transactions should be more tightly controlled, (B) that only formal gifts merit special treatment, or (C) only that the remedial mechanism of *in specie* rescission should be confined?

Interpretation (A) seems most plausible. It also has the widest ramifications. To avoid unjustified subversion of equity's assumed position, future courts would need to rein in common law restitutionary claims for mistaken gifts. Available techniques, within our orthodox unjust enrichment framework, include: (i) preserving the liberal causative mistake test for restitution-grounding mistakes reflected in *Simms*, but articulating a new bar – perhaps in the form of a new 'justifying ground' – to restitution for valid gifts (cf. *Goff and Jones – The Law of Unjust Enrichment* 8th ed., Part 2); (ii) adopting a narrower definition of restitution-grounding mistakes for gifts, most likely by replicating the *Pitt* equitable definition (cf. Lord Scott in *Deutsche Morgan Grenfell Group plc v I.R.C.* [2006] UKHL 49, [2007] 1 A.C. 558, at [87]; Wu (2004) 20 J.C.L. 1); or (iii) finding that gift transactions can only be reversed via the equitable jurisdiction, expanded to allow *in specie* rescission and personal restitutionary remedies where appropriate.

Interpretations (B) and (C) both reject the idea that the reversal of all mistaken gift transactions requires special controls. The common law's liberal approach to restitution-grounding mistakes might therefore continue, subject to fine-tuning to avoid conflict with equity's assumed position. For example, if interpretation (B) holds good, then a court might be expected to refuse the normal common law restitutionary remedy for a formal gift unless the higher equitable threshold is satisfied.

All this is highly speculative. However, what is beyond doubt is that *Pitt* leaves English courts and commentators with more work to do, to integrate more completely the common law and equitable perspectives, and secure a more "joined-up", coherent approach to the reversal of gift transactions for mistake.

STEPHEN WATTERSON

"MENS REA", BREACH OF CONFIDENCE AND THE IMPLICATIONS FOR ENGLAND'S PRIVACY "TORT"

ALTHOUGH the equitable cause of action for breach of confidence is ancient in origin, the Supreme Court's decision in *Vestergaard Frandsen v Bestnet Europe Ltd.* [2013] UKSC 31 marks only the fourth time England's apex court has discussed its requisite elements. The decision potentially marks an important shift in what might be called

the '*mens rea*' of breach of confidence, from an objective to a subjective test. This could have significant implications not just for this equitable action, but also for England's civil action for the misuse of private information, which is formally anchored in breach of confidence doctrine.

The appellant, Vestergaard, was a manufacturer of insecticidal nets. The respondent, Mrs. Sig, was a former employee of Vestergaard, who served four years as a marketing manager before quitting and forming "Bestnet" along with several of Vestergaard's former in-house scientists. Bestnet immediately began manufacturing insecticidal nets in direct competition with Vestergaard, utilising a secret technique that was developed by the former scientists when they had worked at Vestergaard. Vestergaard sued these scientists, and Mrs. Sig, for breach of confidence. The trial judge found all of the defendants liable ([2009] EWHC 1465 (Ch)). The Court of Appeal affirmed these findings in relation to the scientists, but overturned the result in relation to Mrs. Sig, on the basis that she had never acquired the relevant confidential information when working at Vestergaard, and that she did not know Bestnet's product contained Vestergaard's confidential information ([2011] EWCA Civ 424).

Vestergaard appealed, relying on three grounds. First, that Mrs. Sig was liable under her employment contract with Vestergaard. Secondly, that she was part of a common design, along with the former scientists, to misuse Vestergaard's confidential information by manufacturing competing insecticidal nets. Finally, the appellant argued that regardless of whether Mrs. Sig actually knew that Bestnet was using Vestergaard's trade secrets, her participation in this company generated secondary liability for breach of confidence because she had "blind-eye" knowledge that trade secrets were being exploited and in any event showed a reckless disregard of Vestergaard's interests when she formed Bestnet.

Lord Neuberger, writing for the unanimous Supreme Court, dismissed all three grounds of appeal. Regarding the first ground, his Lordship determined that Mrs. Sig's contract of employment, which obliged her to refrain from commercialising any information gained while in Vestergaard's employ, was not breached because she did not in fact acquire knowledge of the relevant information when working for Vestergaard. Regarding the second ground, Lord Neuberger held that to be liable for participating in a common design to breach another's confidence a person must "share with the other … parties … each of the features of the design which make it wrongful" (*Vestergaard*, at [34]). Mrs. Sig was not liable here because she did not know Vestergaard's trade secrets were being used in Bestnet's manufacturing process. Lord Neuberger then turned to the third ground of appeal,

and noted that Vestergaard's argument in relation to Mrs. Sig's secondary liability had two discrete dimensions: (i) Although Mrs. Sig was genuinely unaware that Bestnet's scientists were using Vestergaard's trade secrets, she should nevertheless be liable for possessing "blind eye" knowledge that this was occurring; and (ii) Mrs. Sig was reckless for failing to appreciate that Bestnet's scientists were using Vestergaard's confidential information, which should be sufficient to generate secondary liability. With respect to the first sub-point, Lord Neuberger held that "blind-eye" knowledge required the presence of dishonesty – such as acting in a commercially "unacceptable manner" – and that this argument simply failed on the facts, given Mrs. Sig's genuine ignorance that Bestnet's product incorporated Vestergaard's trade secrets (*Vestergaard*, at [26], [42]). Regarding the second sub-point, Lord Neuberger clarified that recklessness alone would not generate secondary liability for breach of confidence; rather, a finding that Mrs. Sig was behaving recklessly in relation to Vestergaard's trade secrets would simply be a fact that might help support the inference that Mrs. Sig was dishonest and actually knew Bestnet was utilising Vestergaard's confidential information. However, as this factual inference had not been drawn by the trial judge, and as he had determined that Mrs. Sig was genuinely unaware that trade secrets were being used, this ground of appeal also failed.

