Proprietary Remedies: Distributive or Commutative?

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Distributive justice and commutative justice accounts of private law are founded upon different hypotheses about the relationship between law and the state. Adopting a commutative justice account has three important consequences in relation to the justification of proprietary remedies. First, the question as to what relief (personal or proprietary) should be awarded will be a question about whether the claimant is justified in demanding that the defendant transfer a particular asset to the claimant. Secondly, the insolvency of the defendant is not relevant to whether relief ought to be proprietary. Thirdly, multiple party cases need to be understood as conglomerations of two-party cases.

I. INTRODUCTION

Whether proprietary relief, as opposed to a monetary award, is available can be of immense significance to claimants, particularly where defendants are insolvent. There is a considerable body of scholarly literature which addresses this issue and a diversity of opinion about what the controlling principles are.[1] This paper is less concerned with the particular justifications for proprietary relief which have been offered than with the general form that any justification ought to take. Scholarly literature on legal justification tends to focus upon two

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1 Important contributions to the literature not cited elsewhere is this paper include D Paciocco, 'The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors' (1989) 68 Canadian Bar Review 315, Ross Grantham, 'Doctrinal Bases for the Recognition of Property Rights' (1996) 16 Oxford Journal of Legal Studies 561, Craig Rotherham, 'Proprietary Relief for Enrichment by Wrongs: Some Realism about Property Talk' (1996) 19 University of New South Wales Law Journal 378, Roy Goode, 'Proprietary Restitutionary Claims' in WR Cornish, Richard Nolan, Janet O'Sullivan and Graham Virgo (eds), Restitution: Past, Present and Future: Essays in Honour of Gareth Jones (Hart, Oxford, 1998) 63, Craig Rotherham, 'Restitution and Property Rites: Reason and Ritual in the Law of Proprietary Remedies' (2000) 1 Theoretical Inquiries in Law 205, Andrew Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 Law Quarterly Review 412, Lord Millett, 'Proprietary Restitution' in Simone Degeling and James Edelman (eds), Equity in Commercial Law (Lawbook Co, Sydney, 2005) 309, Andrew D Hicks, 'The Remedial Principle of Keech v Sandford Reconsidered' (2010) 69 Cambridge Law Journal 287, Elise Bant and Michael Bryan, 'Constructive Trusts and Equitable Proprietary Relief: Rethinking the Essentials' (2011) 5 Journal of Equity 171 and William Swadling, 'The Fiction of the Constructive Trust' (2011) 64 Current Legal Problems 399.

ways of thinking about justification of entitlements. One mode of reasoning focuses upon whom, according to a desired pattern of distribution of benefits and burdens, should be allowed to take the benefit or bear the burden. Where a proprietary remedy is claimed, the question becomes one of whom, as between competing claimants to an asset, should be allowed to take the asset. Justification is a question of *distributive justice*. Some recent scholarship on proprietary remedies has attributed a significant role to distributive justice considerations in the justification of such awards.[2] The other mode of reasoning asks whether the claimant is entitled to demand that the defendant act in a particular way towards the claimant. A proprietary remedy is seen to be justified to the extent that it is right that the defendant should transfer the relevant asset to the claimant – or, conversely, whether it would be wrong for the defendant to refuse to transfer the asset to the claimant. Justification is a question of *commutative justice*.[3]

This paper attempts to lay some foundations for a purely commutative justice account of proprietary remedies. Part II of the paper gives an account of the commutative justice mode of reasoning and its implications for the recognition and interpretation of legal entitlements. It is argued that commutative justice accounts and distributive justice accounts are founded upon different assumptions as to what has to be justified and, consequently, what counts as justification. Consequently, commutative justice accounts are frequently misunderstood and underestimated by those whose thinking is framed in distributive terms. Part III of the paper sketches how proprietary remedies would be justified under a purely commutative justice account of entitlements. In the author's opinion, a purely commutative justice account of entitlements is to be preferred to a distributive justice account because the former type of account will necessarily be a more coherent account than a distributive justice account.[4] Of course, whether a commutative justice account of entitlements provides a complete account of the legal practice of any particular community is a distinct question. The immediate aim of this paper is the fairly modest one of ascertaining what constraints a purely commutative justice account of entitlements would place upon the forms of argument that may be used to justify proprietary remedies.

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2 Matthew Harding, 'Constructive Trusts and Distributive Justice' in Elise Bant and Michael Bryan (eds), Principles of Proprietary Remedies (Lawbook Co, Sydney, 2013) 19; Elise Bant and Michael Bryan, 'A Model of Proprietary Remedies' in Elise Bant and Michael Bryan (eds), Principles of Proprietary Remedies (Lawbook Co, Sydney, 2013) 211

3 'Corrective justice' theories are examples of commutative justice accounts of legal entitlements. The term 'commutative justice' is a more precise description of the mode of reasoning which is diametrically opposed to distributive justice. The term 'commutative justice' is used in Ernest J Weinrib, 'Law as a Kantian Idea of Reason' (1987) 87 *Columbia Law Review* 472, 495 and Allan Beever, *Forgotten Justice: The Forms of Justice in the History of Legal and Political Theory* (Oxford University Press, 2013) 79. Beever has remarked that the term 'corrective justice' has the unfortunate connotation that it is merely concerned with 'how to rectify circumstances when one person has committed an injustice against another' (at 75).

4 For further explanation of the meaning of 'coherence' for this purpose, see below nn 70-71 and accompanying text.

II. COMMUTATIVE JUSTICE ACCOUNTS

According to commutative justice accounts of entitlements, an entitlement is justified if it is right for the claimant to make a demand of a person and it would be wrong for that person to refuse to comply with the demand. The ascription of right and wrong involves an evaluation of the parties' conduct rather than an evaluation of the distributive effects of giving effect to the entitlement. Commutative justice accounts of legal entitlements appear in two different guises. These shall, for convenience, be called the 'constructivist argument' and the 'evolutionary argument'.

(a) The Constructivist Argument

The accounts of entitlements given by Peter Benson, Ernest Weinrib and Allan Beever rely upon the constructivist argument. Benson used the term 'constructivist' to describe an approach in which 'normative categories are themselves worked out from a standpoint that represents us as fully accountable choosing agents'.[5] Benson said that this approach is 'immanent' in responsible agency – that is, in the notion that individuals are accountable to each other *as individuals* – so that the normative categories are 'posited by and expressive of the choosing self in its capacity for responsible agency'.[6] For Benson, this was the correct standpoint for analysing legal entitlements which emerge from adjudication. Individuals have entitlements *as against other individuals*. The latter are liable to the former on account of their actions *as individuals*. These commitments presuppose that individual people are freely choosing agents – that is, people have 'the capacity to think of oneself, not as concretely determined in this or that way'.[7] Freely choosing agents are seen to be equal to one another in the sense that 'everything that is attributed to subjects in virtue of their being personality must be ascribed equally and identically to each of them'.[8] This does not mean that individuals are taken to be identical in all of their particularities. Obviously, different individuals have different individual projects and desires. The key point for Benson is that the content of their particular characteristics and purposes is irrelevant to the working out of normative categories.

Once the standpoint is established in this way, certain normative categories emerge. First, there is a distinction to be made between persons and things. Persons are ends in themselves who choose their own purposes. A thing is said

5 Peter Benson, 'The Basis of Corrective Justice and Its Relation to Distributive Justice' (1992) 77 *Iowa Law Review* 515, 549

6 Ibid 552

7 Ibid 560; See also Ernest J Weinrib, above n 3, 483-484 at which Weinrib (relying explicitly on Kant) spoke of free agency as having two aspects, namely 'free choice (*freie Willkür*) as independence from determination by sensuous impulse' and 'practical reason (*Wille*) as the determining ground of purposive activity'. Beever (also citing Kant) spoke of human beings having 'the quality of being their own masters' (Beever, above n 3, 153).

8 Benson, above n 5, 561

to be 'a normative dimension … whether physical or otherwise … that contrasts with the self-relatedness of personality'.[9] Things are external to persons and, since they are not persons, 'can in principle be treated merely as a means'.[10] Therefore, it is 'morally possible'[11] for persons to appropriate things to their own use. Since persons are equal, this possibility 'belongs equally and identically to every [person]'.[12] The moral permissibility of appropriating things and using them cannot depend upon any particular interest or need that a person may have – because the matter is being considered from a standpoint that is independent of any such particularity.[13]

Secondly, equality between persons implies limitations upon the moral permission to appropriate things for one's own use. Since every person has an identical moral permission to appropriate things to her own use, every person is required to respect each other person's freedom to use things. Benson explained the point in the following way:-

> I cannot rightly view the subordination of a thing to another's will as nothing more than a particular determination which I may choose to negate. This is because it represents the other's will and decision, and if I interfere with it, my doing so is not, taken in itself, expressive of the other's independence. On the contrary, from the other's standpoint, such interference counts as an external imposition that restricts his or her will. By impinging on it without the other's consent, I *can* affect his or her capacity to use things.[14]

At this point, an account of correlative rights and obligations between two persons has become possible. Respect is owed *by each person to each other person* in relation to the things which the other has appropriated to her use. Rights and obligations exist in the context of a relationship between two interacting people, so the norms contemplated by Benson are *necessarily* associated with bipolar relationships:-

> [W]here interaction involves more than two individuals, it must be possible, for the purposes of normative evaluation, to conceptualize it either as reducible in fact to a two-person relationship or as comprising a number of distinct two-person relationships, each of which must satisfy the requirement of respect. The two-person relationship always

9 Ibid 563

10 Ibid; See also Ernest J Weinrib, 'The Juridical Classification of Obligations' in Peter Birks (ed), *The Classification of Obligations* (Clarendon Press, Oxford, 1997) 37, 45 where Weinrib said that things 'can serve as means because they lack the capacity for self-determining agency'.

