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The *Pallant v Morgan* equity reconsidered

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This paper argues that the *Pallant v Morgan* equity should not be recognised as an independent doctrine because it does not rest on any tenable jurisprudential basis. It shows that a characterisation based on ‘common intention’ should be rejected because it is inconsistent with established legal principles and commercial practice. The alternative explanation based on breach of fiduciary duty, as suggested by Etherton LJ in *Crossco No. 4 Unlimited v Jolan Unlimited* [2011] 2 All ER 754 fares no better, as there is no reason why the *Pallant v Morgan* equity cases should be considered separately from other instances of breach of fiduciary duty in law. Further, this account must however be read in light of the Court of Appeal’s decision in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] 3 WLR 1153 which ruled that proprietary relief is only allowed in circumstances where the breach amounts to abuse of the principal’s asset. This requirement is particularly difficult to satisfy in the paradigm case of the *Pallant v Morgan* equity, save in the case of agency. But where there is a relationship of agency, a constructive trust will also arise in accordance with an established agency principle, resulting in duplication in results.

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INTRODUCTION

This paper discusses the difficulties with recognising the *Pallant v Morgan* equity, which was coined and formulated as a new category of constructive trust in *Banner Homes Group plc v Luff Developments*. The *Pallant v Morgan* equity typically arises in a case where two parties come to a pre-acquisition arrangement that one of them will acquire a particular asset and the non-acquiring party will have some interest in

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2. In many cases, the arrangements concerned a joint venture for the acquisition of land. However, the doctrine has widened in its scope of application to include acquisitions of other kinds of assets as well as going beyond joint ventures. See eg *National Trust v Birden* [2009] EWHC 2023 (Ch) (a joint venture pertaining to certain contractual arrangements); *Benedetti v Sawiris* [2009] EWHC 1330 (Ch) (the facts concerned a cooperative venture to acquire a group of companies but the claim was brought by a party who provided brokerage services for shares in the acquired companies on the basis that that was his promised remuneration). Although the
the asset. In reliance on the pre-acquisition arrangement, the non-acquiring party confers a benefit on the acquiring party in relation to the acquisition or suffers a detriment that prevents it from acquiring the asset on equal terms. In such circumstances, if the acquiring party later decides not to honour the pre-acquisition arrangement without having first informed the non-acquiring party of its change of mind, the acquiring party holds the asset on constructive trust for the non-acquiring party. Until the recent Court of Appeal’s decision in Crossco No 4 Unlimited v Jolan Limited, there had been no detailed discussion of the doctrine’s jurisprudential basis. In fact, the doctrine had been neither doubted nor disapproved by the courts. The available academic literature, however, presents a range of views on the doctrine, with varying degrees of enthusiasm.

In Crossco, Etherton LJ took the opportunity to consider the case-law and representative academic literature. His Lordship, having regard to the developments of the common intention constructive trust in the domestic context, concluded that the Pallant v Morgan equity cases should be reinterpreted as based on breach of fiduciary duty. Arden and McFarlane LJJ, on the other hand, did not think the court could depart from the common intention constructive trust characterisation as enunciated in the seminal case of Banner Homes. A third possibility, viz, the law should not admit of such a type of constructive trust, was not canvassed as it was raised by neither party to the dispute. Nevertheless, in light of the long line of cases endorsing Banner Homes, Etherton LJ did not think that the Court of Appeal could put the decision in that case in doubt, much less overturn it.

This paper suggests that the Pallant v Morgan equity should not be recognised as a new category of constructive trust in the first place because there is no proper jurisprudential basis for this independent doctrine. It extracts fresh perspectives on the Pallant v Morgan equity by examining recent developments in the law that have an impact on the understanding and future development of this doctrine. The discussion is structured in four sections. Section I examines the facts and decision of Crossco, focusing on the areas of the judgment relating to the Pallant v Morgan equity doctrine.
Section 2 considers the suitability of ‘common intention’ as the basis of the doctrine and, in particular, examines the implications flowing from the controversial developments of the domestic common intention constructive trust. The analysis shows that the Stack v Dowden line of cases does not automatically lead to the extinction of a commercial common intention constructive trust, if the Pallant v Morgan equity is viewed as such. More importantly, however, ‘common intention’ is an ill-founded basis for the doctrine because it is inconsistent with commercial practice and established legal principles.

Sections 3 and 4 focus upon analysing the effects and implications of reinterpreting the Pallant v Morgan equity as based on breach of fiduciary duty. The former section discusses the case of Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (In Administration) in which the Court of Appeal held that there is no proprietary relief for breach of fiduciary duty, unless the breach amounts to an abuse of the principal’s asset as opposed to a mere abuse of position. This part of the discussion argues that there is no reason that the Pallant v Morgan equity, understood as based on breach of fiduciary duty, is not similarly subject to the same requirement. The latter section then goes on to consider the implications of realigning the Pallant v Morgan equity doctrine with the decision in Sinclair. The analysis shows two important matters. First, the key features of the doctrine as identified by Chadwick LJ in Banner Homes are merely descriptive of the factual commonality of the cases and can no longer legally define and justify them as amounting to a separate doctrine. Secondly, the only situation in which the Pallant v Morgan equity could be successfully invoked is where the parties are in a relationship of agency. However, the same result can be achieved by applying the established principle of agency wherein an agent acquires an asset in its own name, which it has undertaken to acquire on behalf of the principal. The duplication in results compels one to further question if the Pallant v Morgan equity should be treated as a separate doctrine, meriting recognition.

1. JURISPRUDENTIAL BASIS RECONSIDERED: CROSSCO

Crossco concerned a building that was leased to Piccadilly, a company that ran an arcade on the ground floor, for a term of 15 years. The lease agreement contained a landlord’s break clause operable with three months’ notice. The original landlord (Crossco) later transferred its freehold interest in the building to another party (Jolan) who had plans to extensively convert and develop the building. This transfer was part of a complicated demerger of a large group of family-owned companies and other interests that were ultimately owned by parties who fell into two camps. Crossco and Piccadilly were owned by one camp, while Jolan was owned by the other camp. Jolan served a notice on Piccadilly to operate the break clause, but it was contended that the parties had reached a binding oral agreement before the completion of the demerger which prevented the exercise of the clause. Further, and in the alternative, the claimants argued that the contract should be rectified to reflect this. The claimants also argued in the alternative that the equitable doctrines of estoppel and constructive trust would prevent Jolan’s exercise of the clause. All claims were dismissed in the first instance.9

The Court of Appeal unanimously dismissed the appeal, which was restricted to issues of estoppel and constructive trust. On the principles of the *Pallant v Morgan* equity, Etherton LJ recited the (non-exhaustive) key features of the doctrine as laid down by Chadwick LJ in *Banner Homes* without disapproval. The said features may be summarised as follows:

1. A *pre-acquisition* arrangement between the parties that one of them would acquire a property and the non-acquiring party would have some interest in it. The arrangement need not be and is usually not contractually enforceable.

2. At no time before the acquisition (or before it was too late to restore the parties to the no-advantage or no-detriment position) did the acquiring party inform the non-acquiring party that it did not wish to proceed on the basis of the arrangement.

3. In reliance on the pre-acquisition arrangement, the non-acquiring party must have either conferred an advantage on the acquiring party in relation to the acquisition or suffered a detriment to its ability to acquire the property on equal terms. In many cases, the non-acquiring party’s abstention from bidding for the property will constitute both an advantage to the other party and a detriment to itself.

4. The advantage conferred or the detriment suffered in reliance on the pre-acquisition agreement renders it unconscionable for the acquiring party to act inconsistently with the pre-acquisition agreement, for example, by retaining the property wholly for itself post-acquisition.

