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Distributive justice and proprietary remedies over bribes

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It is often said that distributive justice has no place in private law. However, distributive justice considerations feature strongly in cases involving the remedies imposed over bribes gained in breach of fiduciary duty. This paper argues that courts should exercise structured discretion, guided by principles of distributive justice, in ascertaining the appropriate remedy. The distributive factors of desert, needs and equality should inform the determination of what remedy is apposite to provide justice in the circumstances.

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1. INTRODUCTION

Some theorists assert that there is no place for distributive justice considerations in private law. However, I will argue in this paper that distributive justice considerations feature in at least some areas of private law, and that distributive justice criteria can be used to ascertain which remedies are appropriate for some private-law breaches. The example I use is the situation in which a fiduciary has taken a bribe in breach of his duty towards the beneficiary. I will suggest that distributive justice forms the only possible justification for imposing a constructive trust over a bribe gained in breach of fiduciary duty, and that this has ramifications for the remedial choices courts can make. The fact that distributive justice is the rationale behind the remedy imposed on a bribed fiduciary means that there is no right or entitlement to a constructive trust, and courts undertake a balancing exercise between the various rights involved. The appropriate remedy depends on the circumstances, and on the operation of distributive factors: namely desert, needs and equality. These criteria assist us to choose between three remedial options: an account of profits; a lien securing an account of profits; or a constructive trust (ie an order causing the defendant to convey the bribe or the fruits of the bribe to the claimant). Presently, the courts engage in redistribution, but they often seek to conceal the redistributive aspects of their decisions. Some cases hold that the claimant is always entitled to an immediate constructive trust over the bribe

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because the property 'belongs' in equity to the claimant,[1] whereas other cases hold that the claimant is always entitled to an account of profits, and no more.[2] It is suggested that rules that lead to automatic conclusions are a bad way of doing distributive justice between the parties, because they lack flexibility and do not allow the court to consider whether or not third-party interests are at stake. In Australia, courts have discretion as to what remedy will be given, and the Full Federal Court has suggested that a lien may be more appropriate where the defendant is insolvent.[3]

The question of which remedy is available is important because a constructive trust removes that particular property from the pool of assets available for distribution to creditors.[4] Where third-party creditors are involved, this raises an 'eternal triangle' where two innocent parties (claimant and creditors) have competing claims over the property gained by the defendant's wrongdoing.[5] Cases such as *Reid* have been criticised for failing to take into account third-party creditors in insolvency.[6] Where a defendant is insolvent, it will be suggested that a constructive trust over a bribe should not be awarded, and only personal remedies (ie accounts of profit) are appropriate.[7] The claimant becomes an unsecured creditor.

However, where there is no insolvency, courts may want to award constructive trusts. Constructive trusts allow claimants to place caveats on real property, to assert interests against third parties who are not bona fide purchasers for value without notice and encompass proportionate gains in the value of the property to prevent the wrongdoer from profiting. If the contest over the bribe is solely between the defendant and the claimant, a constructive trust may be imposed on the defendant, particularly if the

1. *Attorney General for Hong Kong v Reid* [1994] 1 AC 324 ('*Reid*') (PC).

2. *Lister v Stubbs* (1890) 45 Ch D 1 at 15 per Lindley LJ; *Sinclair Investments (UK) Ltd v Versailles Trade Finance Limited* [2011] EWCA Civ 347 at [80] per Lord Neuberger ('S*inclair*') (CA). Cf *FHR European Ventures LLP v Mankarious* [2014] UKSC 45 ('*FHR v Mankarious*') (UKSC). This case recently overruled *Lister v Stubbs* and *Sinclair* in England and Wales.

3. *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, [2012] FCAFC 6 ('*Grimaldi*') (FCA).

4. W Swadling 'Constructive trusts and breach of fiduciary duty' (2012) 18 Trusts and Trustees 985 at 985; R Calnan 'Imposing proprietary interests in insolvencies' (2013) 24 J Banking & Fin L & Prac 18 at 18.

5. See M Mautner ' "The eternal triangles of the law": toward a theory of priorities in conflicts involving remote parties' (1991) 90 Mich L Rev 95 at 95.

6. See eg P Birks 'Property in the profits of wrongdoing' (1994) U W Aust L Rev 8 at 16; R Goode 'Ownership and obligation in commercial transactions (1997) 103 L Q Rev 433; P Watts 'Bribes and constructive trusts' (1994) 110 L Q Rev 178, 179; D Crilley 'A case of proprietary overkill' [1994] RLR 57; R Goode 'Proprietary restitutionary claims' in WR Cornish et al. (eds) *Restitution – Past, Present and Future* (Oxford: Hart Publishing, 1998) p 63; P Watts 'Constructive trusts and insolvency' (2009) 3 J Equity 250 at 279–284; W Swadling 'Constructive trusts and breach of fiduciary duty' (2012) 18 Trusts and Trustees 985 at 992–993. Cf *Daraydan Holdings Ltd v Solland International Ltd* [2005] Ch 119 at [89] per Lawrence Collins J; M Halliwell 'The ghost of *Lister & Co v Stubbs*' [2005] Conveyancer 88 at 92; P Millett 'Bribes and secret commissions' [1993] RLR 7; P Millett 'Proprietary restitution' in S Degeling and J Edelman (eds) *Equity in Commercial Law* (Pyrmont: Law Book Co, 2005) p 309.

7. V Finch and S Worthington 'The *Pari Passu* principle and ranking restitutionary rights' in F Rose (ed) *Restitution and Insolvency* (London: Mansfield Press, 2000) pp 1, 19; Calnan, above n 4.

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claimant has an attachment to the property.[8] This reflects the strict approach of equity towards fiduciaries.[9] Nonetheless, the High Court of Australia correctly warns against imposing a constructive trust lightly.[10] If another less intrusive remedy would produce a similar result, it should be awarded, even if it is less advantageous to the claimant.

This paper is set out as follows. In section 2, I discuss the normative justifications for the imposition of a constructive trust over bribes. Deterrence is rejected as the sole justification for the imposition of a constructive trust in fiduciary bribe cases. I suggest that distributive justice is a better fit. The concept of distributive justice seen in these cases is a 'patterned' scheme of redistribution.[11] The distributive criteria that help a court to decide how to allocate resources are *desert*, *needs* and *equality*. I also discuss objections that may be made to a distributive justice analysis. In section 3, I outline how recognising the distributive nature of the remedy clarifies the results of cases, using *Reid*, *Sinclair* and *Grimaldi* as illustration. My argument is both descriptive and normative. I argue that my scheme provides a better explanation of the cases, and a way in which future cases should be resolved. I do not use *FHR v Mankarious*,[12] as it raises the difficult question of the boundaries between bribes gained through wrongdoing, acquisition of opportunities that should have belonged to the claimant and appropriation of property belonging to the claimant.[13] In section 4, I show how distributive criteria can be used to ascertain the availability of proprietary remedies in the future. I also deal with anticipated criticism of the discretionary nature of my scheme. The discretion I propose is structured and enables like cases to be treated alike. It balances the needs of certainty and rule-based justice against the need to provide justice in individual cases.

