

CONSTRUCTIVE TRUSTS AND THEFT

*Craig Rotherham**

The Theft Act 1968 (UK) marked a major reform of United Kingdom criminal law resulting in numerous offences being superseded by a broad crime of theft. The Act explicitly provided that theft extended to interferences with equitable property rights. While the extension of the offence to express trusts might be largely unproblematic, the possibility of it applying to trusts arising by operation of law has been more controversial. This article suggests that the issue is likely to arise less often than is commonly supposed. Many rights enforced by way of a constructive trust can only properly be regarded as initially giving rise to a mere equity that will mature into a full proprietary interest only following the exercise of a power of election and/or the intervention of a court. It follows that, prior to such steps being taken, assets affected by such an equity will not be "property belonging to another" for the purposes of the definition of theft under the Act. Nonetheless, the concerns regarding the extension of theft to constructive trusts are well founded. The reasons for providing that equitable proprietary rights arise by operation of law have little to do with sound rationales for characterising conduct as theft.

I INTRODUCTION

ATH Smith's treatise *Property Offences* represents one of his signal contributions to the criminal law.¹ He explained that the work was originally conceived as a joint project with his mentor Glanville Williams, with the intention being to supplement the latter's account of the "general part" of the criminal law with a series of individual volumes that would cover the "special part", each devoted to a category of related offences.² While that broader project was never completed, ATH's contribution provided us with a valuable systematic account of the modern United Kingdom law of property offences. The work explores some difficulties that have arisen from the reform of the law through the adoption of an expansive general offence of theft that is committed when one dishonestly "appropriates property belonging to another".³ Most of the problems in practice have emerged in

* Professor, School of Law, University of Nottingham.

1 ATH Smith *Property Offences: The Protection of Property Through the Criminal Law* (Sweet & Maxwell, London, 1994).

2 At preface.

3 Theft Act 1968 (UK), s 1(1).

relation to the courts' interpretation of "appropriation" that failed to maintain a clear distinction between the crime of theft and the offence of obtaining property by deception, an interest shared by other leading scholars such as Williams and JC Smith.⁴ In addition, however, ATH Smith examined in particular depth the problems raised by the extension of the offence of theft to include property in which the victim had an equitable interest.⁵ This extension is relatively uncontroversial in relation to trusts that arise in response to the settlor's explicit or presumed wishes but poses greater difficulties as far as constructive trusts are concerned.

This article explores the extent to which the *actus reus* of the offence of theft might be satisfied when property is acquired in circumstances that give rise to a constructive trust. It suggests that, while the matter is underexplored in the case law and academic literature, full-blown equitable property rights are created without some exercise of a power of election and/or the intervention of the courts less often than is commonly supposed. Where such action is required, unless and until it occurs, in dealing with the assets in question, a constructive trustee cannot be said to "appropriate property belonging to another". Nonetheless, there are instances in which a constructive trustee might be guilty of theft in dealing dishonestly with the property in question without the need for an election on the part of the claimant or any intervention from the court because an equitable property right arises automatically. Unfortunately, the factors that determine whether claimants have an immediate equitable interest or whether they are limited to a mere equity have nothing to do with any considerations that might sensibly be thought to distinguish situations in which the law of theft ought to apply from those in which it should not. It follows that the circumstances in which theft might apply to constructive trusts are indefensibly arbitrary. Beyond this criticism, there are powerful objections to applying the offence of theft to property held on constructive trust. This expansion of the offence allows for circumstances not falling within the ordinary understanding of the term to be characterised as theft. Constructive trusts are recognised for instrumental reasons, most importantly to do with the relative priority of claims in insolvency. There is little reason for the criminal law to be involved in protecting interests created for these purposes.

II THEFT (RE)DEFINED: "APPROPRIATION" OF "PROPERTY BELONGING TO ANOTHER"

Section 1(1) of the Theft Act 1968 (UK) provides the following "basic definition" of the offence of theft:

A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and "thief" and "steal" shall be construed accordingly.

4 For a detailed account, see Smith, above n 1, at ch 5.

5 Theft Act 1968 (UK), s 5. See Smith, above n 1, at ch 4; and ATH Smith "Constructive Trusts in the Law of Theft" [1977] Crim LR 395. See also ATH Smith "Theft of Persons Required to Account" (1980) 1 *Canta LR* 15 for an exploration of some related issues in New Zealand criminal law.

The Act was designed to provide a long-needed simplification of the criminal law governing property offences and to move beyond the difficulties posed by the common law offence of larceny.⁶ Larceny was framed in terms of wrongful interferences with the possession of another, reflecting the phenomenon observed by Pollock and Wright that the common law had not developed an abstract concept of ownership and instead largely mediated rights to tangible resources through the concept of possession.⁷ This focus posed difficulties in protecting the interests of owners who were not in possession of personal property at the time that someone else sought to treat it as their own. The common law of larceny had to be supplemented with contrived concepts or outright fictions to ensure that the criminal law could adequately protect owners.⁸ The Theft Act 1968 was supposed to reorientate the law by protecting rights of ownership directly.⁹

The construction of the Theft Act 1968 was largely the work of the Criminal Law Revision Committee, with the drafting of the main offences largely carried out by the distinguished criminal law academics, Professors Glanville Williams and JC Smith, and the parliamentary counsel, Sir John Fiennes, a draftsman of great distinction.¹⁰ Leading criminal law theorists have tended to share the view that the role of property offences lies in the protection of the property rights recognised by the civil law. This can be contrasted with a view expressed by the courts that the criminal law should not concern itself with "the finer distinctions in civil law" on such matters.¹¹ For JC Smith, such an approach was unsustainable, and it would be "intolerable" if the criminal law were to hold that actions that were lawful under the civil law might constitute theft.¹² Thus, the conventional academic view is that appropriation of property that the civil law recognises as belonging to another should be a *necessary* element of the crime of theft.

Unfortunately, this understanding of the new offence of theft was not shared by the courts. The most important issues emerged in relation to situations where a defendant obtained possession with the consent of the owner, although that consent was vitiated by fraud or some other factor. The Larceny Act 1916 (UK) applied to instances where property had been stolen "without the consent of the owner".¹³ The brief definition of theft provided in s 1(1) of the Theft Act 1968 says nothing about

6 Smith, above n 1, at 13.

7 Frederick Pollock and Robert Samuel Wright *An Essay on Possession in the Common Law* (Clarendon Press, Oxford, 1888).

8 Smith, above n 1, at 11.

9 At 13.

10 JC Smith "The Sad Fate of the Theft Act 1968" in William Swadling and Gareth Jones (eds) *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford University Press, Oxford, 1999) 97 at 98.

