DEFINING THE BOUNDARIES OF PERSONAL AND PROPRIETARY RELIEF AGAINST SECRET COMMISSIONS

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I. INTRODUCTION

It is settled law that a fiduciary is precluded by virtue of his office from making personal gains. This is part of the wider principle that those who assume the role of a fiduciary must be disinterested in any benefits or opportunities that are inconsistent with their duties to the principal. However, controversy surrounds the appropriate remedial response where an employee receives unauthorised gains in the form of bribes and secret commissions to subvert the employee's duty to his employer. The classic authority of *Lister & Co v Stubbs* provides a restrictive answer. The principal is confined to a personal claim against the delinquent fiduciary. The bribe money is deemed the property of the recipient and although he is liable to account for this sum, the resultant obligation is only a debt.

In *Attorney General for Hong Kong v Reid*, the Privy Council rejected this reasoning and held that bribe money and its proceeds were held on constructive trust for the principal. The principal therefore acquires beneficial ownership of the bribe and can trace its value into identifiable substitutes. *Reid* generated controversy as to the demarcation of personal and proprietary relief and the debate has been further invigorated by two recent decisions of the Court of Appeal. In a significant development, in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Co Ltd*, the Court of Appeal declined to follow *Reid* and held that proprietary relief is misconceived unless the fiduciary has taken an asset that is beneficially the property of the principal or has acquired property by exploiting an opportunity or right belonging to the principal.4

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1 (1890) 45 Ch D 1 (CA).


4 *Ibid* at [88].
Less than two years later, in *FHR European Ventures LLP v Mankarious*, a differently constituted Court of Appeal granted a constructive trust over the proceeds of a secret commission. The Court applied *Sinclair v Versailles*, while opining that the decision failed to provide clear guidance in this area. Unlike *Sinclair*, where the connection between the breach of fiduciary duty and the profit was relatively remote, in *European Ventures* it was considered that the defendant’s secret commission was the direct and immediate consequence of its breach of fiduciary duty. However, this should not be allowed to mask the different philosophical stance adopted in the latter case, reflecting a broader view of the claimant’s deprivation and the corresponding enrichment of the defendant. This paper will assess the implications of these recent decisions in defining the taxonomy of the wrong and the nature of the defaulting fiduciary’s obligations.

**II. THE CHANGING DEBATE**

*Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* arose from a complex commercial fraud involving inter-company dealings. Mr Cushnie, a director of T Ltd fraudulently applied T Ltd’s funds to artificially inflate the value of V Ltd, a company in which he held shares. Subsequently he sold them for £28.69 million. The claimant, as assignee of the interests of T Ltd asserted an equitable proprietary interest in the proceeds of the shares sold by Cushnie in breach of his fiduciary duties as director of T Ltd. Although Cushnie was personally accountable for the profit, the claimant sought a constructive trust over the gains and their substitutes to gain priority over all claimants except a bona fide purchaser for value without notice. The problem from the claimant’s perspective was that while T Ltd and its resources were instrumental in the unlawful scheme, the gain was achieved by disposing of shares in an independent entity.

Lewison J (as he then was) found that Cushnie had acquired the shares in V Ltd before T Ltd had been incorporated and before he had assumed any fiduciary duties to the latter. T Ltd could not establish any proprietary interest in the shares and the only claim by T Ltd was in relation to the gains made on their sale as a result of share manipulation involving T Ltd. This gave rise to a personal claim...

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5 [2013] EWCA Civ 17.

6 *Ibid* at [105] per Sir Terence Etherton C.

7 [2010] EWHC 1614 (Ch). For earlier proceedings, see [2007] EWHC 915 (Ch) (Rimer J).
only. T Ltd could not therefore assert a proprietary interest in the proceeds of the shares or pursue such claim against traceable proceeds.

