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## REMEDIAL CONSISTENCY AND CONSTRUCTIVE TRUST CLAIMS

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### Introduction

An express trust arises when a settlor transfers property to a recipient to hold as trustee, and the trustee agrees to act as such and becomes subject to a duty to look after and manage the property and distribute it to the beneficiaries on the terms stated by the settlor. A constructive trust arises when D receives property and holds it on trust for C, not because the property was transferred to D by a settlor intending to create an express trust in favour of C, but by operation of law in response to the circumstances, to avoid or undo what the law deems to be an injustice. By contrast with the position for an express trust, D has not agreed to act as trustee and has no management responsibilities with respect to the property, and the effect of the constructive trust is simply to give C a proprietary claim against D in respect of the property.<sup>1</sup>

I shall discuss three types of case where the availability of a proprietary claim, by way of a constructive trust, has been controversial: the constructive trust to recover a mistaken or unauthorised payment, the constructive trust of fiduciary profits, and the constructive trust of matrimonial or quasi-matrimonial property. My aim is not to offer a detailed analysis of the case law

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<sup>1</sup> This is a simplification because in some cases D has actual or constructive knowledge of the circumstances, which may give rise to a personal liability to C. “Constructive trusteeship” may be used to refer to D’s position when D is liable to a proprietary claim, or to the position where D also has personal liability arising from actual or constructive knowledge.

on these topics, or to deal with all types of constructive trust, or to address all the arguments in the very large literature,<sup>2</sup> but more specifically to consider whether what I will refer to as the requirement of “remedial consistency” can show whether a proprietary claim should in principle be available in these cases, and provide guidance on how the law should be understood and developed.

## Remedial consistency

### The idea of remedial consistency

I assume that the law can be expressed in terms of legal relations, a relation being a right and its correlative duty or liability, and that one may conveniently express the legal position by reference to either correlate. I understand the primary relation to be the relation subsisting before a claim arises, which specifies what D is required to do for C, or what risk or potential liability the law requires D to bear vis-à-vis C, and accordingly determines when a claim arises for C against D. The remedial relation is the claim that arises out of the primary relation, that is to say C’s right against D to a remedy to realise or satisfy or protect the primary relation in the circumstances now obtaining, which it is the court’s responsibility to identify and enforce by its order. The remedial relation represents remedial justice relative to, and in accordance with, the primary relation. It must in this sense be consistent with the primary relation. It seems to me clear that the law ought to conform to this requirement of remedial consistency, as I will describe it, but I do not mean to say that it always actually does so.<sup>3</sup>

By way of illustration, say that D owes a duty to C, and breaches the duty and causes harm to C as a result, as a matter of remedial consistency C’s remedy must give C the benefit of the

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<sup>2</sup> The literature includes DWM Waters, *The Constructive Trust*, (London: Athlone Press, 1964); AJ Oakley, *Constructive Trusts* (Sweet & Maxwell, 1996); David Wright, *The Remedial Constructive Trust* (Sydney: Butterworths, 1998); G Elias, *Explaining Constructive Trusts* (2002); YK Liew, *Rationalising Constructive Trusts* (Hart, 2017).

<sup>3</sup> I used the concept of remedial consistency in a similar way in Peter Jaffey, “Explaining the Trust” (2015) 131 LQR 377. Similar or related approaches have appeared in various forms under the rubric of monism, continuity, vindication, or corrective justice: see, for example, M Tilbury, “Remedies and the Classification of Obligations” in Robertson (ed.), *The Law of Obligations: Connections and Boundaries* (London: UCL Press, 2004); Ernest J Weinrib, *Corrective Justice* (OUP, 2012), Ch 3; J Gardner, “What is Tort Law For? Part 1: The Place of Corrective Justice” 30 *Law and Philosophy* 1, 33-4 (2011); E Voyiakis, *Private Law and the Value of Choice* (Hart Publishing, 2017), ch 1; P Jaffey, *Private Law and Property Claims* (Hart, 2007) ch 2.

primary duty, so, if the remedy is pecuniary compensation, the measure of compensation must be the amount that will so far as possible put C in the position that would have obtained if the duty had been performed, which is, of course, the standard measure.<sup>4</sup> If D has a contractual duty to C, and fails to perform, as a matter of remedial consistency the measure of C's compensation should be expectation damages, compensation relative to the position that would have obtained if D had performed the contract; it cannot be reliance damages, compensation for loss incurred by him in reliance on the assumption that the duty would be performed.<sup>5</sup> It is important to identify the primary relation in order to establish the appropriate remedy, and if the court mischaracterises the primary relation, it may formulate the wrong remedy, contrary to the requirement of remedial consistency. This example is intended merely to illustrate the concept of remedial consistency. Here we are concerned with the concept in the context of property law and trusts.

#### Remedial consistency and property

An owner of property generally has a right correlated with a duty on the part of other people not to interfere with or intrude upon the property. A claim to protect the property is typically understood as a claim arising from a breach of this duty or to enforce this duty, and the appropriate remedy is a measure that corrects the wrong by excluding the intruder and restoring the property to the owner, or by compensating the owner for the intrusion. This is, broadly speaking, how the protection of property is characterised at common law with respect to the law of trespass and conversion. It represents a standard approach to private property.

It is not, however, the only type of claim that can in principle arise to protect a property right. A duty is a requirement to act or not to act, and a claim arising from a breach of duty must arise from D's acting, or failing to act, in a way that is contrary to the duty. Where C is an owner whose property comes into D's hands without a valid transfer, for example where it has been taken

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<sup>4</sup> See e.g. *Robinson v Harman* (1848) 1 Ex 850.

<sup>5</sup> Except insofar as reliance damages can be taken to be a proxy for expectation loss: see e.g. *The Mamola Challenger* [2010] EWHC 2026; David McLauchlan, "Reliance Damages for Breach of Contract" [2007] NZLR 417.

without authority, or transferred by the owner or by an agent without authority, or where the exercise of the power is vitiated by mistake, in principle the claim arises simply from the invalid transfer itself, and not from a breach of duty by D, that is to say not because of anything that D has done or not done.<sup>6</sup> In connection with property, we should in principle distinguish between these two types of claim, the claim arising from an invalid transfer of property from C to D, and the claim arising from the breach of a duty by D not to interfere with C's property.<sup>7</sup>

It follows that the primary right from which a claim to recover an invalid transfer arises is not a right against interference, i.e., a right correlated with a duty against interference. It is simply a right to the property itself, or to the benefit of the property, and it generates a liability on the part of other parties, "liability" signifying simply a susceptibility or vulnerability to a claim to recover the property or its value, if the property is received through an invalid transfer.<sup>8</sup>

The remedial consistency requirement applies in principle to both types of claim, and indeed, by considering what remedy is appropriate in the light of the remedial consistency requirement, we can demonstrate and clarify the difference between them. If D has committed a breach of duty, for example by appropriating C's property, or disposing of it after receiving it through an invalid transfer, or destroying it, as a matter of remedial consistency the remedy arising from the breach of duty should be compensation for the loss caused by the breach of duty. This is a personal remedy that binds only D as the wrongdoer. D could be subject to an order of specific restitution, if still in possession of the property, but specific restitution (as I will use the expression) is a personal remedy: it is a right to recover the property binding only D, not a proprietary remedy that binds third parties to respect C's right to recover the property. In particular, C's right to specific

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<sup>6</sup> Strictly speaking, we should distinguish between cases where D is liable for a loss caused to C, where the claim is generally regarded as arising from a breach of duty, and cases where D is liable because of what he has received through a transfer from C.