The disagreement between the judges related to the jurisprudential basis of the *Pallant v Morgan* constructive trust. Etherton LJ characterised the trust as arising in response to a breach of fiduciary duty. In light of recent cases on the application of the common intention constructive trust in the domestic context which drew a distinction between commercial and domestic cases, Etherton LJ deemed it necessary to reconsider the characterisation of the *Pallant v Morgan* equity as a species of common intention constructive trust. After some careful analysis of the case-law on the *Pallant v Morgan* equity, Etherton LJ concluded that they can and ought to be explained ‘by the existence and breach of fiduciary duty’. He elaborated that it is sound policy that the *Pallant v Morgan* equity should be so explained because it promotes commercial certainty and reflects the usual business practice of effecting transactions by written contracts. It follows that the lack of a complete agreement is no obstacle to a trust arising if the trust arises as a judicial means to ‘deprive the defendant of the unconscionable advantage’ obtained in breach of trust. Etherton LJ also noted accounts by McFarlane and Gardner which sought to explain a range of constructive trusts (including the *Pallant v Morgan* equity cases) but considered that

11. *Crossco*, above n 3, at [76].
12. Ibid, at [88].
13. Ibid, at [80].
15. Ibid, at [94]. In other words, Etherton LJ is in favour of exercising judicial restraint in commercial pre-contractual situations.
16. Ibid, at [95].
they are explanations ‘at a high level of abstraction’.

Etherton LJ opined that the *Pallant v Morgan* equity cases can simply be explained conventionally as examples of breach of fiduciary duty. Etherton LJ also seemed to support the view that proprietary estoppel and the *Pallant v Morgan* equity are doctrinally distinct.

In more brief judgments, Arden and McFarlane LJJ said that it was not open to the Court of Appeal to reinterpret the *ratio of Banner Homes* and as such, the *Pallant v Morgan* equity should be treated as a common intention constructive trust. But it would appear that McFarlane and Arden LJJ were merely abiding by the principles of *stare decisis*, awaiting a declaration from the Supreme Court on this issue. Arden LJ expressly acknowledged that Etherton LJ’s interpretation has the merits of restricting the situations in which the *Pallant v Morgan* equity may arise and ensuring consistency with the developments in the law of proprietary estoppel. The difference in characterisation did not matter on the facts of *Crossco* because neither a fiduciary relationship nor the requisite common intention could be established.

*Crossco* thus paves the way for a full examination before the Supreme Court when the opportunity arises. In the next section, we will consider developments in relevant areas of the law that may influence the development of the *Pallant v Morgan* equity.

2. COMMON INTENTION

(a) Domestic cases

The doctrine of common intention constructive trust for unmarried cohabitees has been at the forefront of controversy since the House of Lords’ decision in *Stack v Dowden*. It will remain controversial for some time to come, with the recent decision by the Supreme Court in *Jones v Kernott* endorsing the imputation of intention at the stage of quantification of interest. What seems much more readily accepted from this line of cases, save for some initial protest by Lord Neuberger, is the distinction between acquisition of property for domestic purposes and acquisition of property for commercial purposes. This distinction was subsequently applied by Lord Neuberger in *Laskar v Laskar* and affirmed again in *Jones*.

The *Stack* line of cases confirmed that the presumption of resulting trust approach, which is singularly focused on the parties’ respective contributions to the purchase...
price, is not an appropriate starting point in the domestic context. In Jones, Lord Walker and Lady Hale commented that parties in a trusting, personal relationship do not formalise their agreements on property ownership. Accordingly, the rebuttable default presumption in such cases is that the equitable interest follows the legal interest.

(b) Commercial versus domestic

In Crossco, Etherton LJ opined that the development of the distinction between domestic and commercial cases renders untenable the characterisation of the Pallant v Morgan equity as a common intention constructive trust. He was of the view that the ‘special features, in terms of policy, facts and law’ of the domestic cases do not apply in a commercial context. He explained that commercial men will usually seek legal advice on their interests and rights and record their agreements in a contract, expecting to be bound only when the contract has been made. Given that certainty is the paramount concern of commerce, parties would neither expect their rights to be ‘ambulatory’ nor expect the court to determine their respective shares by an exercise of imputation of intentions.

Arden LJ, with whom McFarlane LJ agreed, pointed out that whilst Stack and Jones may suggest that the application of the common intention constructive trust is in future limited to domestic cases, she did not think that it was so clear that Banner Homes would be inconsistent with these decisions. Indeed, neither Stack nor Jones had considered the precise effects on cases like Banner Homes. Moreover, if one studies the precise reasons and consequence of drawing the distinction between domestic and commercial cases, one will realise that the distinction does not automatically render a commercial common intention constructive trust untenable.

First, the principal distinction between a domestic case and a commercial case lies in the applicability of the presumption of resulting trust analysis as the starting point. The non-application of the presumption of resulting trust as the starting point in a domestic case flows from the nature of the familial enterprise, as discussed above. In the case of Laskar, notwithstanding that the property was jointly purchased by a mother and her daughter, Lord Neuberger did not classify it as a domestic consumer case because he found that the property was purchased for primarily investment purposes. He thus applied the resulting trust analysis to quantify the parties’ shares.

32. Jones, above n 26, at [20]–[21]. While a majority of the cases concerned the division of the family home between unmarried cohabiters, the same approach applies to other types of domestic relationships, eg between a mother and a son. Adekunle v Ritchie [2007] 2 P & CR DG20.
33. Crossco, above n 3, at [87]. Cf Prior to the Supreme Court’s decision in Jones, Etherton LJ commented extra-judicially that it is difficult to see how the relaxation of the requirements (detrimental reliance and inference of an agreement to share) for a common intention constructive trust in Stack could affect how the rules of constructive trust will apply in the commercial context. See Etherton, above n 5, at 124.
34. Crossco, above n 3, at [86].
35. Ibid, at [87].
36. Ibid.
37. Ibid, at [129].
instead of applying the presumption of equal beneficial ownership.\textsuperscript{38} Perhaps, for this reason and not unjustifiably so, Etherton LJ came to the view that a common intention constructive trust analysis will not be applied in commercial cases.

However, commercial men would have no need to argue the \textit{Pallant v Morgan} equity if the non-legal owner has actually made a direct contribution to the purchase price of the property.\textsuperscript{39} In such circumstances, the presumption of resulting trust would have arisen in his favour, subject to rebuttal by direct evidence of a contrary intention. There is no basis for equity to intervene again in a commercial context, through a constructive trust, where a resulting trust analysis would have adequately protected the non-acquiring party’s interest.\textsuperscript{40} Hence, it is arguable that the \textit{Pallant v Morgan} equity operates in very exceptional circumstances—it applies to a commercial case with a unique factual matrix (characterised by the key features highlighted in \textit{Banner Homes}) that merits the imposition of a constructive trust.

Second, it is a mistake to assume that a commercial common intention constructive trust must necessarily operate in the same way as a domestic common intention constructive trust. That the rules are different depending on the context does not mean that the two kinds of constructive trusts cannot share the same objective of giving effect to parties’ ‘common intention’. Hence, the concept of ambulatory constructive trust and the possibility of presuming parties’ intentions at the stage of quantification do not have to apply in the commercial context at all or in exactly the same way because the reasons which gave rise to such developments in the domestic context are absent in the commercial context. Clearly, the concept of ambulatory constructive trust which captures the informality of parties’ dealings in a trusting, familial relationship does not apply where parties are expected to record the variations of their agreements in writing. In any event, the courts do not lightly determine that the parties’ intentions have changed even in the domestic context.\textsuperscript{41} As for the imputation of parties’ intentions in domestic cases, this recourse could only be sought in situations where the parties’ intentions on their shares are not express and cannot be inferred from the evidence. In a commercial case, Megarry J has said that the parties’ shares will be based on their pre-acquisition agreement and only ‘[w]here a reasonable certainty as to the fractions is unattainable then no doubt equity will delight in equality’.\textsuperscript{42} Equal shares would thus be the imputed intentions of the commercial parties in circumstances where there is no agreement on their respective shares. In this connection, it should be noted that imputation of intentions is not alien to commercial law, an exercise that can be found in, first, the implication of terms in the law of

\textsuperscript{38} Lord Neuberger went on to consider the case where the presumption of equal beneficial ownership was applied as a starting point and concluded that it would have been rebutted in any event. See \textit{Laskar}, above n 29, at [18]–[19].