11 *Regina v Baxter* [1972] 1 QB 1 (CA) at 13 per Sachs LJ.

12 JC Smith "Civil Law Concepts in the Criminal Law" (1972) 31 CLJ 197.

13 Larceny Act 1916 (UK) 6 & 7 Geo V c 50, s 1(1).

such an element being a precondition for the offence. On the other hand, it might be thought that an absence of consent will generally be required if the defendant can be said to have "appropriated property belonging to another".

The meaning of "appropriation" is not spelt out as clearly as it might have been. However, s 3(1) of the Act stipulates that "[a]ny assumption by a person of the rights of an owner amounts to an appropriation". This appears to assume that the acts in question must be inconsistent with the rights of an owner, and this should preclude any suggestion that an appropriation might occur in circumstances where there is a transfer that is effective to pass title to the transferee. Moreover, where as the result of a transaction the title to the property in question passes to the defendant, the property of which the defendant thereafter takes possession cannot be said to "belong to another".¹⁴

This was not, however, the interpretation favoured when the issue was addressed by the House of Lords in *Lawrence v Metropolitan Police Commissioner*.¹⁵ The case concerned a taxi driver who fraudulently overcharged a customer and was successfully prosecuted for theft. The defendant appealed the conviction on the grounds that, in circumstances where the victim had consented to the defendant's taking the money, there cannot be said to have been "an appropriation of property belonging to another" and that the proper charge would have been "obtaining property by deception" under s 15 of the Act. The Court concluded that the two charges in question were not mutually exclusive and that an appropriation had taken place for the purposes of s 1(1).¹⁶

Viscount Dilhorne's analysis in that case suggested that s 1(1) would be satisfied where the victim could genuinely be said to have consented to the appropriation, although that consent had been vitiated in some way, for example, by fraud. His Lordship remarked that, if the victim had understood that the accused was asking for a sum that was in excess of the legal fare and nonetheless willingly agreed to part with that sum, the conduct would not have amounted to theft for the reason that any "appropriation" would not have been dishonest.¹⁷ The conclusion is counterintuitive: if one fraudulently demands more than the legal fare, the fact that the victim might knowingly agree to pay the sum does not change the fact that the defendant's actions are dishonest.

The wide interpretation of appropriation favoured in *Lawrence* was consolidated in a later decision by the House of Lords in *Director of Public Prosecutions v Gomez*, an appeal from a case involving an employee of a shop who deceived his manager into accepting two cheques presented by a customer in return for goods in circumstances in which the defendant knew the cheques to be stolen.¹⁸ The

14 Smith, above n 12; and Glanville Williams "Theft, Consent and Illegality" [1977] Crim LR 127, 205 and 327.

15 *Lawrence v Metropolitan Police Commissioner* [1972] AC 626 (HL).

16 At 633.

17 At 632.

18 *Director of Public Prosecutions v Gomez* [1993] AC 442 (HL).

defendant was charged with theft of the goods and not with obtaining property by deception. While there was a cogent dissent from Lord Lowry, Lord Keith, giving judgment for the majority, noted Viscount Dilhorne's unequivocal conclusion in *Lawrence* that absence of the consent of the owner was not a requisite element in the crime of theft under s 1(1) and appeared eager to follow this to its logical conclusion.¹⁹ So uncompromising was his Lordship's stance on the point that it encouraged speculation as to whether it was even necessary for a transaction to be voidable for an appropriation to be said to take place and whether s 1(1) might not apply in circumstances where the transfer by which the defendant acquired property was not defeasible.

That very possibility was explored by the House of Lords a decade later in *Regina v Hinks*.²⁰ The defendant had befriended an older man of low intellect and a trusting disposition, acting as his principal carer. She persuaded the man to make a series of gifts to her that saw him dissipate around £60,000, representing most of his savings and moneys inherited from his father. When she was prosecuted for theft, the defence argued that, given that title to the assets gifted passed to the defendant, she could not be said to have appropriated property belonging to another.

While Lord Steyn, giving judgment for the majority, acknowledged the criticism that the judicial approach to the definition of theft had attracted among academics,²¹ he was unwilling to reverse the course that the House of Lords had commenced in *Lawrence* and continued in *Gomez*.²² The majority concluded that one might appropriate property belonging to another for the purposes of s 1(1) through a transfer that was perfectly legal and indefeasible on the assumption that each of the transfers in the case amounted to a "perfectly valid gift".²³

Lords Hutton and Hobhouse dissented, rejecting the notion that there could be a theft in the context of an indefeasible transfer of property. Lord Hutton agreed with the majority that an "appropriation" could be said to have taken place.²⁴ The source of his disagreement was instead whether such an appropriation could be said to be dishonest. He noted observations made by Viscount Dilhorne in *Lawrence* that someone who had been given property by the owner could not be said to have acted dishonestly.²⁵ However, his Lordship concluded that the fact that consent was given would preclude a finding of dishonesty against the transferee only if it were not vitiated. It followed that the jury should have been given clear instructions on the possibility that the gifts might have been invalid

19 At 457–464.

20 *Regina v Hinks* [2001] 2 AC 241 (HL).

21 At 251.

22 At 251.

23 At 247 and 250–251.

24 At 265.

25 At 256.

because of the donor's incapacity or that they might have been "invalid by reason of undue influence or coercion".²⁶

Lord Hobhouse shared Lord Hutton's view that a defendant who had obtained an indefeasible title as a result of the transfer in question could not be said to be dishonest.²⁷ In addition, his Lordship offered a harsh assessment of the course that the courts had taken in the interpretation of the offence of theft and strongly disagreed with the notion that defendants could be said to have appropriated property belonging to another in the context of an indefeasible transfer. In common with the views expressed by most academic commentators and the dissenting view offered by Lord Lowry in *Gomez*, Lord Hobhouse concluded that it was necessary that the victim had an interest in the property which the defendant wrongfully treated as his own. As a result, he concluded:²⁸

The truth is that theft is a crime which relates to civil property and, inevitably, property concepts from the civil law have to be used and questions answered by reference to that law.

Lord Hobhouse noted that s 5 "qualifies and defines the expression 'belonging to another' and specifically makes use of a number of civil law concepts".²⁹ Perhaps rather unhelpfully, his Lordship examined the issue in the context of s 5(4). This provision provides that, where a right of action arises in respect of a mistaken transfer, the property or its proceeds "shall be regarded as belonging to the person entitled to restoration", thereby bringing such situations within the purview of s 1(1). He suggested that "[i]t is relevant to look at this example further because it is an example of a person who has acquired a defeasible title".³⁰ This is plainly mistaken. The whole point of s 5(4) was to extend the crime of theft to situations where the defendant is subject to a purely personal obligation to make restitution precisely because, according to the understanding of the drafters of the Act, the defendant obtained an indefeasible title to the subject matter of the transfer.

