PROPERTY IN THE PROFITS OF WRONGDOING

PETER BIRKS*

The Judicial Committee of the Privy Council has recently held that, at least in the case of the wrong of bribery, it is possible for the victim to assert an equitable property in the profits of wrongdoing and, after tracing, in the assets in which the ill-gotten gains are invested. The aim of this note is to put that decision in the wider context of the law of restitution for wrongs. The note thus raises the question whether the new property right can be rationally restricted to one wrong and asks whether, if it can only be an isolated anomaly, it ought not to be suppressed. The opposite possibility is not excluded, namely that, however novel, the new mode of acquiring ownership ought to be encouraged and generalized.

There is an intriguing remedial question which belongs to both the law of restitution and the law of civil wrongs. The unfamiliar "civil wrongs" is used advisedly, to avoid the anachronistic tendency of "tort" to exclude wrongs whose historical root is in the Court of Chancery. The question is whether it is possible for the victim of a wrong to claim a gain made by the wrongdoer instead of, or as well as, his own loss. Can the victim have restitutionary rather than, or in addition to, compensatory damages? For present purposes we need not complicate matters by pursuing the relationship between the two species of recovery, cumulative or alternative. Can he have restitutionary damages at all? At a certain level of generality the answer is not in doubt, though it has long been obscured by quaint language.[1] There are undoubtedly circumstances in which the victim may go for the wrongdoer's gain. It is more difficult to say precisely in what circumstances the gain-based

* Regius Professor of Civil Law, All Souls College, Oxford.

1. The present law is surveyed in Eng Law Comm *Aggravated, Exemplary and Restitutionary Damages* CP No 132 (London: HMSO, 1993) pt 7. See also R Goff & G H Jones *The Law of Restitution* 4th edn (London: Sweet & Maxwell, 1993) pt 3, esp ch 38. On the semantic problems, see P Birks "Civil Wrongs — A New World" *Butterworth Lectures* (London: Butterworths, 1992) 56, 58ff.

claim will succeed.[2]

There is another question which troubles the law of restitution. It arises right across the board and not only when the law of restitution is considering the remedies for wrongs. Most restitutionary claims are personal ("in personam"). That is, they suppose that the defendant owes something to the plaintiff but do not assert that there is anything in the defendant's possession which the plaintiff owns or in which he has some property less than full ownership. Nevertheless, in some circumstances a restitutionary plaintiff can maintain a claim which is proprietary ("in rem"). When that is the case, the claim does assert that the defendant holds something which is owned by the plaintiff, or which is co-owned by him in some proportion, or in which he has a security interest such as an equitable lien. Here the task of the law of restitution, not yet successfully discharged, is to identify the circumstances in which the claims which it recognizes are given effect in rem or, in other words, the facts on which a restitutionary proprietary interest arises.[3]

When these two questions, one about restitution for wrongs and the other about restitution in rem, are put together, the law faces an issue of extreme difficulty and one which requires to be approached with some caution. When, if ever, can the victim of a wrong assert, not merely a personal claim to the defendant's gains, but a proprietary claim to the assets in which those gains have been invested? Again, an answer can be fairly easily given so long as the question is left at a certain level of generality. There are undoubtedly some circumstances in which it can be done. The obvious cases, though even they are not without latent difficulties, are instances of

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2. Goff & Jones supra n 1, 720–725 takes a liberal view, giving the plaintiff the option to seek restitution wherever the gain is truly attributable to the tort. Burrows, after a characteristically full and fair review of competing views, is reluctant to go so far: the law will use restitutionary awards chiefly to protect facilitative institutions (as to which see Jackman below) and to deter cynical wrongdoing for profit: see A S Burrows *The Law of Restitution* (London: Butterworths, 1993) 381 ff, esp 394-396. See also: D Friedman "Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong" (1980) 80 Col LR 504; I M Jackman "Restitution for Wrongs" [1989] Cam LJ 302.

