bad analogy, one may fairly argue that the equitable maxim referred to earlier applies more strongly where the parties are in a fiduciary relationship as opposed to a purely commercial one.⁵⁴ More problematic is whether the maxim was properly applied in *Reid*. Clearly the maxim could be invoked only if the fiduciary is under a duty to account for the bribe in the first place. This is arguably unsatisfied in the case of bribes. Many non-trustee fiduciaries do not owe to their principals a duty to account since they hold no asset on behalf of their principals or undertake no economic accounting function. Even in the case of fiduciaries who do undertake some accounting function, there is arguably no duty to accept and hand over a bribe to the principal.⁵⁵ But this point is debatable. On one view, the no-profit rule is a rule of primary attribution. As Smith argues, where a fiduciary acts within a sphere of activity for and on behalf of the principal, any gain the fiduciary makes from that sphere of activity is

51 Peter Millett, "Bribes and Secret Commissions Again" (2012) 71 Camb LJ 583.

52 See especially Darrel Crilley, "A Case of Proprietary Overkill" (1994) 2 RLR 57; Peter Watts, "Bribes and Constructive Trusts" (1994) 110 LQR 178; William Swadling, "Constructive Trusts and Breach of Fiduciary Duty" (2012) 18 T&T 985; James E Penner, "The Difficult Doctrinal Basis for the Fiduciary's Proprietary Liability to Account for Bribes" (2012) 18 T&T 1000; and James E Penner, "Distinguishing Fiduciary, Trusts, and Accounting Relationships" (2014) 8 J Eq 202 at 226–230.

53 Swadling argued that the constructive trust label is misleading because the court order merely requires the vendor to convey title to the purchaser. See William Swadling, "The Vendor-Purchaser Constructive Trust" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Co, 2005) ch 18. See also William Swadling, "The Fiction of the Constructive Trust" (2011) 64 CLP 399. On the other hand, Lord Millett, in his more recent writing, insisted that the situation does give rise to a real trust. Peter Millett, "Bribes and Secret Commissions Again" (2012) 71 Camb LJ 583 at 588.

54 See paras 44–46 below.

55 See Roy Goode, "Proprietary Restitutionary Claims" in *Restitution: Past, Present & Future* (William R Cornish *et al* eds) (Hart Publishing, 1998) ch 5 at p 70.

attributed, as a matter of primary right, to the principal.⁵⁶ Smith explained that this gives rise to a trust relationship:⁵⁷

A trust is a situation in which a person holds rights, but is obliged to hold the benefit of those rights for another. When the no-profit rule is activated, that is exactly what it brings about, so long as the profit is held by the fiduciary in the form of identifiable property.

On another view, it is emphasised that the no-profit rule is proscriptive, not prescriptive.⁵⁸ The rule forbids the fiduciary from accepting a bribe. Thus, what the fiduciary ought to have done is to refuse the bribe. While it is common to speak of the errant fiduciary being liable to account for the secret profit, this is merely in reference to his secondary duty to account. The main merit of this opposing view is its sensitivity to the fact that it is a criminal offence to accept a bribe.⁵⁹ In contrast, a rule requiring a fiduciary to hand over a bribe to his principal as a matter of primary obligation is not only unintuitive but also inconsistent with anti-corruption policies. Suppose a fiduciary accepts a bribe but regrets it the next minute. What should he do besides confessing his misconduct? Arguably it is more of a mitigating factor for him to hand the bribe back to the briber instead of handing it over to his principal.

15 In light of the difficulties with the *Reid* approach, it is unsurprising that in *FHR* the UK Supreme Court did not endorse it. Instead, it sought to justify the same conclusion on grounds of principle and practicality. This has the effect of relegating the *Reid* criticisms to the status of straw man arguments. Recently in *Guy Neale v Nine Squares Pty Ltd*⁶⁰ (“*Guy Neale*”) the Singapore Court of Appeal cited *FHR* with approval but did not disapprove of the *Reid* approach which it previously adopted in *Thahir*. The Court of Appeal is invited to take a clearer stance on this matter when the issue is revisited the next time, preferably in favour of *FHR*. But this is not to suggest that *FHR* is

56 Lionel Smith, “Constructive Trusts and the No-profit Rule” (2013) 72 Camb LJ 260. See also Lionel Smith, “Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on Behalf of Another” (2014) 130 LQR 608 and Lionel Smith, “Deterrence, Prophylaxis and Punishment in Fiduciary Obligations” (2013) 7 J Eq 87. For a criticism of Smith’s view, see James E Penner, “Distinguishing Fiduciary, Trusts, and Accounting Relationships” (2014) 8 J Eq 202 at 230–233.

57 Lionel Smith, “Constructive Trusts and the No-profit Rule” (2013) 72 Camb LJ 260 at 262.

58 The Australian authorities are generally hostile towards prescriptive fiduciary duties: see *Breen v Williams* (1996) 186 CLR 71; *Pilmer v Duke Group Ltd* (2001) 207 CLR 165; and *P&V Industries Pty Ltd v Porto* [2006] VSC 131. Although the recent English case of *Item Software (UK) Ltd v Fassihi* [2004] BCC 994 appears to suggest otherwise, the debate is mainly confined to the duty of disclosure.

59 Prevention of Corruption Act (Cap 241, 1993 Rev Ed) s 5.

60 [2015] 1 SLR 1097.

without problems.⁶¹ Despite what it claims, the decision is somewhat thin on principle, relying more on broad policy considerations. The next section of this article seeks to supply what *FHR* lacks.

B. Arguments from principle

(1) The no-profit rule

16 At the risk of over-simplification but sufficient for the present purpose, it is generally accepted that the purpose of fiduciary law is to ensure fiduciary loyalty⁶² and the no-profit rule is simply a specific tool by which equity seeks to prevent fiduciary disloyalty.⁶³ It does so by removing a significant incentive that might tempt the fiduciary to prioritise his own interest over that of the principal. The rule is strict in several respects.⁶⁴ First, it operates regardless of whether the fiduciary's conduct has actually fallen below the standard of loyalty required of him. It matters not that the fiduciary has acted in a perfectly honest manner. Second, it applies even where the principal is unable to obtain the gain for himself due to legal or practical disability. Being prophylactic in nature, the no-profit rule casts its net wide. It catches all cases where the fiduciary has placed himself in a position where there is risk of disloyalty. With this in mind, what, then, is the appropriate legal response for breach of the no-profit rule? Leaving aside the possibility of a punitive response and focusing only on disgorgement, it is obvious that the no-profit rule is best served by a remedy which is capable of full disgorgement. The strictness of the rule is meaningless unless its rigour is followed through in its remedy. Thus, in choosing between the different disgorgement remedies, regard must be had to the extent to which disgorgement could be effected. In light of how unauthorised fiduciary gains are usually dealt with in real life, it is important to focus on the ability of a remedy to disgorge secondary gains and gains in the

61 For criticism of *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250, see Joseph C Campbell, "When and Why a Bribe is Held on a Constructive Trust: The Method of Reasoning Towards an Equitable Remedy" (2015) 39 Aust Bar Rev 320 at 321–325.

62 See generally Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-fiduciary Duties* (Hart Publishing, 2010).

63 While scholars generally agree on what fiduciary law seeks to achieve, they disagree on how exactly the no-profit rule functions. For a non-conventional take on the no-profit rule, see Lionel Smith, "Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on Behalf of Another" (2014) 130 LQR 608 and Lionel Smith, "Deterrence, Prophylaxis and Punishment in Fiduciary Obligations" (2013) 7 J Eq 87. For a brief summary, see para 14 above.

64 See *Keech v Sandford* (1726) Sel Cas Ch 61; *Boardman v Phipps* [1967] 2 AC 46; and *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134.

hands of a third party.⁶⁵ The common assumption is that a personal remedy is inferior to a proprietary remedy on both measures.⁶⁶ However, given that such assumption has been increasingly doubted, it would be helpful to consider in more detail the limits of a personal remedy of account.⁶⁷

(2) *Reaching secondary gains*

17 An errant fiduciary who receives a secret profit is unlikely to leave it as it is. He is likely to invest it in some way. Suppose a fiduciary who received a bribe of \$2m kept \$1m in a savings account and used the other \$1m to purchase a house, which is now worth \$1.5m. The house was rented out for \$5,000 per month. The rental income was accumulated for ten months and the money (\$50,000) was used to purchase shares, which are now worth \$100,000. The fiduciary also received a dividend of \$5,000 from those shares. It is convenient, for the benefit of subsequent discussion, to classify these profits into primary and secondary gains. The initial \$2m received is a primary gain. So is the \$1m in the savings account as it was part of the initial \$2m. The rest are secondary gains.