2. NORMATIVE JUSTIFICATIONS FOR THE IMPOSITION OF A CONSTRUCTIVE TRUST OVER BRIBES

Constructive trusts over bribes are an instance of proprietary restitution for wrongdoing.[14] They are not subtractive restitution, where the property originally belonged to the claimant and the claimant had a 'proprietary base' as a result,[15] or even an instance in which the property 'ought' to have belonged to the claimant (Goode's 'deemed

8. A Duggan 'Constructive trusts from a law and economics perspective' (2005) 55 U Toronto L J 217 at 229.
9. *Keech v Sanford* (1726) Sel Cas Ch 61; *Boardman v Phipps* [1967] 2 AC 46.
10. *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at [42] (HCA); *Giumelli v Giumelli* (1999) 196 CLR 101 at [10] per plurality (HCA); *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [128]–[129] (HCA).
11. R Nozick *Anarchy, State and Utopia* (Oxford: Blackwell, 1974) pp 155–160.
12. [2014] UKSC 45 (UKSC).
13. The case has been argued to fall within all of the three categories. Chambers has argued that it is a case of appropriation of property belonging to the claimant: R Chambers 'Constructive trusts and breach of fiduciary duty' [2013] Conv 73.
14. *Sinclair* [2011] EWCA Civ 347 at [80] per Lord Neuberger; J Penner 'The difficult doctrinal basis for fiduciary's proprietary liability to account for bribes' (2012) 18 Trusts and Trustees 1000 at 1001–1002. Cf Millett 'Proprietary restitution', above n 6, at 324.
15. P Birks *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, rev edn, 1989) pp 348–349.

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agency gains').[16] The pivotal question is *who* should be considered in the allocation of property between persons and *what factors* are relevant to the allocation. Proprietary remedies raise this issue because they affect not only the defendant but also third parties who have an interest in the property. However, it is not necessary for third parties to be affected for distributive justice to be relevant: two-party cases may involve distributive justice,[17] and in a sense, all 'property rules' are distributive.[18]

There is a deeper question about the appropriateness of disgorgement for wrongdoing in private law. Penner notes the lack of a coherent principle as to why only some private-law wrongs give rise to gain stripping.[19] He observes that Reid would not have had to disgorge his gain had he been a non-fiduciary independent contractor, but that Reid's wrongdoing would be no less contumelious.[20] The law of restitution for wrongdoing is insufficiently developed. Gain-based relief for breach of contract is in its infancy, and it is unclear whether a bribe-taking security guard would be liable to disgorge his profit made in breach of contract absent a fiduciary obligation. Perhaps the answer is that the security guard *ought* to be liable. In any case, in many jurisdictions proceeds of crime legislation would strip gains made by wrongdoers.[21] Private-law profit-stripping remedies were employed in cases like *Reid* and *Reading v Attorney General*[22] because proceeds of crime legislation did not extend extraterritorially or did not exist at the time. The Organized and Serious Crime Ordinance was enacted in Hong Kong in 1994, the year *Reid* was heard by the Privy Council. It provides for confiscation of proceeds of crime and has extraterritorial operation.[23]

(a) Problems with the traditional justification for constructive trusts over bribes

The award of a constructive trust over bribes gained in breach of fiduciary duty has been justified on the basis of deterrence.[24] However, deterrence cannot justify the imposition of a constructive trust over a bribe in all circumstances, particularly where there is insolvency or third parties are involved.[25] In cases involving insolvency, the

16. R Goode 'Property and unjust enrichment' in A Burrows (ed) *Essays on the Law of Restitution* (Oxford: Oxford University Press, 1991) pp 215, 219.

17. Two-party cases may raise questions of distributive justice: M Harding 'Constructive trusts and distributive justice' in E Bant and M Bryan (eds) *The Principles of Proprietary Remedies* (Pyrmont: Thomson Reuters, 2013) pp 19, 25.

18. G Calabresi and AD Melamed 'Property rules, liability rules, and inalienability: one view of the cathedral' (1972) 85 Harv L Rev 1089.

19. Penner, above n 14, at 1002.

20. Ibid, at 1001.

21. Eg Australia – Proceeds of Crime Act 1987 (Cth); Proceeds of Crime Act 2002 (Cth) and various state equivalents; Canada – Proceeds of Crime (Money Laundering) and Terrorist Financing Act 2001 (SC 2000, c 17); New Zealand – Criminal Proceeds (Recovery) Act 2009 (NZ); UK – Proceeds of Crime Act 2002 (UK).

22. [1951] AC 827 (HL).

23. Organized and Serious Crime Ordinance, s 1(4). See also Drug Trafficking (Recovery of Proceeds) Ordinance; Prevention of Bribery Ordinance, s 12AA.

24. Eg *Grimaldi* [2012] FCAFC 6 at [576].

25. *Sinclair* [2011] EWCA Civ 347 at [52]–[53] per Lord Neuberger; R Goode 'A reply' (2011) 127 L Q Rev 493 at 495; L Ho 'Bribes and the constructive trust as a chameleon' (2012) 128 L Q Rev 486 at 488–489.

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real dispute is between the claimant and the third parties who also assert claims to the property. Specific deterrence cannot justify a proprietary remedy because the defendant is indifferent to whether a proprietary remedy is imposed. Some may argue that general deterrence justifies a proprietary remedy, but it is difficult to imagine that bribe-taking fiduciaries will be genuinely deterred from breaching by the imposition of a proprietary remedy instead of a personal remedy.[26]

(b) Distributive justice as a justification

I argue that the justification in the fiduciary bribe cases is distributive justice. The claimant *deserves* the property more than any other person who may have a claim to it. Kennedy has observed that courts and lawyers distrust distributive motives,[27] because they involve value judgements about who deserves a particular resource. Distributive awards are often 'zero sum' – helping one party (the claimant) means hurting the other (the defendant or third parties).[28] Courts mask the redistributive aspects of constructive trusts by 'discovering' a pre-existing interest.[29] It is preferable for courts to be transparent and admit that they are redistributing the defendant's profit to the claimant.[30]

First, it is necessary to distinguish (to the extent possible) between distributive justice and corrective justice. In the *Nicomachean Ethics*, Aristotle distinguishes between two forms of special justice:

(1) *distributive justice* (the sharing of property between persons according to their deserts); and
(2) *corrective justice* (justice that rectifies transactions between persons).[31]

Distributive justice requires a *geometrical* proportion – that is, a person gets property or wealth according to their 'just deserts'.[32] Corrective justice requires an *arithmetical* proportion – that is, a person who takes from another is required to restore the loss or the value of the loss to the person who has been wronged.[33]

Distributive justice requires a consideration of the deserts of the individuals involved, whereas corrective justice does not involve moral judgement. It is irrelevant for the purposes of corrective justice that a base person has taken from a decent person

26. There may be rare exceptions: see C Rotherham 'Policy and proprietary remedies: are we all formalists now?' (2012) 65 CLP 529 at 534 and fn 15.
27. D Kennedy 'Distributive and paternalist motives in contract and tort law, with special reference to compulsory terms and unequal bargaining power' (1982) 41 Md L Rev 563 at 587.
28. Ibid, at 571.
29. M Stone 'The reification of legal concepts: *Muschinski v Dodds*' (1986) 9 UNSW L J 63 at 67; S Evans 'Property, proprietary remedies and insolvency: conceptualism or candour?' (2000) 5 Deakin L Rev 31 at 37–40; C Rotherham *Proprietary Remedies in Context* (Oxford: Hart Publishing, 2002).
30. See Stone, ibid; Evans, ibid; S Evans 'Defending discretionary remedialism' (2001) 23 Sydney L Rev 463 at 474–480; Rotherham, ibid.
31. Aristotle *Nicomachean Ethics*, tr T Irwin (Indianapolis: Hackett Publishing, 2nd edn, 1999) bk V, ch 2 [12] (manuscript 1130b).
32. Ibid, ch 3, [8]–[13] (manuscripts 1131a, 1131b).
33. Ibid, ch 4, [2]–[4] (manuscripts 1131b, 1132a).

