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The commercialisation of equity

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This paper analyses the jurisprudence on the relevance of the commercial context to principles of the law of equity and trusts. We criticise recent UK Supreme Court decisions in the area (chiefly Williams v Central Bank of Nigeria, FHR European Ventures v Cedar Capital Partners *and* AIB Group v Mark Redler & Co*) and identify a trend of the 'commercialisation' of the issues. The cases are placed in comparative context and it is argued that there is an unsatisfactory pattern of judicial reasoning, exhibiting a preference for some degree of unarticulated flexibility in commercial adjudication. But the price of that flexibility is a lack of doctrinal coherence and the development of equitable principles that will apply in, and beyond, the commercial context. We also argue that this trend has important implications for the coming rounds of Supreme Court appointments.*

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> 'The question when it is right to invoke an equitable right in a commercial context is not always easy to resolve.'[1]

INTRODUCTION

In 1516, St Thomas More's *Utopia* was published, with Holdsworth noting that at the time of its writing:

> New countries, new nations, new phenomena of all kinds were emerging. With these things the old learning, the old modes of thought and reasoning were powerless to deal. These things must be investigated; and the results of that investigation necessarily led to the abandonment of old theories.[2]

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1. *Thanakharn Kasikorn Thai Chamkat v Akai Holdings* [2010] HKCU 2362 at [145] (Lord Neuberger NPJ).

2. WS Holdsworth *Some Makers of English Law* (Cambridge: Cambridge University Press, 1938) p 72.

More would go on to become the first common lawyer to reach the office of Lord Chancellor:[3] Scott remarked that equity 'did not begin to assume the shape of law until More became Chancellor', and that it took 'a great stride forward during his administration'.[4]

Five hundred years after *Utopia*, Lord Neuberger has noted that 'equity is alive in the UK Supreme Court'.[5] Here, we consider the extent to which 'old modes of thought' in equity are being challenged by perceived commercial phenomena. The perspectives of current Justices of the Court – especially those who were not Chancery lawyers – are informing a reinterpretation of equitable principles and, in some instances, their application in different contexts. In 2014, the Supreme Court handed down three landmark judgments – *Williams v Central Bank of Nigeria*,[6] *FHR European Ventures v Cedar Capital Partners*[7] and *AIB Group v Mark Redler & Co*[8] – that resolved some of the most difficult debates in equity. All three disputes arose in the commercial context. In *AIB*, the Supreme Court restated the law of equitable compensation for breach of trust as being concerned only with making good losses suffered but for the breach, thereby aligning equitable compensation with damages at law. In *FHR*, the Supreme Court opted for the 'simple' answer, based mainly on policy considerations, that all unauthorised profits received by fiduciaries are held on constructive trust for the principal. In *Williams*, the Supreme Court sharply distinguished between strangers to a trust and trustees for limitations purposes, with little regard for the arguable doctrinal similarities between knowing recipients and express trustees and even less regard for sensible statutory interpretation.

The judicial reasoning in each case, as this paper will show, is underlined by commercial pragmatism of simplifying legal standards for commercial actors, as well as wider commercial concerns. Lord Neuberger commented in *Patel v Mirza* that 'the ultimate function of the courts in common law and equity is to formulate and develop rules of a clear and practical nature'.[9] However, the 'commercialisation' of equity at the highest level – whether by way of context-based application or

3. Lawton J in *Rondel v Worsley* [1967] 1 QB 443 at 459. Professor Holdsworth recorded that 'Cardinal Wolsey was the last of the ecclesiastical Chancellors of the medieval type. He was replaced in 1529 by Sir Thomas More – an eminent common lawyer and the son of a common law judge': WS Holdsworth 'The influence of Roman law on English equity' in *Essays in Law and History* (Oxford: Oxford University Press, 1946) pp 193–194.

4. AW Scott, Trusts §1.1. See also G Glen 'St Thomas More as judge and lawyer' (1941) 10 Fordham L Rev 187 at 193: 'in the great idea of equity to which he turned his energies, St. Thomas More was quite modern, just as he was in all other things'. On the other hand, Hanbury does not mention More at all in his 'Historical sketch of equity', offered as ch 1 of the first edition of *Modern Equity* (London: Stevens & Sons, 1935).

5. Lord Neuberger 'Equity – the soul and spirit of all law or a roguish thing?' Lehane Lecture 2014, Supreme Court of New South Wales, Sydney, 4 August 2014; available at https://www.supremecourt.uk/docs/speech-140804.pdf (accessed 28 September 2016).

6. [2014] AC 1189.

7. [2014] UKSC 45.

8. [2014] UKSC 58.

9. [2016] 3 WLR 399 at [170].

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commercially driven reinterpretation[10] of what are the fundamental principles – often takes place discreetly under the cloak of context-neutrality. Such a tacit yet paradigmatic shift risks undervaluing the importance of equitable doctrine and bypassing the need for transparent reasoning.[11]

Further, as with More's influence on the Chancery as an institution, we argue that an appreciation of the views of particular Justices in the Supreme Court as to equity is crucial to an understanding of the development of the law, and the normative choices involved. This paper therefore offers a critical analysis of contemporary developments of equity not only by reference to principle, but also by considering the influence of the particular judges and the methods employed. Presently, the place of equity in commerce is not at risk; if anything, it is the core of the equitable principles that are in jeopardy.

1. JUDGES, COMMERCE AND EQUITY

Holdsworth had high praise for More, whose 'beautiful character would have made him an ideal Chancellor at any time'.[12] Similarly, Holdsworth viewed the appointment of More as 'an important turning-point in the history of equity',[13] because More rationalised and brought coherence to the operation of the relevant principles, and restored 'harmonious relations between the court of Chancery and the common law courts for the next half a century'.[14] More's Chancellorship was thus transformative.

The assessment of Supreme Court decisions below highlights the influence of certain Justices on the recent developments. Notable contributors appear to be Lord Neuberger PSC (a Chancery judge), Lord Sumption JSC and Lord Mance JSC (commercial lawyers by background). There is no requirement that the Supreme Court should have a particular complement of Chancery lawyers, with the only statutory requirement that 'between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom'.[15] The last round of appointments was in 2013, when Lords Hughes, Toulson and Hodge JJSC were appointed. Lord Toulson replaced

10. There is an imperfect parallel with the contractual interpretation cases. See *Arnold v Britton* [2015] UKSC 36 at [17], where Lord Neuberger PSC cautioned that 'the reliance placed in some cases on commercial common sense and surrounding circumstances … should not be invoked to undervalue the importance of the language of the provision which is to be construed'; ZX Tan 'Beyond the real and the paper deal: the quest for contextual coherence in contractual interpretation' (2016) 79 Mod L Rev 623 and D McLauchlan 'A better way of making sense of contracts?' (2016) 132 L Q Rev 577. See further Lord Neuberger in *Marley v Rawlings* [2014] UKSC 2; [2015] AC 129 at [20], applying the same principles to a will. The emphasis on commercial context in considering the certainty of intention to create a trust was recently considered by the High Court of Australia in *Korda v Australian Executor Trustees (SA) Limited* [2015] HCA 6 (especially per Keane J at [230]–[237]). See also a case on interpretation of trust deeds in a commercial context (albeit one which Lord Sumption in dissent at [55] described as being 'of considerable financial importance to the parties but rais[ing] no questions of wider legal significance'): *BNY Mellon Corporate Trustee Services Ltd v LBG Capital No 1 Plc* [2016] UKSC 29.

11. See further Sir A Mason 'The place of equity and equitable remedies in the contemporary common law world' (1994) 110 L Q Rev 238 and Lord Millett 'Equity's place in the law of commerce' (1998) 114 L Q Rev 214.

12. Holdsworth, above n 2, pp 98–99.

13. Ibid, p 98.

14. Ibid, p 99.

15. Constitutional Reform Act, s 27(8).

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the retiring Lord Walker,[16] which has since left the Court 'looking a bit threadbare on the chancery side'.[17] Lord Neuberger is the only Chancery specialist currently serving on the Court, albeit that Lord Carnwath served in the Chancery Division when in the High Court, but as his Lordship has conceded, his practice at the Bar had principally been in planning and local government law.[18] In addition, Lord Collins has, since his retirement, occasionally returned as an ad hoc judge to assist in such cases.[19] As we shall see below in section 3, even Lord Neuberger has changed his mind on key issues, As his Lordship has said (speaking of himself in the third person, as he did in *FHR*): 'Lord Neuberger is not on his own when it comes to judicial tergiversations on the issue of a principal's proprietary interests in his agent's bribe. His volte-face is by no means an exception in what is seen by some as the placid waters of equity.'[20].

We argue that this overall lack of specialist Chancery expertise has seen the Supreme Court's equity jurisprudence take a more commercial turn. The days are past when commercial lawyers might fear their cases in the highest cases being decided by a 'Chancery lawyer often regarded as somewhat unbending'.[21]

To an extent, these arguments relate to questions of fusion, and *AIB*, for example, is replete with references to the fusion debate.[22] Australian judges have long debated the development of equitable principles, particularly with the influence on legal thinking of late adoption of the Judicature Act[23] fusion in New South Wales.[24] This is not the place to reopen those wounds, beyond noting that the debate has been particularly vigorous in the commercial context.[25] But we may note that the issues examined below are thrown into relief, and into the courts, by the increased

16. Lord Walker's last judgment was in the Equity case of *Pitt v Holt (known as Futter v HMRC; Pitt v HMRC)* [2013] UKSC 26.