18 If the bribe is held on a constructive trust for the principal, he may claim the secondary gains as traceable proceeds of the bribe. However, if a constructive trust is not available, what could he recover by way of a personal remedy of account? In *Lister*, where the bribe was profitably invested, one reason Lindley LJ gave for refusing to impose a constructive trust was that it would require the agent to account “not only for the money with interest, but for all the profits which he might have made by embarking in trade with it”.⁶⁸ This implies that a personal remedy of account does not reach secondary gains. Interestingly, in *Reid* the Privy Council preferred a constructive trust to a personal remedy based on the same reason: only a constructive trust is capable of disgorging secondary gains.⁶⁹ If this is true, then the constructive trust, being the better disgorgement device, should obviously

65 In *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250 at [44] the UK Supreme Court regarded both aims to be important. See also Richard Nolan, “Bribes: A Reprise” (2011) 127 LQR 19 at 22–23.

66 For a general discussion on account of profits, see Yip Man & Goh Yihan, “Navigating the Maze: Making Sense of Equitable Compensation and Account of Profits for Breach of Fiduciary Duty” (2016) 28 SAclJ 884.

67 See, eg, William Swadling, “Constructive Trusts and Breach of Fiduciary Duty” (2012) 18 T&T 985 at 992 and Lusina Ho, “Bribes and the Constructive Trust As a Chameleon” (2012) 128 LQR 486 at 488.

68 *Lister & Co v Stubbs* (1890) 45 Ch D 1 at 15.

69 *Attorney-General for Hong Kong v Charles Warwick Reid* [1994] 1 AC 324 at 331.

be preferred. This is why Lord Millett asserted: “*Reid* implements the policy of the law; *Lister* does not”.⁷⁰

19 Could it be that the courts have wrongly underestimated the reach of a personal remedy of account?⁷¹ In none of the cases did the courts explain what exactly limits the reach of a personal remedy to a primary gain. In the first place, it is incorrect to say that the fiduciary is liable only for the sum of the bribe received. He is liable for its *value*. In the example given above, no doubt the fiduciary is at least liable to the sum of \$2m plus interest. If the bribe were to take other forms, say real property or shares, he would be liable for the market value of that property. Thus any subsequent increase in value is captured.⁷² If the personal remedy of account is capable of capturing subsequent increase in value of the primary gain, why should it not go further to capture also secondary gains? Although the courts do not explicitly say so, it may be that the reach of a personal remedy is curtailed by rules of causation and remoteness.

20 It is convenient to begin with the remoteness rule. On one view, secondary gains are irrecoverable because they are too remote.⁷³ Unlike the initial receipt of \$2m, the other gains were not acquired in breach of fiduciary duty. The fiduciary committed a wrong by accepting the \$2m but committed no wrong in using it to generate additional profits. This marks the line between primary and secondary gains. While it is true that the secondary gains flowed from the wrong, this merely addresses the causation point, not the remoteness point. On a contrary view, there is no reason why the secondary gains could not be seen as representing the value of the primary gain. The distinction between primary and secondary gains is not dictated by logic but is instead policy-driven with the aim of insulating a defendant from the risk of never-ending liability. If this much is accepted, and one considers the remoteness rule to be an impediment to the goal of gain-stripping, then there is no reason why it should not be relaxed or even abandoned.⁷⁴ It has been suggested that a

70 Peter Millett, “Bribes and Secret Commissions Again” (2012) 71 Camb LJ 583 at 590.

71 For a suggestion that secondary profits could be caught by a personal remedy, see *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] 3 WLR 1153 at [91]–[92]. See also Sarah Worthington, “Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae” (2013) 72 Camb LJ 720 at 740–743.

72 If, on the other hand, it depreciates in value, the agent is only liable for the difference in value. See *Attorney-General for Hong Kong v Charles Warwick Reid* [1994] 1 AC 324 at 331–332.

73 Peter Birks, *Introduction to the Law of Restitution* (Oxford University Press, 1985) at p 353; Peter Birks, “Personal Restitution in Equity” [1988] LMCLQ 128 at 134.

74 The case of *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2004] 1 BCLC 131 was cited for the proposition that a fiduciary is accountable for indirect profits: see
(cont’d on the next page)

fiduciary who has committed a deliberate cynical breach of fiduciary duty should be disallowed from arguing that secondary gains are too remote.⁷⁵ Or perhaps, in keeping with the broad prophylactic function of the no profit-rule, the remoteness rule should not apply regardless of the nature of the breach. Having said this, the well-established practice of awarding equitable allowance to honest fiduciaries for contributing their time, skill and effort towards making the gain could be understood as an application of the remoteness rule.⁷⁶

21 Turning to the requirement of causation, while it is only hinted at in some English cases,⁷⁷ it finds clear support from the Australian⁷⁸ and Hong Kong cases.⁷⁹ Causation and remoteness rules serve the same function: to limit legal responsibility. However, while the policy-driven remoteness rule could be abandoned if needed, there is arguably a minimum indispensable requirement of causation. This is because the only basis for imposing a duty to account is the link between the fiduciary's gain and his wrongdoing. Gains that are not attributable to his wrongdoing are not susceptible to disgorgement.⁸⁰ Although the courts have yet to clearly specify the relevant test to be applied, it has been suggested that the principal only needs to show that the

Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3rd Ed, 2015) at p 506. However, although there was an implicit suggestion to this effect, the judgment does not specify in any detail what exactly the fiduciary was accountable for. See also *Murad v Al-Saraj* [2011] EWCA Civ 959 at [85], where Arden LJ said that a personal account could lie for a profit that is “derivative, as where a trustee misappropriates trust property and then sells it and make a profit out of something else”.

- 75 James Edelman, *Gain-based Damages* (Hart Publishing, 2002) at pp 109–110; Rebecca Lee, “Causation and Account of Profits for Breach of Fiduciary Duty” [2006] Sing JLS 488 at 503. *Cf Warman International v Dwyer* (1995) 182 CLR 544, where the court could be understood as having applied the remoteness rule in limiting the principal's claim to profits made by the fiduciary in the first two years. See Charles Mitchell, “Causation, Remoteness, and Fiduciary Gains” (2006) 17 KCLJ 325 at 337–338.
- 76 Charles Mitchell, “Causation, Remoteness, and Fiduciary Gains” (2006) 17 KCLJ 325 at 336. An alternative view is that equitable allowance is awarded to prevent the principal's unjust enrichment at the fiduciary's expense. See Elise Bant & Michael Bryan, “A Model of Proprietary Restitution” in *Principles of Proprietary Remedies* (Elise Bant & Michael Bryan eds) (Lawbook Co, 2013) ch 12 at p 223.
- 77 See Charles Mitchell, “Causation, Remoteness, and Fiduciary Gains” (2006) 17 KCLJ 325.
- 78 *Maguire v Makaronis* (1997) 188 CLR 449 at 468; *Warman International v Dwyer* (1995) 182 CLR 544 at 565.
- 79 *Kao Lee & Yip v Koo Hoi Yan* [2003] 3 HKLRD 296 at 340.
- 80 Peter Devonshire, “Account of Profits for Breach of Fiduciary Duty” (2010) 32 Syd L Rev 389 at 395. *Cf* Lionel Smith, “Constructive Trusts and the No-profit Rule” (2013) 72 Camb LJ 260. For a brief comment of Smith's approach, see para 14 above. See also paras 41–46 below on the scope of the fiduciary's duty to account.

wrongdoing is a cause of the gain.⁸¹ Importantly, this is not a test of but-for causation. In *Murad v Al-Saraj*,⁸² the English Court of Appeal held that the errant fiduciary could not be heard to say that the gain (or some of it) would have been made even in the absence of his breach of fiduciary duty. Suffice to say that fiduciary law adopts a principal-friendly approach to causation. However, while it is usually easy to prove that a primary gain is in some way derived from the fiduciary's wrongdoing, there might be situations where it would be difficult to establish the same link with regard to secondary gains. Suppose a fiduciary received a bribe of \$100,000 and deposited it into his bank account already containing \$100,000 of his own. He subsequently withdrew \$100,000 for a risky investment, which made him a \$50,000 profit. Unbeknownst to others, the initial \$100,000 in his bank account was his life savings and he had a self-imposed policy of not touching it in any situation, let alone applying it towards a risky investment. The reality of the matter is that he was using the bribe money for the investment. With the lack of information about the fiduciary's state of mind, it is impossible to say with any certainty that the \$50,000 profit was derived from the bribe money. The fiduciary could have used his own money for the investment. Even the more lenient probabilistic approach to causation does not help, for it is difficult to prove that the fiduciary's wrongdoing has contributed in some material way to the secondary gain. If a constructive trust is imposed, there is a good chance of avoiding this problem altogether. The "cherry-picking" rule to tracing allows a beneficiary to locate his money in any part of the mixture.⁸³ The principal is allowed to claim, and the fiduciary is barred from denying, that it was the bribe money that was used for the successful investment. The basis of the rule is simply that it is fair to presume against the wrongdoer, who was in the first place responsible for mixing the funds and making identification of the trust money impossible.

22 Even leaving aside the topic of causation and remoteness, there is another aspect of the personal remedy of account which renders it incapable of full disgorgement. It fails to remove the primary gain *in specie*, thus giving the fiduciary the opportunity to generate secondary gains from it. The problem is most apparent where the unauthorised gain is in the form of a profit-making property (eg, real property or

81 Charles Mitchell, "Causation, Remoteness, and Fiduciary Gains" (2006) 17 KCLJ 325 at 332. For a probabilistic approach to causation, see Rebecca Lee, "Establishing Factual and Legal Causation in Fiduciary Liability to Account for Profits" (2006) HKLJ 444 and Rebecca Lee, "Causation and Account of Profits for Breach of Fiduciary Duty" [2006] Sing JLS 488.