11 Benson, above n 5, 563

12 Ibid 564

13 Ibid

14 Ibid 568

> constitutes, normatively speaking, the relevant unit of analysis.[15]

An insistence that the two person relationship is the relevant unit of analysis is essential to a commutative justice account, but that feature alone does not distinguish commutative justice accounts from distributive justice accounts. Matthew Harding has suggested that 'norms of distributive justice are *contingently* bipolar because, as a matter of fact, the grounds for allocation that they specify happen to implicate only two parties as potential objects of allocation' and that it is contingently bipolar norms of distributive justice that are 'at large' in some of the cases in which proprietary remedies are awarded.[16] A somewhat stronger affirmation of the centrality of correlativity between a defendant's liability and the claimant's entitlement to private law adjudication is found in the work of Hanoch Dagan:- [17]

> Correlativity is crucial for private law because private law adjudication … is a coercive mechanism run by unelected officials and, therefore, must be a justificatory practice. To be a justificatory practice, private law adjudication must be able to justify to the defendant each and every aspect of its state mandated power. In particular … private law needs to be able to justify to the defendant both the identity of the recipient of any detriment imposed on her and the exact benefit this recipient receives. The correlativity thesis answers exactly this concern by insisting that the defendant's liability and remedy correspond to the plaintiff's entitlement.[18]

Nevertheless, for Dagan, the law's choice as to the measure and form of a claimant's entitlement and a defendant's liability involves distributive considerations. These are not considerations of society's goals for the distribution of benefits and burdens *across society as a whole* but considerations which arise from 'the social vision respecting the parties' relationship'.[19] Accordingly, the relationship between two individuals is viewed as an instantiation of a type of relationship – for example, a marriage[20] - in respect of which the community has a collective view about the ideal distribution of benefits and burdens.

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15 Benson, above n 5, 569; See also Ernest J Weinrib, 'The Structure of Unjustness' (2012) 92 *Boston University Law Review* 1067, 1067-1068, in which Weinrib said that corrective justice insists 'that liability be based on normative considerations that embrace both parties *in relation to each other*' (italics added).

16 Harding, above n 2, 25 (italics added)

17 Hanoch Dagan, 'The Distributive Foundation of Corrective Justice' (1999) 98 *Michigan Law Review* 138

18 Ibid 150-151

19 Ibid 153

20 Hanoch Dagan, 'The Limited Autonomy of Private Law' (2008) 56 *American Journal of Comparative Law* 809, 820-821, in which Dagan argued that understanding equal division as a rule of marital property law 'requires us to articulate an ideal conception for the institution of marriage'.

The critical distinction between the commutative justice accounts and the distributive justice accounts does not relate to the number of people under consideration. Instead, it relates to *what* has to be justified as between the parties to a two party relationship. Distributive justice accounts focus upon the allocation of benefits and burdens between the parties as the matter to be justified, while commutative justice accounts ask whether and to what extent one party is justified in demanding a restriction of the choices of the other party. This becomes clear when the accounts of property rights offered by Dagan and Harding are compared with the account offered by Benson.

Dagan's distributive justice account assumes that, since any setting of entitlements will have distributive effects, the justificatory enquiry in the adjudicative setting is necessarily a matter of justifying those distributive effects. In relation to property rights, 'each additional stick, and any expansion of any existing stick, in the owner's bundle of rights, is ipso facto a burden on non-owners'.[21] Since property rights can be configured in a multiplicity of ways, the choice as to the configuration of any person's property right is 'implicated in – and is a construction of – social values'.[22] Dagan has made it clear that he does not envisage that 'in evaluating individual cases judges should made *ad hoc* judgments based on [social] values'.[23] Moreover, a private law plaintiff is required 'to give reasons why *people in her predicament* should be entitled to extract from *people in the defendant's category* the kind of remedy she now requires'.[24] Nevertheless, Dagan recognised that values reflect 'our contingent reality'[25] and envisaged a constant re-examination of the received rules. Bringing private law's reliance on social values to our attention was said to help us 'realise that in order to validate our current practices we need to justify these conventional values'.[26] It is clear that Dagan contemplated an ongoing process of justification of the rules which define legal entitlements in the light of *contemporary* values, so that adjudicators acted as agents of the community as a whole in evaluating whether historical constructions of legal entitlements continued to be justified in the light of the contemporary community's values concerning the relationship in question.[27]

Harding's account, like Dagan's, regards the recognition of property rights as necessarily allocative. Harding began with the proposition that 'norms of justice' are 'ought-propositions specifying that grounds for an *allocation* of some benefit

21 Ibid 149

22 Ibid

23 Hanoch Dagan, 'The Public Dimensions of Private Property' (2013) 24 *King's Law Journal* 260, 271

24 Ibid (italics added)

25 Ibid

26 Ibid 272

27 See also Steve Hedley, 'Courts as public authorities, private law as instrument of government' in Kit Barker and Darryn Jensen (eds), *Private Law: Key Encounters with Public Law* (Cambridge University Press, Cambridge, 2013) 89. Hedley asserts that courts are 'public authorities' (at 89) and that, as public officials, 'they should be improving what they do as part of the ordinary process of doing it' (at 93).

or burden as between competing (or potentially competing) claimants'.[28] Some norms of justice express what Harding calls 'corrective justice' and others express distributive justice, but both are ultimately concerned with allocations of benefits and burdens. Corrective justice norms and distributive justice norms differ in terms of (1) the number of parties among whom the allocation is made and (2) the type of justification for the making of the allocation. For Harding, corrective justice is always concerned with an allocation *between claimant and defendant only*. The reason for the allocation is 'an impugned transaction between the plaintiff and the defendant'.[29] An allocation is justified and necessary in so far as the effect of the impugned transaction was to pass the benefit from claimant to defendant, deprive the plaintiff of the benefit or to divert the benefit which was 'due to the plaintiff' from the plaintiff to the defendant.[30] Clearly, for Harding, a re-conveyance of an asset which had been transferred by the claimant to the defendant by mistake is an allocation justified by a norm of corrective justice. Such an allocation cancels the impugned transaction.[31] Harding suggested that norms of distributive justice are 'default norms of justice', in the sense that the allocations that are not concerned with cancelling the effects of an impugned transaction are to be justified (if at all) by norms of distributive justice.[32]

For Benson, an allocation of things could not be the starting point for the law of property because an allocation presupposes that someone has previously acquired the capacity and the right to allocate the things which are available for allocation. A distributive justice account of the origins of property rights would have to take common ownership as its starting point:-

> [T]he members of a distribution must *initially* be viewed as mutually related through a social whole with benefits and burdens being construed in some appropriate way as common or collective. Absent this form of mutual relatedness, a basis for analysis in terms of distributive justice is lacking. … [T]here is no notion here of a social whole (whether viewed as a system of cooperation or otherwise) in which persons are mutually related through common claims or burdens. What persons 'share' in abstract right is simply an *identical* permission to use things to the exclusion of others.[33]

28 Harding, above n 2, 20 (italics added)

29 Ibid

30 Ibid 21; Harding, in defining corrective justice in this way, relies heavily on some recent works of John Gardner, notably John Gardner, *Law as a Leap of Faith* (Oxford University Press, 2012) Chapter 10 and John Gardner, 'What is Tort Law For? Part 1: The Place of Corrective Justice' (2011) 30 *Law and Philosophy* 1, 6-17. It should be noted that this is a narrower conception of corrective justice than that adopted by Ernest Weinrib and Peter Benson. Beever has remarked that Gardner's definition of justice as norms relating to allocative questions 'guarantees that commutative justice will be misunderstood' (Beever, above n 3, 285).

31 Ibid

32 Ibid 25

33 Ibid

Here, it becomes clear that the commutative justice focus on justifying restrictions on a person's choices and the distributive justice focus upon allocation have their foundations in different hypotheses about the relationship between the law and the state. Distributive justice accounts assume that entitlements are the product of an original allocation by an authority which had the capacity to perform such an allocation on behalf of the community as a whole. Thereafter, the question becomes whether the chosen basis for distribution continues to reflect the community's values. The state is understood to be the author of all entitlements and, through the agency of the courts of law, engaged in a continual re-evaluation and recalibration of those entitlements. The 'state-mandated power' of the courts is understood as a power to allocate benefits and burdens and it is the allocative effect of adjudications that has to be justified.