17. J Rozenberg 'Judicial appointments: new boys at the Supreme Court' *The Guardian* 27 February 2013.

18. 'I had no practical experience of many subjects which were the everyday work of the [Chancery] division – such as company, trusts, insolvency, intellectual property and so on. It was also a very lively time for the development of the law in many of those areas. To me they were relatively uncharted territory. It was steep learning curve': Lord Carnwath 'People and principle in the developing law', address at the Eighth Biennial Conference on the Law of Obligations: 'Revolutions in Private Law', Cambridge, 19 July 2016; available at https://www.supremecourt.uk/docs/speech-160719.pdf (accessed 14 April 2017).

19. Lord Collins sat in *Scott v Southern Pacific Mortgages Ltd & Ors* [2014] UKSC 52 (giving the lead judgment); *FHR* [2014] UKSC 45; *Rubin & Anor v Eurofinance SA* [2012] UKSC 46 (giving the lead judgment); and *Re Lehman Brothers International (Europe)* [2012] UKSC 6.

20. Neuberger, above n 5, para 10.

21. F Reynolds 'Commercial law' in L Blom-Cooper, B Dickson and G Drewry (eds) *The Judicial House of Lords 1876–2009* (Oxford: Oxford University Press, 2009) p 704 (speaking of Lord Simonds).

22. See eg Lord Toulson's opening at [1], '140 years after the Judicature Act 1873, the stitching together of equity and the common law continues to cause problems at the seams': *AIB* [2014] UKSC 58. Lord Mansfield was also a much-criticised proponent of fusion: Holdsworth, above n 2, p 173.

23. Supreme Court Act 1970 (NSW), s 64; Law Reform (Law and Equity) Act 1972.

24. See PW Young 'Equity, contract and conscience' in S Degeling and J Edelman (eds) *Equity in Commercial Law* (Sydney: Lawbook Co, 2005) p 489.

25. See eg JD Heydon 'The Hon Roderick Pitt Meagher AO QC (1932–2011)' NSW Bar News, Winter 2011; M Kirby 'Equity's Australian isolationism' (2008) 8 Qld U Technol L & Just J 444; W Gummow 'Equity: too successful' (2003) 77 Austral L J 30; K Mason 'Fusion: fallacy, future or finished?' and W Gummow 'Conclusion', both in Degeling and Edelman, above n 24.

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willingness in recent years of lawyers for commercial actors to invoke the utility of equitable concepts as ways of avoiding statutory or common law rules relating to insolvency, limitation, and causation. Below, we consider the judicial responses to these attempted innovations – sometimes the court removes established distinctions between damages at law and compensation in equity,[26] or avoids fine distinctions (as in *FHR*).[27] The point was well made by Sir Anthony Mason:

> The rise of the modem commercial economy … has raised in an acute form important issues concerning the extension and application of equitable doctrines and principles. That is because trusts are created in commercial settings and commercial transactions are so structured that they provide scope for the creation of relationships recognised in equity, with consequences for proprietary remedies and for third parties.[28]

The inventiveness of equity has been exploited by lawyers seeking advantage in commercial litigation, and that poses challenges.

The development of English commercial law owes, of course, a great debt to another great judge Lord Mansfield, and in his best endeavours in this field, drew on both common law and equity. As Hanbury observed:

> In the field of commercial law, equity missed its chances of capturing a large jurisdiction owing to the scheme of incorporating that topic into the common law which, it is not too much to say, formed the chief life-work of Lord Mansfield. That great judge, however, had a mind strongly imbued with equitable doctrine, and was reported to have said on one occasion that he never liked common law so well as when it resembled equity. The commercial law, therefore, which he converted into common law, tends to be somewhat coloured by equity, and in certain important branches of it equity has gained a very strong foothold.[29]

Our critique here is not framed in terms of common law versus equity, except in so far as the common law position is preferred as part of the court's commercialist common sense approach.[30] It is our contention that in the current period, albeit not necessarily in as deliberate manner as More's, nor (so far) as concerted as the efforts of Lord Mansfield,[31] commercial law is colouring the law of equity.

26. See section 2 below.
27. See section 3 below.
28. A Mason 'Equity's role in the twentieth century' (1997–1998) 8 King's C L J 1 at 4.
29. HG Hanbury 'The field of modern equity' (1929) 45 L Q Rev 196 at 200. See further Holdsworth, above n 2, pp 160–175.
30. Hon Peter Young, the former Chief Judge in Equity in New South Wales, has contrasted 'fusion' with 'fission' in this context, in the sense of the development of principles by either adoption or innovation: 'Equity, contract and conscience' in Degeling and Edelman, above n 24, pp 510–512.
31. Lord Mansfield admired More's valiant attempts to persuade common law judges to grant relief: *Wyllie v Wilkes* (1780) 2 Douglas 519 at 523. Lord Mansfield may also have been the source for the line (via Harman J) that 'Equity ought not to be presumed to be past the age of child-bearing': Sir R Evershed 'Equity ought not to be presumed to be past the age of child-bearing' (1953) 1 Sydney L Rev 1 at fn 1.

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Our study also has significant implications for the balance of expertise on the Supreme Court. Six vacancies will arise on the Court before the end of 2018,[32] and several of those retiring Justices are those who have played key roles in the cases considered here (Lords Neuberger, Mance, Toulson and Sumption). The Court has announced that it will hold the two joint selection exercises to appoint three Justices in each round. This approach followed a review of the appointments process by Jenny Rowe, the former Chief Executive of the Court,[33] and seeks to encourage applicants from a diverse range of backgrounds and specialisms.[34] The trend of the recent Supreme Court decisions on equity re-emphasises the need for Chancery expertise amongst the Justices.

2. COMPENSATORY LIABILITY FOR BREACH OF TRUST

(a) One law of trusts or two?

In *Target Holdings Ltd v Redferns*, Lord Browne-Wilkinson famously said that in order not to render a trust 'commercially useless',[35] the courts must distinguish between 'basic principles of trust and those specialist rules developed in relation to traditional trusts which are applicable only to such trusts and the rationale of which has no application to trusts of quite a different kind'.[36] Where equitable compensation for breach of trust is concerned, Lord Browne-Wilkinson said that the basic rule is that the beneficiary is entitled to compensation for losses that are suffered but for the breach.[37] Relevantly, the specialist rule of reconstitution of the trust fund does not apply in the context of a commercial bare trust once the underlying transaction has been completed.[38] In his view, the rationale of reconstitution – 'no one beneficiary is entitled to the trust property and the need to compensate all beneficiaries for the trust'[39] – is irrelevant for cases such as *Target Holdings*.

32. 'Statement on Supreme Court appointments process'; available at https://www.supremecourt.uk/news/statement-on-supreme-court-appointments-process.html (accessed 28 September 2016). Lord Toulson retired on 22 September 2016 (but will continue to sit on an ad hoc basis): the other five Justices – Lord Neuberger, Lord Clarke, Lord Mance, Lord Hughes and Lord Sumption – will all retire in 2018. See further Lord Neuberger 'The role of the Supreme Court seven years on – lessons learnt', Bar Council Law Reform Lecture 2016, 21 November 2016, para 52; available at https://www.supremecourt.uk/docs/speech-161121.pdf (accessed 14 April 2017).

33. 'Chief Executive's review of the process followed by Selection Commissions making recommendations for appointment to The Supreme Court' (July 2015); available at https://www.supremecourt.uk/docs/review-of-selection-commission-process-july-2015.pdf (accessed 28 September 2016). Neuberger, above n 32, paras 52–58.

34. Concern about the need for Chancery specialism was noted by one of the Chief Executive's consultees: ibid, para 4. For his part, Lord Sumption has professed scepticism as to the value of specialisms: 'I have always taken the view that legal specialisations are essentially bogus. At the bar, I liked to trespass on other people's cabbage patches. As a judge I do it most of the time.' Lord Sumption 'Family law at a distance', At a Glance Conference 2016, Royal College of Surgeons, 8 June 2016, at 1; available at https://www.supremecourt.uk/docs/speech-160608.pdf) (accessed 14 April 2017). See J Lee 'The judicial individuality of Lord Sumption' (2017) 40(2) U NSW L J (forthcoming).

35. *Target Holdings Ltd v Redferns* [1996] AC 421 at 435.

36. Ibid.

37. Ibid, at 436.

38. Ibid.

39. Ibid, at 434–436.

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The proposed binary classification of basic and specialist principles has the potential to change the content of trust law fundamentally. Traditionally, equity caters for a range of different breaches, distinguishing between cases of misapplication of trust assets and cases involving lack of prudence and diligence on the part of the trustee. In equitable parlance, the liability flows from the trustee's primary duty to account for his stewardship.[40] Where there is a misapplication of trust assets, the beneficiary can choose to falsify the account:[41] the unauthorised disbursement would be disallowed, giving rise to a shortfall in the trust estate that the trustee becomes liable to make good, either *in specie* or by paying the monetary equivalent. The objective of the falsified account is to provide the substitutive performance of the obligation; that is, to treat the misapplied assets as being still in the trust fund.[42] Causation between loss and breach is therefore irrelevant. On the other hand, where the trustee has, through the lack of diligence or prudence, caused loss to the trust fund, the beneficiary can surcharge the account. As the surcharging of account has a reparative aim, causation between breach and loss is relevant to the monetary liability derived therefrom.