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or vice versa. The law treats the two as equals, and if one does harm or injustice while the other suffers it, corrective justice restores the status quo.[34]

In analysing corrective justice in tort law, Posner used distributive justice to mean 'justice in the distribution *by the state* of money, honors and other things of value . . .'[35] Nonetheless, some argue that Aristotle's use of the term is broader than this.[36] Distributive justice involves not only distribution of money and property by the state, but also informs distribution of money and property by the legal system in disputes between private citizens. Distributive justice may still operate where a dispute involves only the claimant and defendant. A court may decide that the fairest allocation is for the claimant to have 100% of the property and for the defendant to have 0%, yet the motivation may still be distributive.[37]

Distributive justice is often spoken of as a means of achieving broad aims of social justice. Unfortunately, little attention has been given to how distributive justice may operate as a norm of justice in practice. This may be because, as Gardner has pointed out, there is nothing distinctive about distributive justice:

> . . . justice is none other than the distinctive moral virtue of the allocator, the person who concerns herself with who is to get how much of what and why. Since all justice is allocative, and 'distributive' and 'allocative' are synonyms, it is hard to resist the thought that all justice is distributive. As Leslie Green says, '[i]f we could free ourselves from the familiar Aristotelian categories, we should say that justice is always a matter of distribution'.[38]

The concept of distributive justice that I use in this paper is 'patterned'.[39] In other words, I propose a patterned model to assist courts in making redistributions of property. I do not adopt Nozick's 'historical principle' of distributive justice. The difficulty with Nozick's historical principle is that it acknowledges the possibility of injustice in acquisition and transfer,[40] but it does not explain how this may be rectified in any helpful sense.[41] The cases raised here involve exactly those injustices in transfer and acquisition that Nozick considers problematic.[42] He concedes that redistributive patterned principles may be needed to rectify injustices in transfer and acquisition,[43] and it is suggested that this is exactly what is occurring in the fiduciary bribe cases.

In the next section of this paper, I elucidate the criteria that inform (or should inform) the determination of a just allocation in the circumstances. Keren-Paz has identified three justifications for the operation of distributive principles in tort law:

34. Ibid, ch 4, [3] (manuscript 1132a).
35. R Posner 'The concept of corrective justice in recent theories of tort law' (1981) 10 J Legal Stud 187 at 189 (emphasis added). See also E Weinrib 'Corrective justice in a nutshell' (2002) 52 U Toronto L J 349 at 349.
36. HH Joachim *Aristotle: Nicomachean Ethics*, ed DA Rees (Oxford: Clarendon Press, 1951) pp 139–140.
37. J Gardner 'Corrective justice, corrected', Oxford Legal Studies Research Paper No. 31/2012 (12 June 2012) at 5. Available at SSRN: http://ssrn.com/abstract=2082884 (accessed 25 July 2014); Harding, above n 17, p 26.
38. Gardner, ibid, n 37.
39. Nozick, above n 11, pp 155–168.
40. Ibid, pp 152–153.
41. Ibid, p 153.
42. Ibid, p 152. He includes theft and fraud as instances of injustice in acquisition and transfer.
43. Ibid, p 168.

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(1) *Needs*: allocation of burdens to those who can bear them with the least disutility.
(2) *Equality*: burdens and benefits should be distributed equally across society (in a way that takes account of substantive equality rather than just formal equality).
(3) *Desert*: the agent's activity should be considered as blameworthy vis-à-vis the victim.[44]

While Keren-Paz argues that these concepts are necessary in tort law to ensure fair distribution of burdens,[45] here I deal with the redistribution of a benefit gained through wrongdoing. Nonetheless, I posit that Keren-Paz's categories are useful and can be extended to other areas of private law, and I adapt them for the purposes of this paper. Indeed, the problems that arise in tort law bear some resemblance to the 'eternal triangles' in priority disputes.[46] I propose a weak lexical priority to the criteria: desert is generally (although not always) the criterion that should carry the most weight, and often the considerations of equality and needs feed into the ultimate assessment of desert. My concept of equality operates somewhat differently from Keren-Paz's, as I draw from existing bankruptcy law to glean the appropriate standard.

(I) DESERT

Certain things follow from saying that distributive justice is based on questions of desert. Importantly, desert is based on propriety, not entitlement. Someone who deserves a thing cannot say that they have a right to it; rather, they can only argue that it is proper that they be given an interest in the thing.[47]

The question is when it is proper for a person to be given a proprietary interest in a thing on the basis of desert. Desert looks to the qualities, actions and status of persons.[48] It considers what a person has done in the past and is backward-looking.[49] By contrast, specific and general deterrence are forward-looking.[50] Desert is arguably central to retributive justice.[51] In the present context, desert includes the negative desert of the defendant and the positive deserts of the fiduciary and other interested parties. Usually, the negative desert of the defendant is easy enough to prove but the positive deserts of the claimant (and any other interested parties) are harder to resolve.

44. T Keren-Paz 'Egalitarianism as justification: why and how should egalitarian considerations reshape the standard of care in negligence law?' (2003) 4 Theoret Inq Law 275 at 288–294.
45. T Keren-Paz *Torts, Egalitarianism and Distributive Justice* (Aldershot: Ashgate, 2007) p 5.
46. Mautner, above n 5, at 102.
47. J Feinberg 'Justice and personal desert' in J Feinberg *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton, NJ: Princeton University Press, 1970) p 86; SR Munzer *A Theory of Property* (Cambridge: Cambridge University Press, 1990) p 260.
48. M Harding 'Justifying fiduciary allowances' in A Robertson and Tang HW (eds) *The Goals of Private Law* (Oxford: Hart Publishing, 2009) pp 341, 352; J Kleinig 'The concept of desert' (1971) 8 Am Phil Q 71 at 73; D Miller *Social Justice* (Oxford: Clarendon Press, 1976) p 85; L Becker *Property Rights: Philosophic Foundations* (London: Routledge & Paul, 1977) p 50; Munzer, ibid, p 257; JW Harris *Property and Justice* (Oxford: Clarendon Press, 1996) p 205.
49. Kleinig, ibid, at 73.
50. J Berryman 'The case for restitutionary damages over punitive damages: teaching the wrongdoer that tort does not pay' (1994) 73 Can Bar Rev 320 at 322.
51. A von Hirsch *Doing Justice: The Choice of Punishments* (New York: Hill & Wang, 1976) pp 45–55.

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The negative desert basis for the award of a proprietary interest over a bribe is rooted in retributive justice. The defendant has acted in a wrongful (even criminal) fashion towards the claimant and has breached his duty to act in the claimant's best interests. This provides a reason why the defendant may deserve to be stripped of his proprietary interest in a gain and why the claimant may deserve a proprietary interest in that gain. Davis has argued that retributive justice should look to the advantage the defendant gained by doing wrong to the claimant and calibrating punishment accordingly.[52] Courts do this in fiduciary bribe cases. Feinberg argues that punishment involves public disapproval of the conduct of defendant,[53] and says that punitive damages vindicate the machinery of private law.[54] Declaratory and vindicatory rationales are also visible in the judicial statements in favour of proprietary relief in *Reid* and *Grimaldi*. However, courts should not become carried away by the declaratory and vindicatory nature of the remedy, because often there are third parties whose interests should be acknowledged.

The fact that the negative desert basis is retributive raises issues. A fundamental principle of retributive justice is that punishment must be proportionate to the culpability of the wrongdoing.[55] However, courts do not seem to take proportionality into account when imposing constructive trusts over bribes. By contrast, courts have often refused to award exemplary damages where the defendant has already been punished by criminal sanctions and fines.[56] In *Grey v Motor Accident Commission*, the High Court identified two reasons for this. First, 'the purposes of exemplary damages have been met if substantial punishment is exacted by the criminal law. The offender is punished; others are deterred.'[57] Secondly, the law should not punish a person twice for the same act.[58] Given that this is the case for exemplary damages, it must be asked why it would not also be the case for the imposition of proprietary remedies, particularly when personal remedies might still be available.

