Cambridge Law Journal, **71(3)**, November 2012, pp. 583–614
doi:10.1017/S0008197312000839

BRIBES AND SECRET COMMISSIONS AGAIN

LORD PETER MILLETT*

ABSTRACT. *Where a fiduciary receives a bribe or a secret commission in breach of fiduciary duty it remains controversial whether the bribe or secret commission will be held on constructive trust for the principal. The Court of Appeal has held that in most cases there will only be a personal liability to account. That is incorrect. The duty of the fiduciary is to serve the interest of the principal to the exclusion of his own interest. A fiduciary who keeps a profit for himself abuses the trust and confidence placed in him by the principal. He is bound to hand it over to his principal the moment he receives it. Equity's response to a breach of this duty is to enforce the duty by means of the constructive trust.*

KEYWORDS: *Breach of fiduciary duty, bribes, secret commissions, account of profits, constructive trusts*

Like old soldiers some old cases, wrongly decided, never die; unfortunately they do not simply fade away either. As with Humpty Dumpty after his great fall, someone will always be found to try to put the pieces back together again. *Lister v Stubbs*[1] is such a case; *Metropolitan Bank v Heiron*[2] is another. Both, believed to be dead and buried, were misguidedly brought back to life again in *Sinclair v Versailles*.[3] In *Lister v Stubbs* the Court of Appeal[4] held that, where a fiduciary receives a bribe or secret commission, he does not hold it on trust for his principal; the relationship between them is that of debtor and creditor, not trustee and beneficiary. *Metropolitan Bank v Heiron* has the dubious distinction of being the only case relied on by the Court of Appeal in *Lister v Stubbs*.

Lister v Stubbs has long been the subject of widespread academic criticism. The case was concerned with a bribe, but its reasoning was not so limited. More than 40 years ago Professor Donovan Waters, later the distinguished author of Trust Law in Canada, described the case as "that old *enfant terrible* of restitution". It has had a remarkably chequered history. It survived for more than a century. But in 1994 in

* Lord Millett is retired member of the Appellate Committee of the House of Lords. Address for Correspondence: Lord Millett, Essex Court Chambers, 24 Lincoln's Inn Fields, London WC2A 3EG. Email: lordmillett@essexcourt.net.

[1] [1890] 45 Ch. D. 1.
[2] (1880) 5 Exch. D 319 CA.
[3] [2011] 4 All E.R. 335 CA.
[4] Lindley, Cotton and Bowen L.JJ.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

A.G. for Hong Kong v Reid[5] the Privy Council[6] held unanimously that it was wrongly decided as a matter of English law. Last year in *Sinclair v Versailles*[7] the Court of Appeal[8] followed *Lister v Stubbs* and said that "there was a real case for saying that *Reid* was unsound". The resurrection of *Lister v Stubbs* has proved short lived. Within a few months, in *Grimaldi v Chameleon Mining NL (No.2)*,[9] the Full Federal Court of Australia considered and convincingly rejected both *Lister v Stubbs* and *Sinclair v Versailles* and, following *Reid*, held that a fiduciary who receives a bribe does indeed hold it in trust for his principal.

Sinclair v Versailles has re-ignited passionate academic debate whether a bribe or secret commission received by a fiduciary or profit[10] made by him by exploiting the fiduciary relationship is held in trust for his principal. The question is highly controversial, though only in England. In *Sinclair v Versailles* Lord Neuberger observed that the majority of academic articles on the question supported *Lister v Stubbs*[11] and that while most of the textbooks on equity took the opposite view their discussion of the subject was cursory. Surprisingly he failed to mention the fact that the Law Commission has considered the question and concluded that *Lister v Stubbs* does not represent the law.[12] If the precedent set by Aristophanes in the Frogs is to be followed and the question decided by the relative weight of the competing literature, then it must be said that most of the articles cited by Lord Neuberger were written by commercial or restitution lawyers,[13] whereas important articles by equity lawyers which he omitted to mention and virtually all the textbooks on equity throughout the common law world[14] supported the existence of a constructive trust even before *Reid* confirmed it.

[5] [1994] 1 A.C. 324 (on appeal from New Zealand).
[6] Lord Templeman, Lord Goff, Lord Lowry, Lord Lloyd and Sir Thomas Eichelbaum (Chief Justice of New Zealand). The unanimous opinion of the Board was delivered by Lord Templeman.
[7] [2011] 4 All E.R. 335 CA.
[8] Lord Neuberger MR, Richards and Hughes L.JJ.
[9] [2012] FCAFC 6. The judgment of the Court was delivered by Finn J., who as Dr. Finn was the author of the seminal work *Fiduciary Obligations* (Sydney 1977).
[10] For brevity the author will simply refer to "bribes", but this should be taken to include secret commissions and profits of all kinds.
[11] His choice was conveniently selective, omitting the two most important articles on the subject (by Professor Gareth Jones) in (1968) 84 L.Q.R 472 and (1970) 86 L.Q.R 461 and three of the contributions (by Professor Austin, Lehane and Sir Anthony Mason) to *Essays in Equity* (Sydney 1985): see below p. 588. They all reject *Lister v Stubbs*.
[12] *Breach of Confidence* (Law Com. No 110, 1981) HMSO Cmnd. 8388.
[13] The protagonist is Sir Roy Goode, who is particularly concerned about the effect on the fiduciary's unsecured creditors should he become insolvent. His most distinguished opponent is Sir Anthony Mason (writing extra-judicially) in *Essays in Equity* op. cit.
[14] *England*: Underhill and Hayton, *Law of Trsusts And Trustees* (18th ed., 2010); A.J. Oakley, *Constructive Trusts* (2nd ed., 1987); Snell's *Equity* 32nd ed. (London 2010); Goff and Jones, *The Law of Restitution* (7th ed., 2006); Thomas and Hudson, *The Law of Trusts* (2nd ed., 2010). *Australia*: Jacobs, *The Law of Trusts in Australia* (1977); Meagher, Gummow and Lehane, *Equity, Doctrines and Remedies* (4th ed. 2009): Finn, *Fiduciary Obligations* (1978). *USA*: Scott on Trusts (4th ed., 1998); Story on Agency (2004). *Canada*: Donovan Waters, *The Law of Trusts in Canada*

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

I. The Breach of Duty and Equity's Response

In Sinclair v Versailles Lord Neuberger asked rhetorically

> Why, it may be asked, should the fact that a fiduciary is able to make a profit as a result of the breach of his duties to a beneficiary, without more, give the beneficiary a proprietary interest in the profit?[15]

The answer is that the essential evil of bribery is betrayal of trust. By accepting a bribe, the recipient is acting in his own interests or those of the person who paid the bribe, and betraying the trust of his principal. The relationship between the fiduciary and his principal is a relationship of trust and confidence. The duty of the fiduciary is to serve the interest of the principal to the exclusion of his own, and the breach of this duty does not consist in making a profit but in keeping it for himself. That is not a breach of a personal obligation; it is an abuse of the trust and confidence placed in him by his principal who put him in a position to make the profit because he trusted him not to serve his own interests by making for his own benefit. Equity's response to the breach of this trust is not to give redress for the breach but to enforce the duty; the constructive trust is the means by which it does so. The principal's beneficial interest in the profit is thus inherent in the very concept of a fiduciary relationship. It is an incident of the relationship that any advantage or profit which the fiduciary may obtain by virtue of the relationship is in the eyes of equity obtained for the benefit of his principal and belongs beneficially to him.

II. Rights and Remedies

There seems to be a measure of confusion in Lord Neuberger's handling of the authorities in his judgment in *Sinclair v Versailles*. It arises from a failure to distinguish between rights and remedies coupled with an apparent failure to appreciate that property rights generate personal as well as proprietary remedies, or at least to draw the right conclusion from this. There may also to be a misunderstanding as to the meaning of the word "account" when used to describe a trustee's obligations in relation to trust property. In that context it does not mean merely provide a financial statement in order to quantify the sum due. It means "account for the money or property as part of the trust fund and deal with it accordingly". A ruling that the defendant must account for a bribe is not inconsistent with his holding it in trust. Thus in *Phipps v Boardman*[16] Lord Guest said that the fiduciaries "hold the shares as

(3rd ed., 2005). *Hong Kong*: Ma, *Equity and Trusts Law in Hong Kong* (2009). A notable but recent exception is Virgo, *The Principles of Equity and Trusts* (2012).

[15] Wilberforce J did not require any more in *Phipps v Boardman* [1967] 2 A.C. 46. (See the discussion of the case below).

[16] [1967] 2 A.C. 46, 117.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

constructive trustees and are bound to account" to their principal. He approved the order made by Wilberforce J at first instance, which as will appear was unequivocally proprietary in nature.

An order to account is often made in support of a proprietary right, as a matter either of choice or of necessity. It is necessary, for example (i) in the common case where the fiduciary received a bribe in money which he has spent,[17] so that proprietary relief is not available; (ii) where the bribe consists of the fiduciary's *net* profit which cannot be ascertained without quantifying his costs and debiting the principal with them;[18] or (more rarely) where the bribe must be ascertained by apportioning it between the part which represents a legitimate receipt and the part which does not.[19] A difficulty with Lord Neuberger's judgment in *Sinclair v Versailles* is that, when considering the authorities, he concentrated on the remedy which the court granted rather than on the right to which it responded. Even where the remedy granted by the court is account and payment, the right to which it responds may well be and often is a right of property.