Target Holdings concerned a misapplication of trust funds by the conveyancing solicitors who held the monies on trust for the lender pending completion of the mortgage transaction. Contrary to the lender's instructions, the solicitors paid away the funds to the borrower without obtaining the required security, although the security was executed a month later. Lord Browne-Wilkinson held that the transaction was 'completed', and the lender–beneficiary was therefore not entitled to reconstitution of the trust fund. However, in *Youyang v Minter Ellison Morris Fletcher*, the High Court of Australia explicitly disagreed with such a context-based application of remedial principles.[43]

While much criticism has been directed at the commercial and non-commercial divide,[44] less attention has been paid to the corollary 'basic' and 'specialist' distinction in remedial principles. As explained above, the falsification and surcharging of accounts are simply principles developed for different kinds of breaches that occur in both commercial and traditional trusts. Yet, by labelling one as the 'basic' trust principle, primacy is accorded to the compensatory aspect of trust law, while downplaying the custodianship feature of the trust relationship upon which the falsification of account is based. Importantly, viewed against the commercial and non-commercial divide, the basic and specialist principle distinction is indicative of covert judicial rewriting of what is the norm and what is the exception, by prioritising what is deemed fitting for the commercial setting. As we shall go on to argue, this influence of commercial thinking is apparent in other recent equity and trusts cases from the highest courts of the various common law jurisdictions.

40. *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1513].

41. If the unauthorised disbursement turns out to be profitable, the beneficiary may choose to adopt it. See Millett, above n 11, at 226.

42. For this reason, the trustee is liable to account for the entire misapplied sum, regardless of whether the trust estate would have sustained the same measure of loss even if the duty was duly performed.

43. *Youyang* [2003] HCA 15 at [49].

44. See eg J Edelman 'Money awards of the cost of performance' (2010) 4 J Eq 122 at [127–128].

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The 'rewriting' of trust law is facilitated by the equitable accounting rules descending into neglect historically owing to changes in practice[45] – most notably, the rise of the terminology of 'equitable compensation', which replaced the language of accounting. The differentiation between the awards derived from falsification and surcharging of accounts respectively became obscured as a result. *Target Holdings* exemplifies the increasingly common practice of the courts assessing equitable compensation without reference to the accounting rules. The controversial reasoning of *Target Holdings* – at least, to equity traditionalists – led to a proliferation of modern scholarship on the equitable account,[46] much of which is written with the hope of fully reviving them in practice to bring about clarity to the law of equitable compensation for breach of trust.[47] But these efforts failed to persuade. In the landmark case of *AIB*, the UK Supreme Court affirmed that the basic principle is this: equitable compensation serves a reparative function – it is available for losses suffered but for the breach of duty.[48]

AIB arose from a commercial remortgage transaction. AIB advanced £3.3 million to the solicitors to hold on trust pending completion. The solicitors were instructed to redeem the existing charge over the borrowers' home in favour of Barclays Bank out of the advance, obtain a first charge over the property in favour of AIB and then release the remaining funds to the borrowers. In breach of trust, the solicitors failed to transfer sufficient money to Barclays Bank to fully redeem the existing charge – the shortfall being approximately £309,000. This resulted in excessive funding being released to the borrowers. AIB managed to obtain a second charge over the property in pursuance to negotiations with Barclays Bank. The borrowers subsequently defaulted. Owing to the prevailing depressed market conditions, the property was sold for only £1.2 million. After paying off £309,000 that was due to Barclays Bank, AIB only obtained £867,697. It then sued the solicitors for approximately £2.5 million, being the difference between the loan and the amount it recovered from the sale.

The Supreme Court unanimously found in favour of the solicitors, ruling that AIB was only entitled to £275,000, being the loss it suffered by comparison with what it would have received had there been no breach. Affirming *Target Holdings*, both Lord Reed and Lord Toulson were of the view that English law had clearly moved on from the days of equitable account.[49] Equitable compensation was to be derived from moving from the breach of duty directly to the remedy, without reference to the

45. Justice Edelman (extrajudicially), 'An English misturning with equitable compensation' (UNSW Australia colloquium on equitable compensation and disgorgement of profit, 7–8 August 2015); available at http://www.fedcourt.gov.au/publications/judges-speeches/justice-edelman/edelman-j-201508 (accessed 7 June 2016).

46. See eg Millett, above n 11; S Elliott 'Remoteness criteria in equity' (2002) 65 Mod L Rev 588; S Elliott and C Mitchell 'Remedies for dishonest assistance' (2004) 67 Mod L Rev 16; J Edelman 'Money awards of the cost of performance' (2010) 4 J Eq 122; J Glister 'Equitable compensation' in J Glister and P Ridge (eds) *Fault Lines in Equity* (Oxford: Hart Publishing, 2012) p 143; C Mitchell 'Equitable compensation for breach of fiduciary duty' (2013) 66 Current Legal Probs 307.

47. Cf C Rickett 'Where are we going with equitable compensation?' In A Oakley (ed) *Trends in Contemporary Trust Law* (Oxford: Oxford University Press, 1996) p 29; A Burrows 'We do this at common law and that in equity' (2002) 22 Oxford J Legal Stud 1 at 10–11.

48. *AIB* [2014] 3 WLR 1367 at [73] (Lord Toulson) and [136] (Lord Reed). See also PG Turner 'The new fundamental norm of recovery for losses to express trusts' (2015) 74 Camb L J 188.

49. *AIB* [2014] 3 WLR 1367 at [69] (Lord Toulson) and [138] (Lord Reed).

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accounting principles.[50] In Lord Toulson's view, the falsification of account is simply a legal 'fairy tale'.[51]

Relevantly, both Lord Toulson and Lord Reed, writing separately,[52] rejected a context-based approach towards the application of remedial principles for breach of trust. They clarified that the presence of an underlying contract in the commercial context is merely a fact to be considered in determining the losses caused by the breach of trust.[53] Indeed, Lord Reed interpreted Lord Browne-Wilkinson's context-based analysis in *Target Holdings* to result in a difference in the procedure of payment (to whom the payment is made), as opposed to the quantum of payment.[54]

But Lord Toulson's judgment, on close scrutiny, does not fully support a context-neutral approach. Lord Toulson said that 'the extent of equitable compensation should be the same as if damages for breach of contract were sought at common law' in cases such as *Target Holdings*.[55] Moreover, he went on to endorse the application of Lord Browne-Wilkinson's reasoning in *Target Holdings* to the *AIB* dispute, on the basis that the transaction in *AIB* was similarly 'completed'.[56] But it should not be missed that unlike *Target Holdings*, where the required security was obtained belatedly post-breach, the same was not achieved in *AIB*. In so doing, Lord Toulson unwittingly entrenched a context-based approach (of a different kind) towards remedial principles for breach of trust by extending Lord Browne-Wilkinson's analysis. The point is this: the unavailability of the reconstitution of trust in *Target Holdings* did not affect the outcome of the case because the trust estate eventually received the sought for asset, thereby justifying the premature disbursement of funds. An analysis by way of falsification of outcome would have produced the same result.[57] Lord Toulson's pragmatic understanding of 'completion' of transaction, on the other hand, would have produced different outcomes.

The combined effect of *Target Holdings* and *AIB* (which unreservedly affirmed the former) is therefore difficult to grasp and articulate, as Foskett J conceded in *Various Claimants v Giambrone & Law (A Firm)*.[58] In *Purrunsing v A'Court & Co (a firm)*, Judge Pelling QC, citing Lord Toulson's judgment, interpreted *AIB* as being 'concerned with the measure of equitable compensation for breach of trust that applies where there has been a breach of a bare trust arising in the context of a commercial contract to which the trustee and beneficiary are parties'.[59] He thus commented that equitable

50. J Glister 'Breach of trust and consequential loss' (2014) 8 J Eq 235 at 238, 258.
51. *AIB* [2014] 3 WLR 1367 at [69].
52. With both of whom Lord Neuberger, Baroness Hale and Lord Wilson agreed.
53. *AIB* [2014] 3 WLR 1367 at [71] (Lord Toulson) and [137] (Lord Reed).
54. Ibid, at [108].
55. Ibid, at [71].
56. Ibid, at [74]. This part of Lord Toulson's reasoning contradicts his earlier insistence that the same general principles would apply in respect of both commercial and traditional trusts.
57. See Millett, above n 11, at 227 and (as Lord Millett NPJ) in *Libertarian Investments Ltd v Hall* [2014] 1 HKC 369.
58. [2015] EWHC 1946 (QB) (see Appendix 3 (Supplemental Judgment) at [7]).
59. [2016] EWHC 789 (Ch) at [42]. The case concerned breach of trust by the vendor's solicitors and the purchaser's solicitors in paying purchase money away to the vendor who fraudulently claimed to be the true registered proprietor of the property. The case did not concern the assessment of equitable compensation for breach of trust specifically. A main issue before the court was discretionary relief from liability under s 61 of the Trustees Act 1925. Counsel for the vendor's solicitor relied on *AIB* – specifically, Lord Toulson's point that the solicitor–trustee's liability in equity ought not exceed his liability at law – in his argument that a more favourable standard of 'reasonableness' should be applied to his client.

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compensation should be the same as if contractual damages are sought only in cases where there is an underlying contract.[60] On such an interpretation, equitable compensation would be assessed differently where there is no underlying contract, thereby giving rise to two sets of compensatory principles for breach of trust.[61]

The unacknowledged (or unappreciated) development of two sets of equitable principles is potentially dangerous, though not unprecedented.[62] It is dangerous because the adaptation of equitable principles in response to the commercial context has occurred without proper justification and is discreetly being passed off as part of the general principles. While the common law (in its broad sense of judge-made law, including equity) envisages the incremental development of its principles over the course of time, such progressive changes are to take place by way of transparent and sound reasoning.