3. Goff & Jones supra n 1, 95–102 still contemplates a flexible jurisdiction which would accord proprietary rights after weighing particular factors such as merits in the fight for priorities. Cf *Lord Napier and Ettrick v Hunter* [1993] AC 713. But property rights determine many issues and affect many people in different contexts, so that it is arguably impossible to treat property rights as malleable. Gummow appears, rightly in the author's view, to insist on more stable doctrines: see "Unjust Enrichment, Restitution and Proprietary Remedies" in P D Finn (ed) *Essays on Restitution* (Sydney: Law Book Co, 1990) 47, 71–86. *Liggett v Kensington* JCPC 25 May 1994 gives very little encouragement to the notion of malleable property rights.

misappropriation, whether at law[4] or in equity.[5]

LISTER v STUBBS

This brings us to the wrong of bribery, with which the tort segment of the common lawyer's brain evidently has some difficulty.[6] In the centre of the picture lies the famous or, as its enemies would say, notorious case of *Lister & Co v Stubbs*.[7] *Lister* has long been the focus of dispute. It only decided an issue of interlocutory relief, but the interlocutory question required a view to be taken of precisely the substantive matter which is now under consideration: if an agent received a bribe and used it to make a successful investment, did the victim-principal acquire a proprietary interest in the assets thus acquired?

Stubbs was a buyer for Lister & Co, his employer. He took secret commissions from the sellers with whom he placed contracts. With the commissions he bought a house. Lister & Co made various claims against him and sought interlocutory relief in the form of an order restraining Stubbs from dealing with the house. A very strong Court of Appeal (Cotton, Lindley and Bowen LJJ) held that the availability of the interlocutory relief depended on the plaintiffs' having a proprietary interest in the house. And they did not have one. Ownership and obligation were not to be confused.[8] A bribed agent thus owed the victim-principal the amount of the bribe, but the principal did not own that which the defendant received. The principal's claim was personal, not proprietary.

This has divided the commentators. *Lister v Stubbs*, although followed in subsequent cases,[9] has encountered powerful enemies[10] and found rather

4. *Taylor v Plumer* (1815) 3 M & S 562 (over which, however, a question mark hangs as to whether Lord Ellenborough considered himself operating in law or equity — more probably the latter).
5. *Re Hallett's Estate* (1880) 13 Ch D 696.
6. The leading textbooks have generally failed to index either "bribery" or "corruption". This is certainly still true of *Clerk & Lindsell on Torts* 16th edn (London: Sweet & Maxwell, 1989); *Salmond & Heuston on Torts* 20th edn (London: Sweet & Maxwell, 1992); *Street on Torts* 9th edn (London: Sweet & Maxwell, 1992); *Winfield & Jolowicz on Torts* 13th edn (London: Sweet & Maxwell, 1989).
7. (1890) 45 Ch D 1.
8. Id, Lindley LJ, 15; cf Cotton LJ, 12.
9. *Powell & Thomas v Evans, Jones & Co* [1905] 1 KB 11; *A-G v Goddard* (1929) 98 LJKB 743; *Iran Shipping Lines v Denby* [1987] 1 Lloyds Rep 367.
10. R P Meagher, W M C Gummow, J R F Lehane *Equity: Doctrines and Remedies* 3rd edn (Sydney: Butterworths, 1992) ¶¶ 540–544; Goff & Jones supra n 1, 668–669; D J Hayton "Constructive Trusts: Is the Remedying of Unjust Enrichment a Satisfactory Approach?" in T G Youdan (ed) *Equity Fiduciaries and Trusts* (Toronto: Law Book Co, 1989) 205, esp 211, 221–226.

few friends.[11] The dispute came to a head a decade ago in a criminal context, when the Attorney- General asked the English Court of Appeal to rule on the question whether a manager trusted by his employer to sell only the employer's product could be said to have stolen the money which he received by selling on his own account a similar product made by a competitor. If the manager of a tied pub sold beer other than that made by the owner, did he steal the proceeds which he pocketed? The answer was no: he was personally accountable to his employer for the money which he received in breach of duty but nothing that he received vested in his employer rather than in himself.[12]

However, that decision has not prevented the dispute from erupting again in a civil context. A huge bribery scandal was disclosed in relation to the leading Indonesian oil company, Pertamina. That led to litigation in the High Court of Singapore. A masterly judgment by Lai Kew Chai J, in *Sumitomo Bank Ltd v Katika Ratna Thahir*,[13] reflected on the arguments for and against the position taken in *Lister v Stubbs* and decided, not being bound, that the English Court of Appeal should not be followed. At the same time a paper written by Sir Peter Millett took a similar view.[14] At one of the seminars held in All Souls College, Oxford by the Society of Public Teachers of Law ("SPTL"), Sir Peter concluded that *Lister v Stubbs* was indefensible in terms of authority, principle or policy.

