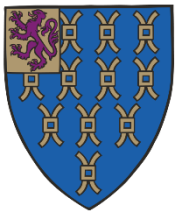
The Honourable Society of Lincoln's Inn



Student Law Journal

Volume VIII

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Foreword

1. This marks the eighth volume of the Lincoln's Inn Students' Law Journal. It is a testament to its continued success and the expanding breadth of legal research. This year's edition features ten exceptional articles, each reflecting the hard work and intellectual curiosity of our student members. This thereby reinforces the Journal's role in advancing legal thought and practice.

2. The Journal remains committed to its core purpose: namely to provide students with an opportunity to publish and share their legal research with a wider audience.

3. This year's winning Lincoln's Inn Legal Essay Prize entry, authored by Luke Woollard, provides a critical examination of the concept of Genocide defined by Raphael Lemkin in the background of the historical phenomenon of 'ethnic cleansing'. This essay offers a thought-provoking perspective in the context of contemporary politics and provides a highly relevant outlook to today's Middle Eastern challenges.

4. I am also pleased to identify the winner of this year's Lord Millett Prize, Tom Spencer. This essay offers a detailed analysis of the 'no-profit rule', whereby fiduciaries, such as trustees or company directors, owe a duty of loyalty to their beneficiary/principal as re-visited by the Supreme Court in the Rukhadze case.[1] In essence, the Supreme Court unanimously dismissed the appeal, all seven Justices concurring in the leading judgment of Lord Briggs. The submission that a 'but for' test should be introduced, was rejected. However, four Justices provided different reasons for their decisions. The author argues that the failure of the Justices to provide unanimous reasons demonstrates a contemporary uncertainty which should be addressed in the future.

5. This year we received 51 entries across the two competitions – the highest number since the journal's conception. This overwhelming response continues to reflect the growing enthusiasm for legal scholarship among our student members. I trust that this Journal will continue to provide rigorous debate and inquiry.

6. My sincere thanks go to all the contributors, markers, and the Lincoln's Inn editorial team for their ongoing support in making this publication possible. I look forward to seeing the Journal's exponential continuing growth.

Edward Cousins, Editor

12th April 2026

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1 *Recovery Partnerships GP Ltd v Rukhadze* [2025] UKSC 10.

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Ethnic Cleansing: de facto not de jure - Codifying Ethnic Cleansing in International Law

Luke Woollard

Introduction

The term ethnic cleansing gained prominence in the 1990s during the Yugoslav Wars as a euphemism for genocide and a means to deny it[1]. Strictly speaking, ethnic cleansing has no legal meaning and is not a 'standalone' offence in international law, nor is there a codified duty to prevent or punish ethnic cleansing akin to the Genocide Convention[2]. This essay seeks to a) explain the phenonoma of ethnic cleansing, b) highlight the distinction between ethnic cleansing and genocide, and c) argue for the codification of ethnic cleansing in international law.

What is 'Ethnic Cleansing'?

The Phenonoma of Ethnic Cleansing

Ethnic cleansing is not "new or remarkable" and is a practice "as old as antiquity"[3]. One of the first recorded ethnic cleansing campaigns was conducted in 747 BCE by the Assyrian ruler, Tiglath Pilser III, and has been a pervasive phenonoma in human history ever since[4]. Ethnic cleansing often intends to sever a group from an ancestral home or land, usually one which is foundational to the groups shared identity, such as the expulsion of Jews from Judea (6BCE)[5]. It also involves the removal of undesirables from a defined territory, usually for the purpose of securing hegemony or persecuting minorities. The means to enact ethnic cleansing vary, it is not limited to "*forcible removal by displacement* (or) *deportation*"[6] and includes "*murder, torture, arbitrary arrest and detention, extrajudicial executions, rape and sexual assaults, severe physical injury to civilians, confinement of civilian population in ghetto areas*, (and) *deliberate military attacks or threats of attacks on civilians...*"[7]

What is 'Genocide'?

The Concept of Genocide

Raphael Lemkin coined the term genocide to describe the intentional and systematic destruction of a religious or ethnic group. The horrors of the Armenian Genocide and the Holocaust led

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[1] Stanton, Gregory. H. "Ethnic Cleansing" is a Euphemism Used for Genocide Denial, (*Genocide Watch*), Sep 2003 https://www.genocidewatch.com/single-post/ethnic-cleansing-is-a-euphemism-used-for-genocide-denial-1

[2] Convention on the Prevention and Punishment of the Crime of Genocide | (adopted 9 December 1948) | 78 UNTS 277 | art 1

[3] Bell-Fialkoff, Andrew. "A Brief History of Ethnic Cleansing." *Foreign Affairs*, vol. 72, no. 3, 1993, pp. 110–21.

[4] Ibid

[5] Schiffman, Lawrence H. "Jerusalem: Twice Destroyed, Twice Rebuilt." *The Classical World*, vol. 97, no. 1, 2003, pp. 31–40

[6] United Nations, Office on Genocide Prevention and the Responsibility to Protect *https://www.un.org/en/genocide-prevention/definition*

[7] Ibid

Lemkin to define, what until then, was referred to as a "crime without a name"[8]. Genocide, as understood by Lemkin, occurred both physically and culturally. The latter is now known as ethnocide. Both lead to the destruction of an ethnic, racial, religious, or national group (distinguished from the concept of a civilian population found in crimes against humanity[9]) but the means are distinct. Genocide is physical or biological destruction. Ethnocide intends to destroy a group's culture by other means, including forced assimilation and the destruction of historical artefacts and religious monuments.