On the face of it, desert does not help to ascertain whether third-party creditors should be considered when a constructive trust is sought over a bribe, because desert is said to be personal[59] and based on the specific conduct of the people involved; thus third parties might be said to be irrelevant. However, convention plays an important part in desert.[60] Convention is important not because of any principle particular to

52. M Davis *To Make the Punishment Fit the Crime: Essays in the Theory of Criminal Justice* (Boulder, CO: Westview, 1992).

53. J Feinberg 'The expressive function of punishment' (1965) 49 The Monist 397 at 400.

54. Ibid, at 407–408.

55. J Gardner 'Crime: in proportion and perspective' in A Ashworth and M Wasik (eds) *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (Oxford: Oxford University Press, 1998) pp 31, 38–41; A von Hirsch 'Proportionality in the philosophy of punishment: from "why punish?" to "how much?" ' (1990) 1 Crim L Forum 259 at 262.

56. E Bant and M Bryan 'Specific restitution without trusts' (2012) 6 J Equity 1 at 16. See eg *Gray v Motor Accident Commission* (1998) 196 CLR 1; *Devonshire and Smith v Jenkins* [1979] LAG Bulletin 114 (CA) and *Archer v Brown* [1985] 1 QB 401; however, in England criminal proceedings are arguably not conclusive against an award of exemplary damages.

57. [1998] HCA 70, (1998) 196 CLR 1 at [42] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

58. [1998] HCA 70, (1998) 196 CLR 1 at [43] per Gleeson CJ, McHugh, Gummow and Hayne JJ. See *R v Hoar* (1981) CLR 31 at 38 per Gibbs CJ, Mason, Aickin and Brennan JJ.

59. Harding, above n 48, pp 352–353.

60. Ibid, p 353. See also Harris, above n 48, pp 207–208; Feinberg, above n 47, p 82; Miller, above n 48, p 91.

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desert itself, but because of the principles that shape the rule of law. A person can only be said to have received his '*just* deserts' if there is parity between the treatment of that person and the treatment of other people who have done the same kind of thing. In other words, like cases should be treated alike. This links to equality (mentioned below). Despite the fact that desert is personal, considerations of the proprietary interests of third parties may enter into the desert equation, depending on whether the claimant's claim is equivalent to those of other third parties. There must be strong bases as to why the claimant positively deserves that property over the third parties.

The best basis a claimant has for denying third parties an interest in the specified property is that there is some reason why the third party does *not* deserve an interest in the property, and on balance, out of all the possible recipients, the claimant is the most deserving. The concept of the bona fide purchaser for value without notice helps establish which third parties should be subject to a claim. The court was willing to make the third parties in *Reid*, who also held interests in Reid's properties, subject to the claimant's property rights because Reid's wife was a volunteer and Reid's solicitor was not in good faith and may have had notice of the claimant's rights. By contrast, in *Sinclair*, the third parties were in good faith, had given value and did not have notice of the claimant's purported proprietary rights.

Other factors may play into desert, including the notion that when a person expends labour, he deserves remuneration in some way. This must be qualified according to circumstance. As Becker argues, 'we must hold the principle of desert to be totally inapplicable to cases in which gains are gotten by violating moral prohibitions – e.g. by unjustifiably overriding the rights of others'.[61] It has been argued that our society has a general concept that labour should be rewarded when it benefits other people,[62] although this proposition has been criticised.[63] One of the difficulties with awarding a proprietary remedy over particular property is that the defendant or third parties may later have contributed to and developed that property so its value has risen, and *this* is why the claimant is seeking a proprietary interest in the property. This arises most frequently non-bribe cases involving breach of fiduciary duty or breach of confidence.[64]

(II) NEEDS

The idea behind the concept of needs is that burdens should be allocated to those who can bear them with the least disutility.[65] The 'needs' I discuss here are specific to restitution for wrongdoing. While courts do not explicitly discuss 'needs' in an English or an Australian context, § 61 of the US Restatement of Restitution and Unjust Enrichment provides for consideration of the needs of the parties and of third parties who may be affected by a proprietary award for restitution for wrongdoing. It states that where restitution is based on 'a wrongful interference with the claimant's legally protected interests', the claimant's right to recovery is subordinated to that of the recipient's creditors in so far as it outstrips the claimant's loss, and restitution that

61. Becker, above n 48, p 51.
62. Harding, above n 48, pp 355–356.
63. S Olsaretti *Liberty, Desert and the Market* (Cambridge: Cambridge University Press, 2004) pp 62–85.
64. Eg *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574.
65. Keren-Paz, above n 44, at 288–289.

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would otherwise go to innocent dependents of a deceased recipient is similarly limited to the amount of the claimant's loss.[66] In comment *a* to the section, it is explained that 'the justification of the remedy disappears if a supracompensatory award to the restitution claimant would come at the expense of a third party who is innocent of the underlying wrong: typically, an unpaid creditor or a surviving dependent of the wrongdoing recipient.'[67] This reflects the retributive rationale for such awards: there is no reason why an innocent third party should be punished for the act of the defendant.

I would not follow the Restatement's lead in capping the award of a constructive trust according to how much a claimant has lost. This confuses two questions: the gain that should be stripped and the loss that the claimant suffered. Nonetheless, the US Restatement provides a useful, yet not exhaustive, summary of the kinds of needs that a court may take into account. Where insolvency and innocent dependents are concerned, there are scarce resources and the needs of claimants, creditors and dependents should be balanced in distributing the resources.

Contrary to the approach of the *Restatement*, I argue that the consideration of needs in insolvency should mean that the claimant's right is simply reduced to a personal remedy, the account of profits. With regard to third-party creditors, need, desert and equality are intertwined. The other creditors' needs are often as great as the claimant's need. And if the creditors are innocent, particularly if they have given value, they are also arguably equally deserving of a slice in the available funds for distribution. Some may answer that perhaps the creditors will be unjustly enriched by receipt of money that really belongs to the claimant,[68] but it is difficult to see how this could apply to the fiduciary bribe situation, as recognised by comment *a* to § 61 of the Restatement. Of course, in an insolvency context, the ranking of the creditors has been established by the *pari passu* rule (discussed below), which provides a bright line rule rather than a rule that subjectively assesses the needs of all the parties. For reasons of commercial certainty, there is only so much assessment of the respective needs of the creditors that takes place.

Where the defendant's innocent dependents are concerned, the concerns are twofold. First, the dependents do not *deserve* to have property redistributed from them because they are not wrongdoers, and retributive justice does not demand that they be punished. Secondly, need comes into play: the need of the dependents is thought to be *greater* than, or at least, equal to, that of the claimant. However, the dependents must be genuinely innocent. And if the dependents are volunteers (as they often will be), their desert may be lessened by the bona fide purchaser for value without notice rule, as a greater right of ownership (and thus desert) is present for those who have given value. Courts tend to treat innocent dependents somewhat differently to creditors. The claimant's interest is balance with those of the innocent third-party dependents. For example, in *Foskett v McKeown*, where the deceased defendant's life insurance premiums had been paid for using the claimants' investment moneys in breach of fiduciary duty, the House of Lords awarded the claimants a constructive trust over the

66. American Law Institute *Restatement (Third) of Restitution and Unjust Enrichment* (2011) § 61.

67. Ibid, comment *a* to § 61.

68. E Sherwin 'Constructive trusts in bankruptcy' (1989) U Ill L Rev 297; A Kull 'Restitution in bankruptcy: reclamation and constructive trust' (1998) 72 Am Banking L J 265; American Law Institute *Restatement (Third) of Restitution and Unjust Enrichment*, ibid, § 55, comment *h*. Criticised in Swadling, above n 4, at 996.