82 [2005] EWCA Civ 959.

83 *Foskett v McKeown* [2001] 1 AC 102 at 132; *Shalson v Russo* [2005] Ch 281 at [144]. For a narrow formulation of the cherry-picking approach, see *Turner v Jacob* [2006] EWHC 1317 at [102].

shares) or has been invested in such property. If the fiduciary manages to find money to pay off the judgment debt without having to sell off the profit-making property, he could generate more profits from that property without having to account for them although, in principle, there should be no difference between secondary gains made before and after the date of judgment (or, for that matter, any cut-off date). Even if he has to borrow money to satisfy the judgment debt, he still stands to gain if the secondary gains that are generated equal or exceed the loan interest. This is quite likely if the profit-making property is land, considering the thriving rental market in Singapore and the possibility of mortgaging the property to obtain a lower interest rate. One must not also forget that real property prices are bound to increase in land-scarce Singapore, in the long term at least, thus giving the fiduciary the further option of selling the property for profit. It is obvious why the personal remedy of account is not accompanied by an additional order prohibiting the fiduciary from making a profit out of the primary gain. To require otherwise would unduly impede his freedom to deal with a property which the law recognises as belonging to him. Obviously this problem does not arise if a constructive trust is imposed, for the root of any secondary gain is removed altogether.

(3) *Reaching into the pocket of a third party*

23 It is no coincidence that many of the prominent cases in which a constructive trust was imposed (or sought) involved the errant fiduciary transferring the unauthorised gains to a third party, that is, a stranger to the trust/fiduciary relationship. A constructive trust is obviously advantageous to the principal in this situation. Having acquired a beneficial interest in the unauthorised gain, he could follow it (or its traceable proceeds) into the hands of the third party and claim it. Importantly, the beneficial interest is persistent. It survives the exchange of hands and could be defeated only by a *bona fide* purchase defence.⁸⁴ The availability of a constructive trust also simplifies the inquiry by dispensing with the need to investigate any wrongdoing on the part of the third party and avails the principal of favourable tracing rules where the unauthorised gain (or its traceable proceeds) is mixed with other property, as discussed earlier. Moreover, the ability to reach into the pocket of a third party is important where the errant fiduciary has absconded or is unable to pay, *eg*, because he has become insolvent.

84 *Sumitomo Bank Ltd v Thahir Kartika Ratna* [1992] 3 SLR(R) 638 at [191] and [243]; *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 at 330.

24 Of course, the mere fact that a remedy is advantageous to the principal is not by itself a good reason for awarding it. Here, however, the need for a persistent remedy is based on a real concern of errant fiduciaries attempting to hide or launder the unauthorised gain with the help of the third party. It is perhaps no coincidence that the third party is often a companion rather than a stranger. Thus, in *Reid*, Lord Templeman made the following observation:⁸⁵

[Mr Reid's] only purpose in opposing the relief sought by the Crown in New Zealand must reflect that the properties, in the absence of a caveat, can be sold and the proceeds whisked away to some Shangri La which hides bribes and other corrupt moneys in numbered bank accounts.

25 If the constructive trust is not available as a remedy, the main methods by which the principal could hope to recover from the third party is to show that: (a) the third party had dishonestly assisted the breach of fiduciary duty (dishonest assistance); or (b) the third party received the unauthorised gain (or its proceeds) with knowledge that it was traceable to a breach of fiduciary duty (knowing receipt).⁸⁶ Another possibility is a strict liability restitutionary claim based on title or unjust enrichment but this is limited to a situation where the fiduciary makes the gain by misappropriating the principal's property.⁸⁷ Thus it is helpful to focus our attention on claims for dishonest assistance and knowing receipt which are of general application in this context. Two important limitations to these two bases of liability will be examined in turn.

26 Firstly, some degree of fault is required on the part of the third party. Broadly stated, he must at least be shown to have had some knowledge of the irregular shortcoming of the transfer so as to render his assistance dishonest or his receipt unconscionable.⁸⁸ While in many cases the third party could be shown to be at fault, an appearance of innocence could be concocted with careful planning, *eg*, by coming up with a convincing explanation for the transfer. More importantly, the risk of money laundering should alone provide sufficient justification for disgorging the gain. Whether the third party is innocent or at fault is irrelevant. After all, he is not made worse off. He is only made to give up a windfall.

85 *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 at 339.

86 See Pauline Ridge, "Equitable Accessorial and Recipient Liability in Singapore" [2013] Sing JLS 361.

87 See *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548; *Fistar v Riverwood Legion and Community Club Ltd* [2016] NSWCA 81. For situations where such a claim could arise, see paras 41–46 below.

88 *George Raymond Zage III v Ho Chi Kwong* [2010] 2 SLR 589.

27 Secondly, the remedy for dishonest assistance and knowing receipt is generally understood to be personal in nature. The third party is merely required to pay to the principal the value of what he had received. He is not required to give up *in specie*. If the gain consists of a profit-making property, we again encounter the problem of incomplete disgorgement discussed earlier.⁸⁹ Interestingly, however, the question of whether a claim for dishonest assistance or knowing receipt gives rise to a proprietary remedy against the third party is not clearly settled under Singapore law. In *Thahir*, the High Court held, and the Court of Appeal agreed, that an alternative ground upon which a constructive trust could be imposed on Mrs Thahir was dishonest assistance.⁹⁰ The relevant part of the High Court's judgment reads:⁹¹

I would ground the imposition of a constructive trust on her on the basis of a series of decisions which adopted and extended the second limb of the principle of the well-known case of *Barnes v Addy* (1874) LR 9 Ch App 244 in which Lord Selborne held that a person who is not a fiduciary and who has not received trust property may nonetheless be fixed with liability for his unlawful gains or profits as a constructive trustee because of his assistance with sufficient knowledge in a fiduciary's breach of duty.

28 Properly understood, however, the term "constructive trustee" often appearing in the older English judgments⁹² was used merely to convey the replicative nature of the third party's liability: the third party is personally liable to compensate for loss or account for profits as though he was the trustee/fiduciary.⁹³ Recently, in *Williams v Central Bank of Nigeria*,⁹⁴ the UK Supreme Court confirmed that a claim for dishonest assistance or knowing receipt does not give rise to a true trust.⁹⁵ Despite *Thahir*, two recent local cases suggest that this is also the position in Singapore law. The first case is *Yong Kheng Leong v Panweld*

89 See para 22 above.

90 The judgments did not state in any detail how Mrs Thahir had dishonestly assisted General Thahir in his breach of fiduciary duty. In the circumstances it is perhaps easier to establish liability for knowing receipt.

91 *Sumitomo Bank Ltd v Thahir Kartika Ratna* [1992] 3 SLR(R) 638 at [244].

92 Including those cited by the High Court: *Barnes v Addy* (1874) LR 9 Ch App 224; *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555; *Karak Rubber Co Ltd v Burden (No 2)* [1972] 1 WLR 602; *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276.

93 See Charles Mitchell & Stephen Watterson, "Remedies for Knowing Receipt" in *Constructive and Resulting Trusts* (Charles Mitchell ed) (Hart Publishing, 2010) ch 4 and Steven Elliott & Charles Mitchell, "Remedies for Dishonest Assistance" (2004) 67 MLR 16.

94 [2014] AC 1189.

95 See also *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400 at 408–409; *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 at [142]; Lionel Smith, "Constructive Trusts and Constructive Trustees" (1999) 58 Camb LJ 294; and William Swadling, "The Fiction of the Constructive Trust" (2011) 64 CLP 399.

*Trading Pte Ltd*⁹⁶ where a company director, in breach of fiduciary duty, used the company's money to pay to his wife a salary although she was not an employee. The Court of Appeal held that the wife was accountable for the profits on grounds of knowing receipt and dishonest assistance. On the issue of limitation period, it was held that the usual six-year limitation period applied, thus implying that at no point did she hold the money on (constructive) trust for the company.⁹⁷ The second case is *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve*⁹⁸ ("*Anna Wee*") in which the Court of Appeal disapproved the High Court's decision in *Comboni Vincenzo v Shankar's Emporium (Pte) Ltd*⁹⁹ for conflating a knowing receipt claim and a claim for remedial constructive trust.¹⁰⁰ The Court of Appeal observed that it was perhaps due to terminological confusion that the High Court in that case failed to distinguish between a personal claim for knowing receipt and a claim for remedial constructive trust, which is proprietary in nature.¹⁰¹ Curiously, *Thahir* was not considered in both cases.

