

Stripping the Gains of Wrongful Fiduciaries: Let a Hundred Flowers Bloom?

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In common law jurisdictions, the principal remedy against a defaulting fiduciary is to strip his wrongful gains. This can be achieved through a wide gamut of remedies that may be both personal and proprietary. In relation to the personal action for account of profits, the established orthodoxy requires a fiduciary to disgorge *all* the unauthorised profits he made from his fiduciary position, subject to equitable allowance awarded by the court: *Regal (Hastings) v Gulliver* [1942] 1 All ER 378; *Murad v Al-Saraj* [2005] WTLR 1573. This strict position, however, has not been universally accepted in common law jurisdictions. Some courts have sought to lay down remedial principles to limit the extent of disgorgement, such as by requiring a closer connection between the breach and the gain: see, for example, *Warman International v Dwyer* (1995) 182 CLR 544; *Kao Lee & Yip v Koo* [2003] 3 HKLRD 296.

In relation to the more controversial question of the availability of proprietary relief for breach of fiduciary duty, common law jurisdictions are even more divided. On the one hand, English court has refused to follow *Attorney General of Hong Kong v Reid* [1994] 1 AC 324, which was adopted in Singapore in *Sumitomo Bank Ltd v Kartika Ratna Thahir (Pertamina)* [1992] SGHC 301, and attempted to lay down bright-line criteria for awarding proprietary relief. In *Sinclair Investments v Versailles* [2012] Ch 453, Lord Neuberger MR held that the receipt of unauthorised profits by a fiduciary will not give rise to a trust unless it involves a misuse of the principal's assets or opportunities (at [88]). The first exception in *Sinclair* refers to actual misappropriation of the principal's assets, while the second, broader, exception deals with misappropriation of opportunities in breach of fiduciary duty. The latter is more difficult to justify because the principal does not have pre-existing ownership in the asset in respect of which the claim is brought, and has been the subject of a proposed overhaul (see *FHR European Ventures LLP v Mankarious* [2013] 1 Lloyd's Rep. 416, per Etherton C at [116]). On the other hand, courts in Canada and Australia have long embraced a discretionary constructive trust: *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 at 44-45; *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6 at [583].

The present paper seeks to explore the relative advantages and disadvantages of these diverging approaches. Of the many ways in which a defaulting fiduciary can garner profits, the paper will focus on two, namely the taking of bribes and interception of business opportunity. This is because they present the greatest challenge to the choice between restricting the principal to a personal remedy and allowing him proprietary relief with the attendant proprietary consequences.

In particular, the paper will: first, examine the theoretical bases of the profit-stripping regime (including strict deterrence, implied undertaking, deemed agency, etc) with a view to delineating the appropriate boundaries of personal and proprietary remedies; secondly, argue for the development of flexible but also principled remedial rules to calibrate the disgorgement remedy; and thirdly, contend that while the spontaneous imposition of the institutional constructive trust to profits obtained from bribes and business opportunities is not warranted, this does not necessarily shut the door to a more discretionary form of constructive trust. In fact, the remedial constructive trust

has more to offer than first meets the eye, for there is sufficient jurisprudence in existing case law to generate the criteria for fashioning proprietary relief according to the needs of individual cases (cf RP Austin, 'The Melting Down of the Remedial Constructive Trust' (1988) 11 *UNSW Law Journal* 66).