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proceeds of the policy in proportion to the claimants' contributions, but the remaining proceeds were left to the deceased's wife and children.[69]

It may be queried why I limit the people who may be considered in a distributive sense to creditors and dependents. The limits of the persons who may be considered in a distribution must be linked to the claimant and the defendant in some legally relevant way. Otherwise, the category of persons to be considered could be unlimited.

(III) EQUALITY

The interaction between proprietary remedies and bankruptcy law raises questions of equality. Equality is inherent in bankruptcy law with the *pari passu* principle, which provides that unsecured creditors must be treated equally (ie they receive the same proportionate sum in proportion to the debt originally owed by the bankrupt).[70] The *pari passu* rule arose to prevent a race for payment among creditors.[71] Otherwise, if the rule was 'first in, best dressed', the strongest and swiftest creditors would have an advantage.[72] Unlike the equality suggested by Keren-Paz, the *pari passu* rule is a rule of formal equality that treats all unsecured creditors as the same regardless of circumstances.[73] As noted previously, the reason why this rule has been adopted is because the courts prefer a 'bright line' rule that promotes commercial certainty (at the expense of detailed considerations of subjective equality and justice). Proprietary remedies cut across the *pari passu* rule, as they remove the asset that is subject to the proprietary remedy from the pool of assets to be distributed to unsecured creditors. The claimant gets 100% of what she is owed, and the amount available for distribution to other third-party creditors is reduced accordingly.

The award of a personal remedy in preference to a proprietary remedy promotes 'equality in the division of scarce assets in insolvency'.[74] Where a defendant is insolvent, it is appropriate to award an account of profits over the bribe, because the deterrent and retributive rationales for imposing a constructive have no purchase.

In terms of treating parties equally, however, there may be factors that mean that the parties are no longer equal and one party may be more deserving or needier than the other. For example, one creditor may have taken the risk of insolvency by failing to bargain for security when entering into a contract, whereas another creditor may be an involuntary creditor.[75] However, there are difficulties with this analysis, and as Paccioco observes, not all general creditors have accepted the risk of insolvency and

69. [2001] 1 AC 102.

70. Finch and Worthington, above n 7, pp 2–3; Watts, above n 6, at 252; K Kilgour 'Equality redefined – re-assessing the rationale of voidable preference law' [2004] UCL Jur Rev 252 at 254–255; A Duggan 'Proprietary remedies in insolvency: a comparison of the Restatement (Third) of Restitution & Unjust Enrichment with English and Commonwealth law' (2011) 68 Wash & Lee L Rep 1229 at 1232.

71. Watts, above n 6, at 252.

72. Finch and Worthington, above n 7, p 3.

73. Kilgour, above n 70, at 255. However, it has been queried whether rules of 'formal equality' exist: see D Lyons 'On formal justice' (1973) 58 Cornell L Rev 833; P Westen 'The empty idea of equality' (1982) 95 Harv L Rev 537.

74. E Sherwin 'Topic II: the availability of and justification of property-based remedies in restitution' (2012) 92 BU L Rev 885 at 898.

75. DM Paciocco 'The remedial constructive trust: a principled basis for priorities over creditors' (1989) 68 Can Bar Rev 315 at 324–325, 340–347; Sherwin, above n 68, at 335–337.

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some potential proprietary interest holders have accepted the risk (eg where the interest arises out of contractual dealings or reasonable expectations).[76] It is arguable that the *pari passu* rule is not sufficiently nuanced to create substantive equality.[77] In any case, in bribe cases, the court should undertake a balancing up of the parties that takes into account the respective needs and desert of the parties in so far as this is possible, and takes into account the *pari passu* rule.

(c) Objections to distributive justice and desert-based analyses

No doubt the suggestion that some proprietary remedies have a distributive flavour is controversial, although others have made the argument.[78] Here, I deal with some possible objections to my argument.

First, Birks would have opposed the use of desert in deciding how property should be allocated.[79] He said:

> Lawyers have no special competence in distributive justice. They cannot be expected to say who deserves what. But, given a decent law library and some time to do the work, a lawyer can be expected to say whether a given purpose is or is not charitable, or whether on given facts a proprietary interest has arisen, and, if so, precisely of what kind.[80]

Reflecting this concern, unjust enrichment scholars have argued that many proprietary remedies in private law reverse unjust transfers (Birks' 'value surviving').[81] There is a corrective flavour to such awards, as they rectify transactions, albeit in a proprietary way. Proprietary remedies are sought to be confined to instances in which it is necessary to impose a remedy on the basis of corrective justice norms. There is good reason for proceeding carefully with proprietary remedies, and constructive trusts in particular are coercive and intrusive.[82] Some scholars have argued that 'constructive trusts' should be reduced to orders to convey property or to pay money.[83] Viewing proprietary remedies in this way reduces 'constructive trusts' to a corrective minimum.

Nonetheless, I disagree with Birks. Lawyers who attempt to explain what the law is (or should be) cannot avoid making decisions that have distributive justice ramifications. Even if judges make decisions on a case-by-case basis on pure corrective justice norms – something that I doubt is possible – this has distributive ramifications.

76. Paciocco, ibid, at 324–325, 340–347. See also W Swadling 'Policy arguments for proprietary restitution' (2008) 28 Legal Stud 506 at 516–518.
77. See RJ Mokal 'Priority as pathology: the *pari passu* myth' (2001) 60 Cam L J 581; Kilgour, above n 70.
78. See above n 30.
79. P Birks 'The end of the remedial constructive trust?' [1998] 12 Trust L Int'l 202 at 214–215; P Birks 'The law of restitution at the end of an epoch' (1999) 28 UWA L Rev 13 at 55–56.
80. Birks 'The end of the remedial constructive trust', ibid.
81. See eg R Chambers *Resulting Trusts* (Oxford: Oxford University Press, 1997).
82. E Bant 'Trusts, powers and liens: an exercise in ground clearing' (2009) 3 J Equity 286 at 294.
83. W Swadling 'The fiction of the constructive trust' (2011) 64 CLP 399; E Bant and M Bryan 'Constructive trusts and equitable proprietary relief' (2011) 5 J Equity 171; Bant and Bryan, above n 56.

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If enough decisions for claimants build up in a particular kind of case (where *x* occurs), the court has effectively decided that when *x* occurs, the property should fairly be distributed to the claimant.[84] And even a decision not to intervene will have distributive ramifications.[85] Gardner sees corrective justice as a subspecies of distributive justice: it is concerned with just allocations within a particular situation.[86] I agree. Desert does not play a central part in corrective justice, but it is still concerned with the justice of allocations, and it necessarily has distributive ramifications. Therefore the Aristotelian dichotomy is not perfect.