The more obvious illustration of the importance of determining whether a transfer of property is defeasible would have been s 5(1), which indicates that, for the purposes of s 1(1), property belongs to one who enjoys "any proprietary right or interest". Lord Hobhouse appeared to have it in mind in *Hinks* that, where a transfer was defeasible for undue influence or duress, it followed that the transferor would enjoy an equitable proprietary right that meant that the transferee had acquired property belonging to another for the purposes of s 1(1). This issue is explored below in conjunction with other questions that arise in relation to theft and constructive trusts.

26 At 260.

27 At 260.

28 At 263–264.

29 At 264.

30 At 265.

III THEFT AND CONSTRUCTIVE TRUSTS

A Theft by a Constructive Trustee

The Theft Act 1968 extended the new offence of theft to cover the misappropriation of trust property, with s 5(1) providing that:

Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest (not being an equitable interest arising only from an agreement to transfer or grant an interest).

The dishonest misappropriation of trust property would not have amounted to larceny at common law, given that the fact that such property was under the legal ownership and factual control of the trustee meant that the element of asportation required for that crime would inevitably be absent.³¹ At first sight, there would appear to be little harm in crafting a general offence of theft that applies to trustees who were deliberately appointed.³² Characterising dishonest misappropriations by such trustees as "theft" would arguably be consistent with normal usage of the word.

What is far less clear is whether the extension of the offence to constructive trusts was wise. Constructive trusts are essentially remedial in nature and are imposed without regard to the intention of the parties for reasons that have little to do with those that explain the recognition and enforcement of more conventional property rights.

B Proprietary Interests and Mere Equities

The significance of the fact that constructive trusts fall within s 5(1) may depend on how and when such trusts arise. It is helpful to consider why most commentators consider that, properly interpreted (as opposed to the approach developed by the House of Lords beginning with *Lawrence* and culminating in *Hinks*), the crime of theft should have little application in cases where property is obtained by fraud.³³ Where, for example, there is a contract for the sale of goods that is vitiated by fraud, the contract will be voidable: the sale will give the transferee title to the goods, albeit a title that is defeasible should the transferor rescind the contract. Upon rescission, the law will treat the transaction as being void ab initio for most purposes, but anyone who purchased the goods from the

31 It was not until the passing of the Punishment of Frauds Act 1857 (UK) 20 & 21 Vict c 54 that dishonest misappropriation by a trustee became a misdemeanour punishable by a maximum of three years' imprisonment (s 1). This approach was essentially reproduced in the Larceny Act 1916 (UK) 6 & 7 Geo V c 50, s 22 of which provided for a discrete misdemeanour of "conversion by a trustee", punishable by seven years' imprisonment, albeit with the complication that public prosecutions were not to be initiated without the sanction of the Attorney-General.

32 This would include both express trusts and automatic resulting trusts that arise where property is transferred to a trustee without directions that fully dispose of the beneficial interest in that property.

33 See above n 14.

fraudster prior to rescission will get good title.³⁴ It follows that, according to the conventional analysis of the matter, at the point at which the fraudster obtains them, the goods in question do not "belong to another", and that the proper offence would be one relating to gaining an advantage from a fraud.³⁵ Our fraudster could, on the other hand, fulfil the actus reus for theft by dealing with the goods after the victim has rescinded the transaction. In practice, however, the property in question is likely to be disposed of by the time the victim is aware of the fraud and has taken any steps that might be interpreted as rescinding the transaction.

The extent to which constructive trusts may be affected by the law of theft will depend upon whether they arise automatically without the exercise of any right of election by the victim and/or the intervention of a court. If such action is needed to give rise to a constructive trust, an equitable interest is likely to come into existence only after the dealings with the property in question have taken place and therefore too late for the constructive trustee to be guilty of theft.

Claimants who need to take steps to acquire a full equitable interest, such as giving notice to rescind a transaction, are generally characterised as having a "mere equity" rather than a full equitable interest.³⁶ The conceptualisation of the matter may affect third parties who might deal with the property in question. The general understanding is that a mere equity will be defeated not only by a bona fide purchase of a legal interest in the property but equally by a purchase in good faith of an equitable interest.³⁷ More importantly, for the purposes of the Theft Act 1968, property to which the defendant has a defeasible title "belongs" to the defendant, who, it follows, cannot at this point steal it.

The position taken here is that an interest can only plausibly be regarded as a mere equity rather than a full-blown equitable interest when one or more of the following is true:

- (a) the claimant has an election to make because (i) choosing to assert a proprietary interest in the property requires forgoing other rights that the claimant presently enjoys and/or (ii) asserting a proprietary interest comes at a cost;
- (b) a court's assistance is required in setting aside a formal order;
- (c) a court's assistance is required because counter-restitution will be required if the transaction in question is to be set aside;

34 Sale of Goods Act 1979 (UK), s 23. See *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525 (CA).

35 Under the Theft Act 1968 (UK), the relevant offence would be "obtaining property by deception" under s 15. That provision was replaced by the Fraud Act 2006 (UK), with most examples of obtaining goods likely to involve a "fraud by false representation" under s 2 of that Act.

36 See also Ann Everton "'Equitable Interests' and 'Equities' – In Search of a Pattern" (1976) 40 Conv 209.

37 *Phillips v Phillips* (1861) 4 De G F & J 208, 45 ER 1164 (Ch); and *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265.

- (d) the court has a discretion as to whether it orders a constructive trust because of considerations relating to the balancing of equities between the parties or concerns about the fairness of the award to third parties.

There is some overlap between these considerations. Thus, if setting aside the transaction in question will require that the claimant provide counter-restitution, the fact that the court is going to have to make an order to that effect may be regarded as a reason why the claimant should not be viewed as having a full equitable interest in the property prior to the court making the order and the claimant complying with its obligations under it. Equally, the fact that counter-restitution would be required indicates that there is a cost to this course of action that the claimant has elected to accept.

One objective of this article is to determine in what circumstances claimants who might ultimately benefit from a constructive trust initially enjoy a mere equity and in what circumstances they enjoy an immediate full beneficial interest. I will consider three examples of constructive trusts here: interests arising in respect of transfers vitiated by fraud, mistake or some other "unjust factor"; proprietary rights to traceable proceeds of property; and rights arising in respect of profits made from breaches of fiduciary duty.