<sup>7</sup> "Invalid transfer" is not a customary expression or a term of art. It refers to a transfer of possession or control in the absence of a valid exercise of the power of transfer. The invalidity may be due to D's actions, as where D has procured C's mistake, but there is still a distinction between the claim arising from the invalidity and the claim arising from the wrong.

<sup>8</sup> See further P Jaffey, "Private Property and Intangibles" in Martin Dixon & Martin George (eds), *Issues in Modern Land and Property Law: Essays in Memory of Mark Thompson* (Hart Publishing, 2019).

restitution **does not override the interests of D's creditors if D is bankrupt**, and so C will be confined to a **pecuniary remedy** in this situation. Under the remedial consistency requirement, **a breach of duty never generates a proprietary claim, because a breach by D of a duty to C cannot in principle affect the position of either party vis-à-vis third parties.**<sup>9</sup>

**By contrast, an invalid transfer of property from C to D should in principle generate a proprietary claim to recover the property, because if the transfer is invalid as against D it must also be invalid as against the whole world.** One might say that the proprietary claim arises from the persistence of the pre-existing property right in the same or a varied form, according to the circumstances, given the invalidity of the transfer. What I take to be the same or a related point has been expressed explicitly or implicitly in the idea that a proprietary claim vindicates a pre-existing property right, or in the form of a requirement of a “proprietary base”, or as the effect of “proprietary inertia”.<sup>10</sup>

Proprietary inertia is a legal principle that states that someone who has not given away their property and has not succeeded in doing so should remain the owner. This means that the person who receives the property should hold it in trust for the original owner.

The distinction between these two types of claim – the claim arising from a breach of duty and the claim arising from an invalid transfer – and their respective remedies is not always recognised in the law. At common law, a claim to protect property, such as a claim in trespass or conversion, always has the form of a personal wrong-based claim, but it is required to do the work of both types of claim, and the effect is that the law conflates the two types of right and falls short of giving them appropriate protection.<sup>11</sup> Equity does of course recognise a proprietary claim in the form of the equitable proprietary claim or constructive trust and has come closer to giving effect to the distinction.<sup>12</sup>

<sup>9</sup> This point is crucial to the analysis of the trust in Jaffey, above n3. Cf Liew, above n 2, --.

<sup>10</sup> See, for example, P Millett, “Restitution and Constructive Trusts” (1998) 114 LQR 399; Peter Birks, *Introduction to the Law of Restitution* (Clarendon Press, rev edn 1989), 386; S Gardner, *An Introduction to the Law of Trusts* (Clarendon Law Series 3<sup>rd</sup> edn, 2011), ch16; RM Goode, “Ownership and Obligation in Commercial Transactions” (1987) 103 LQR 433.

<sup>11</sup> This point is considered further in Jaffey, above n8.

<sup>12</sup> Equity recognises the equitable proprietary claim along with the personal claim for knowing receipt, which in some circumstances at least provides compensation for loss of trust property wrongfully caused, as discussed. The interpretation of knowing receipt is controversial: see for example R Havelock, “The Transformation of Knowing Receipt” [2014] RLR 1; D Sheehan, “Disentangling Equitable Personal Liability for Receipt and Assistance” [2008] RLR 41; K Low, “Recipient Liability in Equity: Resisting the Siren’s Lure” [2008] RLR 96.

### Remedial consistency and the trust

The requirement of remedial consistency is crucial to explaining the nature of the trust, as I have argued elsewhere.<sup>13</sup> There is a longstanding puzzle in the law of trusts over whether the right of a beneficiary under the trust is personal or proprietary, that is to say whether it is a personal right relating to the trust property but binding only the trustee, or a property right in the trust property that binds everyone, not just the trustee.<sup>14</sup>

The trustee's duty to the beneficiaries, **the duty to act as trustee and to look after the trust property and distribute it in accordance with the trust, is of course fundamental to the express trust.**<sup>15</sup> This duty arises from the trustee's undertaking to act as trustee. It is difficult to see on what other basis it would be justified to subject the trustee to such a burdensome duty. However, it follows that this must be a personal duty binding only the trustee, in the nature of a contractual duty.<sup>16</sup> If the beneficiary's only right is a right to the performance of this duty, the implication is that the beneficiary has only a personal right against the trustee, who must be the absolute owner of the property, and, as a matter of remedial consistency, it would follow that the appropriate remedies for a claim by the beneficiary are confined to personal remedies against the trustee arising from a breach of duty, or against accessories in the breach of duty.<sup>17</sup>

In fact, the most important and distinctive claim that arises to protect a beneficiary's right under the trust is the equitable proprietary claim or constructive trust claim, that is to say the beneficiary's proprietary claim against a third party recipient of trust property transferred by the

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<sup>13</sup> See above n3.

<sup>14</sup> This is of course an ancient debate: see for example F.W. Maitland, *Equity—A Course of Lectures*, J. Brunyate, revised edn (Cambridge: Cambridge University Press, 1936); AW Scott, "The Nature of the Right of the Cestui que Trust" (1917) 17 Colum. L. Rev. 269; DWM Waters, "The Nature of the Trust Beneficiary's Interest" (1967) 45 Can Bar Rev 221.

<sup>15</sup> See for example D J Hayton, "Developing the Obligation Characteristic of the Trust" (2001) 117 LQR 96.

<sup>16</sup> The use of "contractual" is not intended to imply that there is a common law contract, or that there is a bilateral agreement with beneficiaries, but that there is a voluntarily-assumed obligation. For a modern defence of the contractual theory of the trust, see John H Langbein, "The Contractarian Basis of the Law of Trusts" 105 Yale Law Journal 625 (1995).

<sup>17</sup> Accessory liability can of course arise in the form of "knowing or dishonest assistance", as in *Royal Brunei Airlines v Tan* [1995] 2 AC 378. Some commentators do try in effect to build on third party accessory liability as the foundation of the trust: see e.g. LD Smith, "Philosophical Foundations of Proprietary Remedies" in Chambers et al. (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP, 2009).

trustee in breach of trust, by which the beneficiary asserts a persisting property right over the trust property. As a matter of remedial consistency, this proprietary claim cannot arise as a response to a breach of duty by the trustee. It must arise from the beneficiary's property right in the trust property, as a response to the invalidity of the transfer of trust property to the third party recipient. The transfer is invalid because it is beyond the authority of the trustee under the terms of the trust.

This also involves a breach of duty by the trustee, but it is the invalidity of the transfer and not the breach of duty that is relevant to the claim against the recipient arising from the transfer.

Furthermore, the beneficiary's property right in the trust property cannot arise from the trustee's undertaking to act as a trustee. It must arise from the fact that the transfer by the settlor, as the original owner of the property, by which the trust was created, was accompanied by the grant of a property right to the beneficiary.