Before 1890 the common law and equity agreed that, where an agent (at common law) or a fiduciary (in equity) takes advantage of his position to make a profit for himself, the profit is the property of the principal. In *Morison v Thompson*[20] Lord Cockburn C.J., delivering the judgment of the Court[21] and after reviewing authorities both at common law and in equity, said that

> the result of these authorities is that, whilst an agent is bound to account to his principal or employer for all profits made by him in the course of his employment or service, and is compelled to account in equity, there is *at the same time a duty, which we consider a legal duty*, clearly incumbent upon him, whenever any profits so made have reached his hands, and there is no account in regard to them[22] remaining to be taken and adjusted between him and his employer, to pay over the amount *as money absolutely belonging to his employer*. … the money in question … was actually in [the defendant's] hands, *subject to an immediate duty to hand it over* to his employer. Under such circumstances, the money, *being the property of the employer*, can only be regarded as held for his use by the agent, and must consequently be recoverable by him in an action for money had and received.

[17] The cases of monetary bribes are almost all of this character. Some of the bribes have been for as little as £75. In such cases judgment for the amount of the bribe is all that is sought or required. It by no means follows that the money was not held on trust before it was dissipated in breach of trust.

[18] As in *Tyrell v Bank of London* (1862) 10 H.L.Cas. 26; *Phipps v Boardman* (note 15 above).

[19] As in *Tyrell v Bank of London* and *Hospital Products Ltd. v United States Surgical Corp* (1984) 156 C.L.R. 41.

[20] (1873-4) L.R. 9 Q.B. 480 (not cited in *Sinclair v Versailles*).

[21] Lord Cockburn C.J., Blackburn and Archibald J.J.

[22] For the relevance of this qualification, see note 41 below.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

In the course of his judgment Lord Cockburn said: "The cases in equity are to the same effect, viz. that the profits … *belong absolutely to the principal*."[23] It will be observed that Lord Cockburn described the duty as a duty "to hand [the money] over", not merely to account for it, because it "belonged to the principal"; and that he said that there were two different but simultaneous duties – which must correspond to two different rights. The language is unequivocally proprietary; the agent had possession, but his principal was entitled to call for the money. In support of his conclusion Lord Cockburn cited the current editions of *Story on Agency* and *Paley on Principal and Agent*. Story stated that "all profits and advantages made by [the agent] in the business, beyond his ordinary compensation, are to be for the benefit of his employers". Paley stated that the profit or advantage "is the property [of the principal] and must be accounted for".

In *Archer's* case,[24] decided two years after *Lister v Stubbs*, Lindley L.J. said that of course the bribe "belonged" to the principal but only in the sense that he was entitled to get it. This is desperate stuff; it is not what Lord Cockburn C.J. was saying. It is a curious statement in any case, for as between the debtor and his creditor it is a misuse of language to describe the debt as "belonging" to the creditor.[25] It is *owed* to him, not *owned* by him.

But although the rights and obligations of the parties are the same at law as in equity, the remedies available to the principal are more extensive in equity. Paradoxically the common law, which acts *in rem*, has virtually no proprietary remedies; whereas equity, which acts *in personam*, has a full armoury of proprietary remedies. Although Lord Cockburn considered that the agent's profit was the property of the principal, he could only grant a personal remedy in an action for money had and received. The remedy at law was always personal, but the right to which it responded could be a property right. Where it was, the common law action for money had and received lay against a third party.[26]

Equity, on the other hand, can provide a proprietary as well as a personal remedy because it derives equitable proprietary interests in property by enforcing personal obligations in relation to it. The trustee's obligation to manage the trust property in accordance with the terms of the trust is a personal obligation; but equity creates proprietary interests in the beneficiaries by its ability to enforce the trustee's obligation to manage the trust property for their benefit, and to

[23] Ibid., at p. 484.
[24] *Re North Australian Territory Co. (Archer's case)* [1892] 1 Ch. 322 CA.
[25] It is otherwise as between the creditor and a third party, for a debt is a chose in action which belongs to the creditor and may be assigned by him.
[26] The cases are collected in Goff and Jones, *The Law of Restitution* (8th ed.) ch. 8.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

enforce the duty not only against the trustee himself but against his successors in title other than a bona fide purchaser for value without notice. In other contexts it is a commonplace to find equity creating a trust in response to a breach of a personal obligation; specific performance of a contractual obligation in relation to land,[27] and the enforcement of the *Quistclose* trust, are but two of many examples.[28] There is nothing exceptional in holding that the fiduciary's obligation to hand over a bribe to his principal the moment he receives it is another. Since it is an equitable obligation, there seems to be no reason to withhold the remedy of specific performance. The trust placed in the fiduciary by his principal replaces consideration as the warrant for equity's intervention.

A key question is: what is meant by a property right? As Jeremy Bentham observed, property is not a thing but a legal concept like possession. It is the legal relationship between a person ("the owner") and an asset which "belongs" to him. If the law says that something is mine or belongs to me, it means that I have title to it; and title is a legal concept. It includes the right to identify an asset in the possession of another, possibly a total stranger whom one has never met and with whom one has had no dealings, and say: "that belongs to me". It is the right to follow an asset from hand to hand and trace it into its proceeds together with the right to recover it or its current value and not merely some earlier and lower value which its present holder paid for it. If the claimant has those rights, then he has a property right in the asset. The singularity of the common law is that property rights may be divided between the legal owner and the beneficial owner.

III. Equity's Inflexible Rules

There are two fundamental and inflexible rules of equity. A fiduciary must not place himself in a position where his interest may conflict with his duty ("the no conflict rule"); and he must not make a personal profit from the fiduciary relationship[29] ("the no profit rule"). Until the last decade of the Nineteenth Century, equity's response to a breach of these rules was not in doubt. If a fiduciary took advantage of the fiduciary relationship to make a personal profit, whether honestly or dishonestly, whether openly or secretly, and whatever the source or

[27] This is a real trust with the usual consequences and not merely another way of saying that the contract is specifically enforceable: see *Lake v Bayliss* [1974] 1 W.L.R 1073. Even if there is no enforceable contract (perhaps for want of formality) payment of the purchase money brings a constructive trust into being, because it would be unconscionable for the owner to keep both the land and the money.

[28] In *Essays in Equity* (note 11 above) Professor Austin listed 15 such situations, including the making of an improper profit by a trustee.

[29] As has been seen, these rules were not unique to equity, though the textbooks on equity seldom mention the fact. Since the Judicature Acts there is no need to invoke the common law.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

nature of the profit, whether property formerly belonging to the principal or not and whether in money or in kind, he could not retain it or derive any benefit from it; he was treated as holding it in trust for his principal and compelled to disgorge it.

There is no requirement that the fiduciary should have acted dishonestly or in bad faith or should have been under a duty to obtain the profit for his principal: see *Regal (Hastings) Ltd.*[30] where Lord Russell of Killowen stated that: "The liability arises from the mere fact of a profit having been made." It arises even though the principal would not, or could not, have obtained the profit for himself.[31] Although the fiduciary need not have been under a duty to obtain the profit for his principal, the no profit rule means that if he does make a profit he may not keep it for himself. His duty is either to make it for his principal or not to make it at all.

The trust is a constructive trust because it arises by operation of law and does not depend on intention. Indeed it arises despite and is intended to frustrate the unconscionable intention of the fiduciary to keep the profit for himself. But it is a trust like any other, entitling the principal to all the remedies, both personal and proprietary, he would have if the profit formed part of the trust fund of his family trust. The trust is obviously remedial in the trivial sense that it is a remedial response to unconscionable conduct on the part of the recipient in keeping the profit for himself; but it is institutional in the more important sense that it is not discretionary but arises as a matter of law in specified and defined circumstances.[32] The Court's function is limited to declaring that the defendant's past conduct gave rise to a constructive trust. The present question is whether the taking of a bribe by a fiduciary constitutes such conduct. Principle, policy and authority dictate an affirmative answer.

A claim to a proprietary remedy cannot succeed unless (and except to the extent that) the claimant can locate the property in question or its traceable proceeds in the hands of the defendant. If he cannot do this, he must be content with a personal remedy, though this will still be in response to a breach of his property right. Where the proceedings are brought against a solvent fiduciary who has not used the money to make a profitable investment,[33] there is no advantage to the claimant in seeking a proprietary remedy, and it will usually not be worth the time

[30] [1942] 1 All E.R. 378, at 386, where the bona fides of the directors was not questioned, and the company could not have obtained the profit for itself; and see *Hospital Products Ltd. v United States Surgical Corporation* (note 19 above) per Mason J. at pp. 107–8. The former was cited to the court but not referred to in the judgment in *Sinclair v Versailles;* despite being one of the most important cases on fiduciaries in the 20th Century, the latter was not cited.

[31] Ibid., per Lord Wright at p. 394 affirmed in *Phipps v Boardman* (note 15 above); and see *Furs Ltd. v Tomkies* [1936] 54 C.L.R 583 *per* Rich, Dixon and Evatt JJ. (not cited in *Sinclair v Versailles*).