(b) Equitable compensation and the trustee's obligation

Taking a chronological overview of the evolution of remedial principles for breach of trust, we see the initial equal and co-existence of falsification and surcharging of accounts in the days of equitable account, which later evolved to the bifurcation between the basic principle (compensation) and the specialist principle (reconstitution) in *Target Holdings* and finally arriving at just compensation for breach of trust in *AIB*. It may be said that the commercial context – from which the disputes in both *Target Holdings* and *AIB* arose – is a key driver of the emergence of the equitable compensatory principle for breach of trust. The contract, from which the commercial trust arose in *Target Holdings* and *AIB*, fortified the analogical bridge between equitable compensation for breach of trust and damages for breach of contract.[63] The court's attention was intensely focused on the bigger picture of performance of the transaction, as opposed to the specific snapshot of custodianship provided by the trust institution in the transactional process. In *AIB*, Lord Reed reflected thus:

> As the case law on equitable compensation develops, however, the reasoning supporting the assessment of compensation can be seen more clearly to reflect an analysis of the characteristics of the particular obligation breached. This increase in transparency permits greater scope for developing rules which are coherent with those adopted in the common law.[64]

60. *Purrunsing* [2016] EWHC 789 (Ch) at [42].

61. This raises the issue of incidental rules for concurrent liability, although Lord Toulson did not explicitly address liability for equitable compensation in that particular context.

62. Another example is the reinterpretation of the content of 'irreducible core' of a trustee's obligations in *Citibank NA v MBIA Assurance SA* [2007] 1 All ER (Comm) 475, a dispute arising in the debt securitisation context. See A Trukhtanov 'The irreducible core of trust obligations' (2007) 123 L Q Rev 342; M Yip 'The commercial context in trust law' [2016] Conv 347 at 356–359.

63. The compensatory principle in contract law has been recently affirmed on numerous occasions: *Golden Strait Corporation v Nippon Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12; [2007] 2 AC 535; *Flame SA v Glory Wealth Shipping Pte Ltd (The Glory Wealth)* EWHC 3153 (Comm); *Bunge SA v Nidera BV* [2015] UKSC 43; [2015] 3 All ER 1082; *Commodities Suisse SA v MT Maritime Management BV (The MTM Hong Kong)* [2015] EWHC 2505 (Comm).

64. *AIB* [2014] 3 WLR 1367 at [138].

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The golden victory of the equitable compensatory principle, however, has profound implications for the contemporary content of a trustee's obligations. That a bare trust is employed as part of the machinery of the trust does not alter the bare trustee's obligation, like the obligations of trustees in traditional trusts, to 'get the trust property in, protect it, and vindicate the rights attaching to it'.[65] The traditional falsification of account arises from the acknowledgement of the trustee's custodianship: conceptually, a falsified account creates an immediate 'debt' between the trustee and the beneficiary in the value of the misapplied assets.[66] This explains the reference to an 'equitable debt' in older English cases. In *AIB*, Lord Toulson, seemingly without a full appreciation of the underlying conceptual significance, hastily concluded that the terminology had been replaced by the vocabulary of 'equitable compensation'.[67] The English abolition of the accounting rules – in particular, the falsification of account – is silently reforming the core obligation of trusteeship. More generally, as we argue here, it is symptomatic of a primacy of commercialist pragmatism in the Supreme Court's reasoning. Quite clearly, the Supreme Court's objective in *AIB* was to simplify the remedial rules for breach of trust. Specifically, on Lord Toulson's approach, equitable liability is aligned with contractual liability where there is an underlying contract, thereby allowing commercial parties to measure their liability based on a single standard.

We now move on to examine the Supreme Court's reasoning in *FHR*, a landmark judgment not only for the issue it resolved but also for how it was resolved, most remarkably, by way of Lord Neuberger's unexplained desertion of his own previous opinion.

3. BREACH OF FIDUCIARY DUTY: PROPRIETARY RELIEF FOR UNAUTHORISED BENEFITS

(a) Constructive trust over unauthorised gains: commercial considerations

In *FHR*, the Supreme Court finally resolved the seemingly endless debate in English law concerning whether an agent held a bribe or secret commission received in breach of his fiduciary duty on trust for his principal. The answer given by the Supreme Court, in a unanimous judgment delivered by Lord Neuberger, was a resounding 'yes'. The state of English law before *FHR* was complex and unwieldy, with 200 years of inconsistent judgments and voluminous academic writing on the subject.[68] Yet, the answer to this question has important practical implications for the principal, most notably, with regard to the nature of injunctive relief available, the ability to invoke equitable tracing rules and priority in the event of the fiduciary's insolvency.

As a matter of principle, there are broadly two camps to the debate. Those in favour of proprietary relief generally base their arguments on the scope of the

65. *Fischer v Nemeske Pty Ltd* [2016] HCA 11 at [111] (Gaegler J).

66. Edelman, above n 45. See also RS French CJ 'Equitable compensation', Hong Kong, 23 September 2015 and *McIntosh v Fisk* [2015] NZCA 74 at [20] (French and Harrison JJ).

67. *AIB* [2014] 3 WLR 1367 at [61].

68. *FHR* [2014] 3 WLR 535 at [1]. When the same case was in the Court of Appeal, Pill LJ remarked that '[c]onsideration of the views of commentators and practitioners generally on the subject of constructive trusts in the law of England and Wales reveals passions of a force uncommon in the legal world': *FHR European Ventures LLP v Mankarious* [2013] EWCA Civ 17 at [61].

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agency/fiduciary obligation,[69] treating the principal as being entitled to the benefits, whether authorised or unauthorised, received by the agent in the course of the agency. Detractors, on the other hand, champion the hard-nosed principles of property law that proprietary interests cannot arise over benefits that are not derived from the principal's assets.[70] Lord Neuberger's previous view in *Sinclair Investments* belonged to the latter camp. In that case, he laid down a controversial 'two-category' test that required some form of proprietary connection between the unauthorised benefits and the principal's assets (or assets that should properly belong to the principal) to justify proprietary relief.[71] Although *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in admin rec)*[72] did not concern the taking of a bribe or secret commission, Lord Neuberger's approach clearly ruled out proprietary relief in such a scenario.[73]

In a surprisingly short judgment handed down by Lord Neuberger, the Supreme Court in *FHR* found a path straight out of the thicket by prioritising simplicity and practicality. Decisions such as *Tyrrell v Bank of London*,[74] *Metropolitan Bank v Heiron*[75] and *Lister & Co v Stubbs*,[76] which held against the imposition of a constructive trust, were overruled.[77] Lord Neuberger therefore repented[78] from his decision in *Sinclair Investments* to follow the aforementioned authorities, instead of *Attorney General of Hong Kong v Reid*.[79] In *Sinclair Investments*, Lord Neuberger MR (as he then was, delivering the leading judgment) provided seven reasons – ranging from precedent, principle, policy and ill-considered reasoning – as to why *Reid* should not be followed and probably would not be followed by the Supreme Court.[80]

69. *FHR* [2014] 3 WLR 535 at [33]. See eg Lord Millett 'Bribes and secret commissions' [1993] RLR 7; Lord Millett 'Bribes and secret commissions again' (2012) 71 Camb L J 583. See also an analysis based on attribution, divorced from wrongdoing by Lionel Smith: L Smith 'Constructive trusts and the no-profit rule' [2013] Camb L J 260; L Smith 'Deterrence, prophylaxis and punishment in fiduciary obligation' (2013) 7 J Eq 87.

70. *FHR* [2014] 3 WLR 535 at [31]. See eg R Goode 'Proprietary restitutionary claims" in WR Cornish et al. (eds) *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Oxford: Hart Publishing, 1998) ch 5; S Worthington 'Fiduciary duties and proprietary remedies: addressing the failure of equitable formulae' (2013) 72 Camb L J 720.

71. [2011] 3 WLR 1153 at [88]. Essentially, a constructive trust would only arise over an asset received by a fiduciary in breach of fiduciary duty where the asset is or has been the beneficial property of the beneficiary (category 1) or it was acquired by taking an advantage of an opportunity or a right that properly belonged the beneficiary (category 2). The decision received mixed reviews: see eg D Hayton 'Proprietary liability for secret profits' (2011) 127 L Q Rev 487; R Goode 'Proprietary liability for secret profits: a reply' (2011) 127 L Q Rev 493; G Virgo 'Profits obtained in breach of fiduciary duty: personal and proprietary claim?' (2011) 70 Camb L J 502.

72. [2011] 3 WLR 1153 (*Sinclair Investments*).

73. Lord Neuberger's reasoning in *Sinclair Investments* was later applied by Newey J in *Cadogan Petroleum plc v Tolley* [2011] EWHC 2286, a case concerning secret commissions.

74. (1859) 27 Beav 273. See a detailed analysis of the House of Lords' decision: P Watts '*Tyrrell v Bank of London* – an inside look at an inside job' (2013) 129 L Q Rev 527.

75. (1880) 45 Ex D 319.

76. (1890) 45 Ch D 1 (*Lister & Stubbs*).

77. *FHR* [2014] 3 WLR 535 at [47] and [50].

78. Ibid, at [50].

79. [1994] 1 AC 324 at [73]–[84]. *Reid* has been affirmed and followed by the English High Court in *Daraydan Holdings Ltd v Solland International Ltd* [2005] 4 All ER 73; *Ultraframe (UK) Ltd v Fielding* [2006] FSR 17.

80. *Sinclair Investments* [2011] 3 WLR 1153 at [76]–[84].