Delivering the judgment of the Court of Appeal, Lord Neuberger of Abbotsbury MR, explained that while no bribes or secret commissions were alleged, the relevant principles derive from this area of law. Accordingly, “if a claimant beneficially owns a bribe received by a fiduciary, it follows that TPL’s proprietary claim to the proceeds of sale of the shares [in V Ltd] must succeed”. After detailed analysis, the Court of Appeal upheld the finding below that Cushnie was personally accountable to T Ltd, but the proceeds were not held on constructive trust.

At the core of his rejection of Reid, Lord Neuberger MR distinguished between the exploitation by a fiduciary of property or opportunities subject to fiduciary obligations, and the wrongful exploitation of a fiduciary position, resulting in unauthorised gains:

In cases where a fiduciary takes for himself an asset which, if he chose to take, he was under a duty to take for the beneficiary, it is easy to see why the asset should be treated as the property of the beneficiary. However, a bribe paid to a fiduciary could not possibly be said to be an asset which the fiduciary was under a duty to take for the beneficiary. There can thus be said to be a fundamental distinction between (i) a fiduciary enriching himself by depriving a claimant of an asset and (ii) a fiduciary enriching himself by doing a wrong to the claimant.

It was only in the first category that an asset should be treated as the principal’s property, to be held on constructive trust. Receipt of a bribe fell in the second category. Such conduct was manifestly wrongful, but there was no duty to obtain the bribe for the principal. Similarly, on the facts of Sinclair, the defendant was under no duty to obtain, on behalf of the claimant, the profit from the sale of his shares. The claimant accordingly had no proprietary basis for a constructive trust.

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8 Ibid at [81].
9 T Ltd was successful in a separate claim in respect of moneys from T Ltd which had passed to another company and became mixed with the latter’s funds. Here, the Court of Appeal upheld the finding that T Ltd was entitled to trace the funds and assert a proprietary claim against third parties.
10 Richards and Hughes LJJ concurring.
12 As a matter of authority, it was held that Reid was inconsistent with earlier Court of Appeal decisions (particularly Lister & Co v Stubbs (1890) 45 Ch D 1), and the House of Lords (Tyrell v Bank of London (1862) 10 HL Cas 26). Lord Neuberger MR stated that the Court of Appeal was not required to follow the Privy Council decision of Reid in preference to judgments of the Court of Appeal unless there are domestic authorities which indicate that the latter were per incuriam or of doubtful reliability. Absent powerful reasons to the contrary, the Court of Appeal should follow its own previous decisions ([2011] EWCA Civ 347, [2011] 3 WLR 1153 at [73]).
His Lordship elaborated that a beneficiary is entitled to an equitable account in respect of any asset acquired by a fiduciary in breach of his duty, but a proprietary claim could not arise:¹⁴

unless the asset or money is or has been beneficially the property of the beneficiary or the trustee acquired the asset or money by taking advantage of an opportunity or right which was properly that of the beneficiary.

The restriction of proprietary relief to “an opportunity or right which was properly that of the beneficiary” is contentious, in the context of bribes and more widely.¹⁵ This formulation poses uncertainty as to the parameters of equitable proprietary relief generally and the remedial scope of the constructive trust in particular. Lord Neuberger MR’s insistence on a proprietary base confines the grant of a constructive trust to a limited class of cases where the principal can establish an interest or right which is sufficiently proximate to the fiduciary’s acquisition. To some extent this reflects the established view of English law that the existence of a proprietary interest is a matter of property law, not discretion.¹⁶ However, the strict alignment of such reasoning with the dispensation of equitable relief serves to inhibit the enforcement of equity’s standards of fidelity. If the remedy is qualified in this way, then the fiduciary who enriches himself by committing a wrong that is not directly connected to the principal’s proprietary interests, is personally accountable in equity but beyond the reach of a proprietary order. This has attracted heated debate. The flurry of academic commentary¹⁷ demonstrates yet again that “the subject of constructive trusts … reveals passions of a force uncommon in the legal world”.¹⁸

The Court of Appeal was again drawn into the debate in *FHR European Ventures LLP v Mankarious*. The background is that Cedar Capital Partners LLC (“Cedar”) provided consultancy services to the hotel industry. Its principal, Mr Mankarious, was aware that the owners of the Monte Carlo Grand Hotel in Monaco wished to

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¹⁴ Ibid at [88].