C Theft and Equitable Interests Arising from Vitiating Transfers

As already mentioned, the relevance of s 5 in this context was highlighted by Lord Hobhouse in *Hinks*.³⁸ His Lordship rejected the notion that there could be "an appropriation of property belonging to another" where the defendant received the property in a transaction that was indefeasible. He noted that "[t]he prosecution must be able to prove that, at the time of the alleged appropriation, the relevant property belonged to another within the meaning given to that phrase by section 5".³⁹ His Lordship's focus on the defeasibility of the transaction would suggest that it might be enough to demonstrate that the transaction was voidable in some way. On the facts of *Hinks*, this might depend on whether the transaction was defeasible because of undue influence or coercion.

1 Fraud

If a right to rescind a transaction were sufficient to make the transferee the beneficial owner of the property in question, it might be argued that, on the analysis of Lord Hobhouse in *Hinks*, both *Lawrence* and *Gomez* were rightly decided, albeit for the wrong reasons (his Lordship having disagreed with the prevailing wide interpretation of "appropriation"). After all, both cases involved transfers that were made subject to contracts that were voidable for fraud. Whether this were true, however, would depend on the question as to whether the transferor can be said to enjoy a beneficial interest at the moment the property is appropriated by the transferee. While there is some authority for the view that property acquired pursuant to a transaction that is vitiated by fraud is held on

38 *Regina v Hinks*, above n 20.

39 At 265.

constructive trust,⁴⁰ the more orthodox position is that it is acquired subject to an equity to rescind.⁴¹ It would follow that only if and when the power to rescind were successfully exercised would the transferor benefit from a full-blown equitable interest.⁴² Prior to this, the property acquired by the fraudster in the transfer could not be said to belong to the transferor under s 5(1).

One reason that it would be difficult to regard fraud as giving rise to a constructive trust prior to any action being taken by the transferor is that a victim of fraud might choose not to exercise the power to rescind a vitiated transaction. Thus, in *Halifax Building Society v Thomas*, the claimant argued it was the beneficiary of a constructive trust over a surplus generated after the defendant, who had fraudulently obtained mortgage finance, defaulted, and the claimant exercised its rights under the mortgage to sell the property.⁴³ Sir Peter Gibson LJ suggested that, had the building society rescinded the transaction, it could have traced the proceeds of the money advanced into the surplus from the sale. However, he reasoned that this course of action was precluded by the building society's decision to affirm the contract by enforcing its rights under the mortgage.⁴⁴

What is more, at least in some cases of fraud, it may be implausible to regard the transferor as having an equitable interest in the property in question because unwinding the transaction requires more than the mere expression of an intention to rescind. Rescission may appear to be a straightforward matter where, for example, an arrangement remains purely executory or where the transferee has not provided good consideration for the property in question. Thus, rescission may appear to be simple where a defendant has defrauded the claimant with a bad cheque.⁴⁵ The matter may be more complicated where defendants have relied on the validity of the transaction to their detriment and/or provided good consideration. In these circumstances, rescission requires some balancing of equities and/or provision of counter-restitution.⁴⁶ Setting aside such transactions clearly requires judicial action; it cannot simply take place on the election of the transferor. Indeed, if counter-

40 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) at 716, where Lord Browne-Wilkinson remarked: "Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient".

41 *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 at [11] per Rimer J; *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717 (Ch) at 734 per Millett J; and *Lonrho plc v Fayed (No 2)* [1992] 1 WLR 1 (Ch) at 11 per Millett J.

42 Thus, in *Latec Investments Ltd v Hotel Terrigal Pty Ltd*, above n 37, Kitto J observed that an equity to rescind had to be "made good" before it gave rise to an equitable interest.

43 *Halifax Building Society v Thomas* [1996] Ch 217 (CA).

44 At 226.

45 See generally *Car and Universal Finance Co Ltd v Caldwell*, above n 34.

46 *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 (HL) at 1278 per Lord Blackburn; and *Spence v Crawford* [1939] 3 All ER 271 (HL) at 288 per Lord Wright. See also Janet O'Sullivan "Rescission as a Self-Help Remedy: A Critical Analysis" (2000) 59 CLJ 509.

restitution cannot be provided or the transferor is guilty of undue delay, relief might be denied altogether.⁴⁷ As a result, where these complications are present, the transaction cannot be regarded as giving rise to a full proprietary interest that predates the court's exercise of its discretion. The orthodox view is that the proprietary consequences of rescission may be backdated either to the date at which the transferor gave notice of an intention to rescind or even to the point at which the transaction was completed.⁴⁸ However, there can be little doubt that the courts would not treat rescission as having retrospective effect so that actions of the transferee prior to the transaction being set aside might be said to involve the appropriation of property belonging to the transferor for the purposes of the Theft Act 1968.

2 *Mistake*

Where, in contrast, a payment has been made pursuant to a mistake that was not made in the context of the formation of a contract, there is nothing to rescind as a precondition for establishing a right to relief. If the claimant is going to be accorded more than a personal right to relief, it is likely to arise immediately via a constructive trust, at least if the defendant is aware of the mistake.⁴⁹ It would follow that defendants who were aware that they were in the possession of property transferred by mistake and have used it for their own purposes would fulfil the *actus reus* for theft by virtue of s 5(1) and would be guilty of the offence provided their conduct were found to be dishonest. In truth, it might be asked whether such conduct should be treated as criminal and certainly whether it is best characterised as a species of theft.⁵⁰ However, the issue is essentially moot, given that s 5(4) was passed to achieve the same result even if that provision was rendered superfluous by the decision in *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* to recognise a constructive trust in these circumstances.⁵¹

3 *Undue influence*

Undue influence would perhaps have been the most obvious basis for suggesting that the transferor's intention to make the gifts in *Hinks* was vitiated. Again, in situations where undue influence results in a contract, it seems likely that the courts would treat the owner as having a choice of setting aside the transaction rather than treating it as having no effect. After all, such a transaction

47 *Erlanger v New Sombrero Phosphate Co*, above n 46.

48 *Reese River Silver Mining Co v Smith* (1869) LR 4 HL 64 (HL); *Alati v Kruger* (1955) 94 CLR 216 at 223–224; and *Daly v Sydney Stock Exchange* (1986) 160 CLR 371. See O'Sullivan, above n 46.

49 This appears to be assumed in the following cases: *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105 (Ch); *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, above n 40; and *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 WLR 3179.