29 If knowing receipt and dishonest assistance only give rise to a personal remedy of account, as the recent cases suggest, then all the more, for reasons that were stated earlier, the constructive trust should be the preferred mode of disgorgement. While there are Australian authorities which suggest that claims for knowing receipt and dishonest assistance may give rise to a proprietary remedy, this is most likely in response to the less stringent form of constructive trust which Australian law adopts in respect of unauthorised fiduciary gains.¹⁰² Singapore law appears to adopt a strong form of constructive trust, thus rendering an alternative/additional proprietary remedy unnecessary. While this statement may seem circular, what it truly does is to reveal the variety of techniques that a jurisdiction may adopt to address the issue at hand. Importantly, this shall not distract us from the simple point, as the discussion in this part sought to illustrate, that the

96 [2013] 1 SLR 173.

97 *Yong Kheng Leong v Panweld Trading Pte Ltd* [2013] 1 SLR 173 at [83].

98 [2013] 3 SLR 801.

99 [2007] 2 SLR(R) 1020.

100 *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 at [138]. See also Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAclJ 136 at 138 and 145–146; Tang Hang Wu, "Equity and Trusts" (2007) 8 SAL Ann Rev 215 at 224, para 13.17; and Yeo Tiong Min, "Restitution" (2007) 8 SAL Ann Rev 364 at 379, para 20.49.

101 *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 at [138].

102 *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296. See also Pauline Ridge, "Constructive Trusts, Accessorial Liability and Judicial Discretion" in *Principles of Proprietary Remedies* (Elise Bant & Michael Bryan eds) (Thomson Reuters, 2013) ch 5 and Pauline Ridge, "Justifying the Remedies for Dishonest Assistance" (2008) 124 LQR 445 at 460–467.

imposition of a constructive trust is a more effective means of full disgorgement as compared to a personal remedy of account.

IV. Fine-tuning the constructive trust

30 If one is convinced that the constructive trust is a justified means of disgorging unauthorised fiduciary gains, our attention must shift to the fine-tuning of the constructive trust to allow for the proper balancing of interests. The following discussion proceeds in two parts. The first part examines the institutional/remedial constructive trust dichotomy with the aim of discovering the utility of the remedial constructive trust. The second part proposes a categorisation of the cases based on the strength of the principal's claim for the purposes of identifying situations where the institutional constructive trust ("ICT") should be imposed and situations where it should give way to the more flexible remedial constructive trust ("RCT").

A. *The institutional/remedial constructive trust dichotomy*

31 The most famous statement of the ICT/RCT dichotomy is to be found in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*¹⁰³ ("*Westdeutsche*"), where Lord Browne-Wilkinson said:¹⁰⁴

Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such trust having arisen (including the possibly unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion. A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court.

32 Although the ICT/RCT dichotomy has generated extensive debates, there is little consensus as to what the distinction truly entails.¹⁰⁵ In approaching this topic, it is important to first be reminded

103 [1996] AC 669.

104 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 714–715.

105 See, eg, Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAclJ 136 at 139–140 and Peter Birks, "Can Sense Be Made of the Remedial Constructive Trust?" (University of Western Australia Law School, 1999). See also *Muschinski v Dodds* (1985) 160 CLR 583 at 613–614.

of the risk of talking past each other without realising that the constructive trust is a creature of many heads.¹⁰⁶ A good example of a context-specific reference to the RCT could be found in the case of *Anna Wee*.¹⁰⁷ Although the case is arguably the most important local authority on the RCT, it offers little assistance to our present discussion. This is because the court was using the term RCT to denote a proprietary claim that may arise outside the presently recognised categories of cases giving rise to a constructive trust.¹⁰⁸ The court was exploring the outer boundaries of the constructive trust. In the context of unauthorised fiduciary gains, however, the availability of a constructive trust has been well settled since *Thahir*. Here the ICT/RCT dichotomy must be approached from a different direction.

33 In *Guy Neale* the Singapore Court of Appeal explicitly referred to the constructive trust imposed to disgorge unauthorised fiduciary gains as an ICT.¹⁰⁹ While the Court of Appeal was silent on what this characterisation entails, the High Court (Judith Prakash J) cited *Westdeutsche* and explained:¹¹⁰

The institutional constructive trust, in a sense, is similar to the express trust in terms of obligations and enforcement where the court's only role is to identify certain facts which have occurred in the past that give rise to the imposition of such a trust. It is essentially a property institution, capable of binding third parties, and it is not an equitable remedy imposed by the court.

This property-based description of the ICT is traceable to the earlier High Court case of *Low Heng Leon Andy v Low Kian Beng Lawrence*,¹¹¹ where Assistant Registrar Chan Wei Sern Paul said: "The court merely recognises that the beneficiary enjoys a pre-existing interest in the property."¹¹² The difficulty with a property-based description of the ICT is that it excludes cases where the unauthorised gain is not derived from the principal's property, eg, bribes and secret commissions. In such cases the principal does not have any pre-existing property right in the gain. Instead his claim is based on the assertion that he deserves to be awarded the gain. If the courts intend to characterise the constructive

106 See, eg, Gbolahan Elias, *Explaining Constructive Trusts* (Clarendon Press, 1990), who suggested that constructive trusts fulfil three distinct aims: perfection, restitution and reparation.

107 *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801.

108 The Court of Appeal said in *obiter* that to succeed in a claim for a remedial constructive trust the plaintiff must establish both unjust enrichment and fault. For a thorough and in-depth analysis of the case, see Man Yip, "Singapore's Remedial Constructive Trust: Lessons from Australia" (2014) 8 J Eq 1.

109 *Guy Neale v Nine Squares Pty Ltd* [2015] 1 SLR 1097 at [124].

110 *Guy Neale v Nine Squares Pty Ltd* [2013] SGHC 249 at [141].

111 [2011] SGHC 184.

112 *Low Heng Leon Andy v Low Kian Beng Lawrence* [2011] SGHC 184 at [54].

trust in all instances of unauthorised fiduciary gain as an ICT, as the Court of Appeal in *Guy Neale* appeared to have suggested, then it is necessary to abandon the property-based description in favour of a wider one.¹¹³ Having said this, the property-based description of the ICT resonates with the suggestion put forth in this article. As shall be explained later, the case for imposing an ICT is strongest where the unauthorised gain could properly be said to belong to the principal.¹¹⁴

34 As for the RCT, it is helpful to look to Australian law for hints. Among the jurisdictions which have recognised the constructive trust as a disgorgement remedy, Australian law is unique in that it explicitly favours the use of the RCT. The most significant aspect of the Australian RCT is that it is not available as of right.¹¹⁵ In *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd*,¹¹⁶ the High Court of Australia said: "A constructive trust ought not to be imposed if there are other orders capable of doing full justice."¹¹⁷ This was recently expanded upon by the Full Federal Court of Australia in *Grimaldi v Chameleon Mining NL (No 2)*:¹¹⁸

[T]o accept that money bribes can be captured by a constructive trust does not mean that they necessarily will be in all circumstances. As is well accepted, a constructive trust ought not to be imposed if there are other orders capable of doing full justice ... Such could be the case, for example, where a bribed fiduciary, having profitably invested the bribe, is then bankrupted and, apart from the investment, is hopelessly insolvent. In such a case a lien on that property may well be sufficient to achieve 'practical justice' in the circumstances. This said, a constructive trust is likely to be awarded as of course where the bribe still exists in its original, or in a traceable, form, and no third party issue arises.

113 The property-based description of the institutional constructive trust fits the facts of *Guy Neale v Nine Squares Pty Ltd* [2015] 1 SLR 1097. There the defendant derived his profits by awarding a licence in respect of a trademark belonging to the plaintiff. The defendant's profits were derived from the plaintiff's property.

114 See paras 41–46 below.

115 For the different ways in which the word "remedial" may be understood, see Elise Bant & Michael Bryan, "Constructive Trusts and Equitable Proprietary Relief: Rethinking the Essentials" (2011) 5 J Eq 171 at 185–192.

116 (2010) 241 CLR 1.

117 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [128]. See also *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at [42].

118 (2012) 200 FCR 296 at [583].

35 It is clear that the preference for the RCT in Australian law is motivated by the desire to protect innocent third parties. The ability to withhold the imposition of a constructive trust provides the courts with the required flexibility to properly balance the interests of the implicated parties. This feature of the RCT was earlier noted by Lord Browne-Wilkinson in *Westdeutsche*:¹¹⁹

Since the remedy can be tailored to the circumstances of the particular case, innocent third parties would not be prejudiced and restitutionary defences, such as change of position, are capable of being given effect.

Thus, the RCT is perhaps best described by reference to its flexibility rather than the discretionary nature of its availability.