\textsuperscript{39} This is to be distinguished from a case where the non-acquiring party had extended a loan to enable the acquisition of the asset. See \textit{Kilcarne Holdings}, above n 4. In a loan arrangement, the loan monies become the property of the debtor and what is between the creditor and debtor is a simple debt.

\textsuperscript{40} Prior to \textit{Stack}, the domestic cases accommodated both a resulting trust analysis and a constructive analysis because the rigidity of the former analysis in quantifying a party’s interest in the property does not accurately reflect the nature of familial dealings.

\textsuperscript{41} \textit{Stack}, above n 25, at [70] per Baroness Hale; at [139]–[141] per Lord Neuberger. See also M Yip ‘The rules applying to unmarried cohabitants’ family home: \textit{Jones v Kernott}’ (2012) Conv 159 at 163–165.

\textsuperscript{42} \textit{Holiday Inns Inc v Broadhead}, above n 1. Equal sharing was indeed the order made in \textit{Pallant v Morgan}, above n 1; \textit{Time Products}, above n 1; \textit{Island Holdings}, above n 1.
contract, and secondly, the determination of the proper law of the contract before the application of the Contracts (Applicable Law) Act 1990.

Third, the domestic equivalent of the Pallant v Morgan cases is the sole name cases. Lord Walker and Lady Hale had clarified via obiter comments in Jones that the starting point of such cases is the presumption of sole beneficial ownership. It follows that the non-legal owner in a sole name domestic case would still need to show that he or she has acquired an interest, as in the case of a non-legal owner joint venture party in a commercial case. In a domestic case, an interest can be acquired based on an express agreement between the parties to share the property coupled with detrimental reliance and where there is no express agreement, an agreement to share may be inferred from conduct. Such conduct also constitutes the detrimental reliance required. Before Stack, it was thought that nothing less than direct contributions to the purchase price will suffice for an agreement to be inferred from conduct. Post Stack, this position has been put to doubt and it remains to be seen whether a holistic approach (taking into account indirect and non-financial contributions) will be applied at the initial stage of proving acquisition of interest.

The Pallant v Morgan equity is the analogue of the express agreement to share in the domestic context. The only difference is that the proof of a detriment in the commercial case is not essential if an advantage to the acquiring party could be shown. But this difference is surely insufficient to reject characterising the Pallant v Morgan equity as a common intention constructive trust. Nield has argued that the Pallant v Morgan equity ‘is dependent on a clear and common intention that the property is to be acquired by the defendant acting in a fiduciary role either solely for the claimant or as a joint enterprise’ and this intention can only be based on express discussions between the parties. The reason why the common intention in a Pallant v Morgan equity case should only be based on express discussions is that in light of the mercenary nature of commercial men and in the absence of express discussions, only one type of conduct by the non-legal owner should assure him of an interest in the property – direct contributions to the purchase price. But where such conduct is found, there is no necessity for the operation of a constructive trust as a presumption of resulting trust arises in favour of the non-legal owner.

Based on the above discussion, the distinction between domestic and commercial cases that has emerged from the Stack line of cases does not necessarily mean that the Pallant v Morgan equity cannot be interpreted as a common intention constructive trust. It may no doubt put pressure on justifying the introduction of a common intention construction trust in the commercial context, but there are other more cogent

43. Terms implied in law are based on public policy and may be viewed as terms that are imposed on the parties, regardless of their actual intentions. See G McMeel The Construction of Contracts: Interpretation, Implication and Rectification (Oxford: Oxford University Press, 2nd edn, 2011) at para [10.36].
47. There are hints of importing a holistic approach at the acquisition stage in the case-law. See Stack, above n 25, at [25]–[26] per Lord Walker; at [60] per Baroness Hale; Abbott v Abbott, above n 45, at [5]–[6] per Baroness Hale.
reasons as to why the *Pallant v Morgan* equity should not be viewed as based on ‘common intention’, which we will discuss below.

(c) Jurisprudential basis

The pertinent question is whether a common intention to share is a proper jurisprudential basis of both the domestic and commercial streams of cases under examination. In relation to the domestic common intention constructive trust cases, the courts have been criticised for straining the concept of ‘common intention’. It has been said that in cases like *Eves v Eves* 49 and *Grant v Edwards*, 50 the legal owner never *subjectively* intended the non-legal owner to have interest in the property and yet a common intention constructive trust was found. 51 The criticism may be a little harsh. In both cases, the man gave an ‘excuse’ to the woman to explain why the property could not be purchased in joint names. In both cases, the ‘excuse’ was to hide the man’s real intention not to share the house. While such cases may be characterised as cases of inducement and can be resolved through the equitable doctrine of proprietary estoppel, 52 it could be argued that where bilateral dealings are concerned, the common intention between the parties should be construed objectively. This means that the subjective intent of one party which is not communicated to the other party will be disregarded. Accordingly, the woman, being the addressee of the ‘excuse’, could reasonably assume that she would have a share in the house but her name was not to appear on the title for formality reasons.

Glover and Todd have also criticised that it is inappropriate to speak of ‘common intention’ in the domestic cases because the facts concern the creation of a trust, instead of an agreement for the disposition of property. 53 It thus follows that only the settlor’s intention is relevant. ‘Common intention’, if it is to be used at all, can only be used in a ‘loose and inaccurate sense’. 54 As for the *Pallant v Morgan* equity cases, ‘common intention’ is used in the sense of *consensus ad idem* for the formation of an agreement. 55 If the two streams of cases concern different kinds of ‘common intention’, there is no value in comparing them. Nor is there basis to say that the *Pallant v Morgan* equity is not concerned with ‘common intention’. In fact, the converse is true. But it might be argued that in a domestic case, the court is looking for a factual common intention which coupled with detrimental reliance, justifies equitable

51. S Gardner ‘Rethinking family property’ (1993) 109 LQR 263 at 264–265; U Riniker ‘The fiction of common intention and detriment’ (1998) Conv 202 at 207. See also N Glover and P Todd ‘The myth of common intention’ (1996) 16 LS 325 at 331 fn 44. Glover and Todd argued that ‘in neither case did [the man] actually intend to create a trust, these cases are good examples of [the woman] obtaining a share where there was no common intention’.
52. An objective test applies to determine whether the recipient of statements would have reasonably understood that the maker of the statements had made a commitment. See B McFarlane and A Robertson ‘Apocalypse averted: proprietary estoppel in the House of Lords’ (2009) 125 LQR 535 at 539–540.
54. Ibid, at 326 fn 5.
55. The agreement is not necessarily enforceable as a contract, eg, for want of certainty in terms or consideration.
intervention. After all, given the informality, the arrangement is not taking effect as a declaration of trust. This is permissible in domestic cases owing to the nature of personal/familial dealings.

The better criticism to make is that the *Pallant v Morgan* equity doctrine does not seek to give effect to the common intention of the parties. This point becomes apparent when one notes that the interest which the non-acquiring party seeks to enforce is one that it would have gotten had the pre-acquisition arrangement been enforceable as a contract. If the purpose of the *Pallant v Morgan* equity is to give effect to the common intention, the common intention is one that is rooted in a bargain – albeit one that is not enforceable as a contract. Uguccioni has criticised that the *Pallant v Morgan* equity is intrinsically claimant-biased and 'panders to opportunistic behaviour of the non-acquiring party'. The non-acquiring party gets to choose whether it wishes to participate in the joint venture as the equity is not formulated in a way that can compel its performance if it decides to walk away after the acquiring party has acquired the relevant asset. In light of the claimant-biased nature of the *Pallant v Morgan* equity, it seems implausible that the objective of the doctrine is to give effect to the common intention of the parties.