¹⁵ See *Cadogan Petroleum plc v Tolley* [2011] EWHC 2286 (Ch) at [27]; *Page v Hewetts Solicitors* [2011] EWHC 2449 (Ch).

¹⁶ See *Foskett v McKeown* [2001] 1 AC 102 (HL) at 109 per Lord Browne-Wilkinson.


¹⁸ *FHR European Ventures LLP v Mankarious* [2013] EWCA Civ 17 at [61] per Pill LJ.
sell the property for a price in excess of €200 million. Mankarious was an advisor to an investment group (“the Group”) of which he was also a member. Mankarious encouraged the Group to purchase the hotel without disclosing that Cedar had entered into an Exclusive Brokerage Agreement with the owner. The agreement provided that the owner would pay Cedar €10 million for securing a purchaser, with payment due within 5 working days of receipt of the purchaser’s funds. Following this agreement, Cedar continued to advise the Group and to negotiate the purchase price with the owner. Ultimately the hotel was sold to the Group for €211.5 million and Cedar received the agreed commission from the owner.

The Group issued proceedings against Cedar and Mankarious, claiming the undisclosed commission of €10 million. It was argued that the defendants were in breach of their duty as fiduciary agents not to profit from their position or to put themselves in a position where their interest and duty conflicted. Simon J found that the defendants had failed to make sufficient disclosure of their relationship with the owner and it could not therefore be said that Cedar had acted with the informed consent of the Group.19 At a subsequent hearing,20 Simon J declined proprietary relief and limited the claimants to the personal remedy of an account in equity. The claimants appealed this decision.

In allowing the Group’s appeal, the Court of Appeal, applied *Sinclair v Versailles*, while opining that the judgment failed to provide clear guidance in this area.21 Although the Group did not retain any proprietary interest in the payment to the vendor,22 it was considered that the Group had been deprived of the opportunity to purchase the hotel for up to €10 million less than it actually paid23 and that the benefit of the brokerage agreement was held on constructive trust for the claimants. A proprietary claim was assisted by the finding that “the exclusive brokerage agreement was part of the overall arrangement surrounding the purchase of the hotel”.24 Unlike *Sinclair*, where the connection between the breach of fiduciary duty

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19 [2011] EWHC 2308 (Ch).
20 [2011] EWHC 2999 (Ch).
21 [2013] EWCA Civ 17 at [82], [116].
22 [2013] EWCA Civ 17 at [33], [67].
23 [2013] EWCA Civ 17 at [67], [69], [106]-[110].
24 [2013] EWCA Civ 17 at [59] per Lewison LJ. See also [68], [69] (Pill LJ).
and the profit was relatively remote, the present case could be understood in more positive terms.

In a practical sense ... the claimants’ money funded the commission paid to Cedar ... in both temporal and causative terms Cedar’s receipt of the commission was the direct and immediate consequence of its breach of fiduciary duty.

The Court took a broad view of the nature of the claimant’s deprivation and in the process laid the foundation for a more liberal application of Sinclair’s model.

III. DISCUSSION

Sinclair adopts the distinction expressed in Lister v Stubbs, between subtracting a bribe from the principal’s funds and receipt of a bribe directly from the briber. In the latter case there is no proprietary base and the principal is confined to a personal order. The Court of Appeal elaborated that there was a fundamental distinction between “(i) a fiduciary enriching himself by depriving a claimant of an asset and (ii) a fiduciary enriching himself by doing a wrong”. Proprietary restitution was appropriate in the first category but not the second. On this model, Mankarious falls in category (ii). The bribe would be regarded as an independent transaction and beyond the reach of proprietary relief.