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Lord Neuberger PSC's (as he now is) tergiversation in *FHR,* merely 3 years after *Sinclair Investments*, is, to say the least, unexpected: indeed, his Lordship has himself described it as 'a damascene conversion'.[81] Importantly, his judgment in *FHR* did not directly engage in principle,[82] notwithstanding his claim that it was a decision arrived based on both principle and practicality.[83] In fact, his Lordship went as far to say that the debate was one that had no 'plainly right or plainly wrong answer' and that there 'can clearly be different views' as to the proper requirements for the creation of a proprietary interest.[84] There are four main reasons – proceeding chiefly from concerns of policy and practicality – for the Supreme Court's preferred approach. First, Lord Neuberger said that the right answer to the debate is 'the simple' one because 'clarity and simplicity are desirable qualities in the law'.[85] Secondly, there is no reason why the principal of a fiduciary who took a bribe or secret commission should be in a worse-off position than one whose fiduciary had obtained an unauthorised benefit in less blameworthy circumstances.[86] Thirdly, 'wider policy considerations' justify the availability of proprietary relief. Lord Neuberger acknowledged the evils of bribery and secret commissions and their harmful impact on the commercial world as well as the wider society.[87] Finally, he opined that it is desirable for English law to cohere with the approaches taken by the rest of the common law world.[88]

We argue that the Supreme Court's analysis, in particular Lord Neuberger's remarkable volte-face, is underlined by commercial considerations. Disputes concerning secret commissions frequently, if not invariably, arise in the commercial context, as was the case in *FHR*. In *FHR*, the buyers of a hotel claimed against their consultant, appointed as the buyers' agent in the sale negotiations, for receiving an undisclosed commission from the seller. As for bribes,[89] they are frequently offered to another party (for instance, public officials[90]) to obtain a business advantage. In Lord Neuberger's view, a rule that excludes proprietary relief for bribes and secret commissions based on subtle distinctions – which can be drawn variously – of what is considered to be the principal's property does not promote certainty.[91] Post *FHR*, commenting extrajudicially on the English rejection of the remedial constructive trust,

81. Lord Neuberger 'The remedial constructive trust – fact or fiction', at the Banking Services and Finance Law Association Conference, Queenstown, New Zealand, 10 August 2014, para 2; available at https://www.supremecourt.uk/docs/speech-140810.pdf (accessed 28 September 2016).

82. See also D Whayman 'Proprietary remedy confirmed for bribes and secret commissions' [2014] Conv 518 at 521.

83. *FHR* [2014] 3 WLR 535 at [32] and [46].

84. Ibid, at [32].

85. Ibid, at [35].

86. Ibid, at [41].

87. Ibid, at [42].

88. Ibid, at [45].

89. Although conventional reference differentiates between a bribe and a secret commission, the substantive distinctions are not immediately clear.

90. Indeed, the policy basis for the standalone offence of 'bribery of a foreign public official' under s 6 of the Bribery Act 2010 is to 'prohibit the influencing of decision making in the context of publicly funded business opportunities by the inducement of personal enrichment of foreign public officials or to others at the official's request, assent or acquiescence'. See the Bribery Act 2010 – Guidance at p 11; available at https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf (accessed 28 September 2016).

91. *FHR* [2014] 3 WLR 535 at [35].

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Lord Neuberger reiterated the need for predictability in respect of legal principles in 'these days of expensive litigation and complex and cross-border commercial transactions'.[92] The Supreme Court's intuitive preference for a simple answer may thus be explained by the fact that the problem of bribes and secret commissions almost always arises in the commercial context.

Indeed, the Supreme Court's tough stance is consistent with the 'zero tolerance' attitude enshrined in the Bribery Acts 2010 as well as international conventions.[93] The Bribery Act 2010 came into force in the UK on 1 July 2011.[94] A main objective of the Bribery Act 2010 is to eradicate corruption and bribery in the commercial world – it does so through various means, including requiring commercial organisations to put in place procedures to prevent persons associated with it from bribery. The national policy on bribery and corruption was therefore crystal clear by the time of appeal before the Court of Appeal and Supreme Court. The clear availability of proprietary relief in cases concerning bribes and secret commissions under English law provides stronger deterrence[95] than personal relief against such forms of wrongdoing.[96]

Even Lord Neuberger's comment on harmonisation of legal principles[97] within the common law world is in part underpinned by practical and commercial concerns. Extrajudicially, in the course of reflecting upon the Supreme Court's decision in *FHR*, Lord Neuberger commented that 'in an increasingly global and competitive world, where most legal systems are civilian, the common law jurisdictions need to ensure a degree of coherence and consistency in their case-law in order to present a credible and effective legal system'.[98] Here, Lord Neuberger clearly meant judicial competition for international litigation business,[99] and such claims are chiefly of a

92. Neuberger, above n 81. It should also be noted that Lord Neuberger, in the same speech, said that where the domestic context is concerned, some (though not himself) 'may think certainty [of legal principles] is less important'. Lord Sumption has underlined English law's opposition to the remedial constructive trust in *Bailey v Angove's PTY Ltd* [2016] 1 WLR 3179 at [27]. The case is considered below.

93. *FHR* [2014] 3 WLR 535 at [42].

94. The legislation entered into force after the key events of the *FHR* dispute had taken place. There was therefore no question of criminal liability on the part of the commercial parties in *FHR* under the Act.

95. Cf K Barnett 'Distributive justice and proprietary remedies over bribes' (2015) 35 Legal Stud 302 at 305–306.

96. *FHR* [2014] 3 WLR 535 at [42].

97. Supported by Leeming JA in *Hasler v Singtel Optus Pty Ltd;Curtis v Singtel Optus Pty Ltd* [2014] NSWCA 266 at [71]: 'There is frequently much to be learnt from the experience of other jurisdictions whose legal systems share a common ancestor'. Cf French CJ, extrajudicially: 'There is a degree of commonality in our jurisdictions but some important issues are ongoing including the proper scope of equitable compensation and how it may differ according to the nature of the equitable wrong' (RS French, above n 66, at 28).

98. Neuberger, above n 5.

99. See the success of the English Commercial Court in attracting international litigation: The Honourable Mrs Justice Carr, 'Closing address for British Turkish Lawyers Association seminar – the Inner Temple' (13 September 2013), available at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/justice-carr-btla-190913.pdf (accessed 28 September 2016); J Croft 'Three-quarters of litigants in UK Commercial Court are foreign' *The Financial Times* 29 May 2014. See further the introduction of the Financial List, a specialist court to deal with financial claims: G McMeel 'A new financial court for London' [2016] Lloyd's Mar & Com L Q 1.

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commercial nature or arising from the commercial context. Part of the aim is therefore to develop a set of legal principles that will encourage the choice of English law as the governing law of contracts, which will most probably lead to the choice of English courts[100] – being the forum most conversant in the application of English law – for the resolution of disputes arising therefrom.

Hence, harmonisation of legal developments is pursued partly for pragmatic reasons. If harmonisation is a desirable end in itself, Lord Neuberger or English law[101] would be far more open to recognising a remedial constructive trust, a doctrine that has been affirmed in a number of common law jurisdictions; namely, Australia,[102] Canada,[103] New Zealand[104] and Singapore.[105] The objection against the recognition of a remedial constructive trust generally emanates from concerns of unconstitutional redistribution of property rights based on judicial discretion and the uncertainty of its operation being founded upon exercise of judicial discretion.[106] However, the same concern of 'redistribution of property rights' arises in respect of the Supreme Court's decision in *FHR*. While explicitly rejecting the 'property law' camp of academic views on the debate for generating uncertainty, there was a tinge of equivocation in Lord Neuberger's reasoning. He said that 'in many cases, the bribe or commissions will very often have reduced the benefit from the relevant transaction which the principal will have obtained, and therefore can fairly be said to be his property'.[107] And while Lord Neuberger adopted counsel's argument that 'any benefit acquired by the agent as a result of his agency and in breach of his fiduciary duty is held on trust for the principal',[108] he seemingly did so largely because the simple answer is the right answer (following Occam's Razor).[109] For, if otherwise, his Lordship would not have considered the debate to be one with 'no plainly right answer'.[110]

(b) *FHR*: implications for modern equity

The lack of a clear conceptual basis for the *FHR* decision has profound implications for trust law. First, it is harder than before to identify a single unifying principle to explain

100. Whether pre-dispute by way of a choice of court agreement or post-dispute.
101. *Bailey v Angove's PTY Ltd* [2016] 1 WLR 3179 at [27].
102. See eg *Muschinski v Dodds* (1985) 160 CLR 583; *John Alexander's Club Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1.
103. See eg *LAC Minerals Ltd v International Corona Resources Ltd* [1989] 61 DLR 14.
104. *Regal Castings Limited v Lightbody* [2009] NZLR 433; *John Hanita Pak v AG of New Zealand* [2014] NZSC 18 at [163] (Elias CJ) and [297]-[312] (Young J). However, the availability of a remedial constructive trust under New Zealand law has yet to be conclusively determined by the New Zealand Court of Appeal: see *Boat Harbour Holdings Ltd v Mowat* [2012] NZCA 305 at [51]; *Strategic Finance Ltd (in receivership and in liquidation) v Bridgman* [2013] NZCA 357 at [122]–[126].
105. See eg *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801.
106. Neuberger, above n 81.
107. *FHR* [2014] 3 WLR 535 at [43].
108. Ibid, at [35] (see also [33]). See also trenchant criticisms by Campbell: JC Campbell 'When and why a bribe is held on a constructive trust: the method of reasoning towards an equitable remedy' (2015) 39 Austral Bar Rev 320 at 321–325.
109. Cf Lord Sumption in *Jetivia SA & Anor v Bilta (UK) Ltd* at [104]: 'I agree with Lord Toulson and Lord Hodge that Occam's Razor is a valuable analytical tool, but only if it is correctly understood. *Entia non sunt multiplicanda praeter necessitatem.* Do not gratuitously multiply your postulates.'
110. *FHR* [2014] 3 WLR 535 at [35].