The commutative justice accounts look upon the state as a body which has come into existence to secure individual entitlements, the intelligibility of which is anterior to the state. Beever has developed this theme at length, tracing it through the thought of Aristotle, Aquinas, Pufendorf and Kant.[34] The critical point is that the intelligibility of entitlements does not depend upon the existence of the state. The state comes into existence so as to secure those entitlements *for all* in a more orderly and effective fashion than individuals could secure them for themselves. Weinrib has explained the matter in Kantian terms:-

> The state of nature is a device for exhibiting the range of rights whose structure and content are normatively intelligible even apart from the public institutions that make them effective. In contrast, 'public right' refers to a condition in which public institutions actualize and guarantee these rights.
>
> Kant posits the state of nature in order to show that public right is necessary to cure its inadequacies. Although the rights in the state of nature are correlatively structured in order to be fair to both parties, the absence of a public mechanism of correction means that the interpretation and enforcement of these rights is left to the unilateral will of the stronger party.[35]

Benson, also drawing on Kant, has remarked that '[t]he moral possibility of coercion is not attached to the obligation as an addition that is justified on distinct ground' but 'constitutes an essential defining feature of the obligation itself'.[36] For Beever, Weinrib and Benson, it is the effectiveness and the regularity of coercion – not the *moral possibility* of coercion – that depends upon the existence of the state and its institutions.

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34 Beever, above n 5, 84-85 (Aristotle), 114-115 (Aquinas), 148-149 (Pufendorf), 163-164 (Kant)

35 Ernest J Weinrib, 'Public Law and Private Right' (2011) 61 *University of Toronto Law Journal* 191, 195

36 Benson, above n 5, 577

There are two observations to be made in concluding this section. The first observation is that the fact that the recognition of an entitlement has certain effects does not necessarily point to an intention or rationale that the recognition of the entitlement should have those effects. It has been noted that the commutative justice justification of particular entitlements is a matter of whether *individuals* are justified in making particular types of demands of other individuals and not a matter of whether the state is justified in allocating benefits and burdens in a particular way. Entitlements are rationalised without referring to their distributive effects. From the perspective of the commutative justice accounts, the distributive justice accounts make the error of assuming that, since entitlements have distributive effects, those entitlements have to be rationalised in terms of those effects. Lionel Smith[37] has pointed to a version of this error in the course of commenting upon the use of deterrence to explain legal entitlements:-

> Some people may be deterred from punching me because of a fear of liability. We might therefore say that my right to bodily integrity has the *effect* of operating as a deterrent in relation to some people. But it would be slightly ridiculous to suggest that my right to bodily integrity arises in order to deter, or has a deterrent function. It is a fundamental right arising from our common humanity.[38]

Explaining any entitlement in terms of a rationale of deterrence presupposes that there is a separate reason for thinking that that which is to be deterred is undesirable. Since conduct which is to be deterred can be characterised as bad or wrong - and, accordingly, something to be deterred – coercing persons to refrain from engaging in that conduct is justified whether the prospect of coercion has a deterrent effect or not. Deterrence has no role to play in providing a rationale for the entitlement to coerce another. The broader point is that beneficial effects - whether in terms of deterrence or distribution – are 'positive externalities'.[39] One cannot assume that the entitlement was recognised *in order to* have those effects.

The second observation concerns the need to distinguish the commutative justice order, created by interactions and made explicit in the course of adjudication of disputes, from the co-existing legislative order. As Beever has explained, the notion that property rights exist independently of the state 'does not imply that property rights are inviolable or mean that the state is incapable of adjusting property holdings for the sake of the common good'.[40] The argument concerns the origins of rights rather than 'their normative strength vis-à-vis other concerns'.[41] A state might, on distributive justice grounds, alter pre-existing rights in large

37 Lionel Smith, 'Deterrence, prophylaxis and punishment in fiduciary obligations' (2013) 7 *Journal of Equity* 87

38 Ibid

39 Allan Beever, 'Formalism in Music and the Law' (2011) 61 *University of Toronto Law Journal* 213, 234

40 Beever, above n 3, 114

41 Ibid

or small ways. It can be acknowledged that there are some 'obvious statutory Leviathans … whose aims and objectives must be given full weight'[42] and which have reshaped the pre-existing entitlements in significant ways. It is not denied that an accurate picture of contemporary private law must acknowledge the role of legislation in reshaping entitlements.[43] Equally, it is not denied that distributive justice concerns have a role in the political forum and that the products of the political process are often to be understood in terms of their distributive motives. What is questioned by these commutative justice accounts is the attribution of distributive justice rationales to what is left of the pre-existing entitlements after the legislature has done its work. There is not one order, but two contiguous orders each of which is to be understood on its own terms.

(b) The Evolutionary Argument

While the constructivist argument takes many of its cues from Immanuel Kant, the evolutionary argument owes much to the thought of David Hume. Hume spoke of the origin of property rights in terms of 'a convention entered into by all the members of the society to bestow stability on the possession of those external goods'.[44] The 'convention' is not to be understood as an historical agreement:-

> [This convention] is only a general sense of common interest; which sense all the members of society express to one another, and which induces them to regulate their conduct by certain rules. I observe, that it will be for my interest to leave another in the possession of his goods, *provided* he will act in the same manner with regard to me.[45]

A rule 'arises gradually' and 'acquires force by a slow progression'.[46] It is reinforced 'by our repeated experience of the inconveniences of transgressing it'.[47] Significantly, for the current discussion, Hume insisted that such conventions provide the foundations for the idea of justice:-

> After this convention, concerning abstinence from the possessions of others, is entered into, and every one has acquired a stability in his possessions, there immediately arise the ideas of justice and injustice; as also those of *property*, *right*, and *obligation*. The latter are altogether unintelligible, without first understanding the former. Our property is nothing but those goods, whose constant possession is established by the

42 Bant and Bryan, above n 2, 226. These Australian authors mention the Torrens statutes and the *Australian Consumer Law*.

43 See Kit Barker, 'Private Law: Key Encounters with Public Law' in Barker and Jensen, above n 27, 5-6

44 David Hume, *A Treatise of Human Nature* (ed A Selby-Bigge)(Clarendon Press, Oxford, 1896) 489 [Book III, Part II, Section II – 'Of the origin of justice and property']

45 Ibid 490

46 Ibid

47 Ibid

> laws of society; that is, by the laws of justice.[48]

The relationship between law and justice contemplated by Hume was not functionalist in character – that is, law was not understood as an instrument which had been designed to do justice. The 'same artifice' gave rise to both justice and property.[49] Moreover, Hume's conception of justice was non-distributive. Hume was concerned with each person's obligation to abstain from interfering with each other person and each other person's possessions. The central idea is commutative justice.

The foremost recent exponent of the evolutionary argument was the Austrian-born economist and historian of ideas, Friedrich Hayek. Hayek's central concern was the problem of knowledge or, more precisely, 'the impossibility for anyone of knowing all the particular facts on which the overall order of the activities in a Great Society is based'.[50] Hayek understood rules as an 'adaptation'[51] to the problem of uncertainty:-

> Man has developed rules of conduct not because he knows but because he does not know what the consequences of a particular action will be. And the most characteristic feature of morals and law as we know them is therefore that they consist of rules to be obeyed irrespective of the known effects of the particular action. … [T]here would be no need for rules if men knew everything – and strict act-utilitarianism of course must lead to the rejection of all rules.[52]

Hayek spoke of rules of *conduct*. Such rules identify correct modes of conduct for individuals. They were not designed to produce desirable effects and the obligation to obey is not conditional upon the effects of obedience in particular cases. The rules of conduct express commutative justice. These rules 'delimit protected domains not by directly assigning particular things to particular persons, but by making it possible to derive from ascertainable facts to whom particular things belong'.[53] They 'do not confer rights on particular person, but lay down the conditions under which such rights can be acquired'.[54]

In Hayek's thought, there is a link between the adoption of rules and the beneficial effects of obeying those rules, but the link has nothing to do with those beneficial effects being foreseen and intended. Hayek stated that 'rules serve because they have become adapted to the solution of recurring problem situations and thereby

48 Ibid 490-491
49 Ibid 491
50 FA Hayek, *Law, Legislation and Liberty* (Volume II: *The Mirage of Social Justice*) (Routledge Kegan and Paul, London, 1982) 8
51 Ibid 39
52 Ibid 20-21
53 Ibid 37
54 Ibid 38

help to make the members of the society in which they prevail more effective in the pursuit of their aims'.[55] The process by which rules emerge was described by Hayek variously as 'social evolution',[56] 'evolutionary selection'[57] and 'spontaneous order'.[58] Whatever label might have been given to it at different times, the core idea remained the same. Rules are not adopted because the state foresaw that the general observance of particular rules would produce beneficial effects. Certain modes of conduct gradually become generally observed rules because people who adopt those modes of conduct find that the observance of those modes of conduct as rules solves certain types of coordination problems that exist within their community and, consequentially, the community survives and prospers. The observance of the modes of conduct which are most successful in overcoming coordination problems will gradually extend to larger and larger groups of people simply because the groups which observe those modes of conduct will 'prevail over others' or 'expand at the expense of others'.[59] The members of a community need not know which particular modes of conduct are the causes of their success. The observance of the *set* of rules followed by successful groups is reinforced within those groups (and expands to include others) because the groups which observe those rules survive and prosper.[60] Since nobody *designed* the rules to have the effects that they have, the idea that any particular rule might be just or unjust in its *effects* has no place in a spontaneous order.[61] That is a judgment which refers to criteria which are extrinsic to the order. It is a matter for *political* judgement rather than legal interpretation.