36 Returning to the ICT/RCT dichotomy, it is obvious that the ICT is more advantageous from the principal's perspective. The ICT is available as of right. Once the fiduciary is proven to have made a secret profit, the court must declare that the secret profit is held on a constructive trust for the principal from the time of its receipt.¹²⁰ The only third party interest that is capable of defeating the principal's claim is that of a *bona fide* purchaser for value. On the other hand, the court may withhold the imposition of a RCT to protect a wider range of third party interests. A possible way of conceptualising this distinction is that the ICT confers a "strong" beneficial interest (approximating a beneficial interest arising under an express trust) while the RCT confers a "weak" beneficial interest. The strong beneficial interest is defeasible only by a *bona fide* purchase defence while the weak beneficial interest is defeasible by a wider range of third party interests. Admittedly this is not how the RCT is traditionally understood. It is more common to say that the courts *withhold* the proprietary remedy if it would be prejudicial to the interests of innocent third parties. Since a constructive trust is not even imposed in the first place, there is no beneficial interest to speak of. There are two problems with this way of understanding the RCT. First, it creates a curious bifurcation between the *bona fide* purchase defence and the other third party defences. While the other defences prevent a constructive trust from arising, the *bona fide* purchase defence does not – it merely defeats the beneficial interest that arose from the constructive trust. Second, it is unable to properly explain a situation where a defence applies only to one or some parts of the unauthorised gain. Take a simple example. A fiduciary received a bribe of \$100,000. He deposited \$50,000 in his bank account and gave

119 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 716.

120 Of course, a constructive trust would be unavailable if the secret profit (or its traceable proceeds) has been dissipated or where it has landed in the hands of a *bona fide* purchaser for value.

the other \$50,000 to his wife. By the time the principal commences proceedings to recover the bribe money the fiduciary had become insolvent. Let us assume for the moment that a court adopting the RCT approach decides to withhold the imposition of a constructive trust over the \$50,000 in the fiduciary's bank account to protect the interest of his unsecured creditors. So the court holds that only the \$50,000 with the fiduciary's wife is impressed with a constructive trust because she was merely a donee. While this may seem straightforward, it sidesteps the question of whether the initial \$100,000 was held on a constructive trust upon its receipt by the fiduciary.¹²¹ One may insist that the ability to follow the \$50,000 into the wife's hands depended on the initial \$100,000 being impressed with a constructive trust. But this would contradict the view that the \$50,000 in the agent's bank account was never impressed with a trust. The explanation offered in this article is simple. The principal acquires a weak beneficial interest in the original \$100,000 by way of a RCT. This allows him to follow the \$50,000 given to the fiduciary's wife. His beneficial interest in this \$50,000 remains intact because the fiduciary's wife could not raise a recognised defence. However, his beneficial interest in the other \$50,000 was defeated by the legitimate interest of the unsecured creditors. While it is indeed unconventional to speak of strong and weak forms of beneficial interest, one should not be overly surprised considering that equity has traditionally recognised a wide variety of interests in property.¹²² Finally, it is important to add that the weak beneficial interest conferred by a RCT is not necessarily confined to a single type. Depending on the nature of the principal's claim, the strength of the beneficial interest may vary.¹²³

37 Having identified the distinction between the ICT and the RCT, the discussions in the next section will focus on the following questions. First, are there situations where it is more appropriate to impose a RCT instead of an ICT? Second, in cases where the imposition of a RCT is more appropriate, what are the third party interests capable of defeating the principal's claim?

B. Categorising unauthorised fiduciary gains

38 The prevailing approach to proprietary disgorgement assumes that all cases of unauthorised fiduciary gain should be treated alike. In *FHR* the UK Supreme Court preferred a simpler approach to avoid

121 There may be differing tax implications depending on the answer.

122 Even the strongest form of beneficial interest recognised by equity could be seen as a weaker form of property right. With a few exceptions the common law property right survives a *bona fide* purchase.

123 Compare paras 47–53 below.

having to make difficult distinctions.¹²⁴ However, this necessarily sacrifices the flexibility needed for the proper balancing of interests. Australian law is better in this regard as it recognises both the ICT and the RCT but its strong bias towards the RCT gives the impression of uncertainty.¹²⁵ Having recently recognised the RCT, Singapore law now shares the same regime as Australian law. Yet on this topic it is closer to English law than Australian law. This is most likely because the practicality of the RCT has yet to be fully appreciated.

39 This article proposes a principled approach to identifying whether the ICT or the RCT should be imposed in any given situation. For this purpose it is necessary to divide the cases on unauthorised fiduciary gain into four broad categories in order of the strength of the principal's interest:

Category 1: gains derived from misappropriation of the principal's property;

Category 2: gains the fiduciary is obliged to acquire and hold on trust for the principal;

Category 3: gains acquired at the principal's expense; and

Category 4: other cases.

In brief, categories 1 and 2 demand the imposition of an ICT for the protection of the principal's pre-existing property right. The imposition of a RCT in categories 3 and 4 is justified due to the absence of such concern. However, as a close analogy could be drawn between category 3 and the law of unjust enrichment, the principal's claim is a relatively strong one, defeasible only by recognised restitutionary defences. The principal's claim in category 4 is the weakest and may be defeated by a wider range of third party interests.

40 The proposed categorisation draws inspiration from previous categorisation attempts¹²⁶ and comes very close to the model proposed

124 *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250 at [35], rejecting the categorisations proposed in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] 3 WLR 1153; Sarah Worthington, "Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae" (2013) 72 Camb LJ 720; Roy Goode, "Proprietary Restitutionary Claims" in *Restitution: Past, Present & Future* (William R Cornish *et al* eds) (Hart Publishing, 1998) ch 5.

125 However, the proposal in this article finds some hint in *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [668]–[670] and [698]–[700].

126 Learning from past experience, the boundaries of each category are carefully drawn in bright lines. For a critique of the categorisation proposed in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] 3 WLR 1153, see *FHR European Ventures LLP v Mankarious* [2014] Ch 1 at [116], *per* Etherton C, and Sarah

by Bant and Bryan in two excellent book chapters.¹²⁷ However, there is at least one notable difference relating to the interaction between the RCT and the intervening third party interests in category 4. While Bant and Bryan see the third party interests as discretionary factors that may influence a court to withhold the imposition of a RCT, this article prefers to see them as defences capable of defeating the principal's vested beneficial interest acquired under a RCT. Whether this latter approach is truly better requires further examination but a possible advantage has been explained earlier.¹²⁸ It suffices to say that there is much room for cross-fertilisation between Australian law and Singapore law on this topic. As for the pre-*FHR* categorisation attempts by English scholars, they may be helpfully referred to but with one important caution. Those attempts were undertaken with a different goal in mind: to identify situations where a constructive trust should arise.¹²⁹ In contrast, our starting point is that a constructive trust is available as a disgorgement remedy in all cases of unauthorised fiduciary gain. The discussion above has demonstrated why this position is warranted.¹³⁰ The proposed categorisation serves only to identify situations where the ICT should give way to the RCT. While the lines may be drawn at different places, in most cases the results are more likely to be similar than different.

(1) *Gains derived from misappropriation of the principal's property*

41 Where a trustee makes a secret profit by misappropriating trust property, the beneficiary may adopt the unauthorised transaction and claim the profit for himself.¹³¹ The same rule applies where a non-trustee fiduciary acquires an unauthorised gain by using the property of his principal.¹³² Suppose a company director lets out the company's freehold property and receives the rental income for himself. Although it is generally agreed that he must hold the rental income on trust for the

Worthington, "Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae" (2013) 72 Camb LJ 720 at 727–729.

127 See *Principles of Proprietary Remedies* (Elise Bant & Michael Bryan eds) (Lawbook Co, 2013) chs 11 ("Defences, Bars and Discretionary Factors") and 12 ("A Model of Proprietary Restitution"). See also Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 3rd Ed, 2015) at pp 513–514.

128 See para 36 above.

129 Sarah Worthington, "Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae" (2013) 72 Camb LJ 720; Roy Goode, "Proprietary Restitutionary Claims" in *Restitution: Past, Present & Future* (William R Cornish *et al* eds) (Hart Publishing, 1998) ch 5.

130 See paras 16–29 above.

131 In *Wright v Morgan* [1926] AC 788 at 799, the Privy Council said:

[I]f a trustee has made an improper investment, the law is well settled. The *cestuis que trustent* as a whole have a right, if they chose, to adopt the investment and to hold it as trust property.

132 Sarah Worthington, "Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae" (2013) 72 Camb LJ 720 at 739 and 743–744.

company, precisely why he must do so is not often explained. It is of course convenient to say that the rental income belongs to the company because it is the fruits of its property (that is, the freehold property). As a matter of fact, however, the rental income was received from an outside source (the tenant). How do we distinguish this case from the case of a bribe? A possible explanation is that a trust arises from the director's intention to hold the rental income for the company.¹³³ Such an intention may be stated in the director's contract of appointment or simply implied as an ordinary incidence of fiduciary undertaking. The fact that the director intends to take the rental income for himself is irrelevant. Focusing solely on this original intention, equity regards as done that which ought to be done. Once the director receives the rental income, he immediately holds it on trust for the company.

42 The trust in this case is in essence an express trust but occasionally it disguises itself as a constructive trust. Whatever one decides to call it, it is clear that the company has a pre-existing beneficial interest in the rental income. If one insists on using the language of constructive trust, there is no doubt that we are here concerned with an ICT. This way of characterising the principal's claim has an important implication. As it is premised on the assertion that the gain *is his* rather than it *should be his*, the case falls squarely within the sphere of property law. In *Foskett*, Lord Millett said:¹³⁴

Property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend upon ideas of what is 'fair, just and reasonable'. Such concepts, which in reality mask decisions of legal policy, have no place in the law of property.