It has been argued that proprietary relief should theoretically be possible in every purchase and sale transaction where a bribe is received directly from the briber. In both cases a bribe payment can be rationalised as an accretion to, or deduction from, the principal’s wealth. This is particularly appropriate given that it is only the defendant’s deception that prevents the principal from receiving the benefit directly. Where the principal is the vendor, a bribe or secret commission paid by the purchaser can be treated as forming part of the consideration. That is, the purchaser was willing to pay the contract price plus a further sum to acquire the principal’s goods or services. Similarly, where the principal is the purchaser, a bribe

25 As Sir Terence Etherton C observed, Sinclair v Versailles presented unusual facts in that the claimant sought a constructive trust in respect of the defendant’s profit from selling his own shares, which had been acquired lawfully before any breach of fiduciary duty (at [102]). See also [17] (Lewison LJ).

26 [2013] EWCA Civ 17 at [105] per Sir Terence Etherton C.


28 Unless it fell within the limited cases identified by the Court (where an asset or money is or has been beneficially the property of the beneficiary or the trustee acquired the asset or money by taking advantage of an opportunity or right which was properly that of the beneficiary ([2011] EWCA Civ 347, [2012] Ch 453 at [88])).

29 P Devonshire, “The Remedial Response to Bribes and Secret Commissions in a Fiduciary Relationship” forthcoming in NILQ.
received by the principal’s agent can be treated as a rebate on the purchase price because the vendor was prepared to sell for less than the sum that had apparently been agreed. The latter has a particular bearing on *Mankarious* where the Court of Appeal considered that the secret commission paid by the vendor to the defendant, had deprived the claimant of the opportunity to purchase the hotel for up to €10 million less than they actually paid.\(^\text{30}\) The fact that it was impossible to determine the precise amount by which the acquisition cost would have been reduced was not a fatal objection.\(^\text{31}\) As Sir Terence Etherton C observed:\(^\text{32}\)

>[T]he Commission Agreement, and the fact it was not disclosed by Cedar to the claimants, diverted from the claimants the opportunity to purchase the hotel at the lowest possible price, that is to say a price lower than the price they ultimately agreed to pay. That point remains a good one even if the claimants cannot show that the vendor would in fact have been willing to accept an amount precisely €10 million less or indeed any specific amount less than the price actually paid by the claimants.

Analysed from this perspective, a bribe is integral to the economics of the bargain between principal and purchaser or vendor. The faithless fiduciary is the conduit between these parties. It is a misstatement to characterise illicit funds in the fiduciary’s hands as a debt due to the principal. To do so fractures the transaction into multi-party dealings: (i) principal and purchaser/vendor, and (ii) fiduciary and briber. The second party in each relationship is the same, but characterised by reference to his or her role - in the first, as the principal’s purchaser/vendor, in the second, as briber of the principal’s agent or employee. This obscures the fact that in both cases the purchaser/vendor and the fiduciary are engaged in a transaction involving the principal. The purchaser/vendor and fiduciary are of course acting dishonestly, which inspires some commentators to argue that the dishonesty of briber and bribee effects a severance of their dealings with the principal and confers beneficial ownership on the recipient of the bribe.\(^\text{33}\) To do so overstates the fiduciary’s position. There is – or should be – no default rule that the proceeds belong beneficially to the fiduciary.

In contrast to *Lister v Stubbs* and *Sinclair v Versailles*, the Court of Appeal in *Mankarious* was prepared to assess the overall transaction without the constraints

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\(^\text{30}\) [2013] EWCA Civ 17 at [67], [69] per Pill LJ; [110] per Etherton C.

\(^\text{31}\) The latter qualification is consistent with equity’s reluctance to permit defaulting fiduciaries to speculate on hypothetical events in order to reduce or limit their accountability. See *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465 (PC); *Murad v Al Saraj* [2005] EWCA Civ 959.