50 Compare Glanville Williams "Mistake in the Law of Theft" (1977) 36 CLJ 62 at 70.

51 *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*, above n 49. See also *R v Shadrokh-Cigari* [1988] Crim LR 465 (CA).

might actually prove to be advantageous to the transferor. Moreover, achieving fairness between the parties may require something more complex than a mere setting aside of the transaction in question.⁵²

It is, in contrast, less clear what view might be taken in cases, like *Hinks*, where gifts are involved. The judicial orthodoxy is that, where gifts made by settlement or voluntary dispositions by trustees are liable to be set aside on the grounds of a mistake, the transfer is voidable with a judicial order setting aside the instrument being required to effect rescission.⁵³ This might suggest that s 5(1) would have no application unless and until such an order is made or, at the very least, until an application to rescind is made. Whether the same approach would be taken in cases of undue influence or duress where gifts were made without the means of any formal instrument is unclear. It is possible that a simple gift would be treated in much the same way as a mistaken transfer, with the transferee holding the gift on constructive trust from the moment it was received. This would suggest that defendants who were dishonest in procuring a gift and/or in subsequently dealing with the subject matter of the gift would be guilty of theft, and would suggest an alternative basis for deciding *Hinks* in the same manner. Whether such cases are best treated as instances of theft is another matter. While the Court in *Hinks* had no doubt about the defendant's dishonesty, the conduct is not aptly described as theft as that term is normally used.

D Theft and Traceable Proceeds

One common way in which constructive trusts arise is via the process of tracing.⁵⁴ Claimants whose property is misappropriated are entitled to assert title to the proceeds of such assets. The most obvious consequence of tracing is that a claim may be brought against the proceeds of property that are in the hands of one who has breached a trust or other fiduciary duty. If s 5(1) might apply to traceable proceeds, one consequence would be that a trustee who has committed theft by misappropriating trust property would potentially be subject to criminal liability with almost infinite regress, whereby every new act of exchanging traceable proceeds of trust assets for other assets would amount to a further theft, thereby raising the spectre of double jeopardy. In truth, there is no indication that prosecutors would be inclined to explore this possibility or that the courts would be liable to pay much attention to such notionally separate, if plainly related, offences when it came to sentencing. Nonetheless, it seems reasonable to think that a thorough reform of property offences should not create the potential for such anomalies.

52 See generally *O'Sullivan v Management Agency and Music Ltd* [1985] 1 QB 428 (CA); and *Cheese v Thomas* [1994] 1 WLR 129 (CA).

53 *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108.

54 Interests under constructive trusts arising through tracing will fall within s 5(1). Some such interests will equally fall within s 5(3), which provides that the property or proceeds received by one person on account of another "shall be regarded ... as belonging to the other". See Smith, above n 1, at 102–109.

The principal benefit of pursuing the right to traceable proceeds held by an errant fiduciary rather than asserting rights arising from the misappropriation of the original property is that it may be advantageous for the claimant should the fiduciary be insolvent. It is difficult to see, however, what such concerns have to do with the law of theft.⁵⁵

A second advantage of tracing is that it permits owners to sue third-party recipients who have received traceable proceeds.⁵⁶ Thanks to rights that arise by virtue of tracing, the owner can hold third parties liable as constructive trustees to the extent that they are still in possession of traceable proceeds of the original property and/or bring a personal claim for unconscionable receipt to the extent that proceeds initially received by the third party have been dissipated.⁵⁷ Receipt of traceable assets could potentially amount to the appropriation of property belonging to another, even if it is transferred from a trustee rather than the party with a right to trace.

While it may be useful for the civil law to provide that property rights can be asserted in the exchange product of an owner's assets to provide the right to hold third-party recipients liable to compensate owners, it is hardly obvious that such parties should be subject to the criminal offence of theft. The essential harm to the defendant has been committed in the original act of appropriation, and to treat later dealings with the exchange product of the property in question as theft would seem to be overreaching.

On the other hand, it might be asked whether the Theft Act 1968 will readily apply in cases of equitable tracing. The notion that rights generated by tracing are fully fledged property rights that arise automatically faces a problem that Birks termed the "geometric multiplication of the plaintiff's property".⁵⁸ Claimants have the choice between asserting their title against anyone holding assets that were taken from them or "tracing" their title into the exchange product of subsequent transactions.⁵⁹ Prior to an exercise of this power of election, the interest is more plausibly characterised as a mere equity. This view was taken, for example, by Porter MR in *Re Ffrench's Estate*, the effect of this being that a subsequent purchaser of an equitable interest in the traceable property was not bound by the

55 Smith "Constructive Trusts in the Law of Theft", above n 5, at 401.

56 *El Ajou v Dollar Land Holdings plc*, above n 41.

57 *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 (CA).

58 Peter Birks *An Introduction to the Law of Restitution* (revised ed, Clarendon Press, Oxford, 1985) at 92 and 394.

59 The matter may be different where one traces in circumstances where the proceeds in question are the product of an authorised sale of the claimant's property by an agent (instances that will largely fall within s 5(3)). Rights to such proceeds would be understood to arise automatically without any need for election because the choice to give up the rights to the initial asset was effectively made when the agent was invested with the authority to sell.

equity.⁶⁰ The analysis of tracing as contingent on the exercise of a power is consistent with the conceptualisation of the doctrine in conventional legal discourse. Thus, in *Lipkin Gorman v Karpnale Ltd*, Lord Goff remarked:⁶¹

Of course, "tracing" or "following" property into its product involves a decision by the owner of the original property to assert his title to the product in place of his original property.

This would suggest that, while owners may trace the proceeds of their property, such proceeds would not have amounted to "property belonging to another" for the purpose of any dealings that preceded the claimant's election to trace.

E Constructive Trusts over the Profits Derived from Breaches of Fiduciary Duty

A long-running controversy in the civil law concerned rights arising in respect of profits made from a breach of fiduciary duty. *Keech v Sandford* has long stood as authority for the proposition that at least some property obtained in breach of a fiduciary duty is held on constructive trust.⁶² In addition, a number of cases appeared to assume that property acquired as the result of exploiting opportunities obtained from a fiduciary position was held on constructive trust even if the principal would not have been in a position to take advantage of the opportunity.⁶³ Many of these cases have in common the feature that the assets in question are relatively unique. It may be that the claimant had a particular interest in the opportunity that was thwarted by the defendant, and either or both of the parties may have attached a value to the property that exceeded its market price.⁶⁴ Alternatively, the courts may consider that it is preferable to award specific relief because it removes any difficulties in valuing the assets in question that would have to be faced if monetary relief were granted. Such difficulties may be acute where the asset is something that does not have a readily identifiable market price.⁶⁵

A further concern that looms large is a desire to ensure that defendants do not profit from their wrongs. A particular issue relates to the possibility that defendants may have fruitfully used the initial

⁶⁰ *Re Ffrench's Estate* (1887) 21 LR Ir 283 (Ir CA).

⁶¹ *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL) at 573. See also Jessel MR's observation in *Re Hallett's Estate* (1880) 13 ChD 696 (CA) at 708 that, "[i]f the sale was wrongful, you can still take the proceeds of the sale, in a sense adopting the sale for the purpose of taking the proceeds".