The express trust can only be adequately explained, consistently with the requirement of remedial consistency, on the basis that it has these two dimensions, the "contractual dimension" arising from the trustee's undertaking to carry out the trust, and the "property dimension" arising from the transfer of property by the settlor to the trustee with the grant to the beneficiary, creating the beneficiary's property right in the trust property. The beneficiary's equitable interest under a trust combines a personal right against the trustee to the performance of the trust and a property right in the trust property binding on the whole world.<sup>18</sup>

The equitable proprietary claim is also described as an equitable interest under a constructive trust. It is a constructive trust that consists of a pre-existing property right that persists and binds the recipient. On the suggested analysis, it is simply the property dimension of the trust, persisting against the third party recipient as a matter of remedial consistency, but without the contractual dimension of the express trust, the duty to carry out the trust on the terms laid down by

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<sup>18</sup> See further above n3.

the settlor, which does not arise with respect to the recipient because the recipient has not undertaken to act as a trustee.<sup>19</sup>

### The constructive trust to recover a mistaken or unauthorised payment

As argued above, as a matter of remedial consistency an invalid transfer of property should give rise to a proprietary claim. At common law, however, a claim to recover an unauthorised or mistaken payment has always been a personal claim. The reason is said to be that title to the money passes from the claimant transferor C to the defendant recipient D, so that C does not retain a property right to any asset in D's hands, and cannot have a proprietary claim. It is sometimes said that the transfer is valid as a matter of property law, but vitiated so as to give rise to a personal claim in unjust enrichment.<sup>20</sup> However, the reason why title passes to D cannot be that the transfer is valid. If the transfer were valid, there would be no reason why C should have a claim at all. The absence of authority or mistake must make the transfer invalid – the absence of authority or the mistake has the effect that there was no valid exercise by the owner of the power to transfer the property.<sup>21</sup> The reason why title passes, despite the invalidity of the transfer, is that the money paid ceases to be distinguishable as a distinct asset, or that it is paid into D's account so that D necessarily has title to it, or by virtue of the rule that title to money passes to protect the interest of third parties in relying on the money as currency.<sup>22</sup>

In equity, when a transfer of trust property by the trustee to the recipient D is invalid because it is outside the terms of the trust, legal title passes but the beneficiary C retains beneficial ownership, which gives him the proprietary claim. Equity has the great advantage over the common law that it is capable of recognising a proprietary claim to property in D's estate, even though legal title has passed to D. It is possible for legal title to pass to D, for the protection of third parties or

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<sup>19</sup> Where the recipient has not undertaken to act as trustee but becomes aware of the breach of trust (in the relevant sense) he can be personally liable in knowing receipt; see above n 12.

<sup>20</sup> See e.g. *Lipkin Gorman v Karpnale* [1991] 2 AC 548.

<sup>21</sup> This is clear in a case of absence of authority, which is treated in the same way at common law. *Lipkin Gorman v Karpnale* is a case of this sort.

<sup>22</sup> See generally D Fox, "The Transfer of Legal Title to Money" [2006] RLR 60.



because of the problem of ascertainability with respect to specific assets, and at the same time for C to have an equitable proprietary claim, in accordance with the requirement of remedial consistency. Furthermore, in equity the claim can persist with respect to traceable proceeds where the trust property is no longer in the form of the original asset, as where trust money is mixed in an account.<sup>23</sup> The common law has always lacked this necessary conceptual apparatus to allow it to recognise the proprietary claim. This is why the common law has only been able to recognise a personal claim.<sup>24</sup> In the interests of remedial consistency, the equitable proprietary claim should be available in circumstances where traditionally only the common law claim has been available.

The equitable proprietary claim has of course traditionally been limited to transfers made in breach of trust or breach of fiduciary duty, but the justification for a proprietary claim does not depend in principle on a prior breach of trust or breach of fiduciary duty, or a prior trust or equitable interest (and in the case of a fiduciary relationship there is no prior trust or equitable interest). The proprietary claim arises in principle simply from the invalidity of the transfer, because it is the apt remedial response, as a matter of remedial consistency. A move towards making the equitable proprietary claim generally available for invalid transfer was made in *Chase Manhattan Bank v Israel-British Bank*,<sup>25</sup> but the traditional limitation was affirmed in *Westdeutsche Landesbank Girozentrale v Islington Borough Council*.<sup>26</sup> However, recent decisions would appear to cast doubt on the traditional position.<sup>27</sup>

<sup>23</sup> The tracing rules are understood to identify a specific asset or share of a specific asset, whereas the common law claim is understood to be simply to the value of the transfer, so there can be a personal claim where there are no traceable proceeds. In theory it would be possible to recognise a proprietary claim to the surviving value as such, as a part of D's estate, even if it does not correspond to any particular asset in D's general assets: see further P Jaffey, "Proprietary Claims to Recover Mistaken or Unauthorised Payments" in P Devonshire and R Havelock, eds, *The Impact of Equity and Restitution in Commerce* (Hart, 2018).

<sup>24</sup> Where a proprietary claim arises from a transfer from one account to another, there must have been a transfer of property from account to account and a property right with respect to the original account. Some commentators are sceptical that this can be the case – see for example Tatiana Cutts, "Modern Money Had and Received" (2018) 38 OJLS 1 – though it is assumed in equity.

<sup>25</sup> [1981] Ch 105. The decision did not explicitly abandon the traditional requirement but really paid lip service to it.

<sup>26</sup> [1996] AC 664.

<sup>27</sup> See *CMOC Sales & Marketing Ltd v Persons Unknown* [2018] EWHC 2230. The judgements in *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29 and *Bailey v Angove's* [2016] UKSC 47 also do not refer to a requirement of breach of trust or fiduciary duty for a proprietary claim. Cf Andreas

It is sometimes said that in the case of a mistaken or unauthorised payment, the court should have a discretion to declare a constructive trust, taking effect from the date of the order, i.e. a so-called remedial constructive trust.<sup>28</sup> The remedial constructive trust has been rejected in English law,<sup>29</sup> and the objection to it in this situation is that, on the assumption that the transfer initially generates only a personal claim, the creation of a constructive trust by court order, where until this point there was only a personal claim, means that third party creditors, to whom the property would otherwise have been available, are in effect expropriated by the order. The underlying objection **here is actually remedial inconsistency**: as a matter of remedial consistency, the court should limit itself to finding and enforcing existing property rights, which means that in this context it should only **enforce a proprietary claim to property invalidly transferred (or traceable proceeds) arising directly from the invalid transfer and subsisting continuously from then**. The remedial constructive trust could however be understood as a device to give effect to the proprietary claim to traceable proceeds that ought to arise as a matter of remedial consistency directly from the invalid transfer. The court order would then be understood to recognise and enforce a subsisting (though not currently explicitly recognised) proprietary claim, just as for the ordinary equitable proprietary claim arising from a transfer in breach of trust. On this understanding, **no exercise of discretion is involved**.

Some commentators, whilst objecting to the remedial constructive trust doctrine on the ground that it empowers the court to create a new property right, argue instead that the recipient of

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Televantos, "Losing the fiduciary requirement for equitable tracing claims" (2017) 133 LQR 492. According to M Conaglen, *Fiduciary Loyalty* (Hart, 2007), 28, the abandonment of the traditional requirement of a breach of fiduciary duty would be "analytical nihilism", though it has happened in US law: see e.g. *Re Omegas Group* 16 F.3d 1443 (US 6th Cir, 1994); WA Seavey & AW Scott, "Restitution" (1938) 54 LQR 29. Similarly in Canada: see GB Klippert, "The Juridical Nature of Unjust Enrichment" (1980) 30 University of Toronto Law Journal 356; DWM Waters, "The Nature of the Remedial Constructive Trust" in PBH Birks (ed), *The Frontiers of Liability*, vol 2 (OUP, 1994); DWM Waters, *The Constructive Trust* (London: Athlone Press, 1964).