The principal's beneficial interest is of the strongest kind that equity has to offer. It is defeasible only by a *bona fide* purchase defence.¹³⁵

43 In deciding what other types of cases fall within category 1, it is important to keep an eye on the evolving notion of property. In *Boardman*, for example, the five members of the House of Lords were divided in their opinions as to whether information obtained by

133 See David Hayton, Paul Mitchell & Charles Mitchell, *Underhill and Hayton: Law of Trusts and Trustees* (LexisNexis, 8th Ed, 2010) at p 1155.

134 *Foskett v McKeown* [2001] 1 AC 102 at 127.

135 The change of position defence does not apply because it would undermine the law's protection of the principal's property right. See *Foskett v McKeown* [2001] 1 AC 102 at 127 and *Armstrong GmbH v Winnington Networks Ltd* [2013] Ch 156 at [103]. See also Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009) at pp 170–172. The case of *Re Diplock* [1948] Ch 465, which hinted that following and tracing are subject to a limitation akin to the change of position defence, is best understood as concerning a claim in unjust enrichment. The case belongs to category 3.

Boardman in his position as a fiduciary could be regarded as the principal's property.¹³⁶ By a 3:2 majority the bench decided that it was not. If only one more judge decided that it was, this case would have fallen squarely within the present category, fully warranting the imposition of an ICT. It would be interesting to speculate how this aspect of the case would have been decided if it were to arise today. Admittedly information is not presently protected through property torts.¹³⁷ But equity has traditionally been more inclusive in terms of what may constitute trust property.¹³⁸

(2) *Gains the fiduciary is obliged to acquire for the principal*

44 Where a fiduciary makes a secret profit by exploiting an opportunity which he ought to have pursued for the principal, does the fiduciary hold the gain on trust for the principal as a matter of primary duty? In cases where the fiduciary is a trustee or employee, such a duty could fairly be implied.¹³⁹ Even if the fiduciary is merely under a contractual duty to acquire and convey a thing to the principal, one may argue that the duty could be converted into a trust duty by invoking the maxim "equity regards as done that which ought to be done". This is arguably an appropriate situation for applying the *Reid* approach.¹⁴⁰ As in the case of category 1, here the principal's claim is premised on the assertion that the gain *is his* rather than it *should be his*. Therefore, he acquires, by way of an express trust or an ICT, a beneficial interest which is defeasible only by a *bona fide* purchase defence.¹⁴¹

45 Where the relationship of the parties is more commercial in character, the court should be slow in implying a trust obligation. In *Hinckley Singapore Trading Pte Ltd v Sogo Departmental Stores (S) Pte Ltd*,¹⁴² where goods belonging to Hinckley were sold at Sogo's departmental store under a concessionaire agreement, the Singapore Court of Appeal held that the business arrangement militated against

136 [1967] 2 AC 46.

137 See Michael Bridge *et al*, *The Law of Personal Property* (Sweet & Maxwell, 2013) at para 25-044 and Sarah Green & John Randall, *The Tort of Conversion* (Hart Publishing, 2009) at pp 141–142.

138 However, in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, the High Court of Australia held that information was not property for the purposes of a knowing receipt claim.

139 See, *eg*, *Keech v Sandford* (1726) Sel Cas Ch 61; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; and *Cook v Deeks* [1916] 1 AC 554.

140 See paras 13 and 14 above. This reminds of Milsom's famous observation: "[E]quity has proved that from the materials of obligation you can counterfeit almost all the phenomena of property" (Stroud F C Milsom, *Historical Foundations of the Common Law* (Butterworths, 1969) at p xi).

141 See para 42 above.

142 [2001] 3 SLR(R) 119.

any inference of trust especially considering the absence of any express duty on Sogo's part to segregate the sale proceeds. Let us suppose that Sogo manages to sell the goods for more than the recommended retail price and plans to keep the extra profit for itself without Hinckley's knowledge. Sogo, being an agent of Hinckley, is obviously in breach of a fiduciary duty, specifically the no-profit rule. However, since Sogo was under no duty to hold the sale proceeds on trust for Hinckley, the same conclusion must follow in respect of the secret profit. In this case a constructive trust is still imposed, not because there is a proprietary base, but for reasons identified earlier.¹⁴³ This case belongs to category 4.

46 It is interesting to compare the scope of our category 2 with that of the equivalent categories proposed by Goode and Worthington.¹⁴⁴ Goode confined his category to:¹⁴⁵

... gains which [the fiduciary] receives through improperly engaging in dealings on his own account which, if he entered into them at all, should have been engaged in for the benefit of [the principal].

Although this comes very close to our category 2, Goode suggested that a RCT is a more appropriate remedy for such a case because he saw it as concerning a gain being diverted from the principal rather than being subtracted from the principal's asset.¹⁴⁶ This article, however, views the gain as belonging to the principal; therefore, the imposition of an ICT is more appropriate. Worthington's category 2 is similar, catching "gains derived from opportunities which are within the scope of the fiduciary's field of endeavour on the principal's behalf".¹⁴⁷ Although she relies on the same equitable maxim,¹⁴⁸ she included in this category some unexpected cases: *Boardman* and *Lister*.¹⁴⁹ However, it is doubtful that the solicitor in *Boardman* owed any duty to pursue the investment for the principal let alone to hold it on trust for the principal. As for *Lister*, the agent was under no duty to accept and hold the bribe on trust for the principal. In the absence of such duty, the maxim "equity regards as

143 See paras 11–29 above.

144 Sarah Worthington, "Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae" (2013) 72 Camb LJ 720 at 745–746.

145 Roy Goode, "Proprietary Restitutionary Claims" in *Restitution: Past, Present & Future* (William R Cornish *et al* eds) (Hart Publishing, 1998) ch 5 at p 73.

146 Roy Goode, "Proprietary Restitutionary Claims" in *Restitution: Past, Present & Future* (William R Cornish *et al* eds) (Hart Publishing, 1998) ch 5 at p 74.

147 Sarah Worthington, "Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae" (2013) 72 Camb LJ 720 at 730.

148 Sarah Worthington, "Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae" (2013) 72 Camb LJ 720 at 740.

149 Sarah Worthington, "Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae" (2013) 72 Camb LJ 720 at 745–746.

done that which ought to be done” is not engaged.¹⁵⁰ While it is true that the agent was under a duty to negotiate the purchase of the dyestuff at the best possible price for the principal, it is not immediately clear how this translates into the agent having to hold the bribe on trust for the principal.¹⁵¹ As indicated earlier, the mere fact that the gain was acquired using an opportunity of the principal is insufficient, especially considering that there is no consensus on whether opportunity could constitute property.¹⁵² Having said this, it is important to be reminded of the different goals of the various categorisation attempts. While Worthington was eager to justify proprietary disgorgement in *Boardman and Lister*, our starting point is that the constructive trust is available as a disgorgement remedy in all cases of unauthorised fiduciary gain. Thus, Worthington’s motive for formulating a broad category 2 is not shared here.

(3) *Gains obtained at the principal’s expense*

47 Most cases involving bribes and secret commissions share a standard fact pattern. The fiduciary enters into a contract on the principal’s behalf. It transpires that the fiduciary received a bribe or secret commission from the other contracting party. In such a case it is almost always fair to infer that the contract price was artificially increased to fund the payment of the bribe or secret commission. For example, in *Thahir*, the evidence shows that Klockner and Siemens had consistently paid General Thahir a fixed percentage of the payments received from

150 Cf David Hayton, Paul Mitchell & Charles Mitchell, *Underhill and Hayton: Law of Trusts and Trustees* (LexisNexis, 8th Ed, 2010) at p 1156, which appears to suggest that such a duty exists because the fiduciary agreed to act exclusively in the principal’s best interests.

151 For the avoidance of doubt, Worthington did not argue that the agent was under a duty to obtain the bribe for the principal. Her reason for including *Lister & Co v Stubbs* (1890) 45 Ch D 1 is as follows:

It is because the essence of the fiduciary endeavour was one that required the fiduciary to negotiate the purchase of dyestuffs at the best possible price for the principal. The fiduciary’s receipt of a bribe from the seller is proof positive that the seller was willing to receive less for the sale than the price charged to the principal. The fiduciary has therefore taken for his own account an opportunity which it was his duty to pursue for his principal.

See Sarah Worthington, “Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae” (2013) 72 Camb LJ 720 at 746.

152 There are two conflicting English authorities on this matter. In *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] 3 WLR 1153 at [88]–[89] the Court of Appeal seemingly took the view that a principal could beneficially own an opportunity. However, in *FHR European Ventures LLP v Mankarious* [2013] 3 WLR 466 at [57]–[58] a differently constituted Court of Appeal opined that opportunity is not property. For the view that opportunity is not property, see also Peter Millett, “Bribes and Secret Commissions Again” (2012) 71 Camb LJ 583 at 602.