One other objection to 'common intention' being the jurisprudential basis of the *Pallant v Morgan* equity is that it directly undermines the institution of contract as an integral part of commercial practice. Uguccioni has forcefully argued that the doctrine allows a claimant 'to complain about a missed economic benefit without requiring proof of a corresponding breach of duty', enforcing what would otherwise be a gentleman's agreement. In a similar vein, Arden LJ astutely observed in *Crossco* that:

> 'For the law in general to provide scope for claims in respect of unsuccessful negotiations that do not result in legally enforceable contracts would, in my judgment, be likely to inhibit the efficient pursuit of commercial negotiations, which is a necessary part of proper entrepreneurial activity'.

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56. Section 53(1)(b) of the Law of Property Act 1925 requires a declaration of trust in respect of land to be manifested and proved in writing.

57. Uguccioni, above n 5, at 163.


59. This was noted by Patten J in *Benedetti*, above n 2, at [513]. Hopkins similarly points out that the parties in these cases did not intend for the land to be held on trust. The cases concerned 'either a post-acquisition division of ownership or that the land will form part of a commercial joint venture'. See Hopkins, above n 5, at 43. These intentions, it is submitted, are intended to be effected through a contract. Exceptionally, in a case like *Baynes Clarke v Corless*, above n 4, at [38], the parties did not intend or expect their arrangements to be incorporated into a contract. But the arrangements were still in the nature of a bargain.

60. In *Benedetti*, above n 2, at [513], Pattern J has described that the claimant 'seeks to make good the absence of a contractual entitlement to that interest by asserting an equity based on the failure of the other party to adhere to the informal bargain previously made' (emphasis added).

61. Uguccioni, above n 5, at 165.

62. Ibid, at 165.

63. Ibid, at 164.

64. *Crossco*, above n 3, at [133].
There are exceptional circumstances in which equity intervenes, most notably where land is concerned, through the doctrine of proprietary estoppel. However, the Pallant v Morgan equity is more robust and therefore more generous because the claim could succeed even where there is no detriment, provided the claimant could show that it has conferred an advantage on the defendant in relation to the acquisition. Where the joint venture concerns the acquisition of other kinds of assets or in respect of other arrangements, the Pallant v Morgan equity effectively operates as a ‘sword’ version of the doctrine of promissory estoppel – a position that is inconsistent with current English law.

In conclusion, ‘common intention’ does not appear to be a suitable jurisprudential basis for the Pallant v Morgan equity. In the next section, we will examine Etherton LJ’s suggestion that the Pallant v Morgan equity is based on a breach of fiduciary duty.

3. BREACH OF FIDUCIARY DUTY: PROPRIETARY CONNECTION

(a) Revival of Lister v Stubbs

Before the Court of Appeal’s decision in Sinclair, it was thought that under English law the principal can always claim a constructive trust over property received in breach of fiduciary duty, including unauthorised profits (secret commissions, bribes, etc). This is attributable to the Privy Council’s decision in A-G of Hong Kong v Reid that allowed the claimant government’s claim for a constructive trust over properties purchased by the wrongdoing fiduciary with bribe monies received. The Privy Council disapproved the earlier Court of Appeal’s decision in Lister & Co v Stubbs which had held that only a personal account would be available where a fiduciary received a bribe or unauthorised profits by breaching his fiduciary duties. The position in Reid was progressively fossilised in English law through affirmation in a series of High Court decisions.

The Court of Appeal in Sinclair, however, revived the position in Lister v Stubbs. Sinclair concerned a Ponzi scheme, where a director, in breach of his fiduciary duties, transferred monies held on trust by the principal company to another company owned by the director to artificially inflate the share price of the latter company. The director later sold his shares in the second company for huge profits. A proprietary claim was

65. In Cobbe, above n 4, at [14] per Lord Scott of Foscote it was stated that although cases of proprietary estoppel usually concerned rights over land, his Lordship thought that the doctrine, in principle, could also apply to chattels and choses in action. This point was not revisited in Thorner v Major [2009] UKHL 18; [2009] 1 WLR 776 and awaits further elucidation from the Supreme Court.
66. Hopkins argues that it is only in circumstances where a detriment could not be shown that it is necessary to rely on the Pallant v Morgan equity. See Hopkins, above n 5, at 44–46.
67. See above n 2.
68. See an example discussed in Thompson, above n 5, at 276.
69. Baird Textiles Holdings Ltd v Marks & Spencer plc [2003] 1 All ER (Comm) 737.
70. A-G of Hong Kong v Reid [1994] 1 AC 324.
72. See eg Daraydan Holdings Ltd v Solland International Ltd [2004] EWHC 622 (Ch); [2005] 4 All ER 73 and Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch); [2006] FSR 17.
asserted over the proceeds of sale. The Court of Appeal disallowed the claim. Tracing through an historical line of English decisions before *Reid*, Lord Neuberger held that the correct position under English law is that there would be no constructive trust over the asset received by a fiduciary in breach of his fiduciary duties unless the asset is or has been the beneficial property of the beneficiary or it was acquired by taking advantage of an opportunity or a right that properly belonged to the beneficiary. We shall refer to the qualification as the requirement of a ‘proprietary connection’. Lord Neuberger’s proposition clearly extends beyond bribes and secret commissions. For this reason, *Sinclair* is relevant to our present discussion on the *Pallant v Morgan* equity and an examination of the reasoning in *Sinclair* is thus crucial.

Lord Neuberger considered Lord Templeman’s reasoning in *Reid* to be question-begging as it started off with an assertion that the bribe vests in the person to whom the fiduciary duty is owed, the very issue which Lord Templeman was to decide. Lord Neuberger also pointed out that the Privy Council in *Reid* did not have the opportunity to consider awarding an equitable account instead, which would have been appropriate relief in the case. Further, Lord Templeman appeared to be persuaded by the extra-judicial writing of Lord Millett who has argued that equity will consider that the bribe received ‘as a legitimate payment intended for the principal’ because ‘this is considered necessary to enforce the high standards which equity demands of a fiduciary’. This seems artificial where bribes are concerned because as Lord Neuberger said, ‘a bribe paid to a fiduciary could not possibly be said to be an asset which the fiduciary was under a duty to take for the beneficiary’.

(b) Rationale for proprietary connection

*Sinclair* has received mixed reviews from commentators, but its reasoning was applied in *Cadogan Peotroleum plc v Tolley*, which concerned secret commissions received in breach of fiduciary duties. It remains to be seen if the Supreme Court will choose to follow *Reid* or *Lister*. In Australia, however, the Full Federal Court of Australia has recently declined to follow *Sinclair* in *Grimaldi v Chameleon Mining NL*.

73. *Sinclair*, above n 8, at [77].
74. *Sinclair*, above n 8, at [88]. Richards and Hughes LJJ concurred in Lord Neuberger’s judgment.
75. The idea of this requirement is very similar to the requirement of a ‘proprietary base’ to justify proprietary relief as proposed by Goode and Birks, respectively. To avoid confusion with these other propositions, the expression ‘proprietary connection’ is used here to specifically denote Lord Neuberger’s proposition in *Sinclair*. See R Goode ‘Property and unjust enrichment’ in A Burrows (ed), *Essays on the Law of Restitution* (Oxford: Oxford University Press, 1991) ch 9; P Birks *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1989) pp 378–385; P Birks ‘Establishing the proprietary base’ [1995] RLR 83.
76. *Sinclair*, above n 8, at [78].
77. *Sinclair*, above n 8, at [79].
79. Ibid, at 17.
80. *Sinclair*, above n 8, at [80].
82. *Cadogan Peotroleum plc v Tolley* [2011] EWHC 2286 (Ch).
It did not think that Australian law, which recognises ‘that the constructive trust can be a discretionary remedy’, needs to take the same restrictive position as the English law. Furthermore, it was of the view that the deterrent effect of a proprietary remedy is most needed in situations like bribery.