<sup>28</sup> See generally Emily Sherwin, "Topic II: The Availability and Justification of Property-based Remedies in Restitution" 92 Boston University Law Review 885 (2012). See also *Muschinski v Dodds* (1985) 160 CLR 583; *Pettkus v Becker* (1980) 117 DLR (3d) 257;

<sup>29</sup> See e.g. *Bailey v Angove's* [2016] UKSC 47, [29]; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 714-5; *Re Polly Peck International Plc (no 2)* [1995] 3 All ER 812, 830-31; *FHR European Ventures LLP v Cedar Capital LLC* [2015] AC 250 [47]. See also P Birks, "Proprietary Rights as Remedies" in Birks, *ibid*; P Millett, "Equity: the Road Ahead" (1995) 9 TLI 35; Ying Khai Liew, "Reanalysing Institutional and Remedial Constructive Trusts" (2016) 75 CLJ 528.

a mistaken or unauthorised payment can become subject to a proprietary claim if he knows of the mistake or lack of authority so that his conscience is affected, and he then acts unconscionably in failing to return the money or put it aside as a separate fund for return to C.<sup>30</sup> But this unconscionability approach certainly falls foul of the remedial inconsistency objection. As a matter of remedial consistency, whether C has a proprietary claim should depend on whether there was an invalid transfer from C to D, which does not depend D's knowledge or whether he acted wrongfully. Whether a claim is personal or proprietary is significant not as against D but as against third parties, D's creditors and indirect recipients from D, and as against these third parties it is the invalidity of the transfer not D's knowledge or how he acted that is relevant. D's knowledge and his actions in the light of it can only be relevant to whether he becomes personally responsible for preserving or returning the property and so incurs a personal liability to compensate C for failing to do so.<sup>31</sup>

On the account I have suggested, where a proprietary claim to recover an unauthorised or mistaken payment is allowed, it would seem appropriate to describe it as arising under a constructive trust, following the usage for claims arising from a transfer in breach of trust or fiduciary duty.<sup>32</sup> However, some would prefer to say that if there is a proprietary claim in this situation it arises by way of a resulting trust. This expression might seem preferable because the effect is to recognise the beneficial proprietary right of the original owner, in accordance with the usual pattern for a resulting trust. However, whichever usage is adopted, the suggested argument based on remedial consistency should be distinguished from a different argument for a proprietary claim in this situation, which is said to be derived from the traditional doctrine of resulting trusts.<sup>33</sup>

<sup>30</sup> e.g. G Virgo, *The Principles of Equity and Trusts* (OUP, 2<sup>nd</sup> ed, 2016), 309-311, 328-34. According to Virgo, *Chase Manhattan Bank v Israel-British Bank* [1981] Ch 105 should be understood in this way.

<sup>31</sup> This is the effect of the law of knowing receipt: see above n12.

<sup>32</sup> As in *Chase Manhattan Bank v Israel-British Bank* [1981] Ch 105.

<sup>33</sup> See for example R Chambers, *Resulting Trusts* (Clarendon Press, 1997), following Peter Birks "Restitution and Resulting Trusts" in SR Goldstein, ed., *Equity: Contemporary Legal Developments* (Hebrew University of Jerusalem, 1992). See also Millett "Restitution and Constructive Trusts" (1988) 114 LQR 399. Some textbooks discuss the equitable proprietary claim and tracing as remedies quite separately from both constructive trusts and resulting trusts.

The starting point for this resulting trust analysis is the case where C makes a voluntary transfer to D, but without expressing any intention to benefit D, and a resulting trust arises under which C has the beneficial interest.<sup>34</sup> The same rule applies where C buys property in D's name. By extension, where two parties contribute to a purchase, the beneficial interest is held in proportion to their contributions to the price. According to Chambers,<sup>35</sup> the resulting trust rule in these cases is based on the principle that there should be a resulting trust where a transfer is made in the absence of an intention to benefit the recipient D (a "non-beneficial transfer"), and he argues that it should also apply in the case where a payment of C's money is made to D without authority or by mistake, where again there is no (true) intention to benefit D.

However, Chambers' approach to the mistaken or unauthorised payment is not in my view a natural extension of the traditional resulting trust rule.<sup>36</sup> On the traditional understanding, the resulting trust doctrine is based on a presumption, subject to contrary evidence, that although C intended to transfer possession or control of the property to D or to vest it in D, he intended to keep or acquire the beneficial interest, or, in the case of two parties, that this was their common intention. The doctrine is concerned with a valid transfer or acquisition, not involving any invalidity due to lack of authority or vitiating, but where no intention has been formed or expressed as to some part of the beneficial ownership, which is presumed to have stayed with C in the absence of evidence to the contrary. This is quite different from the case where the transfer is invalid because it was mistaken or unauthorised. Thus it seems to me that the better analogy for a mistaken or unauthorised transfer is the transfer in breach of trust or fiduciary duty, which is invalid because of

<sup>34</sup> See *Re Vandervell's Trusts (no 2)* [1974] 1 All ER 47; *Westdeutsche Landesbank Girozentrale v Islington Borough Council* [1996] AC 669.

<sup>35</sup> Above n 33.

<sup>36</sup> A similar objection is made by Birke Hacker, "Proprietary Restitution after Impaired Consent Transfers: a Generalised Power Model" (2009) 68 CLJ 324, 345. See further Jaffey, above n8, ch9. See also RB Grantham and CEF Rickett "Resulting Trusts – a Rather Limited Doctrine" in FD Rose, ed, *Restitution and Insolvency* (Mansfield Press, 2000). For a different objection to the resulting trust analysis, see W Swadling, "Explaining Resulting Trusts" (2008) 124 LQR 72. There is controversy over the role of intention, how to understand the presumption, and whether there is a separate category of automatic resulting trust, but this does not affect the basic point that there is a difference between retention of a proprietary interest because this was the intention behind the transfer and retention of a proprietary interest because the transfer was invalid.

the absence of authority, and where the proprietary claim is traditionally said to arise under a constructive trust.<sup>37</sup>

## The constructive trust of fiduciary profits

### The fiduciary relationship

There are various ways in which a trustee or fiduciary, F, may receive a benefit that has to be surrendered to the beneficiary or principal, P: for example, where F appropriates P's property or uses it to make a profit, where F diverts to himself property from a third party that is on its way to P, where F receives a commission from a third party or is paid a bribe, or where F makes a profit from an opportunity acquired from the position of fiduciary. When F is liable to surrender the benefit, it has been controversial whether P should have a proprietary claim in the form of a constructive trust, or only a personal claim by way of an account of profits.<sup>38</sup> This difference of opinion has quite recently been settled, with respect to English law, in favour of the proprietary claim in FHR European Ventures v Cedar Capital Partners,<sup>39</sup> though no doubt there will continue to be argument over whether this was the right decision and why.<sup>40</sup>

To determine the implications of the requirement of remedial consistency for this type of case, we should consider first what the primary relation is with respect to fiduciaries. It is surprisingly difficult to do this in a straightforward and uncontentious way, but the main argument I

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<sup>37</sup> On the suggested approach, a proprietary claim should be available only if there was an invalid transfer, and not, for example, where D receives a valid contractual payment in advance from C and D knows that because of D's impending insolvency it is very unlikely that D will be able to provide the goods or services for which the payment was made. Here there should be only a personal claim: see *Bailey v Angove's* [2016] UKSC 47 per Lord Sumption at [25]-[30]. The claim is purely a matter of "contractual readjustment". This is a rejection of the constructive trust on the ground of unconscionability in *Neste Oy v Lloyds Bank Plc* [1983] 2 Lloyd's Rep 658; *Re Farepak Food and Gifts Ltd* [2006] EWHC 3272; Virgo, above n30. See Howard Wong, "Proprietary restitution and constructive trusts in the Supreme Court" [2016] Conv 480; Televantov, above n27.