[32] Or, as judges used to say, *ex debito justitiae*.

[33] As he did in both *Lister v Stubbs* and *Reid.*

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

and trouble in attempting to identify the relevant property in the hands of the defendant. In many of the cases the bribe or secret commission consisted of money which the fiduciary had spent by the time the proceedings were brought, so that a proprietary remedy would not have been available in any case. It is necessary to bear this in mind when considering the authorities to see whether the fiduciary held the bribe in trust for the principal. If in any particular case the court made a declaration of trust or stated that the defendant was a trustee or ordered him to account for the income actually produced by the property in question rather than merely awarding interest on the sum found to be due, or gave other relief consistent only with a proprietary claim, that is conclusive. But an order for account and payment is equivocal; the court may have made the order because that is all the claimant sought or could seek, the defendant being a trustee who had committed a breach of trust by dissipating the money.

IV. Policy

The no conflict and no profit rules are policy driven. They have nothing to do with compensating the principal for loss or with restoring to him property which belonged to him or ought to have been obtained for him. The rules are prophylactic or deterrent, not compensatory or restitutionary. They are based on a pessimistic but realistic appraisal of human nature, and are directed to the avoidance of temptation.[34] They exist because of the danger of the fiduciary being swayed by personal interest rather than duty. As it is put by Professor Virgo

> [they] operate to insulate the fiduciary from distracting influences and ensure that the fiduciary resists the temptation to serve himself or herself rather than the principal.[35]

The rules are applied "inexorably" and without exception, for "the safety of mankind" requires it.[36] They require the fiduciary to disgorge the profit he has made, and to be effective the disgorgement must in full.

In both *Lister v Stubbs* and *Reid* the corrupt fiduciary received a bribe in money and invested it in shares or property which increased substantially in value. In *Lister v Stubbs* he was allowed to retain the profit he had made by investing the money; in *Reid* he was compelled to disgorge it. *Reid* implements the policy of the law; *Lister v Stubbs* does not.

[34] *Bray v Ford* [1896] A.C. 44, at 50-51 per Lord Herschell. The point has been frequently made.
[35] Op. cit. (note 14) at p. 492.
[36] *Parker v McKenna* (1874) 10 Ch. App 96 at pp. 124–5 per James L.J. cited with approval by Lord Wright in *Regal v Gulliver* (and frequently since). The rules would be more effective if fiduciaries read the law reports.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

V. Principle

It is important to understand both the technique which equity employs to generate a trust in response to a fiduciary's breach of duty by taking and retaining a bribe for his own benefit and the underlying principle on which it is based. Two steps are involved. First, as Lord Greene MR observed in *Re Diplock*,[37] a fiduciary is not allowed to set up a case inconsistent with his fiduciary obligations. Although the bribe was *paid* to the fiduciary for his own use and benefit, he is treated as *receiving* it with the authority of his principal and for the principal's account.[38] The fiduciary is not allowed to say that he received the bribe for his own benefit.

This is not a mere point of pleading or form of estoppel. One way in which it has been put is that a fiduciary who places himself in a position where his interest conflicts with his duty will be treated as having acted in accordance with his duty. In *Fawcett v Whitehouse*[39] the defendant, who was negotiating to take a lease for an intended partnership, received a sum of £12,000 as a bribe from the intending lessors. In holding that he held the money as an asset of the partnership and directing that one third of the sum be paid to each of the defendant's partners Sir John Leach V.-C. said

> … he was bound to obtain the best terms possible for the intended partnership … and all he did obtain will be considered as if he had done his duty and had actually received the £12,000 for the new partnership, *as upon every equitable principle he was bound to do*.

In that case, as in others, the principle was expressed in terms which were tailored to fit the context. But the principle is of general application; it is not confined to the case where the fiduciary acted for a vendor or purchaser and so could be said to have failed in his duty to obtain the best terms for his principal.[40] It is best expressed in general terms: a fiduciary is trusted to act exclusively in the interests of his principal and not his own, and accordingly a fiduciary who gains an opportunity for profit by reason of the fiduciary relationship is bound, if he takes advantage of it at all, to do so for the benefit of his principal. In Story's *Equity Jurisprudence* it is said

> … A Court of Equity will presume that the party meant to act in pursuance of his trust and not in violation of it … the general doctrine proceeds that, whatever acts are done by trustees in regard to the trust property, shall be deemed to be done for the

[37] [1948] Ch. 46 (not cited in *Sinclair v Versailles*).
[38] See for example *Re Smith* [1896] 1 Ch. 71 (not cited in *Sinclair v Versailles*).
[39] (1829) 1 R. & M. 132 at 149 (not cited in *Sinclair v Versailles*).
[40] This was the position in *Lister v Stubbs* itself.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

> benefit of the *cestui que* trust, and not for the benefit of the trustee … *The same principle will apply to persons standing in other fiduciary relations to each other".*

The doctrine is not a fiction. It applies only where the bribe was received by the fiduciary in the course of and by virtue of the fiduciary relationship; and it reflects the fact that the fiduciary is able to obtain the bribe only by reason of the trust which his principal reposes in him not to take personal advantage of the position in which he placed him. It is the principal's trust and confidence in the fiduciary which precedes the receipt of the bribe and puts the fiduciary in a position to receive it, fastens on the bribe the moment it is received, precludes the fiduciary from claiming to retain it for his own benefit, and enables equity to enforce performance of his duty to treat the bribe as held for the benefit of the principal. It avoids the anomaly which would arise if a fiduciary who receives a payment intended for his principal but, perhaps facing other demands from his creditors, fails to pay it to him were treated differently, and more severely, than one who acts dishonestly by taking a bribe.

Secondly, in the absence of any agreement with his principal allowing him to retain the money, use it for his own purposes and merely account for it in due course,[41] the fiduciary is bound to pay the bribe to his principal "the moment he receives it." This is expressly stated not only by Lord Templeman in *Reid* but also by Lindley L.J. in *Lister v Stubbs* and Lord Cockburn C.J. in *Morison v Thomson*. The obligation follows from the fact that, while the fiduciary is treated as receiving the money for the account of his principal, in the absence of agreement to the contrary he is not treated as authorised to retain it or apply it for his own purposes and merely account for it later. But it is important to appreciate the consequences. It follows that the fiduciary has no right to conceal the receipt from his principal, retain the money for any period, or apply it for his own purposes. He cannot use it as part of his cash flow, invest it for his own benefit, or give it to his children; he cannot use it to pay his creditors; and his trustee in bankruptcy cannot do what he cannot do himself. In short, the money is not at his free disposal. As we know from the *Quistclose*[42] line of cases, a person who receives money which he is not free to apply for his own purposes is not the beneficial owner of the money but a trustee.

[41] Many commercial agents are contractually authorised to receive money on their principal's behalf, employ the money for their own purposes, and account to the principal periodically for money received since the last account. Where such an agent takes a bribe, the principle that it is to be treated as received on his principal's behalf does not affect the agent's right to retain the money and employ it as part of his own cash flow until the next period of account. The money is not held in trust but simply treated on the same basis as any other sum received for the principal's account.

[42] *Barclays Bank v Quistclose Investments Ltd*. [1970] A.C. 567; *Twinsectra Ltd. v Yardley* [2002] 2 A.C. 164.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

The trust is a constructive trust of the kind which was classified as a Class 1 constructive trust in *Paragon v Thakerar*.[43] Such a trust arises whenever a person receives money or property in circumstances which make it unconscionable for him to treat it as his own.[44] It is a real trust and not merely a formula for equitable relief as in the so-called Class 2 constructive trust, where the defendant is held to be liable to account as constructive trustee even though he may not have received any trust property and is not a trustee at all. The distinction is between the case where the breach takes place in the course of an existing relationship of trust between the parties; and the case where equity imposes on a stranger to any such relationship a duty to account as a direct consequence of a transaction which is adverse to the claimant and which is impeached by him. The liability of a fiduciary to hold a bribe received by him in the course of an *existing* fiduciary relationship in trust for his principal is an example of the former; the accessory liability of a stranger for dishonestly assisting in a past breach of trust is an example of the latter.

A. Metropolitan Bank v Heiron

Before coming to *Lister v Stubbs* itself it is convenient to deal with the remarkable case of *Metropolitan Bank v Heiron*.[45] In that case a company director received £250 from a debtor to the company as a bribe to induce him to use his influence to obtain favourable terms of compromise. The company delayed bringing proceedings, not merely until more than six years had passed since the defendant received the bribe, but until more than six years since it discovered what had happened. The defendant raised a limitation defence. The question was not whether the bribe was held on trust for the company but whether the company's claim was statute barred, and this depended on whether the trust was what was then called an "express" trust (or what we would today classify as a Class 1 constructive trust), when the claim would not be statute barred, or a class 2 constructive trust, when it would.