Essentially, as Newey J said in Cadogan, a distinction is drawn between ‘(a) the exploitation by a fiduciary of property or opportunities subject to fiduciary obligations and (b) other exploitation by a fiduciary of his position’. Restricting proprietary claims in relation to the former category of acts necessarily means that the characterisation of the Pallant v Morgan equity as a constructive trust arising in response to a breach of fiduciary duty is inaccurate. In light of Sinclair, a mere abuse of position does not justify the award of proprietary relief. A proprietary remedy will only be allowed if it is to protect the principal’s assets, actual or putative. It justifies putting the asset out of the reach of the principal’s creditor in the event of insolvency. Deterrence of breach of fiduciary duty is a subsidiary objective of the proprietary remedy. The proprietary connection requirement is consistent with English law’s seeming commitment to not engage in redistribution of property rights. In other words, this is a manifestation of the English law’s preference for its system of private law to be based on corrective justice.

If the Pallant v Morgan equity is understood as being based on breach of fiduciary duty, there appears to be no sensible reason that a proprietary connection is not also required. It thus follows that realigning the Pallant v Morgan equity doctrine with Sinclair requires that the property acquired by the acquiring party is or has been the beneficial property of the non-acquiring party or it was acquired by taking advantage of an opportunity or right that properly belonged to the non-acquiring party. In Crossco, Etherton LJ, in reinterpreting the case-law on the Pallant v Morgan equity, was focused on explaining the elements of an existing fiduciary relationship and the breach of fiduciary duty in the authorities. As Sinclair was not referred to in Etherton LJ’s judgment, it is unclear if he was aware of the significant effect of Sinclair on his proposed characterisation of the doctrine.

In the next part, we will consider if a proprietary connection can be established in the paradigm case of the Pallant v Morgan equity. We will also consider if and how the key features of the Pallant v Morgan equity remains relevant on Etherton LJ’s proposed characterisation of the doctrine. Understood as a species of common intention constructive trust, the key features (especially the feature of a pre-acquisition arrangement between the parties) are clearly the core and constituent elements of the Pallant v Morgan equity. But if it were to be understood as being based on breach of

83. Grimaldi v Chameleon Mining NL (No 2) [2012] FCAFC 6 at [569]–[584].
84. Ibid, at [574].
85. Ibid, at [575].
86. Cadogan, above n 82, at [23]. In Sinclair, above n 8, at [80], Lord Neuberger said that there is a ‘fundamental distinction between (i) a fiduciary enriching himself by depriving a claimant of an asset and (ii) a fiduciary enriching himself by doing a wrong to the claimant’.
87. For this reason, there is a distinction between an ‘institutional constructive trust’ and a ‘remedial constructive trust’ in English law.
88. See C Rotherham ‘Property and justice’ in M Kramer (ed) Rights, Wrongs and Responsibilities (New York: Palgrave, 2001) pp 149–151. Rotherham commented that the English private law is still influenced by the legal thought of property being the foundation of law and on this understanding of how the law should function, the court only has power to enforce property rights but no power to redistribute property.
89. Crossco, above n 3, at [88].
fiduciary duty, the answer is less obvious. To undertake a proper examination of these two issues, we must first establish the paradigm case in which the claimant will make a claim for the Pallant v Morgan equity.

4. REALIGNING THE PALLANT V MORGAN EQUITY

(a) The paradigm case

A claim for a Pallant v Morgan equity would not have arisen if the non-acquiring party is already the legal owner prior to the joint venture negotiations. Neither will it arise if the acquiring party already owns the property before the parties began their negotiations. Also, the equity is typically invoked in situations where the prospective joint venture partners did not ultimately enter into an enforceable contract. The parties were usually engaged in negotiations and any agreement reached was either not sufficiently certain or subject to contract. But where the negotiations were conducted on a 'subject to contract' basis, a Pallant v Morgan equity claim is unlikely to succeed. Given both parties' understanding that their arrangement is legally unenforceable, the acquiring party's withdrawal from the pre-acquisition arrangement will not be sufficiently unconscionable to justify equity's intervention.

Even in the absence of the 'subject to contract' label, the case may come to the same result if the parties knew that there was no binding contract between them. For this reason, it has been argued that the pre-contractual situations in which the Pallant v Morgan equity can succeed is so limited that it requires only a small step to restrict the doctrine out of existence. But this step, no matter how small, should not be taken as it leads to the result that all cases will be treated as subject to contract, whether the label is used or not – a construction that is inconsistent with practice. It is also inconsistent with contract law which caters for the possibility of an implied contract arising before the execution of a formal contract. More importantly, to succeed in a claim for a Pallant v Morgan equity, the claimant must establish, inter alia, (a) a detriment/advantage and (b) the acquiring party's failure to inform of its change of mind timeously. The latter requirement presumes that the acquiring party has a 'duty' to inform and this 'duty' is only sensible if the acquiring party is at least aware of the relevant detriment/advantage. The combination of these two requirements reduces the possibility of conscious risk-taking by the claimant in the absence of the 'subject to contract' label.

90. In Kilcarne Holdings Ltd v Targetfollow (Birmingham) Ltd [2004] EWHC 2547 (Ch) at [232], Lewison J commented that in the 'paradigm Pallant v Morgan case the claimant has no entitlement at law. If equity does not intervene, he is left with nothing.'
91. Cobbe, above n 4, at [33]–[36] per Lord Scott.
92. For example, Pallant v Morgan, above n 1; Holiday Inns Inc v Broadhead, above n 1; Time Products, above n 1; Island Holdings, above n 1; Banner Homes, above n 1 (an agreement in principle was in place).
93. In exceptional cases, the court may find that the parties have waived the requirement of 'subject to contract'. See RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG (UK Production) [2010] UKSC 14; [2010] 1 WLR 753.
94. London & Regional Investments, above n 4, at [42] and [47]–[48]; Cobbe, above n 4, at [36]–[37] per Lord Scott.
95. Cobbe, above n 4, at [91] per Lord Walker.
96. Ugucioni, above n 5, at 167.
If the arrangement amounts to an enforceable contract, the non-acquiring party could have sought enforcement through specific performance.\textsuperscript{97} It would be unnecessary for him to invoke the \textit{Pallant v Morgan} equity. Nor is there a need for equity to provide a remedy as a contract would be conclusive of the parties’ rights and obligations.\textsuperscript{98} There is simply no unconscionability to redress. As such, the paradigm case of the \textit{Pallant v Morgan} equity involves a pre-contractual arrangement.\textsuperscript{99} But these cases are expected to be rare.

As Conaglen has suggested, ‘non-fiduciary duties can be owed . . . even though the parties are still negotiating towards a final agreement, based on the parties’ conduct and preliminary arrangements’.\textsuperscript{100} He commented that when the proposed venture has been embarked upon, courts will often find that parties owe non-fiduciary duties to one another, notwithstanding that these duties might be later superseded by a comprehensive contractual regime if one is entered into.\textsuperscript{101} Conaglen’s comments were made in the context of justifying the finding of fiduciary duties in cases where the parties were still under negotiations for a final agreement detailing the joint venture. The central thesis of his monograph on the fiduciary doctrine is that fiduciary duties perform a prophylactic function, to protect the performance of non-fiduciary duties.\textsuperscript{102}

These non-fiduciary duties may well be contractual duties. Just because the parties have not signed a formal contract does not mean that contractual duties cannot arise. A contract may be implied from the parties’ embarkation on the joint venture. Even if the hoped for main contract detailing the joint venture is incomplete and thus unenforceable, it does not, in principle, prevent a smaller contract pertaining to a single undertaking from arising, provided the formation requirements are satisfied.\textsuperscript{103} In such a situation, the parties remain prospective joint venture partners in the sense that the exact terms and obligations of their joint venture agreement have not and may never be finalised. But they are parties to a contract of a much more limited scope that is intended to be part of the joint venture under negotiation. This shows that in a case where the intended acquiring party proceed to purchase the property in pursuance to the parties’ understanding, such conduct amounts to an embarkation on the proposed joint venture and may give rise to an implied contract in some situations. In turn, it means that the \textit{Pallant v Morgan} equity will only be invoked in extremely limited circumstances.