A-G (HONG KONG) v REID

Already at that time on its way from the New Zealand Court of Appeal to the Judicial Committee of the Privy Council, *Attorney-General for Hong Kong v Reid*[15] seemed to have been invented to put the question to the test.

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11. Professors Goode and Birks stand virtually alone: R M Goode "Property and Unjust Enrichment" in A S Burrows (ed) *Essays on the Law of Restitution* (Oxford: Clarendon Press, 1991) 215; and "The Recovery of a Director's Improper Gains: Proprietary Remedies for the Infringement of Non-Proprietary Rights" in E McKendrick *Commercial Aspects of Trusts and Fiduciary Obligations* (Oxford: Clarendon Press, 1992) 137; P Birks "Personal Restitution in Equity" [1988] LMCLQ 128, discussing *Iran Shipping Lines v Denby* supra n 9.
12. *A-G's Ref (No 1 of 1985)* [1986] 2 WLR 735.
13. [1993] 1 SLR 738.
14. Sir Peter Millett (now the Rt Hon Lord Justice Millett) "Bribes and Secret Commissions — Remedies: The Error in *Lister v Stubbs*" in P Birks (ed) *Frontiers of Liability* vol 1 (Oxford: OUP, 1994) 51–64. See also n 16 below and text thereto.
15. [1993] 3 WLR 1143, on appeal from the High Court of New Zealand [1992] 2 NZLR 385; noted by P Watts (1994) 110 LQR 178; R C Nolan (1994) 15 Co Lawyer 3; R A Pearce [1994] LMCLQ 189.

However, when the date for the hearing in London was announced, it was immediately obvious that the book of the SPTL seminar papers would come out too late. The editor of the *Restitution Law Review* came to the rescue. He agreed to rush out Sir Peter's paper.[16]

Battle was duly joined. The facts of *Reid* conformed exactly to the pattern of *Lister v Stubbs* itself. The scale was larger. A corrupt Crown prosecutor in Hong Kong had taken huge bribes to pervert the course of justice. He later bought land in New Zealand. The New Zealand courts found that the bribe money was traceable to the land but held that the recipient of a bribe was only personally accountable. They deferred to the authority of *Lister v Stubbs*. Thus in New Zealand the Attorney-General failed to maintain caveats in the land register against dealings with the land in which the bribes were invested.

As did the High Court of Singapore in the Pertamina case, the Privy Council has taken the opposite view. The desire to hit corruption hard is easily perceived as providing the energy which powers the advice written by Lord Templeman. The technical ground for holding that the government of Hong Kong was entitled to a proprietary claim appears to be that earlier courts have failed to understand and apply the maxim that equity regards as done that which ought to be done. The recipient of a bribe ought at the moment of its receipt to hand it over to his principal. The maxim therefore makes the bribe the principal's even before delivery.[17]

In fact that technical point is less watertight than it may appear. The *Lister* court would probably say that you have to ask more carefully exactly what ought to be done and, if all that ought to be done is to render an account, no appeal to *Walsh v Lonsdale*[18] could confer a property in any specific thing received. Furthermore, it is far from clear that it is wise to saddle equity with a constitutional inability to recognize claims which are only personal. That is what *Lister* said that it could do and what it did on these facts. The trouble with dealing only in property rights is overkill. Every case puts in issue the priorities which might be claimed in a hypothetical insolvency and the prospect of an undeserved priority can then deter a court from doing what it might willingly do if property rights could be kept out of the way.