Equity has always given relief against fraud by making any one sufficiently implicated accountable in equity. In such a case equity applied the Statutes of Limitation by analogy. But the Court of Chancery had developed the rule that, in the absence of laches or acquiescence, an "express" trustee was accountable without limit of time.[46] This was because the possession of an express trustee was never by virtue of any

[43] [1999] 1 All E.R. 400 CA.
[44] See *Hospital Products Ltd. v United States Surgical Corp* (note 19 above) per Mason J. quoting Cardozo J.
[45] Note 2 above.
[46] The rule was confirmed by s. 25(3) of the Judicature Act 1873, which provided that no claim by a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, should be held to be barred by any statute of limitation.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

right of his own but was taken from the outset for and on behalf of the beneficiaries. His possession of the property was said to be "coloured from the first by the trust and confidence by means of which he obtained it", and his subsequent appropriation of the property to his own use was a breach of that trust. His possession was treated as the possession of the beneficiaries, with the result that time did not run in his favour against them.[47]

Accordingly a claim against a party who, though not expressly appointed as trustee, was charged with liability for breach of *an existing* trust or relationship of trust and confidence was never barred by lapse of time. Where, however, in the words of Cotton L.J., the trustee (*sic*) received money not belonging to the *cestui que trust* but which the *cestui que trust* could claim on the ground that the receipt of it was a fraud on him, the statute would run from the time he became aware of the fraud. In both cases, therefore, the money was held in trust; but in the second case the claim could be statute barred.

Brett MR and Cotton L.J. held that the fiduciary did not hold the bribe on trust for the company *until the Court created a trust of the bribe and vested it in him*. In *Reid* Lord Templeman, with uncharacteristic moderation, described this as "puzzling". In their first edition, Meagher, Gummow and Lehane[48] were more robust, describing it as "an even more astounding proposition than the basic ruling in *Lister*". It is plainly wrong. The Court has no jurisdiction to create a trust *de novo* of its own motion. Its role is limited to finding, on the evidence of the defendant's past conduct, that a trust had been created by his actions.

James L.J. placed the case in the second category. He analysed it as one of "concealed fraud", with the result that the Limitation Acts applied. As Lord Templeman observed in *Reid*, none of the relevant authorities was cited, with the result that the court's attention was not directed to the cases which showed that the receipt of the bribe, far from being a fraud on the company, should be considered as being for its account. James L.J. treated the defendant as if he were a stranger who had fraudulently misappropriated the company's money instead of a fiduciary who was in a position to receive the bribe only by virtue of the trust and confidence which his principal had previously placed in him.

The case should have been placed in the first category to which the Limitation Acts did not apply. This appears clearly from the later but classic decision of the Court of Appeal[49] in *Soar v Ashwell*,[50] where the

[47] See the classic judgment of Lord Redesdale in *Hovenden V Lord Annesley* (1806) 2 Sch. & Lef. 607 at pp. 633–4.
[48] *Equity, Doctrines and Remedies*, op cit., at para 538.
[49] Lord Esher M.R., Bowen and Kay L.JJ.
[50] [1893] 2 Q.B. 390.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

defendant was the solicitor to the trustees of a will trust. The trust funds included a mortgage. When the mortgage money was repaid, it was received by the defendant with the authority of the trustees in his capacity as their solicitor. He accounted for some of the money he received to his clients but misappropriated the rest. When sued by the sole surviving trustee he pleaded a limitation defence. Lord Esher MR explained that there were two questions for decision. Was the defendant an "express" trustee within the meaning of that expression in the context of the limitation defence? and if so did his misappropriation of the money precede or follow his trusteeship?

The Court of Appeal held that he was not an express trustee of the will but only solicitor to the trustees. So far as the beneficiaries under the will were concerned, he was not a fiduciary but a stranger. He was, of course, guilty of misappropriating money which he knew was subject to the trusts of the will. But if that were all, while the misappropriation would at once of itself make him a trustee of the money for the beneficiaries, he would have a limitation defence. But he was an "express" trustee of the mortgage money, so that the lapse of time was no bar to the action, *because he received the money in a fiduciary relation and as trustee for his clients, the trustees of the will.* The judgments of Lord Esher and Bowen L.J. make it clear that the relevant trust was not the will trust but the trust created by his receipt of trust money with the authority of his clients, an authority which was given because of the trust and confidence they placed in him as their solicitor. That trust came into being when the defendant, being in a fiduciary relation to his clients, received the proceeds on their behalf; and this inevitably preceded his misappropriation of the money. A proper analysis would have produced a similar result in *Metropolitan Bank v Heiron*.

As it stands, the latter decision is plainly wrong. It simply cannot be right that the dishonest fiduciary who receives a bribe should be able to plead a limitation defence while the (relatively) honest fiduciary like the solicitor in *Soar v Ashwell*[51] who acts properly in receiving a payment on his principal's behalf and with his authority but afterwards fails to account to him cannot. There is no conceivable logic in distinguishing between a fiduciary who receives money in fact intended for his principal and one who is merely treated as doing so because of he received it in a fiduciary capacity. In both cases the trust is a Class 1 constructive trust; in neither is there be a limitation defence.

Although the reasoning in *Metropolitan Bank v Heiron* cannot be supported, it does not follow that the company's claim should have succeeded. The circumstances in which the bribe was received should have excluded the application of the statute; but justice did not require

[51] He paid interest on the money he retained to the will trustees.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

the court to distort the law in order to hold that the action was time barred. On the facts it could and probably should have resorted to the well-established equitable doctrine of laches.

B. Lister v Stubbs

In *Lister v Stubbs*[52] the Court of Appeal placed what the Federal Court of Australia has recently described as "an anomalous limitation on the reach of the constructive trust in English law".[53] The defendant was employed to buy materials for his employers. He received commissions from the suppliers, some of which he invested profitably in shares. His employers brought proceedings against him and made an interlocutory application for a freezing order against the shares. At that time such an order could only be obtained in support of a proprietary claim. The Court of Appeal dismissed the application because, it said, the defendant did not hold the commissions or their proceeds on trust for his employers but was merely their debtor.

There were only two reasoned judgments. Cotton L.J. relied on his own judgment in *Metropolitan Bank v Heiron*. Lindley L.J. cited no authority, but denied that the defendant had obtained the bribe as the plaintiff's agent, by which he presumably meant that the bribe was intended for the defendant personally so that its receipt was outside the scope of his agency. If this was his meaning it was a *non sequitur*. It is perfectly possible for a bribe to be intended by the payer to be for the recipient personally but to be received by him for the account of a third party. Indeed, this is the only basis on which the defendant can be made personally liable "as debtor".

Lindley L.J. based his decision on what he considered to be the unacceptable consequences of the claimants' argument. One such consequence would be that they could compel the defendant to account to them, not only for the money he had received with interest, but for all the profits which he might have made by embarking in trade with it. Another was that the bribe would not form part of the insolvent estate if the fiduciary became bankrupt, a concern which others have shared.[54] "Can that be right?" he asked rhetorically, saying that the consequence showed that that there was some flaw in the argument. "If", he said, "by logical reasoning from the premises conclusions are arrived at which are opposed to good sense, it is necessary to go back and look again at the premises and see if they are sound". He said that he was satisfied that they were unsound — the unsoundness consisting in "confounding ownership with obligation", a remark which the Federal

[52] See note 1 above.
[53] *Grimaldi v Chameleon Mining NL (No.2)* note 9 above.
[54] See p. 610 below.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

Court of Australia, with admirable restraint, has recently described as "curious". The problem with this reasoning is that the first[55] of what Lindley L.J. considered to be the undesirable consequences of upholding the claimants' argument was in accordance with the policy of the law and had been (and was subsequently to be) not only accepted with equanimity but insisted upon by generations of eminent equity judges both in England and elsewhere.

In the core passage of his judgment Lindley L.J., having said that the fiduciary was bound to pay the money to his principal "the moment he received it", held that the relationship between them was not that of trustee and beneficiary but debtor and creditor. He did not explain why the debt should differ from an ordinary debt in that, where no terms as to payment are agreed, it is payable immediately whereas other debts are payable on demand. But he not only failed to explain why the money is payable the moment it is received, he failed appreciate the consequences.[56]

The anomaly to which the Federal Court of Australia referred was the fact that a similar limitation has never been applied where the bribe is received in kind. Between 1875 and 1890 the Court of Appeal decided three such cases.[57] In each case the claimant was a newly formed company which had issued shares as consideration for the acquisition of the principal asset of its intended business. In two of the cases the defendant was a director of the company; in the third he was the company secretary. In each case the defendant had been concerned in a fiduciary capacity either in the negotiations with the vendor or in the issue of the shares; and in each case the bribe was paid by the vendor and consisted of shares which he had received as part of the purchase consideration. In each case the Court of Appeal treated the defendant as holding the shares in trust for the company. These cases have never been doubted; yet had the vendor bribed the defendant with money which the defendant had then chosen to invest in the company's shares, he would (according to both *Lister v Stubbs* and *Sinclair v Versailles)* not have held those shares in trust for the company. The distinction is patently absurd.

If there were such an anomaly it would be indefensible. But the only anomaly is *Lister v Stubbs* itself, for there have been many cases in which a fiduciary who has received a bribe consisting of money has been found to hold it in trust for his principal. They include *Fawcett v Whitehouse* (1829),[58] where the defendant received a bribe of £12,000;

[55] The second does not appear to have arisen in practice. Corrupt fiduciaries seem never to become bankrupt.
[56] See p. 596 above.
[57] *Re Morvah Consols Mining Co*. (1875) 2 Ch.D. 1 CA; *Re Caerphilly Colliery Co*. (1877) 5 Ch.D. 336 CA; *Eden v Ridsdales Railway Lamp and Lighting Co. Ltd*. (1889) 23 Q.B.D. 368 CA.
[58] See note 39 above.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

Sugden v Crossland (£75);[59] and *Furs v Tomkies (*£5,000);[60] but there are many others, including *Reid* itself.