\textsuperscript{97} See \textit{Chattock v Muller}, above n 1.

\textsuperscript{98} \textit{Kilcarne}, above n 90, at [231] and [236] per Lewison J; \textit{Benedetti}, above n 2, at [525]–[526] per Patten J. The case went on appeal before the Court of Appeal concerning the issue of quantification of remuneration under a claim for restitutionary quantum meruit. See [2010] EWCA Civ 1427.

\textsuperscript{99} This is also the observation of Pattern J in \textit{Benedetti}, above n 2, at [505] and [513].

\textsuperscript{100} M Conaglen \textit{Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties} (Oxford: Hart, 2010) p 196.

\textsuperscript{101} Conaglen further qualified that this will be the case, unless the courts find that the parties intended their dealings to be ‘completely legally unregulated’ as where preliminary agreements are made on a ‘subject to contract’ basis. See Conaglen, above n 100, p 196 fn 108.

\textsuperscript{102} Ibid, pp 185–187 and 195–197.

\textsuperscript{103} P Davies ‘Anticipated contracts: more room for agreement’ (2010) 69 CLJ 467.
(b) Key features of the doctrine

Setting out the paradigm case of the *Pallant v Morgan* equity is important for appreciating the relevance of the key features of the doctrine on a new understanding that it is based on breach of fiduciary duty. Where parties are in a commercial relationship and dealing at arm’s length, generally, courts should be slow to find that parties are in a fiduciary relationship. But a pre-acquisition arrangement could be the source of a fiduciary relationship, especially in cases where there is no pre-existing relationship between the parties. It could amount to a relationship of agency or an ad hoc fiduciary relationship based on one party’s voluntary undertaking to act on another’s behalf in circumstances that give rise to a relationship of trust and confidence. The requirement of detriment/advantage goes to show the comparative ‘vulnerability’ of the non-acquiring party, which in turn demonstrates the trust and confidence placed in the acquiring party. Whether a fiduciary relationship arises will, of course, have to be decided on a case-to-case basis. If a fiduciary relationship can be established, the fact that the acquiring party later refused to abide by the pre-acquisition arrangement and retain the property acquired would amount to a breach of fiduciary duty.

Notwithstanding that the key features of the doctrine remain relevant on a reinterpretation of its jurisprudential basis, they are merely descriptive of the factual commonality of these cases. Importantly, one wonders why should cases with such features be set apart from other cases of breach of fiduciary duty and be accorded the status of an independent doctrine. Indeed, when Etherton LJ suggested in *Crossco* that these cases are ‘examples of breach of an existing fiduciary duty’, it might be said that he did not think these cases amount to a separate doctrine. Even if Etherton LJ did not go quite so far in *Crossco*, this must be the inevitable result of his proposed reinterpretation.

Satisfying the proprietary connection requirement in the paradigm case of the *Pallant v Morgan* equity presents a further challenge as the archetypical factual matrix concerns pre-contractual negotiations to acquire an asset neither party owned beforehand. A few years before giving judgment in *Crossco*, Etherton LJ had suggested extra-judicially that *Banner Homes* can be justified on the basis of breach of fiduciary duty, following an analysis based on agency or quasi-agency. He cited *Lees v Nuttall*, *Heard v Pilley*, *Cave v Mackenzie* and *Chattock v Muller* in support of his proposition, but did not elaborate further on this line of analysis. It is not clear whether Etherton LJ might have retracted from this narrow line of analysis by the time he gave judgment in *Crossco*, but his extra-judicial suggestion is worth examining and may well provide some answers to the two difficulties aforementioned. We will start off by considering an analysis on agency principles.

104. *Hospital Products Ltd v United States Surgical Corp* [1984] 156 CLR 41 at 149 per Dawson J.
106. *Crossco*, above n 3, at [94].
107. Etherton, above n 5, at 122-123 and fn 86. Uguccioni appears to agree with this suggested approach. See Uguccioni, above n 5, at 163.
110. *Cave v Mackenzie* [1877] 46 LJ Ch 546.
111. *Chattock v Muller*, above n 1.
(c) Agency

In both *Chattock v Muller* and *Pallant v Morgan*, it was held that the defendant acted as the claimant’s agent. Based on the evidence discussed in the judgments, the non-acquiring party in both cases intended or had no objection that the sale and purchase contract was entered into in the acquiring party’s name. Although it was not clarified in either case, there are two possible constructions of the agency arrangement in such circumstances. It could be a case of undisclosed principal—that is, the acquiring party had the authority to create a contract between the third party and the non-acquiring party but it did not disclose that it was doing so. Alternatively, it could be a case of indirect representation, where the acquiring party had no authority to create a contract between the non-acquiring party and the third party, and it was the only purchasing party to the contract, but the acquiring party deals with the non-acquiring party as the principal nonetheless.

Agency arises by agreement which may or may not be contractual. The essence of an agreement in this context is consent. While consent is a key ingredient of a contract, it is, on its own, insufficient to give rise to a contract. The present discussion concerns the internal aspect of agency as what is in issue is the relationship between the principal and agent.

The pre-acquisition arrangement, which is a key feature of the *Pallant v Morgan* equity, constitutes an agreement from which a relationship of agency may arise. In some situations, the acquiring party may be interpreted as acting on behalf of the non-acquiring party in acquiring an interest in the asset. The acquiring party could have expressly undertaken to act on behalf of the non-acquiring party. Provided that the surrounding circumstances support a reasonable factual inference, even in the absence of an express, unequivocal assumption of responsibility, the requirements of an advantage or detriment coupled with the lack of notice of change of mind could indicate that there was implied consent from both parties for a relationship of agency to arise. The advantage/detriment is evidence of the non-acquiring party’s authorisation. Save where there is contrary evidence, it would be difficult to otherwise imagine a commercial party willing to take a comparatively disadvantageous position in relation to the acquisition in which it is interested. By proceeding to purchase the asset without notifying the non-acquiring party in advance of any change of mind, the acquiring party may be construed as manifesting objective consent to accepting its appointment to act on behalf of the non-acquiring party if it proceeds to perform the relevant act. This is the case even if the acquiring party subjectively intended to purchase the property for itself.

Ordinarily, it should not be difficult find an implied contract of agency (as opposed to non-contractual/gratuitous agency) arising in the paradigm case of the *Pallant v Morgan* equity. Under English law, practical benefits are sufficient to constitute contractual consideration. For example, the advantage conferred on the acquiring

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113. Ibid, at paras [1–005] and [1–011].

114. The formation of a contract requires offer and acceptance, intention to create legal relations, consideration, certainty of agreement, etc.

115. See an explanation on the internal and external aspects of agency in Watts and Reynolds, above n 113, at para [1–018].

party or the detriment suffered by the non-acquiring party by staying out of bidding for the relevant asset can therefore constitute contractual consideration.

Even in the absence of consideration there can be a relationship of non-contractual agency based on consent, but unlike contractual agents, a gratuitous agent is generally not liable for non-performance. One could, however, attempt to argue that the gratuitous agent is estopped from denying that he has acquired the asset on behalf of the principal. There could be an estoppel by convention in the paradigm case of the *Pallant v Morgan* equity. The parties have acted upon the agreed assumption that the acquiring party would acquire the asset on behalf of the non-acquiring party. In reliance on this agreed assumption, the non-acquiring party had conferred an advantage or suffered a detriment. The acquiring party, on the other hand, went ahead to procure the asset without informing the non-acquiring party of its change of intention, giving the impression that it was acting on behalf of the non-acquiring party in the acquisition. Although estoppel by convention operates as a shield under English law, it enables a cause of action to succeed which might have failed if not for the estoppel that arises.