One can only regret the unrestrained power of the merits and the corresponding lack of technical craftsmanship in the *Reid* judgment. It was

16. P Millett "Bribes and Secret Commissions" [1993] Rest LR 7–30.
17. *Reid* supra n 15, 1146 E-H.
18. (1882) 21 Ch D 9.

not laudable to cast a slur on *Metropolitan Bank v Heiron*[19] simply because it was decided near the end of term, much less to tar *Lister* with the brush of having thoughtlessly followed a decision reached by judges who were already straining at their holiday leashes.[20] And there was more to be said and done with earlier authorities. Above all it would have been valuable to address the question whether the appearance of the language of constructive trusts in earlier judgments or orders necessarily connoted the existence of equitable proprietary rights.[21] The answer, above all where a defendant is solvent, ought to have been that trust language must not be taken to assume proprietary relationships.[22]

WRONGS OTHER THAN BRIBERY

Be that as it may, there is arguably no future in fighting the central point. It is true that the merits did have power, and it is obvious that most jurisdictions will not regret the new ruling that the victim-principal may go against the land or other assets in which the agent invested the bribe. Yet, if we accept that conclusion, we encounter some puzzles in relation to other wrongs. In the criminal law, at least in England, there will be surprisingly substantial consequences in the law of theft. That matter has already been addressed by Professor Sir John Smith and will not be pursued here.[23] In the civil law *Reid* gives an answer, for bribery, to the very difficult question raised in the third paragraph of this note. The victim-principal's claim arises on these facts in what ought to be called the law of restitution for wrongs. That is to say, there is no cause of action other than the wrong committed by the agent, so that the claim to restitution is nothing other than a remedy for that wrong. The only relevant connection between the principal and the gain to the agent is that the gain has been made by breach of duty to the principal. Only in that sense is the bribee's enrichment made "at the principal's

19. (1880) 15 Ch D 118.
20. *Reid* supra n 15, 1149.
21. A paper by D Crilley "A Case of Proprietary Overkill: *A-G for Hong Kong v Reid*" will explore this question in [1994] Rest LR (August 1994). Cf P Birks in E McKendrick (ed) *Commercial Aspects of Trusts and Fiduciary Obligations* supra n 11, 153–156.
22. The key case is certainly *Boardman v Phipps* [1967] 2 AC 46, in which the *All England Reports* alone reveal the declaration of constructive trust made at first instance by Wilberforce J [1964] 2 All ER 187, 189, 208, without, however, concluding discussion of the question whether, as against that very solvent defendant, the language of constructive trust implied property rights in the shares obtained in breach of the duty to avoid conflicts of duty and interest.
23. J C Smith "*Lister v Stubbs* and the Criminal Law" (1994) 110 LQR 180–184.

expense." So the question raised is whether the victim of a wrong can have a proprietary remedy in relation to assets bought by the wrongdoer with the proceeds of the wrong. The *Reid* answer, in relation to this one wrong, is that he can. The crucial question is whether that answer can be rationally confined to bribery.

It is important to notice that the facts of *Reid* cannot be analogized to the cases of misappropriation which were mentioned above. The case therefore opens a wider door. The reason is that the *Reid* story does not begin from any asset which was already, before the events in question, the property of the plaintiff. In such a case the plaintiff therefore has no proprietary base, at least not in the sense that before the series of events in question there was a "res" the property in which was in himself and which then remained his despite the transfer of possession to the defendant. Yet a proprietary base prior to a chain of substitutions is a necessary precondition of a proprietary claim after tracing through those substitutions, since without it we would have to say (which is manifest nonsense) that the mere process of tracing can create a property in the tracer.

How can a proprietary base be found in the *Reid* facts? The answer is that the proprietary base has to be created by a new rule to the effect that this kind of wrong is constitutive of title in its victim. That is to say, among the list of modes of acquiring ownership must be included a proposition to the effect that bribery or, more accurately, the taking of possession by a bribee confers on its victim a property in the bribe. That is essentially what is asserted by the proposition that the doctrine of *Walsh v Lonsdale* bit on the bribe at the moment of its receipt.[24] Whether this kind of piecemeal addition to the known modes of acquiring ownership will turn out to be acceptable must be regarded as doubtful, although it appears to have survived the letter, if not the stricter spirit, of the more recent decision of the Privy Council in *Liggett v Kensington*, again from New Zealand.[25] However that may be, there is no structural peculiarity of bribery capable of explaining why what can be done for it cannot be done for other acquisitive wrongs.