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why constructive trusts arise,[111] save for a rationalisation pitched at a high level of abstraction, such as 'unconscionability'.[112] Secondly, the *FHR* decision creates the possibility for courts to award proprietary relief in circumstances based on considerations of policy and practicality[113] – the emergence of legal realism that was not previously well received by English law. It is difficult to predict when a constructive trust will arise in a new set of circumstances. Thirdly, the interplay between proprietary and personal relief (account of profits)[114] for receiving unauthorised benefits in breach of fiduciary duty has been transformed. A consequence of *FHR* is the availability of proprietary relief in nearly every case.[115] Accordingly, the interplay between the two kinds of remedies is presently far less concerned with availability; it has instead become primarily concerned with election by the claimant.[116]

The infiltration of the fiduciary doctrine into the commercial world accentuates problems (taking of bribes and secret commissions) that are infrequently encountered in the domestic context. In one sense, *FHR* redirects our attention to focus on the severity of wrongdoing in crafting appropriate remedies,[117] as opposed to the kind of wrongdoing. Lord Neuberger's previous view in *Sinclair Investments* distinguished between 'abuse of principal's property' cases and 'abuse of position' cases.[118] That view was conservatively focused on the proprietary foundation of the constructive trust, and might fairly represent the wisdom of an era where equity sharply distinguished between property rights and personal obligations. *FHR*, on the other hand, treats the remedy as a means to deter wrongdoing and enforce primary obligations. Underlining the *FHR* decision is therefore a decision to shape equitable principles to appropriately respond to the issues that arise in the commercial context, in partnership with domestic statute and international influence. By affirming that a principal is entitled to assert a proprietary claim over benefits received by a fiduciary in breach of his loyalty (personal obligation), regardless of whether they are derived from the interference with the principal's property, English law has further blurred the divide between obligation and property. This brings to mind Worthington's argument a decade ago: 'equity, according to persistent commercial pressure, has effectively

111. G Virgo *The Principles of Equity & Trusts* (Oxford: Oxford University Press, 2nd edn, 2016) pp 305, 327–328. See further section 4 below.

112. *Paragon Finance plc v DB Thakerar and Co* [1999] 1 All ER 400 at 408 (Millett LJ).

113. See *Patel v Mirza* [2016] 3 WLR 399 at [170]. Lord Neuberger holds the view that correct legal analysis is 'not the centrally important issue', if the question confronting the court is based on policy.

114. Account of profits continues to exist in English law: see *Novoship (UK) Ltd v Mikhaylyuk* [2014] WLR (D) 297; *Global Energy Horizons Corporation v Gray* [2015] EWHC 2232 (Ch).

115. Whayman, above n 82, at 524.

116. A corollary consequence is that there is no longer the concern that the account is unable to 'mop up' all the unauthorised benefits that a fiduciary has derived from the breach of duty.

117. Although some may take the view that the effect of *FHR* is to accord equal remedial treatment to all breaches of fiduciary duty (see Whayman, above n 82, at 523–524), it should not be missed that where a fiduciary has acted in good faith, he may be awarded equitable allowance (see *Boardman v Phipps* [1964] 1 WLR 993). As such, it is certainly arguable that the real effect of *FHR*, mapped on to existing principles, is to craft remedies based on severity of wrongdoing.

118. *Sinclair Investments* [2011] 3 WLR 1153 at [80]. Lord Neuberger said that there is a 'fundamental distinction between (i) a fiduciary enriching himself by depriving a claimant of asset and (ii) a fiduciary enriching himself by doing a wrong to the claimant'.

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eliminated the divide between property and obligation, or between property rights and personal rights'.[119] To put it simply, *FHR* says that what you are 'owed' becomes what you 'own'.

Finally, *FHR* is seemingly difficult to reconcile with the subsequent Supreme Court decision in *Bailey v Angove's PTY Ltd*,[120] complicating matters yet further. In *Bailey*, Lord Sumption said in obiter[121] that a constructive trust recognised by Bingham J in *Neste Oy v Lloyd's Bank Plc*[122] was unjustifiable. The *Neste Oy* constructive trust is said to arise over money held by an agent whom, receiving the same for its principal or on its account, could not in good conscience retain the money owing to the agent's insolvency. Lord Sumption, taking the side of the 'property law' camp in *Bailey*,[123] criticised the holding in *Neste Oy* as being contrary to the requirement of identifiable trust property in order for a trust to arise under English law. This is because the money in that case was transferred to the agent with intention that he received full beneficial ownership. In rejecting the *Neste Oy* constructive trust, Lord Sumption ironically relied on[124] an excerpt from Goode's paper[125] in which Goode clearly opposed awarding proprietary relief for bribes and secret commissions received in breach of fiduciary duty. Perhaps conscious of the potential inconsistency with *FHR*, Lord Sumption then pronounced that a constructive trust may nevertheless arise over money paid with the intention of transferring the beneficial interest to the recipient where the intention was vitiated (eg on the basis of mistake) or the money represented the fruits of fraud, theft or breach of trust/fiduciary duty.[126]

Lord Sumption's disapproval of the *Neste Oy* constructive trust is not the issue. The issue lies with his reasoning, which in part contradicts Lord Neuberger's judgment in *FHR*. Moreover, notwithstanding Lord Browne-Wilkinson's criticisms in *Westdeutsche Landesbank Girozentrale v Islington LBC*,[127] Lord Sumption – with respect, rather evasively – appeared not completely averse towards proprietary restitution for mistake, in particular, as a possible, alternative basis for the outcome in *Bailey*.[128] His Lordship declined to consider the alternative mistake analysis[129] on the basis that it would go beyond the scope of the appeal;[130] and yet his Lordship's disapproval of *Neste Oy* was itself obiter, given the prior conclusion as to the agent's authority on the first point of the appeal.[131]

Such subtle (and partial) judicial tergiversation in the already troubled equitable waters further illustrates the Supreme Court's propensity for subjecting trust law

119. S Worthington 'The disappearing divide between property and obligation: the impact of aligning legal analysis and commercial expectations' (2007) 42 Tex Int'l L J 918.
120. [2016] 1 WLR 3179. See P Watts 'The insolvency of agents' (2017) 133 L Q Rev 11 and H Wong 'Proprietary restitution and constructive trusts in the Supreme Court' [2016] Conv 480.
121. With whom Lords Neuberger, Clarke, Carnwath and Hodge agreed.
122. [1983] 2 Lloyd's Rep 658, followed in *In re Japan Leasing Europe Plc* [1999] BPIR 911.
123. See discussion above at text to n 67.
124. *Bailey v Angove's PTY Ltd* [2016] 1 WLR 3179 at [26].
125. R Goode 'Ownership and obligation in commercial transactions' (1987) 103 L Q Rev 433 at 444.
126. *Bailey v Angove's PTY Ltd* [2016] 1 WLR 3179 at [30].
127. [1996] AC 669 at [704]–[716].
128. *Bailey v Angove's PTY Ltd* [2016] 1 WLR 3179 at [32].
129. Eg the analysis of Mann J in *In re Farepak Food and Gifts Ltd* [2008] BCC 22 at [39]–[40].
130. *Bailey v Angove's PTY Ltd* [2016] 1 WLR 3179 at [32].
131. Ibid, at [18]: 'it is strictly speaking unnecessary to deal with the point'.

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principles to commercial dexterity – essentially, picking the explanation that supports the desired outcome. While the Supreme Court loathes the remedial constructive trust, it seems to practise a more disguised form of 'discretionary remedialism'.

4. LIABILITY OF THIRD PARTIES

(a) Limitation

The final category of cases that we shall consider here concerns the liability of third parties or 'strangers to the trust'.[132] In England, the Supreme Court addressed some key questions in respect of such claims in *Williams v Central Bank of Nigeria*,[133] which concerned an alleged sophisticated fraud on the claimant, whose claim was said by the defendants to be out of time. Section 21 of the Limitation Act 1980, provides, so far as relevant, that:

> (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
> (b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.
> …
> (3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued.

By a majority (Lord Clarke dissenting on this point), the Court held that, both for purposes of limitation, and more generally, dishonest assistants and knowing recipients are not constructive trustees in a true sense. Rather, a stranger to the trust 'is not in fact a trustee at all, even though he may be liable to account as if he were'.[134] Additionally (Lord Mance dissenting on this point), in the particular context of s 21(1)(a), an 'action in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy', only refers to an action for breach of trust against the trustee (not to other actions which might more broadly be said to be 'in respect of' a breach of trust, such as dishonestly assisting a fraudulent trustee). This conclusion means that the 6-year limitation period under s 21(3) applies to all claims against strangers to the trust, although, peculiarly, in that section 'in respect of any breach of trust' does include such

132. 'Strangers to the trust' is of course shorthand, as liability may extend to conduct relating to breaches of fiduciary (and other equitable) duties: *Novoship (UK) Ltd v Mikhaylyuk* [2015] 2 WLR 526 at [92]; *Westpac Banking Corp v Bell Group Ltd (No.3)* (2012) 44 WAR 1 at [2714]–[2733].

133. [2014] AC 1189. For fuller and more specific criticism, see J Lee 'Constructing and Limiting Liability in Equity' (2015) 131 L Q Rev 39.

134. *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400, per Millett LJ at 408–409, endorsed by Lord Sumption in *Williams* at [9]–[11]. *Williams* was endorsed and applied by Bell AJ in *Atkinson v Berry* [2014] NZHC 2318 at [27] (considering the then applicable s 21 of the NZ Limitation Act 1950). Cf the position in New South Wales: *Sze Tu v Lowe* [2014] NSWCA 462 at [326]–[339], especially at [336]–[337].

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claims. It also means that the nature of the trustee's breach does not affect whether a limitation period applies.