\(^\text{32}\) [2013] EWCA Civ 17 at [110]. See also [106] where his Lordship records that the trial judge made a finding that at the very least it was likely the claimants could have used the information to their financial advantage in the course of negotiations (citing Simon J in *FHR European Ventures LLP v Mankarious* [2011] EWHC 2308 (Ch) at [106]).

of strict proprietary reasoning. This was done openly, acknowledging that in a formal sense at least, there was no proprietary link between the secret commission and the claimant. The payment was the product of a separate agreement with the vendor. It was not destined for the claimants and it could not therefore be said that the defendant had unlawfully intercepted these funds. From another perspective, whilst the secret commission derived indirectly from the sale proceeds, there was no direct connection between the claimant's funds and the moneys ultimately received by the defendant. The claimants had no continuing interest in the purchase money after it was remitted unconditionally to the vendor. On this point, all members of the Court in Mankarious were in agreement.

However, in a marked departure from Sinclair v Versailles, it was held that, “[i]n a practical sense … it is plain that in reality the claimants’ money funded the commission”. In similar vein, their Lordships drew the expansive conclusion that the brokerage agreement was part of the overall arrangement for purchasing the land and that the proceeds could properly be subject to a constructive trust.

This approach recognises that the receipt of a bribe is not an autonomous act and that it should not become so as a result of the delinquent fiduciary’s own misdeeds. It is anomalous to postulate that such conduct confers standing to retain the proceeds of bribery and affords protection from proprietary claims by the employer. In this regard it is preferable to assess the fiduciary’s position by reference to his status as an employee or agent. Here, the debate stands at a crossroads. Some argue narrowly that an employee is not engaged to receive bribes. Such conduct falls outside the employment relationship and therefore a bribe cannot be treated as a receipt on behalf of the principal. Once it is accepted that the employee acquires both legal and beneficial ownership of the bribe, attention necessarily shifts to defining the extent of his accountability to the betrayed employer. At this point discussion is drawn towards the rich and varied dimensions of the law of obligations.

34 Therefore it was of no assistance to the claimants that the secret commission could be traced back to their original funds. However, this consideration may have been relevant if the contract authorising the secret commission had been rescinded: Cadogan Petroleum plc v Tolley [2011] EWHC 2286 (Ch) at [36].

35 [2013] EWCA Civ 17 at [33] (Lewison LJ), [67], [70] (Pill LJ), [105] (Etherton C).

36 Ibid at [105] per Etherton C.

37 Ibid at [59] per Lewison LJ. Pill LJ accepted this proposition with reservations (at [69]).

38 Although there was not unanimity as to the basis of the order. Lewison LJ relied on the equitable principle of exploitation of fiduciary position [59]; Pill LJ adopted Lord Neuberger MR’s first category (where the asset or money is or has been beneficially the property of the beneficiary (at [73]) and Sir Terence Etherton C held that the commission fell within Lord Neuberger MR’s second category (the asset or money was obtained by taking advantage of an opportunity or right which was properly that of the beneficiary [at 110]).

The focus is entirely different if it accepted that the bribe falls within the fiduciary’s remit to the principal. In economic terms, the proceeds represent additional consideration on a sale, or a rebate on a purchase. This is surely consistent with the expectation that an employee will endeavour to achieve the most favourable return for his employer.\(^{40}\)

The law recognises many relationships of obligation where the res is beneficially enjoyed by the promisor or obligor until a further act is performed. For example, the subject matter of a contract is the property of the promisor until it is transferred to the promisee.\(^{41}\) Until that point the promisor can exercise all the incidents of ownership. If the agreement is specifically enforceable and the promisor has not disposed of the property, the promisee may enforce the transfer. Otherwise, the promisee is confined to damages for breach of contract. It is submitted that it is misleading to treat the recipient of a bribe in an analogous manner. The key question is whether, in the exercise of his office, the fiduciary is competent to acquire both a legal and beneficial interest in a bribe. Naturally, legal title is obtained\(^{42}\) and with it the ability to effect sale to a bona fide purchaser. However, subject to protection for “equity’s darling”, it should be recognised that the fiduciary does not have the capacity to acquire personally a beneficial interest.\(^{43}\) To that extent he holds the proceeds as bare trustee or nominee. It follows that the fiduciary cannot assert a proprietary interest or resist a transfer of the asset to the betrayed principal.