Accordingly, establishing an agency relationship in a case will establish that the acquiring party is under a specific duty/undertaking to acquire the asset for the non-acquiring party, thus satisfying the proprietary connection requirement. A *Pallant v Morgan* constructive trust may thus arise. However, a constructive trust can also arise according to the principle established in *Lees v Nuttall, Heard v Pilley* and *Cave v Mackenzie*. According to this principle of agency, if an agent who undertakes to acquire an asset for the principal proceeds to acquire the same in his own name or for himself, the agent holds the said asset on trust for the principal. Where the asset concerned is land, there was a narrow stream of cases suggesting that the trust could not be enforced by the principal for failing to comply with s 7 of the Statute of Frauds. But this obstacle was overcame by the creation of the *Rochefoucauld v Boustead* doctrine, the effect of which was the recognition of an exception to s 7 where the provision is being used as an instrument of fraud. Where the asset concerned is a chattel, the principal may even claim that it vests in him directly. In the paradigm case of the *Pallant v Morgan* equity, however, the parties usually intended

117. Watts and Reynolds, above n 112, at para [6-026]. But there was suggestion that a gratuitous agent must inform the principal that he is not going to perform the task undertaken in a timely manner before the principal suffers loss for not having sufficient time to appoint another agent. See ibid, at para [6-027].

118. Regarding the doctrine of estoppel by convention, see *Amalgamated Investment & Property Co Ltd (In Liquidation) v Texas Commerce International Bank* [1982] QB 84.

119. Ibid, at 131–132 per Brandon LJ.

120. See also a discussion of this principle in Watts and Reynolds, above n 112, at para [6–082]. It does not matter that the counterparty to the sale and purchase agreement did not know that the buyer was an agent for another party because the principle applies whether the principal is disclosed or undisclosed.

121. *Bartlett v Pickersgill* [1760] 1 Cox 15; *James v Smith* [1891] 1 Ch 384; affd (1892) 65 LT 544.


123. Watts and Reynolds, above n 112, at para [6–082].
for the asset to be shared, a constructive trust may thus arise to effect co-ownership\(^\text{124}\) in equity to enforce the agent’s undertaking.\(^\text{125}\)

Hence, the *Pallant v Morgan* equity, confined to cases of agency, may be viewed as a modern embodiment of the aforementioned principle of agency. The key features highlighted by Chadwick LJ in *Banner Homes* merely go to establishing a relationship of agency, contractual or otherwise. The case of *Pallant v Morgan* itself could be analysed as such. The duplication of results compels one to question if the *Pallant v Morgan* equity should be recognised as a separate and new doctrine in the first place. Taking this analysis, the doctrine’s infiltration into other types of commercial arrangements\(^\text{126}\) appears unwarranted. In any event, these new developments seem to proceed from the basis that the doctrine is concerned with giving effect to ‘common intention’ – a proposition which we have found to be untenable in earlier discussion.

However, not all cases can be explained on the basis of agency. In *Crossco*, Etherton LJ suggested that exceptionally the *Pallant v Morgan* equity may arise in cases not involving agency or partnership,\(^\text{127}\) but the circumstances could nonetheless give rise to fiduciary duties.\(^\text{128}\) As mentioned above, Etherton LJ suggested extra-judicially that it is possible to analyse the cases based on *quasi-agency*. It is not clear what ‘quasi-agency’ means. The label only says that the matter is not agency. Why is a matter to be treated as ‘x’ when it is not ‘x’ seems unconvincing and opens a gap in rational legal reasoning. For this same reason, the term ‘quasi-contract’ has fallen out of favour with restitution scholars.\(^\text{129}\) It is also difficult to examine Etherton LJ’s extra-judicial proposal further given that he provided no elaboration on this concept. What comes to mind is Goode’s concept of ‘deemed agency gains’, which may be along the lines of what Etherton LJ had in mind. No matter whether the two concepts are similar or different, the analysis on ‘deemed agency’ below will illustrate the problems and disadvantages of using opaque reasoning in general.

(d) ‘Deemed agency gains’

Goode proposed a controversial concept known as ‘deemed agency gains’ to justify a proprietary response in cases where the fiduciary derived a gain, not from the principal’s assets, but from pursuing an activity which he was under an equitable duty to

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124. In commercial relationships, parties will ordinarily be taken to share the asset as tenants-in-common, unless there is contrary evidence.
125. Co-ownership in equity is required for assets (eg land, shares) which legal ownership is determined by registration and where the agent has registered the asset in question in his own name. For choses in action, it has long been accepted that there cannot be a legal tenancy in common (see *Re McKerrell* [1912] 2 Ch 648). For chattels, there can be both legal and equitable co-ownership. For a detailed discussion on co-ownership of different assets, see RJ Smith *Plural Ownership* (Oxford: Oxford University Press, 2005).
126. See above n 2.
127. For partnership, there is mutual agency.
128. *Crossco*, above n 3, at [88].
pursue for the principal, if it was to be undertaken at all.\textsuperscript{130} Goode cited a company director\textsuperscript{131} earning profits by pursuing business opportunities for himself which opportunities should have been pursued for the company as a ‘typical case’ of ‘deemed agency gains’.\textsuperscript{132} He explained that it is appropriate to award a \textit{remedial constructive trust} in such circumstances because the gain ‘should have been pursued for [the principal’s] benefit . . . and is therefore necessarily associated with activity to [the principal’s] business’.\textsuperscript{133} Goode distinguished cases of ‘deemed agency gains’ as meriting a proprietary response from cases of bribes and secret commissions which should not result in proprietary relief. He classified the latter category as cases concerning gains obtained by engaging in an activity that should not have been undertaken at all.\textsuperscript{134} For our present discussion, the question is whether the concept of ‘deemed agency gains’ may support the finding of the \textit{Pallant v Morgan} equity in cases not involving fiduciary agents.

Goode’s concept warrants one preliminary comment. The word ‘deemed’ suggests that something is regarded as something else. Is the fiduciary treated as under an agency duty to pursue the gain for the claimant because he should have done so if he undertook the activity at all, even though he is not necessarily an agent? Or is the fiduciary in fact an agent and is treated as having obtained the gains for the claimant even though he clearly acted for his own interests?\textsuperscript{135} This is not quite clear. Goode, in his exposition on the concept of ‘deemed agency gains’, did not rely on principles of agency nor explicitly identify that these fiduciaries must be agents. However, it is difficult to see how the concept can apply to fiduciary actors beyond directors or agents authorised to undertake a particular activity on behalf of the principal such that the fiduciary, in pursuit of the relevant activity, is required and presumed to have acted for its principal. Cases of directors usurping corporate opportunities are more commonly referred to as ‘corporate opportunity’ cases, which some may consider as amounting to a separate doctrine.\textsuperscript{136} But the \textit{Pallant v Morgan} equity is not based on a director taking advantage of corporate opportunities. Cases of fiduciary agents will


\textsuperscript{131} It should be noted that non-executive directors ‘may have no positive obligation to pursue a relevant opportunity for their company, but would nonetheless be precluded from pursuing it for themselves’. See Watts and Reynolds, above n 112, at para [6–081].

\textsuperscript{132} Goode ‘Proprietary restitutionary claims’, above n 130, pp 73–74. It should be noted that the case of a director taking advantage of corporate opportunities is treated as a case of agency in Watts and Reynolds, above n 112, at para [6–081].

\textsuperscript{133} Goode ‘Proprietary restitutionary claims’, above n 130, pp 73–74.

\textsuperscript{134} The full classification differentiates between: (a) cases where the claim has a proprietary base (institutional constructive trust); (b) ‘deemed agency’ gains (remedial constructive trust); and (c) cases of fiduciaries receiving bribes and secret commissions (\textit{in personam} relief).

\textsuperscript{135} Only contractual agents are under an obligation to perform the task undertaken and non-performance will render him liable for consequences of breach of contract.

\textsuperscript{136} R Teele ‘The necessary reformulation of the classic fiduciary duty to avoid a conflict of interest or duties’ (1994) 22 ABLR 99 at 100. In \textit{Ultraframe}, above 72, at [1355], Lewison J commented that: ‘The law relating to the accountability of a director (or former director) for profits derived from the diversion of corporate opportunities is still developing.’ Conaglen, however, does not think that there is a separate doctrine of corporate opportunity. In his view, this is part of the application of the no-conflicts rule and the no-profit rule. See Conaglen, above n 100, pp 139–141.
not bring our analysis beyond agency cases. It thus seems that ‘deemed agency gains’ is of little assistance or relevance to the present analysis.