C. Reid

In *Reid* the head of the anti-corruption unit in Hong Kong took bribes from persons whose conduct he was employed to investigate and invested the money in landed properties in New Zealand which appreciated in value. The Hong Kong Government brought proceedings in New Zealand claiming that the defendant held the properties in trust for it. The New Zealand Court of Appeal held that it was bound by *Lister v Stubbs* and dismissed the claim. The Privy Council unanimously allowed the Government's appeal and held that both principle and English authority showed that *Lister v Stubbs* was wrongly decided and should not be followed. Lord Templeman said that it was not consistent with the principles that a fiduciary must not be allowed to benefit from his own breach of duty, that he must account for a bribe as soon as he receives it, and that equity regards as done that which ought to be done. It followed that the bribe and its traceable proceeds were held on a constructive trust for the principal. The reference to the maxim "equity regards as done that which ought to be done" has been questioned, but it is only another way of saying that the obligation of the fiduciary to pay the bribe to his principal the moment he receives it is one which equity will enforce.

Reid was a decision of a very strong Board. Among those sitting with Lord Templeman were Lord Goff of Chieveley, the Senior Law Lord and co-author of The Law of Restitution and Sir Thomas Eichelbaum, Chief Justice of New Zealand. The decision gave English judges a problem. They recognised that *Lister v Stubbs* was binding on them but rightly preferred the analysis in *Reid*. So did all the major textbooks on Equity. As the years passed, *Lister v Stubbs* was increasingly questioned by English judges. In *Daraydan v Solland*[61] Lawrence Collins J. distinguished it but questioned whether it was still good law in England, and said that he would have followed the Privy Council's decision in *Reid* if the case before him had not been distinguishable from *Lister v Stubbs*.

D. Sinclair v Versailles

In *Sinclair v Versailles* the Court of Appeal adopted a new approach, which has the advantage of seemingly explaining the perceived disparity in the treatment of bribes received in money and those received in

[59] (1856)3 Sm. & G 192.
[60] See note 31 above and p. 610 below.
[61] [2005] Ch. 119.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

kind, but only by ignoring the effect of the fiduciary relationship itself and at the cost of creating other anomalies. It held that the principal is not entitled to a proprietary remedy

> … unless the bribe is or has been the beneficial property of the principal or is acquired by the agent taking advantage of an opportunity which was properly that of the principal.

This ("the 2011 re-formulation") ignores the fiduciary relationship altogether and treats the fiduciary as if he were a stranger to any trust or confidence reposed in him. It seeks to justify the constructive trust on the ground that the bribe can be said to represent the fruits of the principal's property or former property. It treats the constructive trust as confined to something akin to the misappropriation of property belonging in equity to the principal or which ought to have been obtained for him. In the course of posing the question quoted and previously answered[62] Lord Neuberger explained the basis of his re-formulation[63] as follows:

> … there is obvious force in the contention that the mere fact that the breach of duty enabled [the fiduciary] to make a profit should not, of itself, be enough to give [his principal] a proprietary interest in that profit … After all, a proprietary claim is based on property law …

The last sentence is hopelessly confused. It ignores a fundamental feature of the common law, and one which distinguishes it from other legal systems, namely the duality of property. The principal's claim to the bribe received by his fiduciary is not a claim to title; that is vested in the fiduciary, who can dispose of the bribe and pass good title to an unsuspecting purchaser. It is a claim to the beneficial interest in the bribe, that is to say to a right to call on the owner of the legal title to vest it in him. A claim to the beneficial interest is not based on "property law" but on equity.

Equity cannot be fitted into the legal structure bequeathed by the Romans, which divides law into the law of property and the law of obligations. Equity straddles both, giving rise to the paradox referred to above which so puzzles civilian lawyers. Following and tracing are part of our property law, for they are processes which are common to both law and equity and are concerned with the transmission of beneficial interests in property once they have been established. The present question is concerned with the creation of those rights in the first place, and this is the province of equity. Equitable proprietary remedies like specific performance and the constructive trust are not based on

[62] See p. 584 above.
[63] It has no parentage save possibly the judgment of James L.J. in *Metropolitan Bank v Heiron*.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

property law and have never been confined to the vindication of property rights. They extend to a wide variety of cases where equity, acting on the defendant's conscience, enforces a personal obligation in relation to property.[64] The concept of the trust is the paradigm example; there are many others, including for example mutual wills, where a remedy based on rights of property would infringe the Wills Act.

In the second place there is more to it than the fact that the defendant's breach of duty enabled him to make a profit. What has been left out of account is the nature of the fiduciary relationship itself. Such a relationship is a relationship of trust and confidence in which the principal puts the fiduciary in a position to make a profit and trusts him not to act in his own interests by making it for himself. By acting in breach of the trust placed in him by his principal he deprives him of something more than mere property – he deprives him of the single-minded loyalty on which he relied. The fiduciary's duty is to make the profit, if he makes it at all, for his principal and not himself; and if he does make it equity enforces his obligation to do so for the benefit of his principal.

In the third place, equity is not concerned to give the principal a proprietary interest; it is concerned to prevent the fiduciary from retaining any benefit from his abuse of the trust and confidence placed in him. The remedy is disgorgement, not restitution, and it requires disgorgement in full. It does not matter that this may involve giving his principal a windfall (and the Court will not enquire whether it will do so); better the principal receive a windfall than that the fiduciary retain the profit.

There must of course be a nexus between the fiduciary relationship and the bribe received or profit made, but this is demonstrated by showing that the fiduciary received or made it by making use of information or exploiting an opportunity which came into his possession in the course of the fiduciary relationship. It is sometimes sought to rationalise the fiduciary's liability by treating the relevant information or opportunity as an asset of the principal. But the categorisation of information as property owes more to metaphor than legal accuracy.[65] It has long been discredited, though some such thinking appears to have re-emerged as the basis of the 2011 re-formulation. But there is no need to characterise information as property; the fiduciary's liability as constructive trustee does not depend on whether the information was the property of his principal but on whether it was his duty to use it exclusively for the benefit of his principal and not himself.[66]

[64] For a tentative list see Professor Austin's contribution to *Essays in Equity* (note 11 above).
[65] See Lord Upjohn's dissenting speech in *Phipps v Boardman* (note 15 above) and see below p. 610.
[66] The same of course applies to the opportunity for profit.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

The first limb of the 2011 re-formulation confounds two entirely different causes of action with different factual requirements: (i) a claim based (somewhat loosely) on the misappropriation or "knowing receipt" of property beneficially owned by the claimant, where the claimant must show that the defendant received property subject to the claimant's beneficial interest but need not be a fiduciary; and (ii) a claim by the principal to a beneficial interest in a bribe received by his fiduciary, where the defendant need not have received property in which the claimant had or ever had had a beneficial interest but must be a fiduciary and must have received the bribe by virtue of his fiduciary position.

If the principal's claim is based on the misappropriation of property belonging beneficially to the principal, then it does not depend on the fact that the defendant was in breach of a fiduciary obligation; any one whether a fiduciary or not (except a *bona fide* purchaser for value without notice) who receives property which belongs beneficially to another takes the property on trust for that other. Yet all the cases on bribes and secret profits have been based on the no conflict or the no profit rule, and the judges have consistently directed their inquiry into the existence and scope of the fiduciary relationship, questions which are irrelevant under the 2011 re-formulation. Where the cases have caused problems, it has been caused by disagreement either as to the existence of a fiduciary relationship[67] or as to its scope.[68]

The first limb is also too widely stated. The fact that the property had historically belonged beneficially to the claimant is irrelevant if it had ceased to do so before the defendant acquired it. A party who receives property takes it for his own absolute benefit unless it is subject to another's *subsisting* beneficial interest. Thus a property based rule does not explain why the shares received by the fiduciary were held in trust for the company in the cases concerning bribes received in kind mentioned above. They had never belonged to the company, which had merely had the right to issue them and then only to a third party and for value. Even if the 2011 re-formulation is stretched to include such a case, the vendor was contractually entitled to the shares as part of the purchase price for the property it sold, and the company did not intend to and did not retain a beneficial interest when it issued the shares to the vendor. Had the vendor given the shares to a third party, the transferee would have taken them free of any interest of the company. The only reason that the defendant held the shares in trust for the company was that he was a fiduciary and so under an obligation not to retain them for his own benefit.

[67] As in *Phipps v Boardman* (note 15 above) and *Hospital Products Ltd. v United States Surgical Corp* (note 19 above) for example.
[68] As in *Tyrell v Bank of England* for example.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

The second limb by contrast is too narrowly stated, for there is no requirement that the opportunity was properly that of the principal or that the defendant was under a duty to exploit it for his benefit. Moreover the second limb treats information and opportunity as property, a metaphorical usage which has long been exploded as a matter of law. The fiduciary's breach of duty does not consist of his failure to exploit an opportunity for the benefit of his principal, which if tortious would sound in damages, but of the fact that he exploited it for himself. In doing so he did not appropriate information which belonged to his principal or exploit an opportunity to make a profit which he ought to have obtained for his principal. He is liable because he took advantage of information which came to him in the course of or by reason of a relationship of trust and confidence. The true rule is that previously stated, that being trusted to act in the interests of his principal to the exclusion of his own, a fiduciary is bound either to use the information for the benefit of his principal or not to make use of it at all.