While the result in *Vestergaard* is entirely defensible, on the basis that Mrs. Sig was not in fact ever exposed to the relevant confidential information while in the employ of Vestergaard, Lord Neuberger's reasons contain statements that are not easy to reconcile with previous authority. Specifically, in several places, his Lordship states that in order for a defendant's conscience to be affected, and hence for equity to have jurisdiction, she must either agree to keep the relevant information confidential, or, at minimum, must know that the information is confidential (see *Vestergaard*, at [22], [23], [25]). These propositions do not sit comfortably with the House of Lords' last three treatments of breach of confidence doctrine.

The first House of Lords decision to examine breach of confidence is *Attorney General v. Guardian Newspapers (no.2)* [1990] 1 A.C. 109 (H.L.). The case involved an obligation of confidence arising in an established employment relationship; however, Lord Goff, who is usually cited as writing the lead judgment, went on to opine more generally that obligations of confidence could arise in "certain situations, beloved of law teachers" such as "where an obviously confidential document is wafted by an electric fan out of a window into a crowded street" and is then "picked up by a passerby" (*Attorney General* at 281). This statement was controversial at the time, for there was not then any authority from the House of Lords on the

question of whether an obligation of confidence could attach to a complete stranger – that is, to someone who was never in a confidential relationship with the claimant, or who did not acquire the information from someone else in such a relationship. In *Campbell v MGN* [2004] 2 A.C. 457 (H.L.), the House of Lords' second breach of confidence decision, Lord Hoffmann observed that Lord Goff's example, above, illustrated the "artificiality of distinguishing between confidential information obtained through the violation of a confidential relationship and similar information obtained in some other way" (*Campbell* at [46]); and confirmed that obligations of confidence could be imposed on strangers, despite no antecedent agreement to keep the information secret, if the circumstances were such that the defendant ought to have appreciated, objectively, that the information in question is confidential or private. Insofar as commercial information is concerned, Lord Hoffmann considered this objective test to be "firmly established" (*Campbell* at [48]). In *Campbell*, the House endorsed this reasoning, and then applied it to impose an obligation of confidence on a tabloid that had published photographs of a supermodel exiting Narcotics Anonymous, on the basis that the claimant had an expectation of privacy that should have been appreciated by the defendant because it was objectively reasonable in the circumstances. There is now a substantial body of post-*Campbell* jurisprudence applying the privacy arm of this action, and imposing obligations of non-disclosure on defendants where the claimant can demonstrate an objective reasonable expectation of privacy (see *Murray v Express Newspapers*, [2008] EWCA Civ 446). The House's third, and save for *Vestergaard*, most recent discussion of breach of confidence, is *OBG v Allen* [2008] 1 A.C. 1 (H.L.), in which Lord Hoffmann again applied the objective test to impose an obligation of confidence on a tabloid magazine that published photographs taken illicitly at a celebrity wedding. According to Lord Hoffmann, the magazine's "conscience was tainted" because the obviously surreptitious nature of the photographs, coupled with the magazine's knowledge of industry custom, meant it ought to have known the celebrity claimants would have objected to publication by the defendant (*OBG* at [198]).

In sum, prior to *Vestergaard*, the House of Lords had been consistent that the recipient of information's conscience becomes tainted, and hence an obligation of confidence arises, if the circumstances are such that she ought to know, objectively, that the information is confidential. Since *Campbell*, analogous reasoning has been applied to impose obligations of non-disclosure in the context of England's civil action for the misuse of private information, on the basis of an objective reasonable expectation of privacy test. *Vestergaard* potentially opens the door to future defendants to avoid being saddled with

these obligations if they genuinely fail, subjectively, to appreciate that the impugned information is "confidential" or "private". This could have serious consequences for the protection of privacy in particular, given how historically contested, and conceptually fraught, the idea of privacy is.

CHRIS D. L. HUNT

EVALUATING ENRICHMENT

BENEDETTI v Sawiris [2013] UKSC 50, [2013] 3 W.L.R. 351 is the most significant decision in any common law jurisdiction on valuing enrichment for the purposes of the law of unjust enrichment.

Benedetti had facilitated a corporate investment by Sawiris in circumstances where there was no contract between them for the provision of the services. Benedetti sought *quantum meruit* founded on the defendant's unjust enrichment, since he had provided the services in the expectation that he would be remunerated under a contract which was not made, there consequently being a failure of consideration. Benedetti originally sought €3.7 billion. At each stage of the litigation he progressively recovered less. At trial he was awarded €75.1 million, this being the amount which Sawiris had offered him for the services, even though their market value was found to be €36.3 million. In the Court of Appeal he was awarded €14.52 million, this being 40% of the market value of the services, the claimant having already received remuneration for the rest. In the Supreme Court he was awarded nothing, since it was held that the €67 brokerage fee, which was found to have been paid to a company but personally received by Benedetti, constituted full payment for the services he had provided. This was sufficient to defeat the claim since, the claimant having been paid, the defendant was no longer unjustly enriched at the claimant's expense.

Since the claimant had appealed on the ground that the value of the services was higher than that awarded by the Court of Appeal, the Justices also considered how enrichment should be valued. The key issue was whether the award could be higher or lower than the market value of the services and whether the defendant's perception as to their value was relevant. The Justices adopted the same general approach, with one significant exception. The leading judgment was delivered by Lord Clarke, with whom Lords Kerr and Wilson agreed. Nonetheless the judgments of Lords Reed and Neuberger are significant in clarifying aspects of Lord Clarke's analysis or suggesting a different route for the future development of the law.