Under Hayek's evolutionary argument, entitlements exist because rules of conduct mark out 'domains of free action'[62] for individuals. A person is, in respect of things which fall within those domains, justified in saying to others 'keep off' or 'do not interfere'. Accordingly, Hayek's evolutionary argument aligns with the constructivist argument in insisting that private law entitlements are 'normatively intelligible'[63] in the absence of the apparatus of the state and that those entitlements are particularisations of commutative justice. In so far as private law is the

55 Ibid 21

56 Ibid 22

57 FA Hayek, *The Fatal Conceit: The Errors of Socialism* (The University of Chicago Press, Chicago, 1989) 6

58 FA Hayek, 'The Confusion of Language in Political Thought' in FA Hayek, *New Studies in Philosophy, Politics, Economics and the History of Ideas* (Routledge Kegan and Paul, London, 1978) 71, 79

59 FA Hayek, 'The Errors of Constructivism' in Hayek, *New Studies in Philosophy etc*, above n 58, 3, 9

60 Ibid 10; See also Hayek, above n 50, 21, Hayek, above n 57, 70 and FA Hayek, *Law, Legislation and Liberty* (Volume I: *Rules and Order*)(Routledge Kegan and Paul, London, 1982)('Rules and Order') 99

61 Note, in this connection, Hayek's comment that '[s]trictly speaking, only human conduct can be called just or unjust' and that, in relation to a state of affairs, those terms 'have meaning only in so far as we hold someone responsible for bringing it about or allowing it to come about'. (Hayek, above n 50, 31)

62 Hayek, 'Rules and Order', above n 60, 107

63 See note 35 above

manifestation of spontaneous order, *public* law 'merely organises the apparatus required for the better functioning of that more comprehensive spontaneous order' and amounts to 'a sort of superstructure erected primarily to protect a pre-existing spontaneous order and to enforce the rules on which it rests'.[64]

(c) Consequences for Legal Interpretation

Commutative justice accounts reject the notion that entitlements are designed with distributive goals or effects in mind. From this it follows that the consideration of distributive goals and effects ought not to play any role in the *recognition* and *interpretation* of entitlements. Moreover, the recognition and interpretation of entitlements in the *adjudicative* forum is seen as something altogether distinct from the evaluation, criticism and recalibration of entitlements in the *political* forum.[65] The commutative justice accounts maintain that the arguments proposed in the adjudicative forum in favour of enlarging or limiting the scope of an entitlement must be arguments that it is *right* for the claimant to demand that the defendant's freedom of action be restricted in a particular way and it would be *wrong* for the defendant to refuse to abide by the restriction.

The commutative justice accounts do *not* claim that a universal and comprehensive set of legal norms may be deduced from the commutative justice idea. Weinrib, for example, has stated that the *forms* of justice have a 'historical universality' but 'their manifestations in a legal system are relative to a set of public meanings that obtain at a given time and place'.[66] This concentration on the forms of justice 'requires only that whatever mode of ordering a jurisdiction adopts conform [*sic*] to the rationality immanent in that mode of ordering'.[67] In other words, in a legal system in which entitlements are defined in the context of disputes between particular claimants and defendants, any justification offered for requiring that D_1 give x to C_1 must be an argument that giving x to C_1 would be the *right conduct* for D_1 to adopt towards C_1. A variety of particular arguments on the point are admissible. What is not admissible is any argument that D_1 giving x to C_1 would have a desirable distributive effect or would otherwise further social goals. Of course, what is right as between C_1 and D_1 must also be right for all other pairs of persons in materially identical situations but, as Beever has pointed out, this is the product of analogy between the situations of different pairs of persons rather than of consideration of what is good for persons generally.[68]

64 Hayek, above n 58, 79

65 See also Ernest J Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 *Yale Law Journal* 949, 973 at which Weinrib states that his objection to 'loss-spreading' as an explanation of tort law is an objection to 'the linkage of loss-spreading and adjudication'. See also Lon L Fuller, 'Some Reflections on Legal and Economic Freedoms – A Review of Robert L Hale's "Freedom through Law"' (1954) 54 *Columbia Law Review* 70, 81.

66 Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, Cambridge, Mass, 1995) 228

67 Ibid

68 Beever, above n 3, 80; Compare Peter Cane's suggestion that '[i]t is because rules of tort

Since, as Weinrib acknowledged, it is possible that commutative justice may have been given different 'public meanings' at different places and times, the starting point for any exercise in interpretation must be the particular public meanings in the relevant jurisdiction rather than the abstract concept of commutative justice. In other words, an argument must, in addition to expressing commutative justice as between the parties to the dispute, fit within the network of previous instantiations of commutative justice in the relevant jurisdiction. For Weinrib, then, the process of interpretation is neither wholly deductive - from the concept of commutative justice - nor wholly inductive - from the sequence of adjudicative acts. Commutative justice is understood to be the most abstract conceptualisation of the rationality that is immanent in the sequence of adjudicative acts. In saying that coherence is the 'criterion of truth',[69] Weinrib was suggesting that the best interpretation of a practice is that which presents the practice as something which is systematic and unified. Commutative justice provides the best available hypothesis of a common 'supportive structure'[70] for the practice being interpreted. Moreover, where a commutative justice explanation provides a plausible account of a community's legal practice, it provides a more coherent account of that practice than a distributive justice account could. A plurality of considerations could be relevant to any allocation of benefit or burden, so trade-offs between considerations have to be performed. The distributive considerations will not themselves determine what trade-offs need to be performed. What is distributively just is a matter of compromise between competing criteria rather than one of common supportive structure.[71]

Systematicity and coherence were as important for Hayek as they are for Weinrib. Hayek spoke of an 'immanent criticism' which 'moves within a given system of rules and judges particular rules in terms of their consistency or compatibility with all other recognized rules in inducing the formation of a certain kind of order of actions'.[72] Interpretation in the adjudicative context is 'conservative'[73] in the sense that the standard for evaluation of any interpretation has to be those parts of the system of rules which are not in doubt. It may seem at first that the test of the validity of an interpretation is simply lack of contradiction of established interpretations, but this cannot be so. Hayek's emphasis upon 'order' and 'system'

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liability allocate various risks of harm and obligations to repair harm *as between various classes of persons* that they can be treated as falling within the province of distributive justice' (Peter Cane, 'Distributive Justice and Tort Law' [2001] *New Zealand Law Review* 401, 412-413 (italics added)).

69 Ernest J Weinrib, above n 65, 972

70 A set of propositions may be said to be coherent to the extent that they share the same 'supportive structure'. See Robert Alexy and Aleksander Peczenik, 'The Concept of Coherence and its Significance for Discursive Rationality' (1990) 2 *Ratio Juris* 130, 131.

71 As Weinrib has explained, '[t]he formalist assumes that a juridically intelligible relationship cannot consist in an aggregate of conceptually disjunct or inconsistent elements that, like a pile of pebbles, happen to be juxtaposed' (Weinrib, above n 65, 968).

72 Hayek, above n 50, 24

73 FA Hayek, *Law, Legislation and Liberty* (Volume I: *Rules and Order*)(Routledge Kegan and Paul, London, 1982) 120

demands the ranking of propositions, in which lower-ranked propositions are seen to be instantiations of higher-ranked propositions. Hayek, in expressing substantial agreement with an early version of Ronald Dworkin's theory, affirmed that 'the law *is* a system (and not a mere collection) of (articulated and unarticulated) rules'.[74] Hayek said that, by 'system', he meant 'a body of rules that are mutually adjusted to each other and possess an order of rank'.[75] Accordingly, the test of the validity of an interpretation must be that it can be seen as an instantiation of a more general proposition which explains a larger part of the practice.

Once it is recognised that interpretations of small parts of the practice stand to be tested against higher-ranked propositions explaining large parts of the practice, it becomes apparent that there are situations in which interpretation takes a critical stance. Established interpretations can be questioned:-

> It may at first seem puzzling that something that is the product of tradition should be capable of both being the object and the standard of criticism. But we do not maintain that all tradition as such is sacred and exempt from criticism, but merely that the basis of criticism of any one product of tradition must always be other products of tradition which we either cannot or do not want to question; in other words, that particular aspects of a culture can be critically examined only within the context of that culture.[76]

This approach to interpretation – by which every interpretation has to express or refer to a rule of just conduct[77] - proceeds on the basis that commutative justice is the abstract principle which underpins the entire body of interpretation. Every element of the practice is taken to be a particularisation of commutative justice. Commutative justice is the key to understanding the practice as a coherent and systematic practice and, therefore, the basis for evaluation and criticism of particular parts of the practice.