It has been argued above that irrespective of whether the bribe is received directly from the briber, it is founded in a transaction between principal and purchaser/vendor. Within the scheme of that transaction, the fiduciary has undermined the principal’s economic interests. This is not simply breach of a personal obligation. The fiduciary is in receipt of something which belongs to the principal. There is no intermediate point at which the fiduciary obtains both a legal

\(^{40}\) Although Sinclair v Versailles espouses a limited application of the principle, it is aptly described in Lord Neuberger MR’s comment: “in cases where a fiduciary takes for himself an asset which, if he chose to take, he was under a duty to take for the beneficiary, it is easy to see why the asset should be treated as the property of the beneficiary” (Sinclair v Versailles [2011] EWCA Civ 347, [2012] Ch 453 at [80]). See further P Watts, “Constructive Trusts and Insolvency” (2009) 3 Journal of Equity 250 at 260; P Birks, “At the Expense of the Claimant: Direct and Indirect Enrichment in English Law” in D Johnston & R Zimmermann (eds), Unjustified Enrichment: Key Issues in Comparative Perspective (Cambridge: Cambridge University Press, 2001) at 493.

\(^{41}\) This at least is descriptive of the legal title. Sometimes the equitable beneficial interest moves to the transferee upon execution of a binding agreement of purchase and sale. The sale of land is an instance of this because such agreements are usually specifically enforceable.

\(^{42}\) A point readily conceded by the Privy Council in Attorney General for Hong Kong v Reid [1994] 1 AC 324. As the Board bluntly acknowledged: “Money paid to the false fiduciary belongs to him” (at 331 per Lord Templeman).

\(^{43}\) Some commentators express this in terms of the fiduciary being under a disability to acquire beneficial ownership. See particularly Sir Peter Millett, “Bribes and Secret Commissions” [1993] Restitution Law Review 7.
and beneficial interest in the subject matter. In blunt terms, he cannot hold, and never held, what is not his. This is uncontroversial and plainly in evidence in many legal relationships. An agent receives property on behalf of her principal. A trustee holds trust property on behalf the beneficiaries and such property does not devolve to the trustee’s estate in the event of personal bankruptcy. Again, a bailee holds tangible personally for the bailor and cannot deny his superior title.\(^{44}\)

The concept of proprietary disability is a thread running through equity jurisprudence. It could be added that this is a thread with a moral twist. In academic literature, Lord Millett has made a notable contribution in expounding the “good person” fiction.\(^{45}\) Lord Millett argues that in the eyes of equity, fiduciaries are incorruptible. It follows that they never take bribes. Consistent with this theme, equity will treat a bribe in the fiduciary’s hands as a legitimate payment intended for the benefit of the principal.\(^{46}\) This shapes the remedial response.\(^{47}\)

Once the fiduciary is precluded from asserting that it was intended for himself, therefore, a deemed agency gain or a bribe which is received by the fiduciary in kind ought in principle to be treated as trust property held in trust for the principal …

However, \textit{Sinclair v Versailles} maintained a narrow proprietary focus uninfluenced by this paradigm. Secret profits made by a fiduciary from his position, as opposed to property, were not held on constructive trust for the principal. This, conceptually, is the divide between \textit{Sinclair} and \textit{Mankarious}. In \textit{Mankarious}, the Court of Appeal regarded \textit{Bhullar v Bhullar}\(^{48}\) as a stepping-stone towards reinstating proprietary relief for acquisitive wrongs. In a passage from \textit{Bhullar v Bhullar} that was cited with approval by both Lewison LJ and Sir Terence Etherton C:\(^{49}\)

\begin{quote}
In a case such as the present, where a fiduciary has exploited a commercial opportunity for his own benefit, the relevant question, in my judgment, is not whether the party to whom the duty is owed … had some kind of beneficial interest in the opportunity: in my judgment that would be too formalistic and restrictive an approach. Rather, the question is simply whether the fiduciary’s exploitation of the opportunity is such as to attract the application of the rule.
\end{quote}

\(^{44}\) The jus tertii principle.