Secondly, my argument is counter to the theories of Ernest Weinrib and other adherents to the normative corrective justice school of thought.[87] These scholars have generally not focused on proprietary remedies, with some honourable exceptions.[88] Weinrib sees no part for distributive justice in private law, as it involves a value judgement about the comparative merits of the parties. According to Weinrib, distributive justice and corrective justice are mutually exclusive.[89] Unlike corrective justice, which Weinrib describes as 'bipolar' or limited to the two parties in question (claimant and defendant), distributive justice is comparative in nature, and there is said to be no limit to the number of persons who can be compared, or to the number of persons amongst whom a resource can be divided.[90] Weinrib argues that distributive justice is unduly political,[91] and considers that judges cannot select criteria for distribution, especially considerations of moral or social worth, because they are unelected and unrepresentative.[92]

Some scholars have argued that breach of fiduciary duty displays normative corrective justice rationales,[93] and that that disgorgement of gains can be justified according to normative corrective justice on the basis that the beneficiary is entitled to gains by virtue of the primary right arising from the fiduciary relationship, and disgorgement operates in a correlative structure to restore those gains to her.[94]

The imposition of the fiduciary duty itself may be justifiable according to principles of normative corrective justice. However, normative corrective justice does not tell us what kind of remedy is appropriate in these cases. Indeed, Weinrib's theory has been criticised on the basis that the concepts of normative gain and loss are too

84. H Dagan 'The distributive foundation of corrective justice' (1999) 98 Mich L Rev 138 at 153.
85. Keren-Paz, above n 45, p 25.
86. Gardner, above n 37, at 5. See also J Gardner 'What is tort law for? Part 2. The place of distributive justice' (May 2013), Oxford Legal Studies Research Paper No. 62/2013. Available at SSRN: http://ssrn.com/abstract=2269615 (accessed 25 July 2014).
87. See esp E Weinrib *The Idea of Private Law* (Oxford: Oxford University Press, 2nd edn, 2012); E Weinrib *Corrective Justice* (Oxford: Oxford University Press, 2012).
88. Eg A Botterell 'Property, corrective justice, and the nature of the cause of action in unjust enrichment' (2007) 20 Can L & Jur 275.
89. Weinrib *The Idea of Private Law*, above n 87, pp 61–62.
90. Weinrib, above n 35, at 351–352.
91. Weinrib *The Idea of Private Law*, above n 87, p 211. Cf Keren-Paz, above n 45, pp 23–33, who presents a convincing rebuttal to Weinrib.
92. Weinrib *The Idea of Private Law*, above n 87, p 77.
93. L Smith 'The motive, not the deed' in J Getzler (ed) *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (Oxford: Oxford University Press, 2003) pp 53, 60–61; PB Miller 'Essays toward a theory of fiduciary law', unpublished PhD thesis, University of Toronto (2008) pp 227–243. I am indebted to Jason Neyers for providing me with this thesis.
94. PB Miller 'Justifying fiduciary remedies' (2013) 63 U Toronto L J 570.

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abstract to provide a real analytical tool.[95] This is a concern I share. Normative corrective justice cannot help us establish the appropriate remedy in the fiduciary bribe cases. Because of its focus on the correlative and bilateral nature of private-law actions, it cannot guide us as to how to take account of third-party interests, because it only looks to the claimant and defendant, and exhorts us to ignore the wider context. The issue in the fiduciary bribe cases is often not simply the correlative relationship between the claimant and defendant: the courts are attempting to effect a fair allocation of resources among claimant, defendant and relevant third parties. It is better to see the remedies awarded in these cases as instances of distributive justice. Moreover, as I have noted previously, it is at least arguable that corrective justice is simply a subspecies of distributive justice. Even 'pure' corrective justice inevitably leads to distributive ramifications, and there is no sense in trying to confine fiduciary obligations to a 'pure' corrective rationale. Fiduciary obligations have both corrective and distributive justice rationales, and the remedies imposed reflect this.

3. DISTRIBUTIVE JUSTICE IN PRACTICE

I now demonstrate how three recent cases involve distributive justice concerns and how my criteria would help assess the appropriate remedy. I have chosen three recent cases where courts have raised the issue of constructive trusts over bribes. As noted previously, I do not consider *FHR v Mankarious*,[96] because that case raises difficult questions about categorisation.[97] *FHR v Mankarious* shows that English courts sometimes want to award constructive trusts, but I would criticise that case for taking an unduly rigid approach.

(a) *Reid*

As is well known, Reid, a former Crown Prosecutor for the Hong Kong government, accepted bribes to obstruct the prosecution of criminals. He used the bribes to purchase three properties in New Zealand, which were placed in his, his wife's and his solicitor's names. Reid was jailed for 8 years and ordered to pay the Hong Kong Crown HK$12.4 million, but did not pay. The Crown sought to lodge a caveat over the properties, and to use the properties to satisfy the outstanding debt. The third parties were Reid's wife (a volunteer) and Reid's solicitor (who had known of the fraud). The New Zealand courts held that the bribes were not held on trust at the moment of receipt, and the claimant could not trace the bribes into the properties, because they were not bought with trust money.[98]

The Privy Council, however, awarded an immediate constructive trust. Upon receipt, the bribe was imprinted with a trust that allowed the claimant to follow it into the properties and to lodge a caveat. The court imposed a constructive trust to the extent that the properties were purchased with bribe money. I question Lord Templeman's decision in *Reid* to impose an immediate constructive trust. It is fictional

95. H Dagan 'The distributive foundation of corrective justice' (1999) 98 Mich L Rev 138; P Cane 'Corrective justice and correlativity in private law' (1996) 16 Oxford J Legal Stud 471 at 478–480; KW Simons 'Justification in private law' (1995) 81 Cornell L Rev 698 at 727–733; AC Hutchinson 'The importance of not being Ernest' (1989) 34 McGill L J 233 at 241–244.
96. [2014] UKSC 45.
97. See text accompanying nn 12 and 13.
98. *Attorney General for Hong Kong v Reid* [1992] 2 NZLR 385.

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to say that the claimant 'owned' the bribe from the moment it was received by Reid.[99] The claimant would never have sought the bribe, nor would it have sanctioned the bribe had it known of it. In reality, the court redistributed ownership of the properties purchased with the bribe money.

(I) DESERT

To the extent that the property was purchased with bribe money, Reid did not deserve it. He had committed criminal and civil wrongs against his employer and against the people of Hong Kong because of his public office. To the extent that the properties were purchased with bribe money, Reid's wife and solicitor did not deserve them because they had not given value and, in the solicitor's case, had been party to the fraud. Reid owed the Crown a large debt, and did not use the properties to satisfy the debt. The court considered that the Crown deserved the properties more than the wife or the solicitor. Nonetheless, the court made adjustments in the favour of Reid and the third parties.[100] The constructive trust only applied to the properties in so far as they were acquired with bribe money, and the court suggested that an account should be taken to ascertain whether any contribution to the properties was 'innocent money'.[101]

(II) NEEDS

Reid's wife argued that her needs as an innocent third-party dependent should be taken into account. She was a volunteer and thus her needs were regarded as of lesser importance. In a sense, in so far as she had gained the property through bribe money, she could bear the losses with the least disutility, as she had not given value. Nonetheless, the court noted that it had been argued in the lower courts that the wife had an equitable interest in the property, and suggested that this could be taken into account so that her needs were recognised.[102] The solicitor was apparently complicit in the fraud, so he could not be heard to argue that he had a greater need for the property than the Crown.

(III) EQUALITY

Reid did not involve insolvency, and the only third parties who were obviously affected were the wife and solicitor. The court was unduly dismissive of the concern that third-party creditors could be disadvantaged by an immediate constructive trust in bribe cases.[103] While this case might be clear, there is no reason to think that in every case the claimant's proprietary interest should prevail. Indeed, as my analysis of *Sinclair* will demonstrate, in some circumstances, the claimant's proprietary interest should not prevail.

(IV) CONCLUSION

There was little reason for the wife and the solicitor to keep the properties in so far as they were purchased with bribe money, Reid did not deserve to retain the properties,

99. J Edelman 'Two fundamental questions for the law of trusts' (2013) 129 L Q Rev 66 at 82.
100. Evans 'Defending discretionary remedialism', above n 30, at 473.
101. *Reid* [1994] 1 AC 324 at 330, 339.
102. Ibid, at 330.
103. Ibid, at 331. See *Sinclair* [2011] EWCA Civ 347 at [83] per Lord Neuberger and Swadling, above n 4, at 992–993. Cf *FHR v Mankarious* [2014] UKSC 45 at [43].