<sup>38</sup> See generally Terence Etherton, "The Legitimacy of Proprietary Relief" (1914) 2 *Birkbeck Law Review* 59. See also Peter Devonshire, *Account of Profits* (Thomson Reuters, 2013), ch 3.

<sup>39</sup> [2014] UKSC 45.

<sup>40</sup> On the Australian approach, the court has a discretion whether to allow a proprietary remedy: *Grimaldi v Chameleon Mining* [2012] FCFCA 6 at [569]-[584]. See M Conaglen, "Proprietary Remedies for Breach of Fiduciary Duty" (2014) 73 CLJ 490, 493; K Barnett, "Distributive Justice and Proprietary Remedies over Bribes" (2015) 35 Legal Studies 302. See also Peter Watts, "*Tyrrell v Bank of London* – an Inside Look at an Inside Job" (2015) 129 LQR 527, 528; Andrew D Hicks, "Do Constructive Trusts Deter Disloyalty?" (2018) 69 NILQ 147.

shall make does not depend on exactly how the law is understood and for convenience I shall simply adopt my preferred formulation. The starting point is that in a fiduciary relationship F owes P a duty of loyalty, a duty to advance P's interests.<sup>41</sup> According to the requirement of remedial consistency, if F has committed a breach of the duty of loyalty, P should be entitled, in the first place, to an order to secure the performance of the duty if this is still feasible, or alternatively compensation for the breach of duty. However, although these remedies would appear to be available in principle, the duty of loyalty is rarely directly enforced by means of them.<sup>42</sup>

Instead, the usual legal measure applied against F is disgorgement to P of any benefit F has made; and, in addition, F is subject to disgorgement not only where F has committed a breach of the duty of loyalty by failing to promote P's interests, but more widely, under the no-conflict rule, whenever F has profited from a position in which there was a reasonable possibility of a conflict between the duty of loyalty owed by F and F's personal interest.<sup>43</sup> The rationale for disgorgement is to give effect to the principle that a wrongdoer should not benefit through a wrong, and also to remove the incentive to act wrongfully. F has not necessarily acted wrongfully when the no-conflict rule applies,<sup>44</sup> but disgorgement under the no-conflict rule is still aimed at removing the incentive to act wrongfully.<sup>45</sup> By removing the incentive that F may have to pursue a private interest that may conflict with the duty of loyalty, the fiduciary rules give indirect protection to P's right to the performance by F of the duty of loyalty.<sup>46</sup>

Disgorgement is the legally mandated repayment of ill-gotten gains imposed on wrongdoers by the courts.

<sup>41</sup> *Bristol & West BS v Mothew* [1998] Ch 1, 18, per Millett LJ. It has been argued that there cannot strictly speaking be a "duty" of loyalty, or possibly that the duty is not a legal duty: see L Smith "Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on behalf of Another" (2014) 130 LQR 608, 610-11; see also G Thomas, "The Duty of Trustees to Act in the 'Best Interests' of their Beneficiaries" (2008) J. of Equity 177, 202-3.

<sup>42</sup> As to the controversy over equitable compensation, see Conaglen, above n 27, 85-90.

<sup>43</sup> *Keech v Sandford* (1726) Sel Cas Ch 61, 25 ER 223; *Boardman v Phipps* [1967] 2 AC 46.

<sup>44</sup> It is often said that the fiduciary has a duty not to place himself or herself in a position of conflict and so has acted wrongfully when the no-conflict rule applies, but it would be better to say that the rule applies despite the fact that the fiduciary has not acted wrongfully by breaching the duty of loyalty, and that the claim arises from a "liability" or "disability" that precludes him from retaining the profit. See *Movietex v Bulfield* [1988] BCLC 104.

<sup>45</sup> See e.g. *ex p Lacey* (1802) 6 Ves. Jun. 625, 267; *Murad v Al-Saraj* [2005] WTLR 1573 at [74] per Arden LJ.

<sup>46</sup> The role of the no-conflict rule in supporting the duty of loyalty is discussed by Conaglen, above n 27, --. Conaglen's version is unorthodox in treating the duty of loyalty as non-fiduciary. Cf Rebecca Lee, "In Search of the Nature and Function of Fiduciary Loyalty: Some Observations on Conaglen's Analysis" (2007) 27 OJLS 327.

This distinctive regime, involving disgorgement and the no-conflict rule, seems to be appropriate because the fiduciary's role involves the exercise of judgement about how best to promote P's interests. It may well be difficult to establish whether F has actually acted contrary to P's interests, and if so what loss this has caused to P, as would be required for the direct enforcement of the duty of loyalty through specific enforcement or compensation.<sup>47</sup>

### The character of disgorgement

Since the rationale for disgorgement is not to secure to P the performance of the duty of loyalty owed to him by F, or an equivalent benefit, it does not serve to satisfy or fulfil P's primary right.<sup>48</sup>

This is why the benefit to P is properly understood as a windfall. In taking proceedings for disgorgement, P exercises a power of confiscation, and is the incidental beneficiary of it.

Disgorgement does not, in other words, conform to the requirement of remedial consistency. On this analysis, since it is not aimed at securing to P the benefit of his primary right, disgorgement is not, in the strict sense, a remedy at all.<sup>49</sup> This does not mean that it cannot be justified, but that it cannot be justified as a remedy in the strict sense; it must have a distinct justification, as indeed it appears to have in the prophylactic approach of removing the incentive of the fiduciary to depart from the duty of loyalty.<sup>50</sup>

Because disgorgement is not a remedy in the strict sense, there is no reason to think that it should conform to the features of an ordinary proprietary or personal remedy in private law. This may be why disagreement on this issue has seemed so intractable. Disgorgement should certainly encompass consequential benefits, and this has been understood to imply that it must be a

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<sup>47</sup> The problem is compounded by the fact that F is often in a position to acquire property that might have gone to P, in circumstances in which it is unclear whether F has actually breached the duty of loyalty or not, and this may give F an incentive to depart from the duty.

<sup>48</sup> Other than the interest in removing any incentive F may have to depart from the duty to P.

<sup>49</sup> For this reason, some theorists deny that such a measure should be available at all in private law: see A Beever, "The Structure of Aggravated and Exemplary Damages" (2003) 23 OJLS 87; EJ Weinrib, *Corrective Justice* (OUP, 2012), ch 3. Disgorgement understood in this sense is distinct from restitution in the sense of the reversal of a transfer.

<sup>50</sup> Thus the confiscation could be effected by and on behalf of the state rather than the claimant. In some cases under the no-conflict rule the fiduciary actually breaches the duty of loyalty. Here disgorgement prevents the fiduciary from profiting through wrongdoing, as is made clear in cases such as *A-G v Guardian Newspapers (no 2)* (*Spycatcher*) [1990] 1 AC 109 and *Attorney General for Hong Kong v Reid* [1994] 1 AC 324.



proprietary remedy that can encompass traceable proceeds,<sup>51</sup> but in fact the reason why P should be able to recover a consequential benefit is simply to ensure that the power of confiscation operates effectively to capture all the benefit derived by F from the wrong or position of conflict of interest, not in order that P should be able to recover property that already belongs to him.<sup>52</sup> Considered in the light of its rationale, disgorgement is personal: it is not so much that P is entitled to the benefit received by F, but that P is entitled to prevent F from retaining it. Thus it is doubtful whether P should have any priority over F's creditors;<sup>53</sup> it might even be better for P's claim to be subordinated to theirs. Also, it is not clear that any claim should be available to P against a third party to whom F transfers the benefit. Furthermore, in some circumstances the third party from whom F acquired the benefit may have a better claim to recover it than P.