Where a fiduciary who is acting for a purchaser receives a bribe from the vendor, it results in the purchaser paying more for the property than the vendor seeks. It is tempting to describe the difference represented by the bribe as being, not part of the purchase price, but a sum unlawfully abstracted from the principal. This is no doubt accurate enough in economic terms, and has sometimes been put forward as justifying the imposition of a constructive trust, though not as a ground for it.[69] As a matter of law, however, this is problematic to say the least. In the first place, for the claim to succeed on this basis the claimant would have to prove that the bribe was in fact paid out of the purchase money. If the vendor paid the bribe before he received the purchase money or paid it out of his own money, a claim on this basis could not succeed.[70] In some of the cases fulfilment of this condition may be taken for granted, particularly where the bribe consisted of shares which constituted the consideration for the purchase. But in no case has the court made any enquiry whether the bribe was in fact paid out of the purchase money; and where the bribe consisted of shares which did form part of the consideration for the purchase this was not the basis of the court's decision.

In the second place, the 2011 re-formulation does not explain the many cases where the transaction was not one of sale and purchase and there was no connection between the bribe and any property previously beneficially owned by the principal. The most

[69] See Lord Cranworth's speech in *Tyrrell v Bank of London* (note 19 above).

[70] Advice to the purchaser's agent: if you are offered a bribe by the vendor, make sure you receive it before your principal pays any part of the purchase price; and to be on the safe side ask for the bribe to be paid by a different entity, such as a different company from the company to which the purchase money will be paid. That will not relieve you of the liability to account for the bribe, but you will be free to invest it and keep the profit.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

serious cases[71] as well most of the cases on secret profits or commissions, some at the highest level, are of this character. It simply cannot be right to make the nature of the liability of a fiduciary who receives a bribe differ according to the nature of the relationship (if any) between his principal and the party who paid the bribe; or on the latter's motive in paying it; or on whether he paid the bribe out of the money he received from the principal or his own. The vice is the same in every case; the bribe deprives the principal of the single and undivided loyalty of his fiduciary unaffected by consideration of his own interests.

Finally, the 2011 re-formulation does not reflect the way in which the principal's claim has been put in the cases or the way in which the courts have decided them. The fact that in a handful of cases, all concerning an agent who acted for a purchaser, the claim could have been formulated in a way which the courts did not adopt does not mean that the basis on which they decided them was wrong.

Lord Neuberger recognised, as Lindley L.J. did not, the importance of ensuring that the fiduciary should be made to disgorge any profit he had made by investing the bribe, and made the remarkable suggestion that the personal duty to account might be "adjusted" to give the principal the profit. This not only contradicts a basic principle of the law of restitution that following and tracing, being part of our property law, require a property base; it rejects the *ratio* of *Lister v Stubbs* in a judgment which professes to follow it. But if the claimant has the right to follow the bribe into the hands of a third party or to trace it into its proceeds and recover them or their value, then he *has* a right of property. You cannot have it both ways. Either the principal can recover the bribe or its traceable proceeds from a third party or he cannot. If he can, he has a right of property, and the basis of the 2011 re-formulation falls away.

In sum, the conditions prescribed by the 2011 re-formulation succeed at one and the same time as being neither necessary nor sufficient, as well as creating further anomalies and being inconsistent with numerous authorities, some at the highest level.

VI. The English Authorities

Many of the authorities have already been discussed, but it is worth examining others which are incompatible with *Sinclair v Versailles*. An instructive case, and one of the earliest, is *Diplock v Blackburn*,[72] which demonstrates the fact that the constructive trust in these cases is a response to a breach of the no conflict or no profit rule and not to the

[71] Such as *Reid* itself, and *A.G. v Goddard* (1929) 98 L.J.K.B. 743, where a police officer in the vice squad was bribed not to report brothel keepers.
[72] (1811) 170 E.R. 1300.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

misappropriation of property belonging to the claimant. The master of a ship claimed to retain for his own benefit the premium which he received upon a bill drawn on account of the ship on the ground that there was a usage for masters to appropriate such premiums to their own use. Lord Ellenborough C.J. held that the money belonged to the owner and not to the master. He could have reasoned that this followed from the fact that the bill was drawn on the account of the ship, which would be a property analysis. But this would have required a finding that there was no such usage, for if there were it would have governed the terms on which the master was employed. But Lord Ellenborough did not enquire whether the alleged usage existed. He stigmatised it as a "usage of fraud and plunder", not because the premium belonged to the owner, but because if it belonged to the master it would give him an interest in conflict with his duty. "What pretence," he asked, "can there be for an agent to make a profit by a bill upon his principal? This would be to give the agent an interest against his duty."

This could hardly be plainer. The alleged usage would found a claim by the captain to property which in law belonged to the owner; but the money belonged to the owner only because of the no conflict rule. The master was claiming property to which, but for the no conflict rule, would be his; but which the no conflict rule vested in the owner. Or as modern judges would probably say, the no conflict rule trumps the law of property.

In *Fawcett v Whitehouse*[73] the defendant, who was negotiating to take a lease for an intended partnership, received a sum of £12,000 as a bribe from the intending lessors. Sir John Leach V.-C. declared that he had received the money on behalf of himself and his two partners, *and was a trustee as to one third for one partner and another third for the other*.[74] But the money could not have been paid out of money belonging or formerly belonging to the partnership, *because the lease did not reserve a premium*. No money passed from the partners to the lessors.

In *Sugden v Crossland*[75] a trustee was paid £75 to retire from the trust and appoint the person who paid the bribe in his place. The money was not, of course, part of the trust fund but belonged to party who paid it. It could not conceivably be said to have been the duty of the trustee to obtain the money for the trust. Under the 2011 reformulation no proprietary relief would have been available. Sir John Stuart V.C held that the money must be treated as part of the trust fund,[76] saying "there does not seem to me difference in principle

[73] Note 39 above.
[74] The case was affirmed on appeal.
[75] (1856) 3 Sm. & G. 192.
[76] He also removed the person who paid the bribe from the trusteeship, so that he not only lost the money but the office he had paid for. Serves him right!

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

whether the trustee derived the profit by means of the trust property or from the office itself". In *Reid* Lord Templeman approved of the decision as

> disposing succinctly of the argument which appears in later cases and was put forward in the present case that there is a distinction between a profit which a trustee takes out of the trust and a profit such as a bribe which a trustee receives from a third party.

That is the distinction drawn in *Metropolitan Bank v Heiron* and *Sinclair v Versailles*, and it is irrational. The source of the bribe cannot matter when the vice of its retention by the recipient is the same.

In *Williams v Barton*[77] a trustee who was a stockbroker recommended the employment of his firm to value the trust securities. He received a commission from his firm for making the recommendation. He was expressly found to have acted in good faith, but he was treated as holding the commission as part of the trust fund because he had infringed the no profit rule. There was no evidence that the commission was paid out of money received by the firm from the trustees; it seems unlikely that it was; and there is no reason why it should make a difference if it were.

There have been only two cases in the House of Lords which bear directly on the present question, and they are sufficiently important to merit more detailed examination. The first is *Tyrrell v Bank of London;*[78] the second is *Phipps v Boardman*.[79]

A. *Tyrrell v Bank of London*

This is among the authorities which Lord Neuberger cited in *Sinclair v Versailles* as supporting the 2011 re-formulation. Interestingly, Counsel for the successful appellants in *Reid* cited it as supporting his argument. When the case is properly analysed, it is clear that he was right to do so. The facts are described in the judgments in tedious detail, but can be shortly summarised. Tyrrell was a solicitor acting for a bank which to his knowledge was interested in buying a property known as the Hall of Commerce. He entered into a secret arrangement with the vendor, one Read, who had only recently bought a larger piece of land which included the Hall of Commerce, to take a one half share of the net profit from any sale of the land which Read had acquired.[80]

[77] [1927] 2 Ch. 9.
[78] Note 19 above.
[79] Note 15 above.
[80] Read entered into a backdated agreement to convey a one half share in the land which he had acquired to Tyrell for no consideration. Quite apart from the fact that the transaction was a fraud on the bank, the absence of consideration rendered the agreement unenforceable. The head note records that Tyrell owned a half share in the land, which seems incorrect. He was not entitled to anything unless and until a part of the land was sold, and then he was not entitled to a half share in the proceeds of sale but only to a half share in the net profits.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

Read and Tyrrell described their arrangement as a "joint speculation". Tyrrell gave no consideration for his share of the profit. The bank, which never had any interest in acquiring any other part of the land, bought the Hall of Commerce at a price which significantly exceeded Read's cost of acquiring the whole. By the time some four years later that the bank brought proceedings, Tyrrell has probably received and spent his share of the profit, but he still had a half share in the net profit to arise on the eventual sale of the unsold land which presumably stood in the books of the speculation at nil cost. When the proceedings were brought neither Read's cost of acquiring the land nor Tyrrell's half share of the cost had been ascertained.