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and the Crown had an outstanding debt. If the maxim 'Equity considers as done that which ought to have been done'[104] is to make any sense in this case, it can only mean that the court was forcing Reid to pay his debt to the Hong Kong government. If he were decent, Reid *should* have sold his properties to satisfy his debt to the Hong Kong Crown. Of course, Reid had already been punished for the crime. However, the imposition of the constructive trust responds not to the crime, but to Reid's failure to sell off the properties to meet his debt, and for this reason there is no problem of double punishment. A clear message was sent that laundering of bribes was unacceptable. In that context, a deterrence argument works. The action in trying to hide the property in the names of others, and the failure to pay the debt owed to the state is being deterred.

Lord Templeman says that Reid's only purpose in resisting the order 'must reflect that the properties, in the absence of a caveat, can be sold and the proceeds whisked to some Shangri La which hides bribes and other corrupt moneys in numbered bank accounts'.[105] *This* is the crux of the case: the court redistributes property to ensure that a corrupt man does not avoid his obligations to the Crown a second time. While proprietary rights of third parties should generally be respected by the law, the law does not want to allow persons such as Reid to profit from wrongdoing. It also seeks to deter criminals from hiding their assets in the names of third parties. Thus it redistributed ownership of the properties to the Hong Kong government. This may appear radical and consequentialist, but it is far less radical than if *Reid* is applied to *all* cases involving fiduciary bribes.

(b) *Sinclair*

Sinclair involved an investment scheme where certain 'traders' or investors (including the claimant) paid investment money to Trading Partners Limited ('TPL'). TPL paid the investment money to Versailles Trade Finance Limited ('VTFL') (a wholly owned trading subsidiary of TPL). The investment scheme appeared to be phenomenally successful, but it was a 'Ponzi scheme' where investment money was later paid back to investors as 'profits'. Various banks loaned money to VTFL, and were secured creditors.

In the wake of the apparent success of the investment scheme, the value of shares in a company related to TPL and VTFL, Versailles Group plc ('VGP'), skyrocketed. One of the principal shareholders of VGP was Cushnie, also a director of TPL. Cushnie sold his shares in VGP for £28.69 million and used that money to purchase a property and pay off bank loans. Later, the scheme unravelled and all the businesses became insolvent.

Among other things, the investors argued that TPL was entitled to a constructive trust over the profits Cushnie derived from the sale of the VGP shares. They argued that Cushnie breached his fiduciary duty to TPL by permitting misuse of its money, increasing the share price of VGP. They argued that Cushnie's profit from the share sale should be held on constructive trust for TPL pursuant to *Reid*. The English Court of Appeal rejected this argument and said that the investors were only entitled to a personal remedy (somewhat confusingly, this was said to be equitable compensation). If the investors had established a constructive trust from the moment the profit was

104. *Reid* [1994] 1 AC 324 at 331 per Lord Templeman.
105. Ibid, at 339.

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realised, they would have attempted to trace it into the hands of recipient banks. Their failure to establish a constructive trust meant they were simply unsecured creditors.

Sinclair is different to *Reid*. It has been argued that the case was not really a bribe case,[106] but even if it was a case where a proprietary remedy was appropriate, there were three important differences. First, the defendant was insolvent. Secondly, the third parties were bona fide purchasers for value without notice, who had secured interests over the property. Thirdly, claimants sought to propel their own claim above other creditors. As Lord Neuberger observes, a deterrent argument for a proprietary remedy in this case is unconvincing.[107] It does not matter to the defaulting fiduciary whether he is stripped of his profits by a proprietary or a personal remedy. However, 'the difference very much matters to the other creditors of the defaulting fiduciary, if he is insolvent'.[108] This case is a contest between creditors, not an exercise in punishing or deterring the wrongdoer.

(I) DESERT

It is difficult to say that the investors deserve the money more than other secured or unsecured creditors. Certainly, they were wronged by the defendant's breach of fiduciary duty. However, Cushnie and the other directors had already been jailed for their role in the Ponzi scheme, so they had been punished. The remedy effectively punishes the third-party creditors, not the defendant. Goode says:

> [The creditors] are not parties standing in the shoes of the defendant but independent third parties with claims of their own based on value they have given. Why should they be subordinated to a claimant who had no existing proprietary interest, who has given no value, who may have suffered no loss and who cannot even invoke a reliance interest?[109]

The law considers that the creditors have greater desert as they have given value. The counter-argument (raised by Lord Templeman in *Reid*) is that the unsecured creditors should not be in a better position than the debtor, and that property acquired through a criminal breach of trust should belong to the beneficiary of the breach of fiduciary duty.[110] However, Lord Neuberger points out that this 'assumes what it asserts'.[111] There has to be a better reason why the claimant deserves the property more than the third parties.

(II) NEEDS

The law uses the *pari passu* rule to work out a fair distribution where there are scarce resources and needy creditors, but the claimants sought to bypass this. The claimants would argue that the banks in this case could bear the losses with the least disutility (as powerful commercial entities) and that the ramifications for them were disproportionately worse. The banks would respond that they were bona fide purchasers for

106. *FHR v Mankarious* [2023] EWCA Civ 17 (CA), [102] per Lord Chancellor Etherton.
107. *Sinclair* [2011] EWCA Civ 347 at [53]–[54] per Lord Neuberger.
108. Ibid, at [54].
109. Goode, above n 20, at 495.
110. *Reid* [1994] 1 AC 324 at 331.
111. *Sinclair* [2011] EWCA Civ 347 at [78].

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value without notice who had the foresight to take security, and that at law, this made them the most deserving parties. They would say that to undermine the system of securities would create disutility for all bank customers by eroding commercial certainty.

(III) EQUALITY

The claimants sought a proprietary remedy so that they could recoup all of their investments while other unsecured and secured creditors got less. However, a constructive trust would mean that the claimants were not equal to other unsecured creditors and would have priority over even secured creditors. This undermined the *pari passu* system, which seeks to establish at least a rough measure of equality in insolvency. The court considered it unfair to treat the claimants in such an advantageous way when others would lose out.[112]

(IV) CONCLUSION

Accordingly, *Sinclair* is correct in so far as it says that a constructive trust is inappropriate in this case, and the court correctly imposes a personal remedy. However, a personal remedy is not *always* the appropriate remedy in every case. It will depend upon the circumstances of the case.

(c) *Grimaldi*

The facts of *Grimaldi* are also complex. In brief, Grimaldi and Barnes misused their fiduciary position as directors of a company named Chameleon in order to help fund the purchase of iron tenements by a company named Murchison, of which Grimaldi was a de facto director. Murchison purchased the iron tenements with a company named Winterfall. Shares in Winterfall were allotted to Barnes and Grimaldi for their role in 'assisting' the purchase of the iron tenements ('spotter's fees'). This had been agreed before the wrongdoing occurred, at the outset of Murchison's dealings with Winterfall. Some of the spotter's fee went to Barnes' nominee, Pinnacle, and therefore to some other third parties associated with the nominee.

Winterfall developed the iron tenements, which were worth AU$1 billion by the time of trial. Grimaldi had no dealings with the development and had resigned as director of Murchison shortly after the transactions were concluded. Chameleon received no benefit from any of the transactions. It proceeded against a multitude of parties, and sought a multitude of remedies. Among other things, it argued that Grimaldi and Barnes had taken a bribe in breach of fiduciary duty by taking the 'spotter's fee' and that it was entitled to a constructive trust over the 'spotter's fee' (based on *Reid*). This argument presupposed that Grimaldi and Barnes had breached their fiduciary duty in response to the 'spotter's fee' and that it was a 'bribe' to ensure the transaction took place.