⁶² *Keech v Sandford* (1726) Sel Cas Ch 61, 25 ER 223.

⁶³ *Cook v Deeks* [1916] 1 AC 554 (PC); *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (HL); and *Boardman v Phipps* [1967] 2 AC 46 (HL).

⁶⁴ This appears to have been a factor in the Canadian Supreme Court decision in *Soulos v Korkontzilas* (1997) 146 DLR (4th) 214 (SCC) at 221 per McLachlin J.

⁶⁵ Cases involving shares in private companies or real estate may readily be understood on this basis. See generally *Boardman v Phipps*, above n 63; and *Regal (Hastings) Ltd v Gulliver*, above n 63.

profit obtained from a wrong to generate further wealth. Awarding a constructive trust enables claimants to take advantage of tracing rules, and generous evidential presumptions associated with them, to strip defendants of any proceeds of the initial fruits of the breach.⁶⁶ The law has not developed rules that provide for the recovery of such remote profits through personal remedies.⁶⁷

On the other hand, in *Lister & Co v Stubbs* the Court of Appeal took the position that the remedy in a case where an employee responsible for procuring supplies for his employer's business took secret commissions from a supplier was personal and not proprietary.⁶⁸ Here the fact that the wrongful gain was in the form of money meant that the award of specific relief offered no advantages in relation to the quantification of the defendant's benefit. Perhaps it was this factor that encouraged Lindley LJ to focus on the other consequences of proprietary relief. His Lordship expressed the view that the consequences that a constructive trust would have in the event of the defendant's insolvency could not be justified.⁶⁹

The impact in insolvency is indeed one of the most important consequences flowing from the award of proprietary relief. Whereas a claimant seeking to enforce a personal obligation to account for profits must line up with other unsecured creditors, assets that are impressed with a constructive trust do not form part of a bankrupt defendant's estate and are not available for distribution amongst unsecured creditors. Where a defendant is insolvent, concerns about wrongdoers profiting from their misdeeds fall away, and the contest is effectively between the claimant and the defendant's creditors. In these circumstances, it becomes difficult to justify the award of proprietary relief where the claim does not concern assets that belonged to the claimant. For this reason, Lindley LJ's concerns appear well founded.

The issue of the application of s 5(1) in this context arose in *Attorney-General's Reference (No 1 of 1985)*.⁷⁰ The Court of Appeal considered whether that section applied in the case of the manager of a public house who had profited from a breach of the fiduciary duty that he owed to his employer. The defendant was permitted to sell only his employer's products and was obliged to deposit the resulting profits into an account belonging to his employer. Instead, he was in the practice of acquiring supplies from another source, selling them to clientele at the public house and keeping the profits for himself. The Court asked whether the defendant would have been a constructive trustee of any of the unauthorised profits and, if so, whether that would mean that they were "property belonging to

66 *Foskett v McKeown* [2001] 1 AC 102 (HL).

67 Compare *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [2012] Ch 453 at [91] per Lord Neuberger MR. It was suggested that the law might be developed to allow claimants to use tracing rules to assert a personal claim to profits.

68 *Lister & Co v Stubbs* (1890) 45 Ch D 1 (CA).

69 At 15.

70 *Attorney-General's Reference (No 1 of 1985)* [1986] 1 QB 491 (CA).

another" by virtue of s 5(1). While the Court accepted that the manager would have a duty to account for the secret profits, it concluded that *Lister & Co v Stubbs* dictated that his liability was personal rather than proprietary.⁷¹ Secondly, it concluded that, even if a constructive trust did arise on the facts, "it is not such a trust as falls within the ambit of section 5(1) of the Theft Act 1968".⁷²

At the time that *Attorney-General's Reference* was decided, *Lister & Co v Stubbs* was heavily contested. Commentators generally regarded the decision as irreconcilable with the courts' general willingness to award constructive trusts for breaches of fiduciary duties.⁷³ On the other hand, academics who closely examined *Keech v Sandford* have suggested that the decision might have turned on the manner in which the courts conceptualised the renewal of leases and should not necessarily be taken as indicating that fiduciaries would hold as constructive trustees any property obtained in breach of their duties.⁷⁴ In addition, the suggestion that the case law supported a general principle that constructive trusts arise in cases where fiduciaries have exploited opportunities obtained from their position was undermined by the fact that the courts had seldom addressed the issue of the proprietary nature of relief in any depth. The question as to whether the principal in such cases enjoyed a full-blown beneficial interest or instead benefited from a right to elect to claim specific relief did not arise. Indeed, the courts in these cases often failed to distinguish between a personal liability to account for profits and proprietary relief by way of a constructive trust.⁷⁵ As a result, the arguments for and against these positions were not fully rehearsed. Some commentators suggested that the reluctance of the Court in *Lister & Co v Stubbs* to redistribute proprietary rights had much to recommend it as a matter of principle and that the consequences in insolvency of awarding constructive trusts over such profits were difficult to defend as a matter of policy.⁷⁶

The Privy Council chose not to follow *Lister & Co v Stubbs* in *Attorney-General for Hong Kong v Reid* in concluding that bribes received by the defendant while serving as a government employee responsible for prosecuting criminals were held on constructive trust.⁷⁷ Lord Templeman, in giving the advice of the Board, followed an argument developed by Sir Peter Millett extrajudicially that employed the maxim "equity regards as done that which ought to be done" to convert what would

71 At 505.

72 At 507.

73 See for example the list provided by Richardson J in the New Zealand Court of Appeal in *Attorney-General for Hong Kong v Reid* [1992] 2 NZLR 385 (CA) at 393.

74 Stephen Cretney "The Rationale of *Keech v Sandford*" (1969) 33 Conv 161; and Andrew D Hicks "The Remedial Principle of *Keech v Sandford* Reconsidered" (2010) 69 CLJ 287.

75 Birks, above n 58, at 388.

76 At 387–389.

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

have seemed to be a personal obligation to account into a proprietary right.⁷⁸ Commentators regarded the reasoning in *Reid* as unconvincing.⁷⁹

Subsequently, in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*, the Court of Appeal applied *Lister & Co v Stubbs* rather than following *Reid*.⁸⁰ The claimant in *Sinclair* was seeking a constructive trust in order to assert rights to assets that had already been recovered by one of the defendant's creditors in enforcing a floating charge. In contrast to many earlier authorities dealing with benefits gained in breach of a fiduciary duty, the case directly concerned the issue of the impact of proprietary relief in insolvency. Lord Neuberger MR's starting point was the principle that the Court of Appeal could not prefer a Privy Council ruling to an earlier decision of the Court unless there were domestic authorities that suggested that the latter decision was reached per incuriam or was at least unreliable.⁸¹ His Lordship argued that, not only was this threshold not satisfied, but that the advice of the Privy Council in *Reid* was defective in its analysis as a matter of principle and unbalanced in its consideration of the relevant authorities. He concluded that Lord Templeman's analysis was undermined by a circularity resulting from an assumption that a proprietary right arose without any real explanation as to why this should have been so,⁸² and that it "may have given insufficient weight to the potentially unfair consequences to the interests of other creditors".⁸³

His Lordship sought to reconcile the authorities on the provision of proprietary relief over profits earned from breaches of fiduciary duty by suggesting that constructive trusts arose only 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".⁸⁴ This represented a valiant attempt to draw the line between the secret commission or bribe cases and the class of cases where the courts had been prepared to award constructive trusts. In truth, however, the basis of any justification for such a distinction was difficult to discern.