Lord Sumption found support for his approach of limiting the exceptions to limitation in the judgment of Lord Hoffmann in the Hong Kong case of *Peconic Industrial Development Ltd v Lau Kwok Fai*[135] (although the dissenting Lord Mance was notably critical of Lord Hoffmann's approach).[136] And indeed, it is must be conceded that the approach of the Supreme Court is in line with other common law jurisdictions. In *Yong Kheng Leong v Panweld Trading Ltd*,[137] the Singapore Court of Appeal considered a claim brought by a private company against one of its directors in respect of alleged financial irregularities, and against the director's wife. Although the court's observations on limitation were strictly obiter,[138] they are of relevance here, as the material provisions of s 22 of the Singapore Limitation Act replicate those of the 1980 Act. The Court held that the distinction between constructive trustees (now endorsed in *Williams*) holds true for Singapore, and for the law of limitation. The question is whether 'the person holds property in the position of a trustee … and deals with that property in breach of trust'.[139] There was no challenge to the conclusion that the 6-year limitation period applied to a claim against the director's wife for knowing receipt.

The decision in *Williams* is less overtly based on commercialist reasoning than either *AIB* or *FHR*, admittedly: however, we argue that it fits the trend, not least in the light of subsequent cases. In particular, as we examine through a comparative angle in the next section, recent authorities from various common law jurisdictions on the liability of strangers to the trust demonstrate reluctance on the part of the courts to subject such parties (typically commercial actors who do not voluntarily undertake onerous equitable obligations) to extensive liability.[140] In particular, in addition to considering Australian developments, our analysis compares English law with the developments in other commercially focused common law jurisdictions, such as Singapore and Hong Kong. The convergence of judicial attitudes within the common law world strongly indicates that English law is not alone in its commercialist treatment of equity.

(b) Standards for liability

Williams was the first time in a decade that the Supreme Court (or House of Lords) had substantively considered either ancillary liability in equity.[141] The case was argued on the basis, which the majority *Williams* accepted, that the principles as to establishing the

135. [2009] HKCFA 16.
136. *Williams* at [154].
137. [2013] 1 SLR 173.
138. As the Court dismissed the appeal on the challenge to the facts decided (and conceded below): [2013] 1 SLR 173 at [34]–[35].
139. [2013] 1 SLR 173 at [46].
140. In *Sea Shepherd UK v Fish & Fish Ltd* [2015] UKSC 10, Lord Toulson, speaking of the liability of a joint tortfeasor, noted (at [39]) that 'In reality, the limitations which the courts have placed upon the scope of liability as a joint tortfeasor are founded on a pragmatic concern to limit the propensity of the law of tort to interfere with a person's right to do things which are in themselves entirely lawful.' For further detail, see P Davies *Accessory Liability* (Oxford: Hart Publishing, 2015) chs 4, 6.
141. Since *Criterion Properties Plc v. Stratford UK Properties LLC* [2004] UKHL 28. There had been some Privy Council decisions, such as *Barlow Clowes International Ltd & Anor v Eurotrust International Ltd (Isle of Man)* [2005] UKPC 37 and *Arthur v Attorney General of the Turks & Caicos Islands* [2012] UKPC 30.

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liability of strangers are largely settled, without interrogating some remaining uncertainties that go to the nature of liability. As cases from the English Court of Appeal and other jurisdictions show, other issues arising in the commercial context may well require consideration at the highest level in England again soon.

We deal with dishonest assistance first, and only briefly, since the *nature* of the liability is less controversial than that in knowing receipt. English law has had some struggles with the test for dishonesty,[142] but the law now appears to have settled on an objective test.[143] It has been clear in England since the Privy Council decision in *Royal Brunei Airlines v Tan*[144] that there is no requirement for the trustee themselves to be dishonest. In Australia, however, the High Court insisted that an action does require there to have been knowing assistance in a dishonest and fraudulent design on the part of the trustee or fiduciary.[145] *Hasler v Singtel Optus Pty Ltd*,[146] the New South Wales Court of Appeal disapproved a Western Australian decision[147] that had been understood to have misinterpreted this criterion in so far as it related to the nature of the breach of the primary duty. In *Hasler*, the court refused to lower the standard for such claims in dishonest assistance: 'It is plain (in Australia) that it is the quality of the fiduciary's breach which must answer the description of "dishonest or fraudulent"'.[148] The effect of the Australian position is to confine the potential for the liability of an accessory (who does not procure or induce the breach) to those breaches which are dishonest,[149] and thus to make the action's availability much more limited in commercial litigation than it would be in England.

The reluctance to expose commercial actors to extensive equitable liability can also be seen in *Novoship (UK) Ltd v Mikhaylyuk*.[150] A full account of the decision in that case is beyond our scope here. But in the context of a claim in dishonest assistance in respect of a complicated bribery scheme, the Court of Appeal insisted on a special causation test that worked in favour of the defendant because he was not 'a true fiduciary'.[151] The Court went on to state that 'where a claim for an account of profits is made against one who is not a fiduciary, and does not owe fiduciary duties then … the court has a discretion to grant or withhold the remedy'.[152] The general approach in *Novoship* has since been endorsed by the Board of the Privy Council.[153] This retention of discretion fits with the trend we have seen for a measure of flexibility in

142. J Lee 'Fidelity in interpretation: Lord Hoffmann and *The Adventure of the Empty House*' (2008) 28 Legal Stud 1.
143. *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314, [25] (Sir Andrew Morritt C) and *Central Bank of Ecuador & Ors v Conticorp SA & Ors (Bahamas)* [2015] UKPC 11 at [9] (Lord Mance).
144. [1995] 2 AC 378.
145. *Farah Constructions Pty Ltd v Say-Dee Pty Ltd (Farah)* [2007] HCA 22; 230 CLR 89, on a strict interpretation of Lord Selborne LC in *Barnes v Addy* (1874) LR 9 Ch App 244 at 251–252.
146. [2014] NSWCA 266.
147. *Westpac Banking Corporation v Bell Group Ltd (No 3)* [2012] WASCA 157; 44 WAR 1.
148. *Hasler* [2014] NSWCA 266 at [110] (Leeming JA).
149. Ibid, at [125] (Leeming JA).
150. [2015] 2 WLR 526.
151. Ibid, at [115].
152. Ibid, at [119].
153. In *Central Bank of Ecuador and others v Conticorp SA* [2015] UKPC 11 (judgment on interest and costs) at [9], speaking in the context of the discretion to award compound interest.

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judicial decision making in the commercial context, and is also applicable in knowing receipt, to which we now turn.

The starting point for the modern English law on knowing receipt is *Bank of Credit and Commerce International (Overseas) Ltd v Akindele*, which concerned a loan made to the bank at a very generous rate of interest.[154] The Court of Appeal determined that the state of the recipient's knowledge should be 'such as to make it unconscionable for him to retain the benefit of the receipt'.[155] Of particular note for present purposes is that Nourse LJ expressly framed it within a commercial objective in mind:

> A test in that form … should better enable the courts to give commonsense decisions in the commercial context in which claims in knowing receipt are now frequently made.[156]

In applying that test to the facts, the Nourse LJ held that the defendant Akindele, who had no knowledge of underlying frauds at the bank, did not have the requisite knowledge in all the circumstances: the defendant had viewed it 'simply as an arm's length business transaction'.[157]

In Hong Kong, a key case in this thread is *Thanakharn Kasikorn Thai Chamkat v Akai Holdings*[158] (featuring then Jonathan Sumption QC as counsel and Lord Neuberger as judge). The case concerned the appropriate standard for judging whether it was justifiable for a bank to have relied on an agent's apparent authority to act in a transaction. Lord Neuberger noted that 'at least when it comes to normal commercial transactions, the application of the concept of constructive notice, which is what Akai's approach effectively involves, has been deprecated'[159] and that.

> In a commercial context, absent dishonesty or irrationality, a person should be entitled to rely on what he is told: this may occasionally produce harsh results, but it enables people engaged in business to know where they stand.[160]

Later, his Lordship observed 'how the law in this field struggles to reconcile principle and predictability with commercial reality and fairness',[161] and thus sought to avoid laying down any rigid principles, in an echo of Nourse LJ in *Akindele*.[162] Having adopted that commercially friendly approach, Lord Neuberger held that the bank nevertheless failed to establish that it had acted rationally, evaluating it in terms of 'commercial common sense' on the basis of both its own practice and that of Thai banks more broadly.[163] And, again, Lord Neuberger found that it was particularly important in the commercial context that the common law test for reasonable reliance on apparent authority of an alleged agent should be effectively identical to the equitable test for a claim in knowing receipt:[164]

154. [2001] Ch 437.
155. Ibid, at 455.
156. Ibid.
157. Ibid, at 457.
158. [2010] HKCU 2362.
159. *Thanakharn Kasikorn Thai Chamkat v Akai Holdings* [2010] HKCU 2362 at [51].
160. Ibid, at [52].
161. Ibid, at [70].
162. Although it may be noted that Lord Neuberger left open the point as to whether unconscionability as stated in *Akindele* is the correct approach in knowing receipt: Ibid, at [128].
163. Ibid, at [89].
164. Ibid, at [135].

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> It makes little commercial sense, and would provide a fertile source of confusion and inconsistency, if the tests were different … above all in a case involving knowing receipt in an arm's length commercial context, I consider that, at any rate absent very special facts, equity would follow the law.[165]

An application of these explicitly commercial considerations can be seen in the Singapore case of *George Raymond Zage III v Ho Chi Kwong*.[166] The Court of Appeal drew upon both *Akindele* and *Akai Holdings* in addressing the consequences of a fraud by a solicitor on two of his clients. The fraudulent solicitor had then bought jewellery and precious stones from the defendant jewellery firm, buying in two batches – one in respect of the majority of the items, and then a second payment which was via a cash cheque identifying it as coming from a client account. That cheque was handed to a Mr Ho, who was a director of the jewellery firm and an experienced businessman.