Further, the concept itself is fraught with difficulties. Leaving aside the controversy of recognising a remedial constructive trust under English law, it seems that ‘deemed agency gains’ has received pointed criticisms from various academics. These criticisms will not be repeated here. A further weakness with the concept is the hasty leap to the conclusion that the fiduciary cannot deny the beneficial interest in the acquired asset because he ‘ought’ to have pursued the relevant activity for the principal in the first place. The conceptual difficulty lies in the leap from the secondary obligation to account (in personam liability) for breach of duty to holding the acquired asset on trust. There may be a difference if there is a primary, specific undertaking to acquire the beneficial interest of an asset for the principal because the very equitable fraud in issue is the denial of the equitable interest.

Based on the above reasons, it is unfruitful to consider the concept of ‘deemed agency’ in the Pallant v Morgan equity cases, or any other context at all, given the difficulties and limitations with the concept. It is expected that any analysis based on quasi-agency will also meet with insurmountable challenges – in particular, finding a good reason for treating a fiduciary as an agent when he is not and justifying the award of proprietary relief in such circumstances.

(e) Rights and opportunities

For completeness of analysis, we shall consider more generally if and how the second limb of Lord Neuberger’s test for proprietary connection may be relevant to cases of Pallant v Morgan equity. ‘Rights’ is a very imprecise term and can refer to both rights in rem and rights in personam. It is unclear what kind of rights Lord Neuberger is referring to in the second limb for establishing a proprietary connection, although his Lordship commented that the law of proprietary interests is within the law of property. If one agrees that the rationale for the proprietary connection is to prevent judicial redistribution of proprietary rights, the justification for allowing proprietary relief in instances where the property is acquired by taking advantage of the claimant’s in personam rights seems weak. The problem is that the line between rights in personam and rights in rem is not clearly drawn. This is because, as various commentators have pointed out, ‘property’ is an unstable concept. This point awaits elucidation.

Opportunities are even more illusory. Unlike the conventional paradigms of property like land or chattels, it is hard to see an opportunity as having an independent

137. English law rejects the remedial constructive trust. See Re Polly Peck International plc (in admin) (No 2) [1998] 3 All ER 812 at 826–827 per Mummery LJ and Potter LJ concurring and at 831 per Nourse LJ; De Bruyne v De Bruyne [2010] EWCA Civ 51 at [48] per Patten LJ. Moreover, the effect of Sinclair is the entrenchment of the institutional constructive trust in English law.


139. Sinclair, above n 8, at [90].

existence from a person such that it could be, in the words of Baroness Hale in OBG v Allan, "bought and sold, given and received, bequeathed and inherited, pledged or seized to secure debts, acquired (in the olden days) by a husband on marrying its owner". Difficulty of regulation on access aside, excessive regulation on access will no doubt stifle competition, which is the cornerstone of a prosperous market-oriented economy. Therefore, not all opportunities will be relevant for the purpose of making a proprietary claim. The clearest authorities for allowing proprietary claims over property acquired by the diversion of an opportunity are corporate opportunity cases discussed above. As mentioned, only opportunities that are connected with the principal’s business will be relevant. What is also interesting is that in Bhullar v Bhullar - a case in which the Court of Appeal upheld the trial judge’s decision to grant proprietary relief - it was clarified that the question was not dependent on whether the company had any beneficial interest in the opportunity. The only question that mattered was whether the fiduciary’s conduct had attracted the application of the no-conflicts rule. This proposition may require some semantic refinement after the Court of Appeal’s decision in Sinclair.

(f) Confidential information

One last point worth briefly exploring is the possibility of a constructive trust arising over property acquired through breach of confidence. This immediately brings to mind the case of Lac Minerals v International Corona Resources, in which the Canadian Supreme Court held that a constructive trust is available as a remedy for breach of confidence. Although the facts of Lac Minerals are very similar to the paradigm case of the Pallant v Morgan equity, the majority of the Canadian Supreme Court did not find that the parties were in a fiduciary relationship and a constructive trust was awarded simply for breach of confidence. The case would thus not aid in the present analysis on establishing a proprietary connection.

One possible way of establishing the proprietary connection is to characterise confidential information as property. Some support may be found in the case-law for the proposition that confidential information can be treated as trust property. Adapting this in a claim for the Pallant v Morgan equity, provided that the claimant is able

141. OBG v Allan [2007] UKHL 21; [2008] 2 WLR 920 at [309].
142. See Newey J’s suggestion in Cadogan, above n 82, at [29]-[30].
143. This was affirmed by Newey J, ibid, at [30].
144. Bhullar v Bhullar [2003] BCC 711 at [27]-[28]. Schiefmann and Brooke LJ concurred in the judgment delivered by Jonathan Parker LJ.
146. See a detailed discussion of the basis for awarding a constructive trust for breach of confidence in HW Tang ‘Confidence and the constructive trust’ 23 LS 135.
147. Wilson and La Forest JJ found that the parties had been in a fiduciary relationship.
149. See eg Boardman, above n 148, at 107 per Lord Hodson and 115 per Lord Guest; Satnam Investments Ltd v Dunlop Heywood [1999] 3 All ER 652. Satnam was later cited with approval by Lewison J in Ultraframe, above n 72, at [1491]. See also P Kohler and N Palmer
to prove disclosure of confidential information which the defendant acquiring party took advantage to successfully acquire the asset, one may then argue that the case is one involving misuse of the claimant's property. Of course, the claimant must still separately show that the parties were in a fiduciary relationship. Yet even if this analysis\textsuperscript{150} is accepted, it does not mean that a constructive trust over the asset acquired should therefore arise. There remains the complex, unresolved issue of tracing the confidential information into the asset purchased by the acquiring party. Even if cases of such unique factual matrix do arise, it seems that the claimant is better off suing for breach of confidence.

**CONCLUSION**

It is helpful to take stock of the conclusions that we have reached so far. We have considered the developments of the common intention constructive trust on the domestic front and came to the conclusion that ‘common intention’ is an inappropriate basis for the *Pallant v Morgan* equity. We then examined the merits of analysing the *Pallant v Morgan* equity as based on a breach of fiduciary duty. An inevitable part of this exercise is to take into account the Court of Appeal’s decision in *Sinclair*, which held that a constructive trust for a breach of fiduciary duty will only arise if there is a proprietary connection. Our analysis shows that it is very difficult to establish a proprietary connection in the paradigm case of *Pallant v Morgan* equity. Fiduciary agency is the most secure case of establishing this essential element. However, if the *Pallant v Morgan* equity doctrine is confined to cases of agency, it appears that the doctrine, at its core, is no more than a modern embodiment of an old agency principle. These conclusions compel us to consider the normative question of whether the *Pallant v Morgan* equity should be recognised as an independent doctrine in the first place.

Further, it is expected that commercial parties will continue to invoke the *Pallant v Morgan* doctrine in their disputes because of its indirect effect of enforcing an otherwise unenforceable promise. A constructive trust also protects the claimant’s fruits of success in the litigation from any risk of the defendant’s insolvency. While an interpretation of the doctrine based on breach of fiduciary duty might curb the excesses of equitable intervention in commerce, there is also the danger that the concept of ‘fiduciary’ may in turn be distorted and strained amid counsels’ arguments and courts’ motivation to do ‘justice’. It is hoped that when the occasion arises before the Supreme Court, it may not only take the time to examine the jurisprudential basis of the *Pallant v Morgan* equity, but also take the courage to question the validity of such a doctrine in the first place.

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\textsuperscript{150} Lord Millett commented extra-judicially that artificially stretching the meaning of ‘property’ to include confidential information is ‘unnecessary as well as misleading’. See Millett, above n 78, at 14.