When the matter was addressed again by the Court of Appeal a year later in *FHR European Ventures LLP v Mankarious*, it seemed apparent that the line that Lord Neuberger MR had proposed

78 At 331.

79 Paul Finn "Equitable Doctrine and Discretion in Remedies" in William Cornish, Richard Nolan and Janet O'Sullivan (eds) *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (Hart Publishing, Oxford, 1998) 251 at 263.

80 *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*, above n 67, per Lord Neuberger MR (followed by Hughes and Richards LJ).

81 See *Re Spectrum Plus Ltd (in liq)* [2005] UKHL 41, [2005] 2 AC 680 at [153] per Lord Walker.

82 *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*, above n 67, at [78].

83 At [83].

84 At [80] per Lord Neuberger MR.

to draw was likely to be untenable.⁸⁵ The defendant agent in that case had been tasked by the owner of a hotel with finding potential purchasers for the sale of the hotel in return for a commission in the event of a sale, on the understanding that this appointment was to be disclosed to potential purchasers. The defendant encouraged the claimants to purchase the hotel, indicating that it was being sold through his consultancy business but failing to inform them of the terms of his brokerage arrangement with the owners of the hotel that would see him take a commission on the sale. When the claimants learned of the undisclosed commission, they sued, claiming that the defendant held that commission for them on constructive trust. The facts would appear difficult to distinguish from *Lister & Co v Stubbs*, by which the Court accepted it was bound. However, in giving separate opinions all three members of the Court agreed that the case should be characterised as one where the defendant had taken an "asset" in the form of the opportunity to acquire the hotel at a lower price.⁸⁶ The notion of such an opportunity representing an asset belonging to the defendant's principal appears artificial. Moreover, it is, however, difficult to see how the secret commissions accepted in *Lister & Co v Stubbs* did not equally result in the principal in that case losing the opportunity to acquire the materials purchased by his employee on his behalf at a lower price than was paid.

When it heard the defendant's appeal of the decision, the Supreme Court appeared to accept that the distinction drawn in *Sinclair Investments* was not workable.⁸⁷ The matter was resolved by a sole judgment given by Lord Neuberger, who had since become President of the Court. His Lordship reversed the course he had taken in *Sinclair Investments* and suggested that, in the interests of consistency and simplicity, a constructive trust should always be awarded over profits gained from a breach of fiduciary duty.⁸⁸ His Lordship had little to say about the policy considerations that led him in *Sinclair Investments* to decide against awarding proprietary relief and to suggest that the outcome in *Reid* was ill advised. He noted that the effect of the decision was to overrule decisions that relied on *Lister*, including *Attorney-General's Reference*.⁸⁹

The result of *FHR European Ventures* would appear to be that fiduciaries profiting in breach of a fiduciary duty would be liable for theft, provided it could be established that they had been dishonest. It might be objected that *Attorney-General's Reference* held that a constructive trust awarded in these circumstances would not fall within s 5(1) and that this conclusion remains even after the fall of *Lister & Co v Stubbs*. Moreover, it might be argued that this conclusion would equally preclude a finding of theft in other contexts where the law has long recognised that a constructive trust arises in the aftermath of a breach of a fiduciary duty, such as the corporate opportunity cases. It is, however, very

85 *FHR European Ventures LLP v Mankarious* [2013] EWCA Civ 17, [2014] Ch 1.

86 At [69] per Pill LJ.

87 *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250.

88 At [35].

89 At [50].

difficult to take this conclusion seriously.⁹⁰ Lord Lane CJ's rejection of the proposition that "section 5(1) ... import[s] the constructive trust into the Theft Act 1968" in *Attorney-General's Reference*⁹¹ is at odds with the analysis offered by the Court of Appeal in *R v Shadrokh-Cigari*.⁹² There, the Court recognised that the effect of the post-Act decision in *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*⁹³ that a mistaken payment is held by the transferee on constructive trust for the transferor meant that dishonest dealings with such payments or their proceeds would amount to theft by virtue of s 5(1). The Court in *Shadrokh-Cigari* noted that the effect of this was to render redundant s 5(4), which had been passed specifically to bring such cases within the offence of theft.⁹⁴ Moreover, the fact that s 5(1) specifically excludes one form of constructive trust ("an equitable interest arising only from an agreement to transfer or grant an interest") implicitly indicates that constructive trusts generally fall within that section.

It is difficult to see what would be gained if the law provided that the defendant in *Reid* was not only guilty of a crime for accepting a bribe to obstruct the prosecution of certain crimes but potentially guilty of theft in spending that bribe. The inclusion of such property held subject to such constructive trusts within s 5(1) would appear to expose defendants guilty of other criminal conduct to the risk of double jeopardy. In other instances where the fiduciary breach is far less blameworthy, such as in *FHR European Ventures*, there seems little to be said for treating the matter as potentially giving rise to a crime. As Lord Lane CJ warned in *Attorney-General's Reference*, if secret profits cases fell within s 5(1) "then a host of activities which no layman would think were stealing will be brought within the Theft Act".⁹⁵

Doubt must remain as to what actions might fall within s 5(1) after *FHR European Ventures*. Would the offence now extend to the defendant in *Regina v Rashid*, a British Rail steward who it was alleged was in the practice of selling to passengers sandwiches he had made himself rather than the food supplied by his employers and keeping the profits for himself?⁹⁶ ATH Smith explored whether the defendant might have potentially been guilty of theft if it could have been established that he had collected the proceeds and treated them as his own.⁹⁷ Now that *Lister & Co v Stubbs* is no longer regarded as good law, it might be that the answer to this question would depend on whether Mr Rashid

90 Smith, above n 1, at 126–127.

91 *Attorney-General's Reference (No 1 of 1985)*, above n 70, at 506.

92 *R v Shadrokh-Cigari*, above n 51.

93 *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*, above n 49.

94 *R v Shadrokh-Cigari*, above n 51, at 467.