An important consequence of the emphasis upon systematicity in both Weinrib's and Hayek's accounts of adjudication is that interpretation of the practice of adjudication proceeds on the assumption that the previous *decisions* of the courts - or the overwhelming majority of them, at least - are correct. What is not assumed is that the *verbal formulae* used to justify decisions in individual cases always constitute the best possible explanations for the decisions in those cases. This is a

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74 Hayek, above 50, 34 (footnote 4)

75 Ibid

76 Hayek, above n 50, 25

77 Ibid 34-35; Hayek pointed out that the law contains many rules which are not, strictly speaking, rules of just conduct but which 'define by separate rules [those] states of affairs to which particular rules of conduct refer'. An obvious example of such a rule is the requirement that contracts are not enforceable in the absence of consideration passing from the promisee to the promisor. Such a rule defines (in part) the state of affairs in which one person has an obligation to perform its contractual undertaking to another.

plausible account of common law adjudicative practice which has been endorsed by others. Peter Jaffey has said that '[t]he *fundamental* constraint the court is under is to conform to previous decisions on the facts, not to apply exclusionary rules previously laid down, and rules are built up by analogical reasoning on the basis of this constraint'.[78] Accordingly, the verbal form of a rule laid down by a court is always 'provisional'.[79] Of course, explanations which have become widely accepted are not to be dismissed lightly. Emily Sherwin has said that 'if *the pattern of the decisions* and *the remarks of the judges who decided them* suggest a common idea, that idea is worth attending to because it represents the collective reasoning of a number of judges over time'.[80] While ideas running through cases could be mistaken, 'the epistemic advantage lies with an idea or principle that has been developed and accepted collectively over time'.[81] The difference between Jaffey and Sherwin on this point is merely a difference of emphasis. Both Jaffey and Sherwin have emphasised the controlling function of abstract ideas, as opposed to verbal formulae, which explain large numbers of decisions. The explanations offered by judges in particular cases are relevant data for the purpose of identifying those abstract ideas. At the same time, arguments and explanations are evaluated in the light of the abstract ideas. This evaluation will not usually refer directly to the most abstract principle of the system, namely that of commutative justice. It will usually refer to the more particular forms of commutative justice that are pervasive in the previous adjudicative practice. Aberrant forms of justification, which should not be adopted by subsequent courts, identify themselves by their lack of reference to those more abstract ideas. One might say that, by way of 'a series of repetitions around a self-contained system', a group of laws 'assumes its optimal, most evolved form'.[82]

III. COMMUTATIVE JUSTICE AND PROPRIETARY REMEDIES

The generic question posed by the principle of commutative justice is a question of whether it is right for the claimant to demand that the defendant's freedom of action be restricted in a particular way. Where a proprietary remedy is claimed, that question becomes a question about whether it is right for the claimant to demand an immediate transfer of a particular asset or interest in an asset from the defendant and, conversely, it would be wrong for the defendant to refuse to make the transfer. It is not a question of which of two (or more) parties is more deserving of the asset. This is the first and most important consequence of embracing the commutative justice accounts. A second consequence is that

78 Peter Jaffey, 'Authority in the Common Law' (2011) 36 *Australian Journal of Legal Philosophy* 1, 21 (italics added)

79 Ibid

80 Emily Sherwin, 'A Defense of Analogical Reasoning in Law' (1999) 66 *The University of Chicago Law Review* 1179, 1189 (italics added)

81 Ibid

82 Richard Sutton, 'Restitution and the Discourse of System; in Charles Rickett and Ross Grantham (eds), *Structure and Justification of Private Law* (Hart Publishing, Oxford, 2008) 127

whether the defendant must transfer the asset to the claimant is a question which is to be resolved independently of any consideration of the defendant's insolvency and the consequence that the claimant would obtain an advantage over other creditors of the defendant. A third consequence is that all cases are to be understood as two party cases – or, to state the matter more precisely, multiple party cases are to be understood as conglomerations of several two party cases. Each of these consequences is discussed in greater detail below.

(a) A Question of Right Action

Harding has suggested that, when a vendor under a contract for the sale of land is said to be a constructive trustee for the purchaser, the court is carrying out an allocation on the basis of a norm of distributive justice:-

> The most plausible interpretation of such cases is that in them a court must allocate a benefit as between the plaintiff and the defendant, thus raising a question of justice, and that the intention of one or more of the parties is specified as a ground for that allocation, an allocation that takes the form of division of the benefit as between the plaintiff and the defendant as opposed to the subtraction of the benefit from the defendant and its addition to the plaintiff.[83]

In such a case, it is supposed that the parties' contractual intentions provide the ground for an allocation of property rights in the purchaser's favour. The requirement of valuable consideration is understood by Harding as an example of a condition 'whose justification most likely relates to an instrumental concern for the integrity of the social practice of contracting and for the formalities attaching to dealings in land'.[84] In any event, since the parties' intentions are taken to justify one person's conferral of a new right upon the other person – as opposed to a transfer back of something to which the other person previously had an entitlement – the justifying norm cannot, according to Harding's reasoning, be a norm of *corrective* justice. For Harding, any norm of justice which is not a norm of corrective justice, understood in this narrow sense of justifying a 'giving back' - is taken to be a norm of distributive justice.[85]

If, on the other hand, private law entitlements are seen to be grounded in commutative justice, the most plausible interpretation of the vendor-purchaser constructive trust is that the terms of the contract provide the purchaser with a justification for demanding that the vendor transfer the title to the land to the

83 Harding, above n 2, 26; See also Matthew Harding, 'The Limits of Equity in Disputes over Family Assets' in Jamie Glister and Pauline Ridge (eds), *Fault Lines in Equity* (Hart, Oxford, 2012) 193, 202-203, in which Harding describes family assets decided on the basis of the parties' common intention as 'distributions of property in accordance with a limited set of relevant norms'.

84 Harding, above n 2, 26-27

85 See above nn 31-32 and accompanying text.

purchaser on the completion date and, in the meantime, deal with the land only in ways which are consistent with the performance of the contractual undertaking. To fail to perform the contractual undertaking is to treat the purchaser as less than her equal – that is, as a means only and not as an end. This idea was encapsulated in Kant's statement that 'what I acquire directly by a contract is not an external thing but rather [the promisor's] deed, by which that thing is brought under my control so that I make it mine'.[86] The vendor's refusal to transfer title is a use of the vendor's freedom which is 'a hindrance to freedom in accordance with universal laws (i.e. wrong)' so that 'coercion this is opposed to this (as a *hindering or a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right'.[87]

For there to be a constructive trust as a matter of commutative justice, there must be a reason why vendor *ought to transfer the asset* - as opposed to a monetary substitute for the asset - to the purchaser. The nature of the asset which is being bought and sold will often provide such a reason. It is trite law that, where a near substitute for the undelivered thing is readily available, the vendor is obliged only to pay damages in respect of the purchaser's loss caused by the failure to deliver[88] - so the vendor has the freedom not to transfer the thing which it has undertaken to transfer. Where it can reasonably be inferred that it is an essential element of the parties' agreement that a particular asset be transferred – for example, where the asset is an identified block of land, a particular painting by Rembrandt or items which are infrequently traded in an open market[89] - the claimant's entitlement is not fulfilled by payment of the cost of acquiring a similar item from elsewhere, because no similar item is readily available. Payment of the monetary value of the entitlement is not adequate to ensure that the defendant does what is right towards the claimant. Where the asset which is being bought and sold is not of this type, a monetary substitute for literal performance of the contract – in other words, damages in the expectation measure - is an adequate remedy. Such an approach can be seen as an outworking of the common law's commitment, when presented with alternative means of giving effect to a claimant's right, to preferring the remedy which is the lesser interference with the defendant's freedom.[90]

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86 Immanuel Kant, *The Metaphysics of Morals*, (translated by Mary Gregor)(Cambridge University Press, Cambridge, 1996) [6:274] (Part I, Chapter II, Section II, 'On Contract Right')

87 Ibid [6:231] ('Introduction to the Doctrine of Right')(italics in original)

88 'The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, for far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.' (*Robinson v Harman* (1848) 1 Ex 850; 154 ER 363, 365); See also *The Commonwealth v Amman Aviation Pty Ltd* (1991) 174 CLR 64, 80-82 (Mason CJ and Dawson J), 98-99 (Brennan J).

89 One of the leading Australian cases, *Dougan v Ley* (1946) 71 CLR 142, concerned the sale of a taxi cab licence.

90 For a discussion of Anglo-Australian law's preference for the lesser interference, see Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart, Oxford, 2003) 102-104

The notion that a particular allocation of resources has to be justified is completely absent from this mode of reasoning. What has to be justified is the purchaser's insistence that the vendor's freedom be restricted in a particular way – that is, that the vendor not be free to deal with the asset in any way she chooses. Of course, restricting the vendor's freedom to deal with the land has the *effect* of allocating resources in a particular way but it is not the *rationale* of the restriction to allocate resources. The rationale is to ensure that the vendor *does* what is right towards the purchaser.