The analogy with misappropriation at law and in equity being put on one side, bribery thus turns out to be structurally identical to other acquisitive wrongs such as profitable battery — I was paid to beat you up — or defamation or inducing breach of contract or passing off or infringement of patent, and so on. That is to say, the defendant enriches himself merely by committing a breach of duty owed to the victim, that breach not consisting

24. Supra n 18 and text thereto.

25. *Liggett v Kensington* supra n 3, on appeal from NZ Court of Appeal [1993] 1 NZLR 257.

in an appropriation of any asset already belonging to the plaintiff. The crucial and sensitive issue is thus exposed in the law of civil wrongs: is there any wrong for which this proprietary trick cannot be worked? It is a question which is closely associated with, but much more difficult than, the first question introduced in this note: when can a plaintiff seek restitutionary damages in personam (ie, a gain-based money award) for the wrong of which he complains.

CONCLUSIONS

It is worth recalling the relationship of these questions. The law's normal response to a wrong is a claim for compensation in personam. That is, the plaintiff recovers his loss, the defendant being under a personal obligation to make it good. The first question, already perceived as flirting with unorthodoxy, is whether the victim can make a personal claim for the amount of the defendant's gain. Then comes the next question, even more innovative: can he not only recover the plaintiff's gain but assert a proprietary claim to the assets in which it has been invested? If bribery is structurally identical to all other wrongs which consist in breaches of duty not amounting to misappropriation, and if the answer in the case of bribery is that the victim can do both (ie, both claim the gain in personam and assert a right in rem in assets in which the gain is invested), the courts will be hard put to find good reasons why what applies to bribery does not apply to the other cases — infringements of patent, circulation-enhancing defamation and so on. It is too late to fall back on the dualism of law and equity. It will not be intellectually respectable to say that the answer is yes when there is an equitable peg on which to hang it, and no when there is not.

Hence, the real problem — or is it the real excitement? — of the departure from *Lister v Stubbs* is that it exposes fault-lines and contradictions which have long been lurking in our law of civil wrongs. First, the law of civil wrongs is divided historically by a line which admits of no analytical defence between equitable and legal wrongs. Secondly, although people can and do make disapproved gains from breaches of contract, from trespasses, infringements of patent, passing off, defamation, breach of confidence, even from assault and battery, yet, still for the most part bemused by a mumbo jumbo distinction between damages on the one hand and money awards which go under the name of "waiver of tort" or "account of profits" on the other, few lawyers have even learned that there is a straightforward restitutionary question to be asked: which wrongs can give rise to gain-based (restitutionary) remedies? Despite or because of being in this mess, the law

turns out to capable of giving rather easy birth to a brand new proprietary proposition, albeit one which may as it gets better known stir some dust in the law of insolvency: subject to successfully tracing the value received through whatever substitutions may have happened to assets still held, the victim of a wrong may assert a property in the profits of wrongdoing.

If this is good, it will last. However, to the tolerant wisdom of Gamaliel, a doctor of the law,[26] will need to be added some rigorous scientific analysis. The overt emancipation of the law of wrongs from dependence upon compensation for loss may well be no bad thing. Waiver of tort and account of profits were already there doing that work. They needed only to be seen more clearly and in a closer relationship to each other and to the law of damages. However, neither has ever had any obvious proprietary implications.

The property in the profits of wrongs which is encouraged by *Reid*, with its ramifying consequences in, for example, criminal law and insolvency, may prove difficult to bed down. If it turns out to be manageable only through the exercise of a judicial discretion,[27] it ought to be drowned as soon as possible after its too easy birth: monstra suffocanda sunt. Except in special and narrow contexts, as where consensual dealings are poisoned by ill-will in married and unmarried divorce, the courts should not be given — and a fortiori they cannot, even under cover of the so-called remedial constructive trust, make for themselves — a discretionary jurisdiction to vary property rights.

Whether or not this proprietary monster, if it is one, is to be deprived of oxygen, personal restitution for wrongs is now likely to grow stronger and straighter. And proprietary restitution for wrongs may yet survive, even in cases not involving misappropriation. The rational alternative to drowning is to nourish the newcomer and make it welcome. The law of tort (or, as it will be, civil wrongs) is likely to look very different by the time this debate is water under the bridge.

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26. *Acts* 5:34–39.
27. As in *Lac Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR(4th) 14 (abuse of confidential information, possibly also breach of fiduciary duty).