95 *Attorney-General's Reference (No 1 of 1985)*, above n 70, at 503.

96 *Regina v Rashid* [1977] 1 WLR 298 (CA).

97 Smith "Constructive Trusts in the Law of Theft", above n 5, at 395–399.

was regarded as a fiduciary. The answer to that is not obvious: employees are sometimes treated as fiduciaries, but it may depend on how much trust and confidence was reposed in them. It might be asked whether this issue should be regarded as determinative and, if so, whether it is really an appropriate matter to be left to a jury.

Would profitable breaches of a fiduciary duty necessarily give rise to an immediate equitable interest in the property acquired, or might the principal's interest initially be a mere equity that will not fall within s 5(1)? It might be argued that there is at least an important class of cases that would be best understood as providing the claimant with nothing more than an equity to set aside the transaction in question. In cases where the claimant objects to the defendant's acquisition of an asset that should have been acquired, if at all, for the benefit of the claimant, it is difficult to conceptualise the asset as belonging in equity to the claimant from the outset. It is perfectly possible, for example, that an opportunity acquired in breach of a fiduciary duty may prove to be unprofitable. Moreover, claimants who seek to claim the asset in question will have to reimburse the defendant for the consideration furnished for the benefit, and it cannot be assumed that they would choose to do so in every case. On occasion, the defendant may be entitled to an allowance for skill and labour expended in generating the profit in question.⁹⁸ In such cases, what is required is both an election on the part of the principal to assert a proprietary right to the property in question and a determination by the court of what is required of the claimants in return for the proprietary interest they have sought. Not only is it difficult to see that claimants could be said to have more than a mere equity before they have elected to seek to assert a proprietary interest, but it would also be hard to argue that claimants will enjoy a full beneficial interest under a constructive trust until they have satisfied any conditions set out by the court.

It might be supposed that this issue would not arise in relation to bribes or secret commissions, where it might be argued that relief is uncomplicated in that there will generally be no issue as to the claimant needing to decide whether to assert rights to an opportunity that might prove unprofitable or any question of remuneration for expenses or allowances for services provided. It is still possible, however, that the courts might decide that a constructive trust is not available as of right in such cases. This is the view taken in Australia, where courts have embraced a vision of the "remedial constructive trust".⁹⁹ In *Grimaldi v Chameleon Mining NL (No 2)*, the Full Federal Court of Australia endorsed the view that a constructive trust should be available in cases in respect of bribes or secret commissions accepted in breach of fiduciary duty.¹⁰⁰ However, it held that the court had a discretion as to whether such an award was appropriate and should take account of factors such as the competing

98 See generally *Boardman v Phipps*, above n 63.

99 *Giumelli v Giumelli* [1999] HCA 10, (1999) 161 ALR 473 at 485; *Bathurst City Council v PWC Properties Pty Ltd* [1998] HCA 59, (1998) 157 ALR 414; and *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* [2010] HCA 19, (2010) 266 ALR 462 at [128].

100 *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6, (2012) 287 ALR 22.

interests of the defendant's creditors. The Court contrasted its approach with that taken by the Privy Council in *Attorney-General for Hong Kong v Reid*, indicating that: "*Reid* has the constructive trust arising the moment the bribe is received. In Australia, the constructive trust in this setting is a discretionary remedy."¹⁰¹ It would follow that any actions taken by the defendant in relation to the wrongful gain before that point would not fall within s 5(1).

FHR European Ventures stands, in contrast, as a testament to the unwillingness of the English judiciary to recognise the "remedial constructive trust".¹⁰² This is generally understood as rejecting the related suggestions that whether a constructive trust arises might depend on an exercise of judicial discretion and that, rather than coming into existence at the time of the events that give rise to the claim, the interest in question might arise when declared by the courts, albeit with retrospective effect.¹⁰³ The result is that a fiduciary who subsequently treats any profits obtained through such a breach will have "appropriated property belonging to another".

IV CONCLUSION

The Theft Act 1968 has widely been regarded as a failure as a result of the judicial interpretation of the notion of "appropriation of property belonging to another" being starkly out of step with the understanding of those responsible for drafting the legislation. In addition, however, it would seem that those responsible for the reform gave inadequate thought to the question as to whether interests arising under constructive trusts should be covered by the law of theft.

The law on constructive trusts is complex and unpredictable. As cases decided since the Act was passed, such as *Chase Manhattan* and *FHR European Ventures*, demonstrate, it is difficult to second-guess how the courts might extend the scope of the constructive trust. The result of the decision to draft s 5(1) so that property held by a defendant on constructive trust is treated as "property belonging to another" has been to ensure that "a host of activities which no layman would think were stealing [have been] brought within the Theft Act".¹⁰⁴

This article suggests that constructive trusts might give rise to proprietary rights without the exercise of a right of election or the intervention of the court less often than is commonly supposed. On the one hand, this may be seen as something of a blessing, as it means that there is less scope than is sometimes assumed for applying the Theft Act 1968 in the context of constructive trusts. On the

101 At [582].

102 *FHR European Ventures LLP v Cedar Capital Partners LLC*, above n 87, at [47] per Lord Neuberger P. For earlier rejections of this concept, see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, above n 40, at 714–716 per Lord Browne-Wilkinson; and *Re Polly Peck International plc (in administration) (No 2)* [1998] 3 All ER 812 (CA) at 830 per Nourse LJ.

103 See Craig Rotherham *Proprietary Remedies in Context* (Hart Publishing, Oxford, 2012) at ch 1.

104 *Attorney-General's Reference (No 1 of 1985)*, above n 70, at 503 per Lord Lane CJ.

other hand, the law on the point is undeveloped and confusing. Moreover, the considerations that are likely to be critical in deciding whether a right of action gives rise to a mere equity as opposed to a full-blown property right are unlikely to bear any relationship to reasons which might be thought to be relevant to determining whether the defendant's conduct should be treated as amounting to theft.

Ultimately, constructive trusts are recognised for objectives that have little to do with the reasons for enforcing proprietary interests that arise in other ways. Thus, the fact that it might be thought appropriate to confer the advantages in insolvency that come with having a proprietary remedy is unlikely to provide an indication that it would be proper to bring the defendant within the scope of the Theft Act 1968.

It is true that, in practice, the law of theft will function well enough, as we can generally rely on prosecutors to exercise judgement and so not to pursue cases that do not merit it, and we can trust jurors to use common sense and to rely on the discretion effectively conferred by the requirement to establish dishonesty. However, this was broadly true of the state of the law prior to the reform effected by the Theft Act 1968. The goals of the reform to make the law of theft more rational, simpler and more transparent remain both unfulfilled and as worthy of pursuit as ever.