#### Should there be a true proprietary claim?

The exercise of a confiscatory power by C can explain the disgorgement of fiduciary profits, but one might think that it does not provide a full explanation of the law. Does P not also have, in some cases at least, a genuine proprietary claim in respect of property received by F, that is to say a claim based on C's right to the property in itself rather than as an instrument for depriving F of it?

It is sometimes argued that, in consequence of receiving a benefit that is caught by the no-conflict rule, F comes under an immediate duty to hand it over to P and, in accordance with the equitable maxim that "equity regards as done that which ought to be done", equity treats P as already having beneficial ownership, so that P should always have a proprietary remedy.<sup>54</sup> Similarly, it might be said that F has expressly or impliedly undertaken to hand over any benefit acquired from

<sup>51</sup> This is the argument usually made in support of *Reid*, *ibid*.

<sup>52</sup> The possibility of a personal remedy extending to consequential profits was mentioned in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] 3 WLR 1153, [90]-[91], per Lord Neuberger MR. See also Birks, n10 above, 394.

<sup>53</sup> This was the reason behind the personal remedy in *Lister v Stubbs* (1890) 45 Ch D 1.

<sup>54</sup> See *A-G v Reid* [1994] 1 AC 324, 331 per Lord Templeman with respect to bribes; DJ Hayton "Proprietary Liability for Secret Profits" (2011) 127 LQR 487; Millett "Bribes and Secret Commissions Again" (2012) 71 CLJ 583. See also D Hayton, "The Development of Equity and the 'Good Person' Philosophy in Common Law Systems" [2012] Conv 263. Worthington draws on the maxim with respect to profits falling under the no-conflict rule and the fruit of the trust property rule but not the no-profit rule: see Sarah Worthington, "Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae" (2013) 72 CLJ 720.



the position of fiduciary, and that a proprietary remedy arises on the same basis with respect to any benefit covered by the undertaking. These are intended as arguments for a true proprietary right of C, not merely a right to disgorgement in the sense of confiscation. However, according to the requirement of remedial consistency, the equitable maxim cannot logically generate a proprietary remedy, simply because, as pointed out above, a duty is a matter as between the duty-bearer and the right-holder, the person to whom the duty is owed, and there is no reason why the remedy for a breach of the duty should adversely affect any third party. Thus the breach of a duty on the part of F to pay over to P any benefit obtained in breach of the duty of loyalty, or in circumstances that fall under the no-conflict rule, does not justify a proprietary remedy. The remedial consistency requirement implies that a fiduciary relationship (involving a fiduciary duty of loyalty and the fiduciary no-conflict rule) cannot ever generate a true proprietary remedy, because it is only a bilateral relationship between P and F.

The remedial consistency requirement implies instead that, to justify a proprietary claim, it is always necessary to identify a primary property right. With respect to fiduciaries, there is indeed commonly said to be a connection between P's having a prior property right and his having a proprietary claim. For example, according to Lord Neuberger in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*, the trustee must have "acquired the asset or money by taking advantage of an opportunity or right which was property of the beneficiary".<sup>55</sup> This seems to be understood to be in some way an aspect of the no-conflict rule, but the remedial consistency requirement implies that the proprietary claim arises directly from P's ownership of property, independently of the fiduciary relationship or the no-conflict rule. For example, in the simple case where P's property is invalidly transferred to F, P has a proprietary claim to recover it, which does not depend on the no-conflict rule or on whether the recipient is a fiduciary. More typically in the fiduciary context, as suggested in the quotation from Lord Neuberger, the issue is likely to be whether P can have a proprietary claim over property acquired by F through the exploitation of

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<sup>55</sup> [2011] 3 WLR 1153 at [88]. See also Birks, above n 10, --.

confidential information or an opportunity belonging to P.<sup>56</sup> This approach raises the question whether confidential information and opportunities can truly be forms of property, or “objects of property”, things capable of being owned. What can count as property is sometimes regarded as a matter of mere usage or terminology,<sup>57</sup> but on this approach whether something can be property and if so when a right of ownership over it arises are crucial matters of substance. To establish whether there should be a true proprietary claim, this is what needs to be investigated, not the operation of fiduciary relationships and the no-conflict rule.

Confidential technical information is in practice recognised as a form of property under the law relating to trade secrets or know-how,<sup>58</sup> and there seems no reason why this should not also apply in the fiduciary context with respect to the commercial confidential information of a trust or business, so as to justify a true proprietary claim over profits made from it.<sup>59</sup> Similarly, with respect to opportunities, the commercial reputation of a business, which generates opportunities by way of offers of custom, is a form of intangible property – the business’s goodwill, protected through the law of passing off and trade marks against misappropriation by rival traders who take advantage of the reputation.<sup>60</sup> Thus again it seems plausible to say by extension that an opportunity exploited by a fiduciary can in principle be the property of the business or trust.<sup>61</sup>

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<sup>56</sup> With respect to remedial consistency, one should distinguish in principle between a claim with respect to property generated by P’s property or acquired by F in return for P’s property, which can give rise to a proprietary claim, and a benefit made through the unauthorised use of P’s property for which a personal claim would seem appropriate. A claim arising from the unauthorised use of property is conventionally a personal claim, for example in the form of “restitutionary damages”.

<sup>57</sup> See for example *OGB v Allan* [2007] UKHL 21 at [276], per Lord Walker.

<sup>58</sup> See e.g. *Seager v Copydex* [1967] 1 WLR 923. The traditional law of confidential information combined protection for privacy with protection for commercial confidential information, as discussed in *OBG v Allan* [2007] UKHL 21.

<sup>59</sup> This was left unsettled in *Boardman v Phipps* [1967] 2 AC 46.

<sup>60</sup> i.e., by deceiving customers into thinking their products have a connection with the business: see e.g. *Reckitt & Colman v Borden* [1990] 1 All ER 873.

<sup>61</sup> A business may generate many opportunities that cannot plausibly be understood to belong to the owner. For example, by attracting customers to the area, a business may create opportunities for other businesses to provide different goods and services to the same customers. A business owner who owned these opportunities would be able to charge other businesses for dealing with these customers, but this is not the position and it would surely give a business owner an excessive return.