At first instance[81] Sir John Romilly M.R. found that Read's motive in voluntarily relinquishing a half share in the net profit from a sale of the land he had acquired was to take advantage of Tyrrell's influence with the bank as its solicitor. The critical finding of the Master of the Rolls was that but for his confidential relationship with the bank Tyrrell would never have received a share in the profit, which was due to his role as the bank's agent and his employment as such. He directed the accounts necessary to quantify Read's costs, declared Tyrrell to be a trustee for the bank of his share in "the hereditaments" (by which he meant the unsold land as well as the net profit on the sale of the Hall of Commerce), and ordered him to pay the sum due on the taking of the account and to convey his interest in the unsold land to the bank. The form of the decree in relation to the unsold land shows that he treated Tyrrell as holding the land as trustee for the bank; and since Tyrrell cannot have been possessed of his share of the net profit on the sale of the Hall of Commerce on a different basis, he must have considered him to be a trustee of that profit also. The Master of the Rolls expressed some doubt about the unsold land but, as the Lord Chancellor was to observe, was concerned that if he excluded it from the trust Tyrrell would bear no part of its cost of acquisition.

A three man committee[82] of the House of Lords unanimously dismissed Tyrrell's appeal but varied the order to exclude the unsold land. In dismissing the appeal in relation to the Hall of Commerce, Lord Westbury L.C. said

> The client bought the property whilst acting under the advice of the solicitor. … The principle is that the solicitor shall not be permitted to make a gain for himself at the expense of his client. The client is entitled to the best exertions of the solicitor … I prefer to rest my opinion in this case on the obligation of a solicitor to his client, and on the conduct of [Tyrrell] being a violation of the duties and confidence which are incidental to that relation.

[81] 27 Beav. 273.
[82] Lord Westbury L.C., Lord Cranworth and Lord Chelmsford.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

As regards the Hall of Commerce, which he described as "the subject matter of the transaction carried out in this relation", the Lord Chancellor said that Tyrrell "must be converted into a trustee." His two colleagues agreed with him and gave no additional reasons of their own. Lord Chelmsford observed that if the decree in relation to the Hall of Commerce were not affirmed

> the House would make a serious inroad upon those principles established in courts of equity by which persons clothed with a fiduciary character are restrained within the bounds of honesty and fair dealing.

It is quite plain that the Committee treated Tyrrell as holding the profits he had made from the sale of the Hall of Commerce in trust for the bank, and that this had nothing to do with any expropriation of part of the purchase money which the bank had paid but was due to the fact that the profit arose from the nature of the relationship between a solicitor and his client.

In *Sinclair v Versailles* Lord Neuberger considered that the exclusion of the unsold land from the trust supported his approach; but it does not. It was not excluded on the ground that any future profits from the unsold land would not be derived from the purchase money paid by the bank. It was excluded because, in the Lord Chancellor's words, the unsold land was not "the particular subject of the relation between [Tyrrell] and his client", and the principle could not "be extended further to give the clients the benefit of property and the benefit of an agreement with which they had no concern". Since the bank did not buy the unsold land and never had any interest in acquiring it, Tyrell owed no duty to the bank in relation to it.

By its order, the form of which the Lord Chancellor proposed and with which Lord Cranworth and Lord Chelmsford agreed, the House (i) varied the decree by substituting a declaration that the bank was entitled to the benefit, not of "the hereditaments" as the Master of the Rolls had decreed, but of Tyrrell's agreement with Read so far as it related to the House of Commerce (which accurately described the relevant part of the interest which Tyrrell had received); ordered that the account be adjusted by disallowing Tyrrell's share of Read's cost of acquiring the unsold land (thereby increasing the amount for which Tyrrell would be liable and meeting the concerns of the Master of the Rolls); and awarded interest on the amount found due at the rate payable by trustees in cases of breach of trust. Although necessarily resulting in a payment of money, the relief granted was unequivocally proprietary in nature.

Lord Cranworth agreed but struck out on a frolic of his own, saying that the case could have been decided on a short ground, viz. that

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

Tyrrell had been guilty of falsely representing that the money paid by the bank for the Hall of Commerce was payable to Read when part was being retained by Tyrrell himself. While this might have justified an award of damages for fraud, it would not have entitled the bank to the relief which it was awarded and with which Lord Cranworth agreed. His remarks must be considered to be an alternative ground justifying the grant of relief, though not the relief contended for or granted, and not a ground of decision.

Lord Chelmsford was a criminal practitioner whose appointment as Lord Chancellor was political. He was no equity lawyer. With the exception of a single passage his speech was entirely orthodox and in agreement with that of the Lord Chancellor. He began by considering the critical question, whether Tyrrell's authority to negotiate on behalf of the bank extended to the whole property or only the Hall of Commerce, and after a detailed examination of the evidence concluded that it was the latter. He agreed with the Lord Chancellor that any profits which Tyrrell might make from a future sale of the unsold land should be disregarded, because, as he put it, the bank's claim "could not be carried beyond the limits of the agency". This was the same as the reason given by the Lord Chancellor.

Unfortunately in a curious passage to which undue attention has been paid, Lord Chelmsford considered what the position would be if Tyrrell had taken a bribe of £5,000 instead of an interest in the net profit on the sale of the land. He said that in that case the bank would be entitled to damages but could not reach the bribe itself. His answer foreshadows *Lister v Stubbs* and has been seized upon by its supporters. But the point had not been argued and Lord Chelmsford's opinion was not only unsupported by previous authority but was inconsistent with cases cited in argument which included *Fawcett v Whitehouse*,[83] to which he did not refer. Moreover, its relevance is doubtful to say the least, for it has no bearing on the reason which both he and the Lord Chancellor gave for excluding the unsold land from any relief. It is hard to disagree with the summary way in which in *Reid* Lord Templeman disposed of the passage as "*obiter*, unnecessary and wrong".

B. Phipps v Boardman

In *Phipps v Boardman*[84] the claimant was a beneficiary of a family trust; the defendants were the solicitor to the trustees and another beneficiary. The trust fund included a minority holding in a small private company. The defendants were dissatisfied with the way in which the

[83] Note 39 above.
[84] Note 15 above.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

company's business was being conducted and considered that it would be advantageous to acquire the outstanding shares and reorganise the company's business. The trust was not in a position to acquire the shares. Accordingly the defendants decided to buy the shares for themselves and with their own money. They obtained the consent of two of the three trustees, but the other trustee was an old lady who was senile and in failing health and she was not consulted. The defendants wrote to the beneficiaries to seek their approval and wrongly believed that they had obtained it. They bought the outstanding shares in the company and turned the business round to their own financial benefit as well as that of the trust which continued to have a significant shareholding in the company.

At first instance Wilberforce J. found that the defendants had throughout acted as agents for the trustees, and applied what he described as "the broad principle of equity developed by [the Court of Chancery] in order to ensure that trustees and agents shall not make a profit by reason of their office". He cited *Regal (Hastings) Ltd. v Gulliver to the effect that* that there was a breach of this principle when the defendant made a profit "by reason of [his] fiduciary position and by reason of the opportunity and knowledge, or either, resulting from it". He observed that, as outsiders, they would have been unable to buy the shares, for the vendors dealt with them only because of the substantial and threatening minority shareholding owned by the trust.

Wilberforce J. granted a declaration that the defendants held the shares as constructive trustees for the claimant, ordered an account of the profits derived by the defendants from the shares (which would include dividends and other receipts) and an inquiry what sum it would be proper to allow to the defendants for their work and skill.[85] All three components of the order were unequivocally proprietary in character. The judge did not award interest but ordered an account of the profits actually derived from the holding of the shares; and he directed an inquiry to ascertain the sum which should be paid to the defendants by way of a "just allowance" in recognition of the fact that they had acted in good faith and that the increase in the value of the shares was in large measure due to their work and skill in turning the business round. This was formerly regarded as the exercise of an incidental power of the court of equity in its supervisory jurisdiction over trusts, and may today be more generally considered as a restitutionary claim for work carried out by one party which has improved property belonging to another. On appeal the order was affirmed by the Court of Appeal and the House of Lords.

[85] A copy of the order is held by the library of Lincoln's Inn.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

It will be observed that the defendants bought the shares with their own money and that they could not possibly be said to have been under a duty to obtain the shares for the trust. Nor did they make use of any property (at least in the normal sense) belonging to the trust. Their breach consisted of taking personal advantage of information and an opportunity which only came their way because of their fiduciary relationship with the trustees. Insofar as they took advantage of the trust's minority shareholding, they were taking advantage of their ability to represent the trustees as their agent not of property which "properly" belonged to the trust.