Harding's discussion of disgorgement remedies for breach of fiduciary duty was, likewise, influenced by an attribution of allocative rationale on the basis of allocative effect. Where a fiduciary's profits consist of non-diverted gains - that is, gains that 'far from having a duty to make for the plaintiff, she ought not to have made at all in the absence of authorisation from the plaintiff'[91] – disgorgement does not involve giving to the principal something that would have belonged to her had the fiduciary performed his duty. Therefore, for Harding, the allocation of the profit *to the principal* could not be informed by a norm of corrective justice.[92] A consequence of Harding's focus upon the *allocation* of the profit to the principal is that disgorgement of diverted gains is justified differently from the disgorgement of non-diverted gains:-

> [I]n cases where assets or opportunities are misappropriated or diverted from the plaintiff to the defendant in breach of duty, disgorgement is best understood, by analogy with restitution in cases of unjust enrichment, in terms of … "allocation back" by subtractive and additive means in order to cancel the impugned transaction; in these cases, disgorgement restores to the plaintiff what was due to her but has been gained by the defendant in breach of duty.[93]

Put simply, diverted gains cases are to be seen as cases of returning misappropriated resources and only non-diverted gains cases are truly cases of disgorgement. It is thought that, since the primary duty of the fiduciary in the latter case was not to make the profit at all and the principal had no antecedent entitlement to that profit, norms of distributive justice are needed to justify giving the profit to the principal once the fiduciary has disgorged it. Harding suggested that the relevant considerations might include 'the value of economic relationships in which assets are entrusted to some for the benefit of others, the value of trusting interpersonal relationships and guaranteeing the trustworthiness of trustees and fiduciaries, and moral injunctions against using other people'.[94]

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91 Harding, above n 2, 32
92 Ibid 32-33
93 Ibid 32
94 Ibid 34

A commutative justice account of disgorgement of profits, by contrast, focuses upon the fiduciary's wrongful use of the freedom that she has been given to manage the principal's affairs. Paul Miller[95] has recently provided such an account. According to Miller, the 'normative significance' of fiduciary power relates to its legitimation of 'a limited form of substitution of legal personality'.[96] Moreover, the exercise of fiduciary power is discretionary. It is 'not subject to – and, in some cases, is not susceptible of – dictation'.[97] The fiduciary is given the freedom to determine how the interests of her principal will be advanced and, hence, the freedom to manipulate the situation to her own advantage. Such manipulation cannot be allowed because the fiduciary power involves the exercise of a legal capacity which belongs to the principal.[98] Instead of imposing upon the fiduciary an affirmative obligation to serve the best interests of the principal, the law imposes the so-called conflict rules which 'proscribe appropriation by the fiduciary of fiduciary power understood as means belonging exclusively to the beneficiary'.[99] A breach of fiduciary duty can be said to be a wrongful use of freedom because 'the fiduciary has treated fiduciary power as a means at his disposal and, in doing so, has violated the beneficiary's exclusive claim upon the disposition of her means'.[100]

For Miller, since a fiduciary's use of the fiduciary power to make a personal profit would involve treating a means belonging to the principal as her own, the principal must have a right that the fiduciary should refrain from doing this *and*, in the event that the fiduciary disobeys the proscription, the right 'should be interpreted as including an implied entitlement to profits realized through the exercise of fiduciary power'.[101] The lynchpin to Miller's argument is the notion that the power given to the fiduciary is a means which belongs to the principal. It follows from the principal's exclusive claims to that means that 'others are under a correlative obligation to refrain from appropriation of or interference with the object of the right'.[102] This explains, in commutative justice terms, why a principal should be entitled to disgorgement even where the profits are generated by way of

95 Paul B Miller, 'Justifying Fiduciary Duties' (2013) 58 *McGill Law Journal* 969

96 Ibid 1017

97 Ibid 1018

98 Ibid 1020

99 Ibid 1021; See also Weinrib's description of the fiduciary relationship as a situation in which 'the beneficiary's interests are so completely at the mercy of the fiduciary that the law disables the fiduciary from acting except in the beneficiary's interests' (Weinrib, above n 9, 45) and Sarah Worthington's observation that fiduciary obligations cannot be understood as duties to bring about a particular end position because it is impossible to define that end position (Sarah Worthington, *Equity* (2nd ed)(Clarendon Press, Oxford, 2006) 129). As Lord Wright explained, in *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134, an enquiry about an end position would be 'as to what would have been the position if that party had not acted as he did, or what he might have done if there had not been the temptation to seek his own advantage' (at 154).

100 Miller, above n95, 1021

101 Paul B Miller, 'Justifying Fiduciary Remedies' (2013) 63 *University of Toronto Law Journal* 570, 615

102 Ibid 617

the fiduciary's exploitation of an opportunity to which the principal had no pre-existing claim, such as where a fiduciary receives a bribe.[103] Miller's explanation proceeds entirely in terms of why it is morally permissible for *the principal* to take the profit from the fiduciary. The right to deprive the fiduciary of the profit cannot belong to society as a whole or anyone other than the principal. Justifying the principal's taking of the fiduciary's profits requires the consideration of norms of distributive justice only if one conceives the question in terms of whether *the court* or *the state* should take the benefit from the fiduciary and give it to the principal – that is, as a question concerning the allocation of a resource.

The remaining question is whether the principal's right to take the fiduciary's profit must always take a proprietary form – that is, necessarily justifies taking the asset which constitutes the profit – or may sometimes involve merely a personal right to demand that the fiduciary pay the monetary value of the profit. Miller's emphasis upon the fiduciary power being a means which belongs exclusively to the principal suggests that a transfer of the *assets* which constitute the fiduciary's gain should be, at the very least, the default remedy. The suggestion is even stronger in Lionel Smith's recent suggestion that the 'no-profit rule' is 'a primary rule of attribution'[104] – that is, 'the profit is attributed to the beneficiary as a matter of primary right'.[105] There is apparent judicial support for such a position in Australia.[106] Certainly, the proposition that proprietary relief is restricted to cases in which the fiduciary had an obligation to acquire the asset or opportunity in question for the principal has been rejected.[107]

A contrasting stance is that recently taken by Sarah Worthington.[108] Worthington has suggested that proprietary relief ought to be available in most cases but that cases in which the profit is gained through 'exercise of the fiduciary's role' but 'involves no use of the principal's property nor pursuit of an opportunity within the scope of the role' would attract only personal relief.[109] As Worthington

103 Ibid 621-622

104 Smith, above n 37.

105 Ibid?

106 *Furs Ltd v Tomkies* (1936) 54 CLR 583, 592 (Rich, Dixon and Evatt JJ)('belongs in equity to the company'); Note, on the other hand, the cautious stance of Bant and Bryan on this issue (Bant and Bryan, above n 2, 224 (n 76)).

107 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 107-108 (Mason J)

108 Sarah Worthington, 'Fiduciary duties and proprietary remedies: addressing the failure of equitable formulae' (2013) 72 *Cambridge Law Journal* 720

109 Ibid 735; Note that Graham Virgo has drawn the line in a slightly different place – that is, proprietary relief *would* be available 'where the profit [is] derived directly from the principal's property … or derived from the exploitation of an opportunity or right which was available to the principal and would have benefited him had the fiduciary not intervened' (Graham Virgo, 'Profits obtained in breach of fiduciary duty: personal or proprietary claim? (2011) 70 *Cambridge Law Journal* 502, 504). Virgo's formulation appears to exclude the possibility of proprietary relief where it is improbable that the principal would have procured the benefit in the event that the fiduciary had not, so would, in practice, be more restrictive of proprietary relief than Worthington's formulation.

acknowledged,[110] drawing the line in this way calls into question the Privy Council's decision in *Attorney-General for Hong Kong v Reid*.[111] According to Worthington, the claimant in *Reid* should have been restricted to a personal remedy because, even though it was probable that the defendant could not have made his real estate investment without having received the bribe, the rationale for disgorgement in that case was merely 'to strip the fiduciary' of a profit and 'not to transfer to the principal an asset to which the principal is entitled ahead of anyone else'.[112] The profit was made from exploiting an opportunity which the fiduciary would not, in any circumstances, have had to pursue on behalf of his principal.

A problem with restricting the principal to a personal claim in such cases is the lack of a mechanism for the disgorgement of future gains which are causally linked to the breach of fiduciary duty. The situation in *Reid* serves as an illustration. Mr Reid used the bribe money to purchase real estate which appreciated in value. As Worthington acknowledged,[113] it is unlikely that Mr Reid would have been able to make that profitable investment without having received the bribe. Any monetary remedy which a court could award in such a case would be limited to profits which the fiduciary has accumulated up to the date of judgment. Yet, since it is conceivable that the fiduciary would, after judgment, continue to accumulate profits which are causally linked to the breach of duty, a monetary remedy would not be effective in bringing about a complete disgorgement of the fiduciary's profits. To say that the principal has a right to the asset which the fiduciary received in breach of duty so as to give the principal a right to the proceeds of realisation or investment of that asset overcomes the difficulty in quantifying the necessary disgorgement.[114] It is consistent with a commutative justice account of remedies for breach of fiduciary duty to insist that the fiduciary must give to the principal the asset which constitutes the fiduciary's ill-gotten gain, at least in those cases where it is difficult to quantify the fiduciary's profit. Such an approach to the question of whether proprietary relief ought to be awarded would affirm the outcome in *Reid* as well as that in the landmark Canadian case of *LAC Minerals Ltd v International Corona Resources Ltd*.[115]

110 Ibid 749

111 [1994] AC 324

112 Worthington, above n108, 742

113 Ibid

114 For an explanation of the decision in *Reid* that runs along these lines, see Struan Scott, 'Rights, Remedies and Wrongs and the Bribe-taking Fiduciary' in Charles EF Rickett (ed), *Justifying Private Law Remedies* (Hart Publishing, Oxford, 2008) 54-56; See also Darryn Jensen, 'Reining in the Constructive Trust' (2010) 32 *Sydney Law Review* 87, 106-107.