The court found that the 'spotter's fee' was not a bribe, because it had been proposed before the wrongdoing had occurred.[113] Nonetheless, the Full Federal Court

112. Ibid, at [54], [83].
113. *Grimaldi* (2012) 200 FCR 296, [2012] FCAFC 6 at [584].

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of Australia made obiter dicta observations about constructive trusts over bribes. In contrast to *Reid*, the bribe was not 'deemed' to belong to the claimant.[114] However, the Full Federal Court said that bribed fiduciaries should be subjected to a constructive trust on the basis of deterrence, particularly where corrupt public officials were concerned.[115]

It is true that corruption of public officials should be discouraged, and proceeds of crime legislation has been enacted to claw back gains made through criminal behaviour. Nonetheless, courts must consider whether awarding a constructive trust will achieve deterrence in the circumstances of each case. Deterrence cannot justify the imposition of a proprietary remedy where the defendant is indifferent to the remedy; for example, in insolvency. By contrast, where third parties are uninvolved, there may be a more convincing specific deterrent rationale for awarding a proprietary remedy. However, it can be queried whether general deterrence provides a sufficient rationale, as it is doubtful whether breaching fiduciaries are sufficiently alive to the niceties between personal and proprietary remedies such as to deter them from breaching their duties.

The Full Court recognises the problem of third parties who may have an interest in the property and finds that a lesser remedy such as a lien may be awarded where the fiduciary is insolvent.[116] The discretionary approach is welcome and illustrates an advantage of the Australian approach. While the English 'immediate' constructive trust is certain, it is inflexible and the remedy cannot be adjusted to take account of third parties. By contrast, an Australian court can adjust the remedy to take account of third-party interests.

(I) DESERT

Although no constructive trust was awarded in *Grimaldi*, any proprietary interest would have affected the interests of innocent third parties associated with Pinnacle because the claimant would have been able to trace its contributions to the acquisition of a venture into the subsequently profitable mining venture. The court might have been reluctant to award a constructive trust over the spotters' fee because innocent third parties who were uninvolved in and unaware of the wrongdoing of the defendants would have been unfairly prejudiced if the claimant chose to trace into their property.

Unfortunately, it is unclear whether, or how, the discretion to award a lesser remedy would have been exercised if the spotter's fee had been a bribe. The mention of a lien gives a hint of a possible resolution. However, it is unclear why the Full Court considers that a lien has less impact on third-party creditors than a constructive trust.[117] While a lien will not encompass any subsequent increases in the value of the property, it still attaches to an asset at the time of the events that support its award.[118] Equitable liens can prejudice both unsecured and secured creditors because of their retrospective

114. Edelman, above n 99, at 84.
115. *Grimaldi* (2012) 200 FCR 296, [2012] FCAFC 6 at [576].
116. Ibid, at [582]–[583].
117. Ho, above n 25, at 488–489.
118. Bant, above n 82, at 304; *Blumin* v *Ellis*, 186 So 2d 286 (Fla App, 1966). Cf D Wright 'Proprietary remedies and the role of insolvency' (2000) 23 UNSW L J 143 at 170–171.

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operation.[119] They also have priority over prior equitable interests acquired by a bona fide purchaser for value without notice.[120] It seems that where insolvency is present, the only fair option is to award a personal remedy.

(II) NEEDS

In respect of the constructive trust over the spotter's fee, *Grimaldi* does not appear to raise any particular question with regard to needs. The issue with regard to the innocent third parties who purchased the mining business is not one of needs, but of equality and desert. In the context of fiduciary bribes, needs are only relevant where there is insolvency or innocent next of kin who may be adversely affected.

(III) EQUALITY

Equality issues may have been raised if the innocent third parties who purchased the mining business had been unfairly prejudiced, because there would have to be a reason why the claimant's entitlements should be prioritised over those of innocent third-party owners of the property. However, there is not enough information to know how the court would have balanced the respective entitlements.

(IV) CONCLUSION

Grimaldi has been praised for recognising that it may be appropriate to impose a lesser remedy to take account of third parties' interests, but criticised on the basis that it does not provide a guiding principle on the imposition of constructive trusts when there is a breach of fiduciary duty.[121]

4. WHERE TO FROM NOW?

I have used distributive theory and case-law to establish the factors that a court should take into account in deciding what remedy to award. I suggest that distributive criteria are useful and in fact already underlie the decisions made by courts. Without identifiable criteria, there is a risk that distributive aims may result in what Birks called 'palm tree justice' – a redistribution based on individual preferences as to what is fair. Birks himself was steadfastly against the notion of the remedial constructive trust.[122] Aristotle was mentioned in section 2 of this paper. Aristotle considers that equity must

119. A Wong 'An introduction to liens in commercial transactions' (1999) 20 Singapore L Rev 134 at 144.

120. *Australian Building & Technical Solutions Pty Ltd v Boumelhem* [2009] NSWSC 460 at [178]. See also F Burns 'The equitable lien rediscovered: a remedy for the 21st century' (2002) 25 UNSW L J 1 at 10.

121. Nyuk Nahan nee Chin 'Practical justice and appropriate relief: *Grimaldi v Chameleon Mining NL (No 2)*' (2012) 36 UWA L Rev 252 at 261–262; Swadling, above n 4, at 986 and n 9.

122. See eg Birks 'The end of the remedial constructive trust?', above n 79; Birks 'The law of restitution at the end of an epoch', above n 79; P Birks 'Three kinds of objection to discretionary remedialism' (2000) 29 UWA L Rev 1.

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intervene where law falls short by reason of its generality.[123] In other words, it is important to have clear, general rules, but sometimes, it is unfair or unjust to apply those rules without adjustments to suit individual circumstances. In circumstances such as the fiduciary bribe cases, a court should have a range of remedies available to it, with clear criteria for when such remedies would be appropriate.

Discretion in remedial awards is merited as long as it is carefully structured and in the nature of 'weak' rule-bound discretion.[124] If discretion is unbounded, it undermines the rule of law because like cases are not treated alike, and the law becomes subject to individual bias.[125] Moreover, it is difficult for lawyers to predict what the outcome of a client's case is likely to be.[126] By contrast, if there is a coherent, principled and transparent basis for redistribution, then distributive justice looks less suspicious.

The difference between my formulation and that of previous cases is that a court applying my formulation must be transparent. It cannot simply say that the claimant has always 'owned' the bribe. The court is removing the proprietary rights from the defendant and the third parties in so far as they are derived from the bribe and redistributing them to the claimant. I suspect that courts might not be so willing to openly redistribute property in this fashion in the fiduciary bribe cases as a consequence, but perhaps that illuminates something important about what is going on in these cases.

123. Aristotle *Nichomachean Ethics*, above n 31, bk V, [26]–[27] (1137b).
124. K Barker 'Rescuing remedialism in unjust enrichment law: why remedies are right' (1998) 57 Cam L J 301; P Finn 'Equitable doctrine and discretion in remedies' in W Cornish (ed) *Restitution, Past, Present and Future: Essays in Honour of Gareth Jones* (Oxford: Hart Publishing, 1998) p 251; P Loughlan 'No right to the remedy? An analysis of judicial discretion in the imposition of equitable remedies' (1989) 17 Melbourne U L Rev 132; Evans, above n 30; D Wright 'Discretion with common law remedies' (2002) 23 Adelaide L Rev 243; M Bryan 'Constructive trusts: understanding remedialism' in J Glister and P Ridge *Fault Lines in Equity* (Oxford: Hart Publishing, 2012) p 215. Cf D Jensen 'The rights and wrongs of discretionary remedialism' [2003] Singapore J Legal Stud 178.
125. Birks 'Three kinds of objection', above n 122, at 15–16.
126. Ibid, at 14–15.

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