Pertamina.¹⁵³ More rarely, as in the English case of *Daraydan Holdings Ltd v Solland International Ltd*¹⁵⁴ (“*Daraydan*”), there was evidence to show that the bribe was actually paid out of the money advanced by the principal. The legal significance of this fact pattern was recently considered by the UK Supreme Court in *FHR*. There the agent negotiated on its principal’s behalf for the purchase of certain shares for €211.5m. Unknown to the principal the agent had earlier entered into an agreement with the vendor, pursuant to which the agent was paid a fee of €10m for the successful sale. The UK Supreme Court made the following observation:¹⁵⁵

[I]n terms of elementary economics, there must be a strong possibility that the bribe has disadvantaged the principal. Take the facts of this case: if the vendor was prepared to sell for €211.5m, on the basis that it was paying a secret commission of €10m, it must be quite likely that, in the absence of such commission, the vendor would have been prepared to sell for less than €211.5m, possibly €201.5m.

The Supreme Court explained that since the secret commission is likely to have reduced the benefit which the principal would have obtained from the transaction, the secret commission “can fairly be said to be [its] property”.¹⁵⁶ Importantly, for this reason, the court said that this was an unsuitable case for taking into account the interests of the agent’s unsecured creditors in the event of insolvency.¹⁵⁷

48 Interestingly, the Supreme Court’s reference to property was somewhat vague and lacked emphasis in the judgment. In contrast, in *Daraydan*, the English High Court went as far as to say that the fact pattern makes it a case “where there is a proprietary basis for the claim and where the bribe derives directly from the claimants’ property”.¹⁵⁸ In other words, a case of this kind belongs to category 1. This is arguably incorrect. In *FHR*, the Court of Appeal explained that title to the money had properly passed to the vendor under the contract.¹⁵⁹ The vendor is then free to pass good title to the agent. Unless the contract is in some way vitiated, the principal does not retain any beneficial interest in the money. This is unlike the case of stolen money where title does remain with the owner.¹⁶⁰

153 *Sumitomo Bank Ltd v Thahir Kartika Ratna* [1992] 3 SLR(R) 638 at [100]–[101].

154 [2005] Ch 119.

155 *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250 at [37].

156 *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250 at [43].

157 *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250 at [43].

158 *Daraydan Holdings Ltd v Solland International Ltd* [2005] Ch 119 at [87].

159 *FHR European Ventures LLP v Mankarious* [2013] 3 WLR 466 at [30]–[33], *per* Lewison LJ, and [67], *per* Pill LJ.

160 For the view that the imposition of an institutional constructive trust is appropriate in this case, see *Black & Black v S Freedman & Co* (1910) 12 CLR 105; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996]

(*cont’d on the next page*)

49 Here the essence of the principal's claim is not that the bribe or secret commission belongs to him but instead that it should be given back to him.¹⁶¹ It is obvious that category 3 aligns closely with the law of unjust enrichment. In both cases the defendant acquires a gain at the plaintiff's expense. There is a transfer of value from the principal to the agent. In such a case the constructive trust performs two overlapping functions: disgorgement and restitution. The restitutionary aspect of the case engages the principle of corrective justice in support of a strong(er) proprietary remedy.¹⁶² In contrast, where the fiduciary acquires an unauthorised gain without causing a loss to the principal, the only function of the constructive trust is disgorgement. A case that comes to mind is *Boardman*. The principal's claim is noticeably weaker as it falls outside the restitutionary sphere. It belongs to category 4.

50 Having said the above, to search for an answer in the law of unjust enrichment may prove to be more frustrating than illuminating as there is yet to be any consensus as to when proprietary restitution should be ordered. But if we must proceed in this direction, then it is convenient to focus on the core case of unjust enrichment: a mistaken payment. The legal position appears to be that a constructive trust arises when the recipient comes to know about the mistake.¹⁶³ In *Ching Mun Fong* and *Anna Wee* the Singapore Court of Appeal characterised the constructive trust as a RCT. However, although Lord Browne-Wilkinson's definition of "RCT" in *Westdeutsche* was cited with approval, the discretionary nature of the RCT was not emphasised. It is not immediately clear that the Court of Appeal intended the term "RCT" to connote a weaker form of proprietary restitution/disgorgement in the sense used in this article. Instead, the court was pre-occupied with determining when, beyond the presently recognised cases, a constructive trust would arise. Interestingly, in the Australian case of *Wambo Coal*

AC 669 at 715–716, *per* Lord Browne-Wilkinson; *Robb Evans of Robb Evans & Associates v European Bank Ltd* [2004] NSWCA 82 at [115]; and *Shiu Shing Sze Tu v Lowe* [2014] NSWCA 462 at [147]. See also Michael Bryan, "What Exactly is a Remedial Constructive Trust?" paper presented at University of Queensland TC Beirne School of Law Current Legal Issues Seminar Series, Brisbane (25 July 2013) at pp 23–25.

161 *Cf* Robert Chambers, "Constructive Trusts and Breach of Fiduciary Duty" [2013] Conv 241 and Lionel Smith, "Constructive Trusts and the No-profit Rule" (2013) 72 Camb LJ 260.

162 *Cf* Matthew Harding, "Constructive Trusts and Corrective Justice" in *Principles of Proprietary Remedies* (Elise Bant & Michael Bryan eds) (Lawbook Co, 2013) ch 2 at pp 21–22.

163 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 714–715 (re-interpreting *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105); *Wambo Coal Pty Ltd v Ariff* [2007] NSWSC 589; *Ching Mun Fong v Liu Cho Chit* [2001] 1 SLR(R) 856 at [33]–[37]; *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 at [171] and [182].

Pty Ltd v Ariff,¹⁶⁴ the New South Wales Supreme Court declared that the constructive trust that arises in the case of a mistaken payment “is as much an institutional trust as a trust imposed on property in the hands of the thief”.¹⁶⁵ The significance of this characterisation is explained by Bryan:¹⁶⁶

The purpose of the constructive trust is to protect title to property which has been lost by reason of the defective transfer. The law’s conception of equitable title is not malleable. It should not be distorted by reference to factors, such as the solvency of the payee, that are not material to equity’s purpose in recognising and enforcing that title.

The reason why category 3 leans closer to the ICT is because the principle of corrective justice is engaged. It is in this broad sense that category 3 aligns with categories 1 and 2.

51 However, unlike in categories 1 and 2, here the constructive trust does not confer on the principal the strongest form of beneficial interest that equity has to offer. Due to the restitutionary aspect of the case, it is likely to attract the application of the change of position defence.¹⁶⁷ As the principal’s claim does not rely on a proprietary base, any fear that the defence would stultify the law’s protection of property right is unfounded.¹⁶⁸ There should also be no objection that this is a case of restitution for wrong, not restitution of unjust enrichment.¹⁶⁹

164 [2007] NSWSC 589.

165 *Wambo Coal Pty Ltd v Ariff* [2007] NSWSC 589 at [42], *per* White J, cited with approval in *Riverwood Legion & Community Club Ltd v Repaja & Co Pty Ltd* [2015] NSWSC 383 at [11].

166 Michael Bryan, “What Exactly Is a Remedial Constructive Trust?” paper presented at University of Queensland TC Beirne School of Law Current Legal Issues Seminar Series, Brisbane (25 July 2013) at pp 25–26. For avoidance of doubt, Bryan’s statement was made on the assumption that the law does impose a constructive trust in favour of the mistaken payer. In a book chapter co-written with Bant, they were of the view that proprietary restitution is warranted only “where the defendant has received an asset directly from the plaintiff’s own assets”: Elise Bant & Michael Bryan, “A Model of Proprietary Restitution” in *Principles of Proprietary Remedies* (Elise Bant & Michael Bryan eds) (Lawbook Co, 2013) ch 12 at p 217. A good example of a case falling within this description is *Daraydan Holdings Ltd v Solland International Ltd* [2005] Ch 119.

167 On the change of position generally, see Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009); Tang Hang Wu, “Taking Stock of the Change of Position Defence” (2015) 27 SAclJ 148; Graham Virgo, “Change of Position: The Importance of Being Principled” [2005] RLR 34; James Edelman, “Change of Position: A Defence of Unjust Disenrichment” [2012] 92 BU L Rev 1009; and Charles Mitchell, “Change of Position: The Developing Law” [2005] LMCLQ 168.

168 See paras 48 and 49 above. See also Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) at p 547; David Fox, “Legal Title As a Ground of Restitutionary Liability” [2000] RLR 465 at 488. *Cf* Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009) at p 208.

169 *Cf Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 580.

Recently in *Cavenagh Investment Pte Ltd v Kaushik Rajiv*¹⁷⁰ the Singapore High Court decided that the defence is applicable in cases of restitution for wrongs provided that the defendant has acted in good faith.¹⁷¹ However, the overriding concern about deterring fiduciary disloyalty may be a good reason for denying such a defence from a fiduciary even if he has acted in good faith.¹⁷² This article goes as far as to suggest that due to the concerns raised earlier¹⁷³ it may even be appropriate to deny the defence from persons closely related to the fiduciary, especially his immediate family members. However, the defence ought to be available, as a matter of both principle and policy, to other innocent third parties who are unwittingly implicated in the dispute. Take a simple example: a fiduciary donates \$5,000 of bribe money to an orphanage. Relying on its new financial security, the charity spends \$5,000 from a different bank account to throw a children's party. It would not have done so but for the additional income. To order the return of the \$5,000 would make the charity financially worse off. It is only fair that the charity is allowed to rely on the defence to defeat the principal's claim. In order to allow for the application of the change of position defence in category 3, the RCT is the more appropriate remedy.