115 (1989) 61 DLR (4th) 14; In that case, a majority of the Court concluded that the defendant company held the land that it had acquired ('the Williams property') on constructive trust for the plaintiff. Both breach of confidence and breach of fiduciary duty were argued and only two members of the majority (La Forest and Wilson JJ) concluded that the defendant had breached a fiduciary duty. The third member of the majority (Lamer J) concluded that there had been no breach of fiduciary duty but there had been a breach of confidence. While La Forest J noted that this was a case in which the constructive trust 'simply redirects the title of the Williams property to its original course', his Lordship noted also that this

In cases like *Reid*, the argument is about 'what counts as the profit that the defaulting fiduciary has made as a result of his breach of fiduciary duty'.[116] The principal is entitled, as a matter of commutative justice, to take from the fiduciary the addition to the fiduciary's wealth which is attributable to the breach of fiduciary duty. Once the profit which the fiduciary has made by reason of the breach of duty has been identified, the remaining question is one concerning the practicalities of conveying that wealth from the fiduciary to the principal. It would be consistent with the 'lesser interference' commitment of Anglo-Australian law[117] to insist that where the total addition to the fiduciary's wealth arising from the breach of duty can be quantified at the time of judgment, the relief should take a monetary form. In cases in which the addition to the fiduciary's wealth takes the form of an asset which continues to produce profits for the fiduciary, the fiduciary should hold the asset on constructive trust for the fiduciary. Such an approach proceeds on the basis that the principal has a primary right to any *benefit* which accrues to the fiduciary but whether the principal has a secondary right to the transfer of an asset or to the monetary value of the benefit will depend upon the precise character of that benefit and what is necessary to convey the benefit from the fiduciary to the principal. Nevertheless, the question of the form of relief remains a question about what is necessary to ensure that the fiduciary does what is right towards the principal and, conversely, what is the principal justified in demanding.

(b) Irrelevance of Insolvency

If a claimant is, as a matter of commutative justice, justified in demanding that a defendant transfer an asset to her, then the claimant's right to the asset ought not to be defeated simply by the fact that the defendant has unsecured creditors whose interests in being paid might be compromised in the event of the defendant's insolvency.[118] The interest of an unsecured creditor is not an entitlement to the particular asset. It is merely an interest in maximising the value of the estate which is available for satisfaction of the monetary claims of unsecured creditors. The possibility that unsecured creditors may go unpaid – or receive only a fraction of what is owing to them - is not a reason for refusing to give proprietary relief to the payer.[119] Equally, one ought to be deeply suspicious of cases in which the only

was a case in which 'the right of the property holder to have changes in value accrue to his account rather than to the account of the wrongdoer' was important (at 51). Wilson J commented that 'the imposition of a constructive trust ensures … that the wrongdoer does not benefit from his wrongdoing, an important consideration in equity which may not be achieved by a damage award' (at 17).

116 *FHR European Ventures LLP and Others v Mankarious and Others* [2013] EWCA Civ 17 [14] (Lewinson LJ)

117 See above note 90 and accompanying text.

118 Note, in this connection, Sarah Worthington's observation that any policy argument that the principal should rank behind the fiduciary's general creditors 'applies only to gains made by the fiduciary which the fiduciary *must not* have' and 'does not apply to gains which the principal *must* have' (Worthington, above n108, 750)

119 In *Muschinski v Dodds* (1985) 160 CLR 583, Deane J (of the High Court of Australia) proposed that the effect of a constructive trust be postponed to the date of publication of

apparent reason for awarding proprietary relief was that a personal remedy would be of no value to the claimant.[120] Both lines of argument displace the question of the moral permissibility of demanding the transfer with a question concerning the distributive effect of requiring the transfer.

(c) All Cases are Two-Party Cases

A claimant may, as a matter of commutative justice, be able to demand a transfer of assets from a principal wrongdoer but may not be able to demand a transfer from a third party transferee of the asset. The question of third party enforceability does not turn upon the relative desert of the claimant and the third party. It is a matter of the third party being entitled to refuse to transfer the asset to the claimant, even though the principal wrongdoer would not have been entitled to refuse to transfer. In other words, the alleged three-party case is actually a conglomeration of two two-party cases.

The well-established bona fide purchaser without notice rule provides a simple illustration of the appropriate pattern of reasoning. A transfer of *x* from A to B may be impugned – so that A is entitled to demand a re-conveyance from B and a court of equity will enforce this entitlement – but if C has acquired an interest in *x* for valuable consideration and without notice of A's equitable interest, A cannot demand a conveyance from C. This is precisely how the rule was understood in the classic decision of *Pilcher v Rawlins*.[121] Lord Hatherley LC remarked that, on a plea of bona fide purchaser without notice, 'equity declines all interference with the purchaser, having … no ground on which it can affect his conscience'.[122] James LJ said that, once good faith, the giving of consideration and lack of notice have been established, 'this Court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate'.[123] Mellish LJ said that 'this Court will not take an estate from a purchaser who has bought for valuable

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the court's reasons '[l]est the legitimate claims of third parties be adversely affected' (at 623). It might be remarked that the effect of such a postponement would have been to limit the entitlements of the parties to personal entitlements *against each other* as to how they were to divide the proceeds of sale of a jointly-owned asset. The correctness of this outcome is not disputed. The case is best understood as one in which neither party had, in the first place, a right to a transfer of an interest in the asset which was enforceable against the whole world.

120 Peter Watts, 'Constructive trusts and insolvency' (2009) 3 *Journal of Equity* 250, 255; Watts argued (at 274) that the payee's insolvency was 'a strong driver of the result' in *Chase Manhattan Bank NA v Israel-British Bank (London) Limited*. Note, on the other hand, Professor Birks's view that *Chase Manhattan* was a case in which it was 'affirmatively proved' that the payer never had any intention to benefit the payee, so a *resulting* trust in favour of the payer arose (Peter BH Birks, 'Restitution and Resulting Trusts' in S Goldstein (ed), *Equity and Contemporary Legal Developments* (Hebrew University of Jerusalem, 1992) 347).

121 (1872) 7 Ch 259

122 (1872) 7 Ch 259, 266

123 Ibid 269

consideration without notice'.[124] The common understanding that is apparent in these statements is that the original transferor cannot enlist the aid of a court of equity to compel the legal owner to re-convey the asset. One might say, in Kantian terms, that it is not morally permissible for the original transferor to coerce the bona fide purchaser of the legal estate. The court's lack of jurisdiction reflects the moral impermissibility of coercing a legal owner who has purchased its interest from the previous transferee, does not know of the original transferor's rights against the previous transferee in respect of the same asset and is not negligent in failing to have discovered the existence of those rights. What the court is certainly *not* doing is performing a distribution between two or more claimants by reference to their relative merits as claimants.

The bona fide purchaser rule is the easy case. Elise Bant and Michael Bryan described the bona fide purchaser rule as 'a true defence that determines defendants' liability once and for all'.[125] In the same work, Bant and Bryan observed there are a number of 'discretionary factors' which 'assume particular weight' in certain types of cases concerning the award of proprietary relief.[126] In particular, such factors are important in cases where proprietary disgorgement is sought:-

> [W]here proprietary disgorgement is sought over the defendant's original asset – for example, over a bribe taken by a fiduciary in breach of duty, or land promised to the plaintiff pursuant to a contract or a relied-upon representation – the authorities suggest that discretionary factors properly and commonly bear directly on the availability and nature of a proprietary remedy. The reason for this distinctive mode of operation likely lies in the underlying justifications for proprietary relief in such cases. In disgorgement cases, corrective justice considerations are irrelevant. It follows that justification for proprietary relief must like elsewhere, in concepts such as consent, deterrence and reward.[127]

Bant and Bryan have suggested that the prejudice that a proprietary remedy would visit upon a broad range of third party interests, such as those of investors, unsecured creditors and employees of the defendant,[128] should be considered in determining whether the relief awarded should be personal rather than proprietary. The matter to be considered is the *effect* upon a third party of awarding proprietary relief – or even a conjectural class of third parties[129] – in terms of the third

124 Ibid 273

125 Elise Bant and Michael Bryan, 'Defences, Bars and Discretionary Factors' in Elise Bant and Michael Bryan (ed), *The Principles of Proprietary Remedies*, above n 2, 185, 190

126 Ibid 189

127 Ibid 201; See also Bant and Bryan, above n 2, in which the authors stated that corrective justice justified proprietary restitution 'where the defendant has received an asset directly from the plaintiff's own assets' (at 217) but disgorgement of secondary profits requires a 'fresh justification' (at 222). Accordingly, Bant and Bryan's account is a mixed corrective-distributive justice account and is broadly similar to Harding's account.