\(^{46}\) \textit{Ibid} at 20. See particularly \textit{Attorney General for Hong Kong v Reid} [1994] 1 AC 324 (PC) at 337, where the Privy Council placed particular emphasis on this reasoning.


\(^{49}\) \textit{Ibid} at [28] per Jonathan Parker LJ.
In his summation in *Mankarious*, Lewison LJ returned to *Bhullar v Bhullar* in affirming the focus on exploitation of a fiduciary’s position:50

Nor is there any need to enquire whether the Investor Group can be said to have a proprietary interest in the strict sense, in that opportunity. In my judgment the principle we must apply is that stated by Jonathan Parker LJ in *Bhullar v Bhullar*: is the fiduciary’s exploitation of the opportunity such as to attract the application of the rule … with the consequence that Cedar held the benefit of the contract on a constructive trust for the Investor Group.

Support was drawn from certain passages in *Boardman v Phipps*,51 where the defendant’s relationship to the trust gave him a unique opportunity to acquire shares in a private company in which the trust held a minority interest. In this regard, it was noted that the defendant’s conduct in *Boardman v Phipps* had resulted in a formal declaration of a constructive trust.52 From this perspective it is unnecessary to engage with *Sinclair*’s rejection of proprietary restitution for wrongs. While abuse of position is a form of wrongdoing, accountability in equity is not dependent on want of probity.53 Proprietary relief can therefore be countenanced by reference to a principle that is morally neutral.54

**IV. CONCLUSION**

*Sinclair v Versailles* consigns proprietary relief to vagaries of fact and the manner in which the faithless fiduciary achieved an improper purpose. The judgment is difficult to reconcile with equity’s deterrent-inspired remedial regime. It has been argued that bribery should not be regarded as an autonomous act which confers a beneficial interest on the recipient. In the overall context of the transaction, the betrayed principal is entitled, at its election, to proprietary relief, because the proceeds of bribery should be regarded as an accretion to, or deduction from, the principal’s wealth.

*Mankarious* emancipated the constructive trust from formulaic reasoning which inhibits its application and shields venal breaches of fiduciary duty from the rigour of equitable doctrine. If the outcome is policy-driven, that is hardly a profound rebuke. It has aptly been said:55

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50 [2013] EWCA Civ 17 at [59]. See further Sir Terence Etherton C at [85] et seq.
51 [1967] 2 AC 46 (HL).
52 [2013] EWCA Civ 17 at [91]. See also [89]-[96] (Sir Terence Etherton C) and [72] (Pill LJ).
53 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134n (HL) at 144-145.
55 *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6 at [576] per Finn, Stone and Perram JJ.
To exclude the bribed fiduciary from the deterrent effect of the constructive trust is … to make it unavailable in the very situations where deterrence is likely to be the most needed. Bribery at its most 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.

The Court of Appeal in Mankarious did not – and could not\footnote{2013} – follow Attorney General for Hong Kong v Reid in preference to its earlier decision in Sinclair v Versailles. Reid was a purposive judgment and its methodology was unique. Despite similar outcomes, comparisons cannot be readily drawn with Mankarious. Nevertheless, a salutary principle animates both decisions: relief should flow from the substantive wrong, not the manner of its execution.

\footnote{Australian jurisprudence in particular has invoked the constructive trust to reverse gains deriving from misuse of a fiduciary’s position. See, for example, Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd (1958) 100 CLR 342 at 350; Chan v Zacharia (1984) 154 CLR 178 at 198-199; Hospital Products Ltd v US Surgical Corporation (1984) 156 CLR 41 at 107-108.}

\footnote{[2013] EWCA Civ 17 at [81]}