In general, the effect of recognising a thing (tangible or intangible) as an object of private property is **to secure to the owner all the benefits of the thing**, which means that an owner or prospective owner can invest time and resources in acquiring it or creating it or maintaining it, with a view to receiving the benefit of the investment as owner. The **question for the law is whether a certain type of thing should be capable of being owned**, so that there can be someone exclusively entitled as owner to the benefit generated by investment in the thing – in particular, with respect to confidential information and opportunities, investment by creating the thing.<sup>62</sup> Confidential information and opportunities certainly seem capable of being objects of property, because they are, or at least in some circumstances can be, sufficiently well-defined and stable to allow one to identify them and the benefits to be derived from them. It seems reasonable to say that P, as the owner of a business, owns or ought to own confidential information created in the business, and also opportunities, such as offers of custom, that have been generated in building up the reputation of the business. If so, it would be important whether in a particular case the confidential information or opportunity was acquired or generated by F on behalf of P in the course of working as a fiduciary, so as to belong to P rather than F. It **might then appear that a proprietary claim with respect to property acquired from the confidential information or opportunity arises under the no-conflict rule or from a breach of the duty of loyalty**, but in fact it is simply a response to P's ownership of the opportunity or confidential information as property, and in fact the position **should be the same for any agent or employee of P who acquires or generates such property in circumstances such that it belongs to P.**



This approach would **exclude any proprietary claim over a bribe or secret commission**, or over the proceeds of an opportunity that comes to **F as a result of F's personal reputation**, or a fortuitous opportunity not in any sense generated by the business, since in none of these cases can one say that **the opportunity to acquire the benefit was the product of work done and resources applied by or on behalf of P, so as to belong to P.**

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<sup>62</sup> See further Jaffey, above n 8.

However, the absence of a true proprietary claim in this type of case will not generally be of any consequence, at least so far as fiduciaries are concerned, because, as discussed above, the confiscatory power of the principal should be available with respect to any benefit reaching the fiduciary that falls under the no-conflict rule, and it should extend to consequential benefits. For present purposes, the important point is that, for a satisfactory theoretical account of the area, it is necessary to recognise, in accordance with the requirement of remedial consistency, a distinction between the confiscatory power, which arises to enforce the no-conflict rule and the duty of loyalty owed to the principal, and a true proprietary claim arising, not from the duty of loyalty or the no-conflict rule, but from the principal's ownership of an opportunity or confidential information.<sup>63</sup>

### The constructive trust of the family home

When a couple M and W have lived together and then separate, the question may arise whether the law of constructive trusts operates to give W a share in the beneficial ownership of the house where they have lived, which would otherwise belong to M because originally it was his or because M paid for it from his own money or through a mortgage. (Of course, the cases have often been much more complicated, and the positions of M and W may be reversed, but this simple situation will suffice for present purposes.) Famously, according to Lord Denning, the court should be able to allocate beneficial ownership of the home according to what is fair and equitable in all the circumstances, under a so-called "constructive trust of the new model".<sup>64</sup> Considerations of fairness might arise, in particular, from the fact that M and W have been in a committed personal relationship, and that W has looked after the children and the home, having possibly given up her career to allow M to pursue his. The new model constructive trust did not, of course, attract support from other English

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<sup>63</sup> Cf Smith's argument that the no-profit rule is concerned with the extraction of wealth from the principal, and operates independently of the no-conflict rule: Smith, above n41, at 628-9. Smith also points out that the rule can apply with respect to confidential information as against a defendant who has ceased to be a fiduciary, though he regards the rule as being concerned fundamentally with the allocation of resources as between principal and fiduciary.

<sup>64</sup> See *Eves v Eves* [1975] 1 WLR 1338, 1341; *Hussey v Palmer* [1972] 1 WLR 1286.

judges and was repudiated on the basis of the excessive uncertainty that was said to result from reliance on general considerations of fairness and conscience.<sup>65</sup>

Instead, the English courts developed the doctrine of the “common intention constructive trust”.<sup>66</sup> The basic approach is that the original owner M retains ownership of the property unless M and W reach an understanding or common intention that W should acquire an interest in the property. Although the common intention must apparently be a genuine intention relating to ownership of the property, there seems to be some artificiality involved in determining whether there is such an intention.<sup>67</sup> Until relatively recently, the court would require either an actual expression of a common intention, on which W had relied to her detriment, or pecuniary contributions to the acquisition of the property, which were taken to be evidence of a common intention. Now, following *Stack v Dowden*, it appears that the court can take account of some additional factors as evidence of a common intention, such as the purpose for which the property was acquired, the nature of the parties’ relationship, and whether there were dependent children.<sup>68</sup> These factors are relevant (it is said) only as evidence of a common intention concerning ownership of the property, and not because more general considerations of fairness arising from the parties’ relationship are relevant in themselves.<sup>69</sup> This development goes some way towards responding to the objection that the law is unfair to W,<sup>70</sup> though one might say that it both fails to take account fully of the considerations of fairness arising from the parties’ relationship and at the same time opens the law to the objections previously made against the new model constructive trust.

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<sup>65</sup> See *Carly v. Farrelly* [1975] 1 NZLR 356; *Cowcher v Cowcher* [1972] 1 All ER 943.

<sup>66</sup> *Gissing v Gissing* [1971] AC 886; *Lloyds Bank v Rossett* [1991] 1 AC 107; *Stack v Dowden* [2007] 2 AC 432; *Jones v Kernott* [2011] 3 WLR 1121. See generally Mark P Thompson & Martin George, *Thompson’s Modern Land Law* (OUP, 6<sup>th</sup> ed 2017), ch 9.

<sup>67</sup> According to Gardner, it would always be possible to contrive a common intention where it seems desirable to achieve a fair result: S Gardner, “Problems in Family Property” (2013) 72 CLJ 301.

<sup>68</sup> *Stack v Dowden* [2007] 2 AC 432; *Jones v Kernott* [2011] 3 WLR 1121.

<sup>69</sup> See for example T Etherton, “Constructive Trusts: a New Model for Equity and Unjust Enrichment” (2008) 67 CLJ 265; W Swadling, “The Common Intention Constructive Trust in the House of Lords: an Opportunity Missed” (2007) 123 LQR 511; B Sloan, “Keeping Up with the *Jones* Case: Establishing Constructive Trusts in ‘Sole Legal Owner’ Scenarios” (2015) 35 *Legal Studies* 226.

<sup>70</sup> See for example Jo Miles, “Cohabitation: Lessons for the South from North of the Border?” [2012] CLJ 492.

What light can be cast on the controversy by the requirement of remedial consistency?

Again, the first question is, what is the primary relation? This issue is not explicitly addressed in the literature or case law. One can distinguish between two different possible primary relations that might be in issue. They are different primary relations because they arise by virtue of different and independent principles, in response to distinct sets of facts. First, there is M's right of ownership of the house (vis-à-vis W and the rest of the world); secondly, there is the legal relation between the two parties that arises or ought to arise to give legal recognition to the mutual moral rights and responsibilities of the parties generated by their personal relationship, which could presumably extend to financial support or the sharing of wealth on separation.

Since the common intention constructive trust is a property law doctrine that generates proprietary claims, as a matter of remedial consistency the implication is that the primary relation is the right of ownership. As a matter of property law, it must surely be a matter for the owner to decide how to dispose of his property, and so, starting from this primary relation, it seems right to say that, as a matter of remedial consistency, W can acquire a proprietary right to a share of the property only by way of a transfer or grant of a proprietary interest by M. On this basis, whether W acquires an interest should be governed simply by M's intention, and should not depend on general considerations of fairness arising from the parties' relationship.<sup>71</sup>

The common intention constructive trust in effect extends the concept of transfer or grant to include the case where M is party to W's understanding that ownership is to be shared. This might appear to involve an agreement by M to transfer a part of the property to W, but because an agreement affects only the position as between the two parties, as a matter of remedial consistency it cannot generate a proprietary claim, and so cannot properly be relevant to the constructive trust doctrine. However, M's assent can in principle be relevant in a different way.