128 Ibid 201-202

129 Although Bant and Bryan (at 203) state that '[a]ny person who may be affected by the

parties' ability to satisfy claims which are not *specifically* related to the particular asset that is the subject of the claimant's claim. Here, Bant and Bryan were not concerned with the moral permissibility of coercing a particular person to transfer or relinquish a direct interest in the asset. They were concerned with the relative desert of two or more claimants to an asset – or, in the case of creditors, whether one claimant should be paid in full while others are left to participate in a *pari passu* distribution of the remaining assets.

If, on the other hand, it is argued that a fiduciary becomes a constructive trustee because that is the only effective means to deprive the fiduciary of the whole of the gain which arises from the breach of duty, the mere possibility that the fiduciary could become insolvent and that the interests of unsecured creditors would be compromised in a future bankruptcy administration cannot stand in the way of giving effect to the claimant's property right. Unsecured creditors or other third parties are not the object of a demand to transfer a specific asset to the claimant. Awarding proprietary relief has an effect on the distribution of wealth to the potential detriment of other creditors, but this is simply a consequence of the claimant's morally permissible coercion of the errant fiduciary. There is no direct coercion of the third parties.

Bant and Bryan relied upon statements by the High Court of Australia in *Giumelli v Giumelli*[130] and *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd*[131] and the Full Court of the Federal Court of Australia in *Grimaldi v Chameleon Mining NL (No 2)*[132] which indicate that prejudice to the interests of third parties is a legitimate reason for withholding proprietary relief and granting only personal relief.[133] Treating the effects on third party interests as an affirmative reason for denying proprietary relief creates a problem – namely, the problem of identifying the relevant third party interests and ensuring that they are represented before the court which has to discern whether and how those interests will be affected. Bant and Bryan (and the High Court) were certainly conscious of this problem.[134] The problem disappears if the decisions in the cases mentioned are taken to stand for a narrower proposition - that is, since it is possible that there are other persons whose interests might be adversely affected by the award of proprietary relief, a court should take care to ensure that the relief awarded is *no more than is necessary* to

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making of a proprietary order' ought to be joined as a party to the litigation. See also *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1, 53 (par 153). See also Michael Bryan, 'Constructive Trusts: Understanding Remedialism' in Jamie Glister and Pauline Ridge (ed), *Fault Lines in Equity* (Hart, Oxford, 2012) 215, 235 in which Bryan remarked that a doctrine of remedial constructive trusts that allows the award of a constructive trust 'in order to give effect to the claimant's subjective preference to own or recover property … will only be workable if it is supplemented by adjectival provisions directed to indentifying whether the dispute is in fact a 'three-party' contest'.

130 (1999) 196 CLR 101, 125

131 (2010) 241 CLR 1

132 (2012) 200 FCR 296

133 Bant and Bryan, above n125, 201-203

134 See above n 129

vindicate fully the claimant's rights against the defendant. Such an interpretation is consonant with the general notion, referred to earlier, that remedies which constitute a lesser interference with the defendant's freedom should be preferred to those which constitute a greater interference.

The case of *Giumelli v Giumelli* may be used to illustrate the point. In that case, the concern was that the plaintiff had, as a consequence of his parents' creation of an expectation that he would be given a portion of the family land, given up opportunities to earn a living elsewhere and invested his energies into the working and improvement of the family property. The plaintiff was entitled to relief on the ground of equitable estoppel and was awarded the monetary value of the interest that he expected to receive. The decision to award a monetary sum, rather than a transfer of an interest was given the double-barrelled justification that it was 'necessary both to avoid injustice to others [particularly the plaintiff's brother] and *to avoid relief which went beyond what was required for conscientious conduct* by Mr and Mrs Giumelli'.[135] The proposition might have been equally well expressed in terms of not using a 'sledgehammer' when a 'scalpel' would suffice,[136] lest the use of the proverbial sledgehammer have adverse consequences for those who are not parties to the litigation. The narrower proposition is consistent with the commutative justice account. A person ought not to be coerced to any greater extent than is necessary to vindicate the claimant's rights.

The interests of third parties were not the only considerations that were apparently in play in the cases under discussion. Bant and Bryan recognised that it is appropriate for a court to refuse proprietary relief 'where it would force the parties into an ongoing dysfunctional relationship'.[137] This 'clean break' consideration provided a reason for the refusal of proprietary relief in cases such as *Giumelli v Giumelli* and *Grimaldi v Chameleon Mining NL (No 2)*. Bringing this consideration into account can be reconciled with the commutative justice account. It will be recalled that, under Weinrib's Kantian account of private law, rights can be 'provisionally understood in abstraction from the judgment of any public institution'[138], but the effective enforcement of those rights requires that those rights 'operate within

135 (1999) 196 CLR 101, 125 (italics added); In *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566, 585 (par 42) the High Court said that a court should consider whether 'there are other means available to quell the controversy'. In *John Alexander's Clubs v White City Tennis Club Ltd* (2010) 241 CLR 1, 45-46 (par 129), it was said that 'care must be taken to avoid granting equitable relief which goes beyond the necessities of the case' but that a constructive trust should not be declared 'in a manner injurious to third parties merely because the plaintiff has no other useful remedy against a defendant'. The context of the latter remark was a discussion of whether a constructive trust may be awarded because other remedies 'lack practical utility *because of the impecuniosity of those against whom they are sought*' (italics added). See also *Sidhu v Van Dyke* [2014] HCA 19 (par 85).

136 RP Austin, 'The Melting Down of the Remedial Trust' (1988) 11 *University of New South Wales Law Journal* 66, 84

137 Bant and Bryan, above n125, 203

138 Weinrib, above n 35, 195

a public and systematic framework that has supplementary requirements of its own'.[139] That public and systematic framework involves adjudication by courts which award relief to claimants so as to resolve once and for all their disputes with the relevant defendants. A form of relief which would require the parties to maintain an ongoing relationship involving regular negotiation of the detail of their entitlements is a recipe for generating further disputes. This is, of course, the key consideration which underlies the well-accepted notion that a court ought to refuse to award specific performance of a contract if the decree would require the constant supervision of the court.[140]

'Clean break' considerations may operate either in favour of or against the award of proprietary relief. In *Giumelli*, they operated against the award of proprietary relief because bringing about a transfer of land from the defendants to the plaintiff would have involved subsequent cooperation between the parties in order to identify the land to be transferred and to perform the necessary subdivision. It was not simply a matter of the defendants signing an instrument of transfer. In *Attorney-General for Hong Kong v Reid*,[141] a 'clean break' consideration operated in favour of proprietary relief in so far as there was an identifiable asset which represented the proceeds of the bribes and awarding merely an account of profits would not have captured the benefits which would have accrued to the defendant by way of post-judgment increases in the value of that asset. For as long as the defendant continued to be the owner of the land, a regular accounting as to the increase in his wealth derived from his ownership of the land would have been necessary. No lesser degree of coercion would have constituted both a 'clean break' and full disgorgement to the claimant of the defendant's gain. The question is ultimately a question of what coercion of the defendant is morally permissible in the circumstances of the case, bearing in mind the practicalities of resolving the dispute once and for all.

V. CONCLUSION

Whether one understands the legal entitlements which emerge from adjudication in terms of commutative justice or distributive justice affects what one may recognise as a legitimate consideration in the determination of both the defendant's liability and the form that the court's relief may take. From the perspective of those who insist that the law which emerges from adjudication is concerned only with commutative justice, the distributive justice account rests upon a mistaken assumption that legal entitlements are designed to produce the distributive consequences that they have. Only such an assumption can underpin an insistence that the configuration of legal entitlements (including property rights) be justified in terms of whether they advance a social vision respecting parties' relationships. Commutative justice accounts, whether 'constructivist' or

139 Ibid 203
140 Bant and Bryan, above n125, 204
141 [1994] 1 AC 324

'evolutionary', understand entitlements, not as the product of design, but as the product of interactions between pairs of human beings. The role of courts is to centralise and regularise the interpretation and enforcement of these entitlements. Interpretation of entitlements and the justification of the configuration of those entitlements in particular cases proceeds according to arguments which are particularisations of the abstract form which is immanent in the existing system of entitlements – namely, commutative justice. All justifications must consist of arguments about whether one particular person's coercion of another particular person is morally permissible. Questions about the form of relief must focus upon what coercion of the defendant is necessary – but no more than necessary – in order to give effect to the claimant's entitlement. Proprietary relief is justified if requiring the defendant to transfer an asset to the claimant is the least coercion that would give the claimant that to which it is entitled as a matter of commutative justice. Neither the mere fact that the defendant is insolvent nor the mere existence of third party claims defeat proprietary claims which are justified as a matter of commutative justice.