The clients sought to claim against the jeweller in both dishonest assistance and knowing receipt. The action for dishonest assistance failed because the Court of Appeal was not satisfied that the jeweller had assisted in the breach by passive receipt of funds or that it was dishonest, though the latter finding was not properly explained.[167] The jeweller was held liable for knowing receipt of a portion of the proceeds. On knowing receipt, the Court cautioned that:

> courts should be very slow in imputing knowledge of wrongdoing when assessing the propriety of commercial transactions. In the *absence of established commercial practices* or obviously questionable conduct on the part of a counter-party, merchants are not ordinarily expected to make searching inquiries into their customers' source of funds. To demand such diligence in the course of ordinary commercial transactions would unduly constrict trading activities.[168]

In so holding, the Court delved into considerable detail on the nuances of the etiquette of jewellery purchases, and luxury goods more broadly.[169] This might be thought to be 'commercialist' reasoning on a relatively micro-scale,[170] not least because the Court stated that 'real estate transactions that might involve lengthy investigations into title and the existence of conflicting interests do not set normative standards in transactions for the sale and purchase of goods' (even 'for very large purchases').[171]

The Court went on to note that the subsequent receipt of a cash cheque labelled as being from the firm's client account did give rise to the requisite level of knowledge to 'a sophisticated businessman' such as Mr Ho: 'This was not, on the face of it, a method of payment that a person with Ho's background and experience could properly regard as legitimate.'[172] *George Raymond Zage III v Ho Chi Kwong* therefore

165. Ibid.
166. [2010] 2 SLR 589.
167. Ibid, at [43]. VK Rajah JA, delivering the judgment of the Court of Appeal, merely stressed that the knowledge requirement for both causes of action, though similar, remain 'conceptually distinct'. There is a strong sense that the Court was careful not to label commercial actors as 'dishonest', given the reputational repercussions. A similar, though separate concern was found in Lord Hutton's now disapproved combined test for dishonesty in the context of the solicitor in *Twinsectra Limited v Yardley* [2002] UKHL 12 at [35].
168. [2010] 2 SLR 589 at [52] (emphasis added).
169. [2010] 2 SLR 589 at [46].
170. The court noted (at [46]) the then absence of obligations in respect of money laundering regulations in Singapore.
171. [2010] 2 SLR 589 at [46].
172. Ibid, at [50].

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demonstrates the very flexibility in application of traditional principles of Equity encouraged by *Akindele* and *Akai Holdings*. It also serves to highlight a further tension in the courts' reasoning. *Akindele* endorsed unconscionability as a supposedly objective, yet flexible standard (by virtue of its deliberate vagueness)[173] that is applicable to commercial contexts. And yet we find that the courts still wish to retain the ability to judge by a different, but still supposedly objective and flexible standard in the form commercial expectations or established practice for particular contexts.

In this area, the commercial paradigm[174] perhaps explains the relative lack of judicial interest in the case-law in the more nuanced arguments about the nature of claims in knowing receipt, and whether it is, as Mitchell and Watterson have argued, a distinctive, primary, custodial liability'.[175] Rather, it was sufficient to decide in *Williams*, for example, that knowing recipients are not trustees, reinforcing the independence of the wrong from the (decided to be) fictive language of trusteeship.[176] *Williams* thus establishes the clear dividing line for commercial actors to be able to avail themselves of the limitation period, even if the interpretation is decidedly awkward.[177] The authorities considered in this section are thus in line with the trend which we have seen *AIB*, *FHR* and even *Bailey*.

CONCLUSIONS

Lord Browne-Wilkinson famously cautioned against 'the wholesale importation into commercial law of equitable principles inconsistent with the certainty and speed which are essential requirements for the orderly conduct of business affairs'.[178] Our argument has shown that recent jurisprudence suggests that care should be taken in the opposite direction too. We have seen that the influence and impact of commercial (and Scots) rather than Chancery lawyers in part explains the revisionist creativity on display. The framing of issues is important: Lord Sumption, for example, began his judgment in *Bailey* – a case which, as we have seen, raised important questions about the law of constructive trusts – by stating that the appeal raised 'two important and controversial questions of *commercial* law'.[179]

It is important to be clear that the target of our criticism here is very much the tone and structure of the reasoning in the key authorities: it is perfectly possible to agree with the

173. As to which, see G Virgo 'Whose conscience? Unconscionability in the common law of obligations' in A Robertson and M Tilbury (eds) *Divergences in Private Law* (Oxford: Hart Publishing, 2016) p 293.

174. Lord Walker 'Dishonesty and unconscionable conduct in commercial life – some reflections on accessory liability and knowing receipt' (2005) 27 Sydney L Rev 187.

175. C Mitchell and S Watterson 'Remedies for knowing receipt' in C Mitchell (ed) *Constructive and Resulting Trusts* (Oxford: Hart Publishing, 2010) p 129. This was supported by Sir Terence Etherton in the Privy Council decision of *Arthur v Attorney General of the Turks & Caicos Islands* [2012] UKPC 30 at [37]. Sir Terence has served as Chancellor and was recently appointed to succeed Lord Dyson as Master of the Rolls (returning a Chancery lawyer to the role). Cf D Whayman 'Remodelling knowing receipt as a gains-based wrong' [2016] J Bus L 565.

176. See J Glister and J Lee *Hanbury & Martin: Modern Equity* (London: Sweet & Maxwell, 20th edn, London, 2015) para 25–004.

177. Lee, above n 133, at 42–43.

178. *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 704G–705B. Cf also Reynolds, above n 21, pp 704–705.

179. [2016] UKSC 47 at [1] (emphasis added).

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outcome of any one of these cases without signing up to the route by which the court arrived at the conclusion. Nor is our argument that commercial considerations should be *irrelevant* to adjudication. Diversity of views can enrich the court's reasoning. As More noted in *Utopia*:

> You are not obliged to assault people with discourses that are out of their road, when you see that their received notions must prevent your making an impression upon them: you ought rather to cast about and to manage things with all the dexterity in your power, so that, if you are not able to make them go well, they may be as little ill as possible; for, except all men were good, everything cannot be right, and that is a blessing that I do not at present hope to see.[180]

Our concern is, rather, with the demonstrable pattern in the cases of either subjugating the received notions of equity to commercial dexterity, or declining to engage with principle in the first place. Nor are appeals to commercial considerations always objectively ascertainable or verifiable. This commercialist flexibility comes at the expense of doctrinal coherence and a lack of development of equitable principles. Equity is being assaulted by commercialist discourse.

Our principal focus has been on the UK Supreme Court, and we have argued that the next two rounds of appointments of Justices must recognise the need for Chancery experience, and the balance of specialist and generalist expertise. Importantly, there should not be any assumption that commercial experience is neutrally 'generalist'. Yet we have further shown that the 'commercialisation' of equity is not, however, a purely national revolution. And our argument has broader horizons, especially when one turns to examine the developments in jurisdictions that pride themselves as commercial hubs. In Hong Kong, there is a cross-pollination of the law from the judges in England and Australia sitting in the Court of Final Appeal: the influence of these judges is notable in commercial/Chancery cases.[181] A wider, related issue is the extent to which the law, and the courts, in the various jurisdictions considered above are, and should be, sensitive to reflecting commercial reality and good sense, as a facet of being an attractive centre for the adjudication of international commercial litigation.[182] For example, Singapore's goal of developing its own indigenous law contrasts with the rise of the Singapore International Commercial Court[183] (which is part of the initiative to internationalise the local legal sector): disputes before the latter will usually be presided over by international judges. It remains to be determined the extent to which cases before the Singapore International Commercial Court will influence the development

180. T More *Utopia*, tr G Burnet (London, 1808) p 56.

181. Of cases mentioned here, see eg Lord Hoffmann NPJ in *Peconic Industrial Development Ltd v Lau Kwok Fai* [2009] HKCFA 16, Lord Neuberger NPJ in *Thanakharn Kasikorn Thai Chamkat (Mahachon) (aka Kasikornbank Public Co Ltd) v Akai Holdings Ltd (in liquidation)* [2012] HKCU 2362, and Lord Millett NPJ in *Libertarian Investments Ltd v Hall* [2014] 1 HKC 369.

182. See further the Honourable the Chief Justice Sundaresh Menon, Keynote Address at Singapore Academy of Law and Chancery Bar Conference 2013 'Finance, property and business litigation in a changing world', speech, Singapore, 25 April 2013.

183. See M Yip 'The resolution of disputes before the Singapore International Commercial Court' (2016) 65 Int'l Comp L Q 439.

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of Singapore law, but our analysis suggests that caution is needed.[184] Throughout this paper, we have used 'commercialisation' and 'commercialised' as shorthand for commercial considerations, and perhaps the considerations of commercial lawyers influencing reasoning in equity here.[185] But we have also used it advisedly, with the implicit undertone of the potential commodification of law, in England and elsewhere.

At the heart of the debate concerning the modern development of equity, then, lies the important query of what the law of trusts is meant to do, and to be. After this dystopian revolution, a restoration of principle is needed. But such a restoration requires us to consider more deeply what are the old ways of equity that no longer suit the modern world, and which, if any, must be abandoned.

184. See eg *CPIT Investments Ltd v Qilin World Capital Ltd* [2016] SGHC(I), in which Vivian Ramsay International Judge delivered a decision on Singapore civil procedure, in relation to applications made in respect of a case that has been transferred to the Singapore International Commercial Court.

185. Lord Sumption has noted that 'there is greater flexibility [in] the legal profession. The division between the chancery bar and the common law bar, which was once absolute, has become almost imperceptible': Sumption, above n 34, at 6.

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