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<sup>71</sup> Lord Neuberger's dissenting judgement in *Stack v Dowden* seems to reflect the property-based approach to the common intention constructive trust.

As suggested above, **property ownership protects investment in things that are recognised as objects of property**. Someone who invests work or resources in unowned property – i.e. a thing capable of being an object of property but not owned by anyone – will normally acquire a property right in it.<sup>72</sup> If W invests work and resources in property that is not unowned, but is owned by M, and M shares W's understanding that the investment will give W a property right in the form of a share of ownership, it seems reasonable to think that W will indeed acquire such a property right. Given M's assent, one would think that W would be in no worse a position than if the property were unowned. This provides a possible explanation of the role of common intention in the common intention constructive trust doctrine. On this understanding, W's claim depends on the parties' intention, but it **depends on their intention being about the property**, and on W's contribution being directed at the property, rather than being a common intention or contribution to sustaining the relationship or family, and again it leaves no room for more general considerations of fairness arising from the parties' relationship to be taken into account.

Considerations of fairness relating to the family and home can only be taken into account, quite separately, in connection with the distinct primary relation arising from the parties' mutual rights and responsibilities arising from their personal relationship. This legal relation is simply a bilateral relation between the parties. It does not involve a property right and it need not relate specifically to property. In accordance with the requirement of remedial consistency, a claim arising for W from this relation would not be a proprietary claim over M's property, **merely a personal claim against M exigible against his property**. The statutory power available to the courts on divorce implies recognition of a legal relation of this sort for married couples. In divorce proceedings the remedy is personal, the effect being to allocate the parties' property prospectively, not to recognise an existing share of ownership. It seems to me that, insofar as the courts have gone astray in this

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<sup>72</sup> The rule is a version of the common law's "first possession" rule. See generally Carol M Rose, "Possession as the Origin of Property" 52 University of Chicago LR 73 (1985). See also Jaffey, above n3, ch -. This might be one way of understanding proprietary estoppel, to which the common intention constructive trust has often been compared: see e.g. *Grant v Edwards* [1986] Ch 638; *Oxley v Hiscock* [2004] 3 All ER 703.

area, it is through their failure to develop a common law doctrine governing cohabiting couples that generates a legal relation along these lines.<sup>73</sup>

The objection to Lord Denning's new model constructive trust doctrine was said to be the problem of uncertainty arising from its dependence on general considerations of fairness arising from the parties' relationship. However, the underlying objection is that it failed to respect the requirement of remedial consistency. Where the primary relation is a matter of ownership by M, as a matter of remedial consistency the claim should arise from the transfer or grant of a property right by M, or from the investment of work and resources in the property by W on an understanding shared with M, and these depend in principle on M's and W's intentions concerning the property, and not more general considerations of fairness. General considerations of fairness can, however, be taken into account in the proper context – as they are in connection with the allocation of property on divorce under the statutory jurisdiction.

With respect to the common intention constructive trust doctrine, under the guise of a search for the parties' intention relating to the property, the courts have to some extent introduced more general considerations of fairness into the law. This is why the search for intention is often thought to be artificial (and even more so after *Stack v Dowden*). The dissociation of the doctrine from genuine intentions directed at the property, even though its effect is to determine pre-existing property rights makes it incongruous as a property law doctrine.<sup>74</sup> As a matter of remedial consistency, the determination of existing property rights should be separated from the legal effect of general considerations of fairness. If a claim based on the parties' personal relationship were recognised, it could take proper account of these considerations of fairness in the right context. Furthermore, it could provide protection where no property is involved, for example where M has a secure income but no property.

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<sup>73</sup> With respect to this second legal relation, there is room for argument over whether these moral rights and responsibilities arise from the parties' agreement or understanding about their future together, or directly from the parties' relationship itself.

<sup>74</sup> See M Dixon, "*Jones v Kernott*: The Still Not Ended, Never-Ending Story" [2012] 76 Conv 83.



One might object that the problem with the personal, relationship-based claim is that it does not give adequate protection to W, because of the risk that M may charge or dispose of his property to a third party. However, in many situations it does not make any difference whether W's claim is personal or proprietary and as mentioned above in divorce proceedings the remedy is personal, though it relates to the allocation of property for the future. Furthermore, a proprietary claim may in fact be possible on the following basis. It may sometimes seem incompatible with the personal relationship between M and W for M to be in a position to jeopardise W's prospects of enforcing her personal right against him by charging or disposing of the property without W's consent. If so, it may be possible to infer that M intended that his property should be held on trust, not on terms that give W a defined interest in it, but on the basis that W has a right under the trust to the satisfaction out of the trust property of whatever personal claim she may have against M, arising from their relationship, in the light of events. For the property-based claim and the relationship-based claim to operate in tandem in this way is not contrary to the requirement of remedial consistency (as discussed above, the express trust has personal and proprietary dimensions).<sup>75</sup> It may seem a rather complex legal arrangement, but it might actually reflect quite well the sort of commitment that the parties make in marital or quasi-marital relationships. It might in fact be an appropriate way to understand the common intention constructive trust, at least in some circumstances.<sup>76</sup>

## Conclusion

According to the requirement of remedial consistency, a remedial relation must be consistent with the primary relation because it arises to protect or give effect to the primary relation. The law at the

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<sup>75</sup> One might compare this to the position under the contracting-holding theory for unincorporated associations, where the content of a member's property right under the trust is determined at any time by the contract between the members, following *Neville Estates Ltd v Madden* [1962] Ch 832 and *Re Recher's WT* [1972] Ch 526.

<sup>76</sup> It would fall short of a family "community property" or "family assets" regime, under which the property of the parties can be treated, from the time when a matrimonial relationship is formed, as immediately ceasing to be each party's own property and becoming subject to a distinct matrimonial regime as a matter of the general law concerning marriage rather than as a matter of private law, understood as an extension of property or contract. On the community property approach, see e.g. E Cooke, A Barlow & T Callus, *Community of Property* (Nuffield Foundation, 2006).

remedial stage, which the court directly enforces, cannot aim at doing justice other than justice in accordance with the primary relation. Remedial consistency is particularly important with respect to proprietary claims, because the requirement of remedial consistency implies that proprietary claims arise from a prior property right, and do not arise from a breach of duty.

In the case of a claim for restitution of a mistaken or unauthorised payment, the requirement of remedial consistency implies that a proprietary claim should generally be available, irrespective of whether there has been a breach of trust or fiduciary duty or whether there was a trust or prior equitable interest.

With respect to fiduciary profits, remedial consistency requires a distinction to be drawn between two distinct types of claim. First, there is the principal's power to confiscate profits made by the fiduciary through a breach of the duty of loyalty, or in a position of conflict of interest where they fall under the no-conflict rule. Secondly, there can be a genuine proprietary claim arising not from a breach of the duty of loyalty or under the no-conflict rule but from the principal's ownership of an opportunity or confidential information.

In the case of cohabiting parties, again remedial consistency requires that the law recognise a distinction between two distinct claims, a proprietary claim based on a primary right of ownership of property or money, and a personal claim for financial support based on a primary personal right of one cohabiting party against the other party arising from their personal relationship. Behind the longstanding controversy over the common intention constructive trust (and before that the new model constructive trust) is the conflation of these two grounds for a claim. It is possible for the relationship-based claim and the property-based claim to operate together, where one party, the pre-existing owner of the property, by implication must have intended that there should be a trust to protect the relationship-based claim of the other party.