(4) *Other cases*

52 Two well-known cases belong to this category: *Boardman and Reid*. In both cases the secret profit does not belong to the principal; neither was it acquired at its expense. Admittedly, the principal's claim in *Reid* appears stronger. The Government of Hong Kong did suffer a real albeit unquantifiable loss. The justice system was brought into disrepute. Moreover, the case concerns bribery, which raises public policy concerns.¹⁷⁴ However, while these two factors underscore the seriousness of the fiduciary's breach, they do not warrant the elevation of *Reid* into a category that demands a stronger form of disgorgement. Although in a broad sense Reid was enriched at the expense of the Government of Hong Kong, the case lacked the restitutionary element found in category 3. Restitution concerns the reversal of a subtraction from the principal's asset. The purpose is to reverse the transaction and

170 [2013] 2 SLR 543.

171 *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543 at [58]–[65], per Chan J, noted in Rachel Leow, “Change of Position in Restitution for Wrongs: A View from Singapore” (2014) 130 LQR 18. The High Court approved the position advanced in Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009).

172 Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009) at pp 170–171.

173 See paras 23–29 above.

174 *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 at 330: “Bribery is an evil practice which threatens the foundations of any civilised society.” See also *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250 at [42].

place the principal in his original position. In *Reid*, recovery of the bribe does nothing to undo the injury. This is a case of pure disgorgement. As for the need to signal strong disapproval of corrupt practices, this is perhaps better achieved through stringent anti-corruption legislations.¹⁷⁵ It is also interesting to note that in *Grimaldi* the Full Federal Court of Australia opined that the seriousness of bribery and the need for deterrence warrant “the full range of equity’s remedies and techniques”¹⁷⁶ but qualified the statement by stating its preference for a RCT to allow the interests of innocent third parties to be taken into account.¹⁷⁷

53 In category 4 the principal’s beneficial interest may be limited or defeated not only by the established defences identified earlier¹⁷⁸ but also possibly by other third party interests.¹⁷⁹ This is an important characteristic of the Australian RCT. In *Grimaldi* the principal claimed a share in a mining tenement by way of a constructive trust. The Full Federal Court of Australia refused to impose a RCT because it was inappropriate in the circumstances. To do so would prejudice the interest of investors who contributed significantly to the successful exploitation of the mining tenement.¹⁸⁰ Moreover, if the principal were to become a co-owner of the mining tenement, it would cause potential dispute, disruption and destabilisation to the established mining operation.¹⁸¹ Consider also a different example: a matrimonial home is co-purchased and financed by a fiduciary using bribe money and the fiduciary’s wife using her life savings. Let us assume that the fiduciary’s wife has no knowledge of the bribe. If an ICT were to be imposed, allowing the principal a proportionate share in the property, it is quite likely that the principal would seek a court order for the house to be sold, thus resulting in the fiduciary’s wife losing her home. The innocent wife is an obvious candidate for attracting the law’s protection against the principal’s proprietary claim. It is obvious that the flexibility

175 Prevention of Corruption Act (Cap 241, 1993 Rev Ed); Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed).

176 *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [576].

177 *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [583].

178 The *bona fide* purchase defence and the change of position defence. The latter defence should perhaps be unavailable to persons closely related to the principal. See para 51 above.

179 See Elise Bant & Michael Bryan, “Defences, Bars and Discretionary Factors” in *Principles of Proprietary Remedies* (Elise Bant & Michael Bryan eds) (Lawbook Co, 2013) ch 11; Katy Barnett, “Distributive Justice and Proprietary Remedies over Bribes” (2015) 35 *Legal Stud* 302; and Joe C Campbell, “When and Why a Bribe Is Held on a Constructive Trust: The Method of Reasoning Towards an Equitable Remedy” (2015) 39 *Aust Bar Rev* 320 at 336–341.

180 *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [677].

181 *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [679].

of the RCT comes in handy when dealing with such situations. The downside is the resulting uncertainty. The open-ended list of legitimate third party interests may not find favour with jurisdictions that place strong emphasis on legal certainty. A possible solution would be to identify more concrete factors that would better guide the exercise of discretion. Some examples are disproportionality, hardship and clean break considerations, which clearly explain why the principal's proprietary claim in the previous two examples ought not to succeed. Once the core case for each factor is identified, the list could be gradually expanded by analogy.

(5) *Insolvency consideration*

54 A commonly encountered argument against the imposition of a constructive trust is that it would prejudice the fiduciary's unsecured creditors in the event of his insolvency. The constructive trust removes the claimed property from the asset pool from which the unsecured creditors are paid, thus causing them to shoulder a greater loss. While this is simply another way of saying that on grounds of fairness and equality the interest of the unsecured creditors should be recognised as a legitimate third party interest capable of defeating the principal's proprietary claim, and is thus simply a continuation of the earlier discussion, the insolvency argument is briefly discussed in a section of its own because it would be helpful in re-emphasising the utility of the categorisation proposed in this article.

55 To be sure, the allegation of unfairness does not apply to categories 1 and 2 because the principal is a true beneficiary of the gain. The same cannot be said of a principal in category 3. The essence of his claim is not that the gain belongs to him but rather that he deserves to get it by virtue of the principle of corrective justice. For this reason the preferential treatment of an unjust enrichment claimant to the prejudice of other unsecured creditors is often questioned. An analogy is often drawn with the unpaid seller of goods, who equally suffers a subtraction from his asset but is not afforded the same preferential treatment. A standard response is that while the unpaid seller could have bargained for a security but did not, an unjust enrichment claimant could not have done. The latter is an involuntary creditor. Although the arguments for and against the imposition of a constructive trust in the event of the fiduciary's insolvency appear to be finely balanced,¹⁸² the pro-proprietary

182 See generally Vanessa Finch & Sarah Worthington, "The *Pari Passu* Principle and Ranking Restitutionary Rights" in *Restitution and Insolvency* (Francis Rose ed) (Mansfield Press, 2000) ch 1 at pp 14–19; William Swadling, "Policy Arguments for Proprietary Restitution" (2008) 28 *Legal Stud* 506; and Roy Goode, "Proprietary Restitutionary Claims" in *Restitution: Past, Present & Future* (William R Cornish *et al* eds) (Hart Publishing, 1998) ch 5.

remedy camp has the support of judicial authorities.¹⁸³ It is beyond the scope of this article to identify the right answer to this issue. It aims only to highlight the strength of the principal's claim in a category 3-type case.

56 Category 4 stands alone.¹⁸⁴ As the principal's claim is not based on a proprietary base or corrective justice rationale, those who insist on the imposition of a constructive trust often resort to policy arguments based on deterrence. This argument does not work because an errant fiduciary who is already insolvent most probably could not care less about the kind of remedy that is imposed against him. On the other hand, as Lord Neuberger recognised in *Sinclair*, the type of remedy "very much matters to the other creditors."¹⁸⁵ Another common argument is that the gain should not be in the fiduciary's estate.¹⁸⁶ But one could also say the same for the principal. If one recognises the interests of the principal and the unsecured creditors to be roughly equal in strength, then in all fairness the principal should be made to join the insolvency queue. It needs only to be added that the protection of the interest of the unsecured creditors does not demand that no constructive trust be imposed. A constructive trust may still be required to perform important functions identified above.¹⁸⁷ The RCT supplies the needed flexibility by conferring on the principal a weak beneficial interest which is defeasible in the event of the fiduciary's insolvency.¹⁸⁸

V. Conclusion

57 This article stresses the importance of differentiating cases of unauthorised fiduciary gain based on the strength of the principal's interest. Two types of cases were singled out as warranting special treatment. The first is where the principal's claim is based on a pre-existing property right (categories 1 and 2). The second is where the fiduciary's gain was obtained at the principal's expense (category 3). In both cases the principal's claim for a constructive trust is defeasible only in very limited circumstances. For all other cases (category 4), the principal's claim is defeasible by a wider range of third party interests. This context-sensitive approach to proprietary disorgement could be

183 *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250 at [43]; *Daraydan Holdings Ltd v Solland International Ltd* [2005] Ch 119 at [86]. See also para 50 above.

184 See Peter Watts, "Constructive Trusts and Insolvency" (2009) 3 J Eq 250.

185 *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] 3 WLR 1153 at [54].

186 *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250 at [43]; *Daraydan Holdings Ltd v Solland International Ltd* [2005] Ch 119 at [86].

187 See paras 16–29 above.

188 For an illustration, see para 36 above.

implemented only by applying both the institutional constructive trust and the remedial constructive trust. The latter supplies the flexibility that the former lacks. With the renewed interest in the remedial constructive trust, there is a greater hope that the Singapore courts would soon turn their attention to this dormant topic and offer their views on how the issues raised in this article are best approached.