Two of the majority of the Appellate Committee[86] considered that such information could be characterised as property, so that the defendants could be said to have made a profit by making use of property belonging to the trust. The third[87] held that information could not be characterised as property, but that it was sufficient that the defendants had taken advantage of information which they had obtained in the course of and by virtue of their fiduciary position. Lord Upjohn, who dissented,[88] roundly rejected the characterisation of information as property, and on this point his opinion is generally regarded as correct today.[89]

In view of the diversity of opinions expressed by the members of the Appellate Committee, it is not easy to extract the *ratio*. But given the fact that a majority upheld the order while a different majority rejected the argument that the defendants had misappropriated property belonging to the trust, it is difficult to fault Professor Virgo's analysis[90] is that the defendants had profited from their position as fiduciaries by exploiting information which they had obtained while acting in that capacity. As he puts it,

> the relevance of the information was not that it was property, but that it enabled the fiduciaries to exploit the opportunity of purchasing shares. It was significant that the company was a private company, so that there was no public market for the shares, and consequently the information that they obtained as fiduciaries and the ability to purchase shares in the company came to them in a fiduciary capacity.

Even if this analysis is not accepted, as in the author's opinion it should be, the decision that proprietary relief was available is incompatible with the 2011 re-formulation. That is because the case shows that there

[86] Lord Hodson and Lord Guest.
[87] Lord Cohen.
[88] He did not agree that the defendants were in breach of trust at all. His speech is the best regarded and the most commonly cited.
[89] If information is property it is of a very unusual kind, since it can at one and the same time be disposed of and yet retained.
[90] Op. cit., note 14 above, at p. 512.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

may be two different grounds for awarding such relief, whereas the 2011 re-formulation allows for only one of them.

VII. Insolvency

Professor Goode and others have expressed concern for the general creditors where the fiduciary has become insolvent. This concern is misconceived. As Lawrence Collins J. observed in *Daraydan v Solland*:[91]

> There is no injustice to the creditors in their not sharing an asset for which the fiduciary has not given value and which he should not have had.

Put another way, since the fiduciary ought not to have received and retained the bribe, his creditors have no legitimate claim to it. Some who have expressed concern have suggested that the remedy might lie in substituting an equitable lien for the constructive trust. Since such a lien is proprietary and gives the holder priority over the general creditors, it is difficult to see how this meets the concerns which have been expressed. Presumably it is thought that the lien would extend only to the amount of the original bribe, but there is no warrant for or logic in any such assumption. The creditors claim through their debtor, and they cannot lay claim to that to which he is not entitled.

Professor Hayton has pointed out that if the contract of agency contained a clause expressly forbidding the agent to take a bribe and providing that if he did he should hold it in trust for the principal, the agent's creditors would have no complaint if the bribe were to fall outside the insolvent estate even if they were unaware of the existence of the clause. Why, he asks, should they be thought to have a legitimate complaint if this were the result of the general law?

VIII. Other Jurisdictions

Lister v Stubbs was not well received outside England. It was criticised in *Queensland Mines Ltd. v Hudson*[92] and referred to as "the *Lister* anomaly" by the New South Wales Court of Appeal in *DPC Estates Pty v Grey*.[93] In their contributions to *Essays in Equity*[94] Lehane referred to "the *Lister* heresy" which, he said, "remains to be eradicated", while Professor Austin said that it should be disregarded and Sir Anthony Mason that it should not be followed. In 1993, shortly before *Reid*, the Singapore Court refused to apply it in *Sumitomo Bank Ltd. v Kartika Ratna Thahir* (1993).[95]

[91] Note 61 above, at p. 863.
[92] (1978) 52 A.L.J.R. 399
[93] [1974] 1 N.S.W.L.R. 443, at 470-471.
[94] Note 11 above.
[95] Not cited in *Sinclair v Versailles*.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

Lister v Stubbs has simply been ignored by the High Court of Australia, where some of the leading equity judges of the 20th Century continued to expound the law in classical terms. In *Palette Shoes v Krohn*[96] Sir Owen Dixon explained:

> In equity, the relation of agent would carry with it a duty to account and, as a rule, a duty, if monies are received in the course of the agency, *to hold them specifically for the principal*. At law the relation would be that of debtor and creditor.[97]

In *Keith Henry* [1958] Dixon C.J. said:

> a trustee must not use his position as trustee to make a gain for himself: any property acquired, or profit made, in breach of this rule *is held by him in trust for his cestui que trust* … [The rule] applies to all cases in which one person stands in a fiduciary relation to another.[98]

As has previously been observed, the dichotomy arises because the common law gives redress for breach of duty, whereas equity enforces performance of the duty. In *Chan v Zacharia* (1983)[99] the fiduciary received a bribe while acting as agent for a partnership. Deane J., sitting in the High Court of Australia, said that any benefit or gain … obtained by or received by use of his fiduciary position … is held by the fiduciary *as constructive trustee*" and was "*an asset of the partnership*". All three cases were decided before the availability of the proprietary remedy was confirmed by *Reid;* but then the High Court of Australia has never taken any notice of the aberrant *Lister v Stubbs*.

In the important case of *Hospital Products Ltd v United States Surgical Corp*,[100] another decision of the High Court of Australia decided before *Reid*, Mason J. said:

> Any profit or benefit obtained by a fiduciary in [breach of his fiduciary obligations] …… is held by him as a constructive trustee. … Neither principle nor authority provide any support for the proposition that relief by way of constructive trust is available only in the case where a profit or benefit obtained by the fiduciary was one which it was an incident of his duty to obtain for the person to whom he owed the fiduciary duty. … It can make no difference that it was not his duty to obtain the profit or benefit for the person to whom the duty was owed. What is important is that the advantage has accrued to him in breach of his fiduciary duty or by his misuse of his fiduciary position. The consequence is that he

[96] (1937) 58 C.L.R 1, at p. 39 (not cited in *Sinclair v Versailles*).
[97] The curiosity is that Lindley L.J. of all people should invoke the common law rule to govern a fiduciary relationship.
[98] [1957] 100 C.L.R 342, at p. 350 with whom McTiernan and Fullagar JJ. agreed.
[99] (1983) 154 C.L.R 178, at p. 199 (not cited in *Sinclair v Versailles*).
[100] Note 19 above, at para 96 et. seq.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

> must account for it and in equity the appropriate remedy is by means of a constructive trust.[101]

He continued by citing Cardozo J.:

> A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.[102]

As Lindley L.J. said, a fiduciary who receives a bribe must hand it over to his principal "the moment he receives it". It would seem to follow that he cannot "in good conscience retain the beneficial interest". In the *Hospital Products* case the profit consisted of part of the profit of a global business, so complex accounting was required in order to apportion the profit between that which was held on trust and that which was not. The remedy necessarily took the form of an account and payment, but Mason J. (who was dissenting on the question whether the defendants were fiduciaries at all) would have restored the Order of the trial Judge, who had granted a lien to secure payment, a proprietary remedy which is not available in the case of a mere debt.

In *Furs Ltd. v Tomkies*[103] a director who negotiated the sale of the division of his company in which he worked agreed to take up employment with the purchaser when the sale was completed. His fellow directors knew of this and consented. But without telling them he also arranged to be paid a signing on fee of £5,000. He was expressly acquitted of bad faith; but the Court found that he held the £5,000 on trust for the company. In their judgment Rich, Dixon and Evatt JJ said: "An undisclosed profit which a director derives from the execution of his fiduciary duties *belongs in equity to the company*". This entirely orthodox view was expressly approved by the Federal Court of Australia in *Grimaldi v Chameleon Mining NL (No.2)*.[104]

In that case the Federal Court of Australia re-examined the question afresh and had no hesitation in rejecting both *Lister v Stubbs* and *Sinclair v Versailles* as contrary to principle and authority. In a judgment written by Finn J, the Court said

> To exclude the bribed fiduciary from the deterrent effect of the constructive trust is, in our view, to make it unavailable in the very situation where deterrence is most needed. Bribery at its most

[101] In the author's respectful opinion the greatest equity judge of the late 20th Century.
[102] In *Beatty v Guggenheim Exploration Co*. (1919) 225 N.Y. 380.
[103] Note 31 above.
[104] Note 9 above.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press

> naked breeds the crudest form of fiduciary infidelity. To privilege the dishonest fiduciary in this way is to create an incentive which should not be tolerated.

Exactly: "fiduciary infidelity" is what it is all about, and the 2011 reformulation conspicuously fails to capture it. The Federal Court continued with the withering comment:

> English law may have its own reasons for so contriving the limits to proprietary relief. We need not speculate about them … Whatever may be the reasons for English law's continuing adherence to *Lister*, the weight of High Court decision and expressions of judicial opinion across the twentieth century preordain our rejection of it. … We simply note that in the result Australian law matches that of New Zealand, Singapore, United States, and Canada".

IX. Conclusion

Lister v Stubbs and *Sinclair v Versailles* are contrary to principle and authority, fail to give effect to the policy of the law, reduce English law to a state of incoherence, and leave this country in the uncomfortable position of being the only common law jurisdiction where a dishonest fiduciary is allowed to retain a profit he has made by profitably investing a bribe or otherwise exploiting the fiduciary relationship for his own benefit without the fully informed consent of his principal.

There is ground for hope, however. The Court of Appeal has recently granted permission to appeal the decision of a first instance judge who followed *Sinclair v Versailles*, as he was bound to do. It is to be hoped that the case will reach the Supreme Court, and that the opportunity will be taken to restore the fundamental principles of equity and reinter *Lister v Stubbs*, this time never to be revived.

https://doi.org/10.1017/S0008197312000839 Published online by Cambridge University Press