Genocide as Defined by the Convention

The international community decided only physical and biological destruction, constitutes genocide proper within the meaning of the Genocide Convention.[10] The following five acts, when inflicted on a group with the intent to destroy, constitute genocide. They are killing members,[11] causing serious bodily or mental harm,[12] deliberately inflicting on the group conditions of life calculated to bring about physical destruction,[13] imposing measures intended to prevent births,[14] and the forcible transfer of children.[15] Other acts found under the umbrella of international criminal law[16] but not in the convention include a) the destruction of religious and cultural heritage,[17] b) persecution,[18]and c) non-destructive displacement such as population exchanges and forced deportation.[19] (not involving the transfer of children from one group to another). As the title maintains, while ethnic cleansing "de jure" is not a singular offence, the underlying practices that implement ethnic cleansing are "de facto" prosecuted.

When is Ethnic Cleansing not Genocide?

Internationally Endorsed Ethnic Cleansing; a 'Lesser of Two Evils'

Expulsion and population exchange were considered reasonable compromises to resolve ethnic conflicts upon the dissolution of muti-ethnic empires and the rise of nationalism during the 20th century.[20] With cruel irony, the intention to create ubiquitous ethnic hegemony led to the cultural destruction of distinct ethnic subgroups.

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[8] Lemkin, R. (1946). Genocide. *The American Scholar*, *15*(2), 227–230, quoting Winston Churchill
[9] Rome Statute of the International Criminal Court, 17 July 1998 art. 7
[10] (n.2), art.2
[11] Ibid, (a)
[12] Ibid, (b)
[13]Ibid, (c)
[14]Ibid, (d)
[15]Ibid, (e)
[16](n.9), art.5
[17] Ibid, art.8(2)(b)(ix)
[18] Ibid, art.7(1)(h)
[19] Ibid, art.7(1)(d)
[20] Preece, Jennifer Jackson. "Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms." *Human Rights Quarterly*, vol. 20, no. 4, 1998, pp. 817–42.

The population exchange between Greece and Turkey under *Article 1 of the Convention Concerning the Exchange of Greek and Turkish Populations 1923* authorised the compulsory removal of approximately 1.5 million Orthodox Christians from Turkey, and 400,000 Muslims from Greece.[21] The term Christian and Muslim are preferred as religion initially defined Greek and Turkish identities. This distinction meant newly incoming 'Turkish' and 'Greek' communities, by definition of their religion, were required to learn languages they had never spoken.[22] Ancient Anatolian communities, like the Cappadocian and Pontian Greeks, were systematically uprooted from lands they had lived in since antiquity. Similarly, the Potsdam Agreement for the "orderly and humane…organised transfer"[23] of ethnic Germans from Eastern and Central Europe led to the forced removal of 2 million Sudeten Germans from their ancestral home[24]. This distinct subgroup of ethnic Germans who had inhabited the Sudeten Mountains (within the territory of modern-day Czech Republic) since the Middle Ages and now considered collaborators of Nazi Germany, were collectively punished by systematic expulsion and later assimilation into new ubiquitous German identities[25].

Ethnic Cleansing - The Intent to Displace not Destroy.

The above examples exemplify cultural destruction and, to an extent, ethnocide, of distinct ethnic subgroups in part if not in whole. Nonetheless, genocidal intent "must be to destroy the group…as a separate and distinct entity, and not merely some individuals because of their membership in a particular group."[26] It is difficult to infer an intent to destroy if the purpose of the displacement acts as a 'lesser evil' when hegemonizing a territory, especially when motivated to resolve ethnic conflict. This is problematic as despite the phenonoma of ethnic cleansing being present and recognisable, there is no statutory offence to attach it to. Ethnic cleansing, like genocide, is a systemic campaign. However, unlike crimes against humanity, the target of displacement is usually a protected group, rather than a civilian population in general.

An Alternate Offence in the Spirit of Lemkin?

The 'New' Offence of Ethnic Cleansing

This essay argues for the introduction of a singular charge of ethnic cleansing by means of combining Articles 7(1)(d), (h) and 6(c) of the Rome Statute while substituting the intention to destroy. Therefore, ethnic cleansing would be intentionally removing a protected group, in whole

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[21] Ibid

[22] Shields, Sarah. "The Greek-Turkish Population Exchange: Internationally Administered Ethnic Cleansing." *Middle East Report*, no. 267, 2013, pp. 2–6.

[23] Glassheim, Eagle. "National Mythologies and Ethnic Cleansing: The Expulsion of Czechoslovak Germans in 1945." *Central European History*, vol. 33, no. 4, 2000, pp. 463–86, quoting Radomír Luža, *The Transfer of the Sudeten Germans* (New York, 1964), 279—86.

[24] Ibid

[25] Ther, Philipp. "The Integration of Expellees in Germany and Poland after World War II: A Historical Reassessment." *Slavic Review*, vol. 55, no. 4, 1996, pp. 779–805

[26] as cited in Alexander K. A. Greenawalt. "Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation." *Columbia Law Review*, vol. 99, no. 8, 1999, pp. 2259–94.

or in part, by means of a) population exchange or other form of forcible transfer, b) persecution, or c) deliberately inflicting on the group conditions of life calculated to bring about the group's displacement.

Practical and Theoretical Justification for Codification

Codification would unify the underlying practices associated with ethnic cleansing and emphasise the calamitous consequences of cultural destruction, rectifying its initial original omission from the genocide convention. It could further be argued that giving ethnic cleansing clear legal meaning would encourage greater intervention from an international community that has consistently failed to act[27].

Conclusion

The intent of this essay is not to imply ethnic cleansing is a 'lesser' offence to genocide. It is an abhorrent practice that destroys culture, and at its extreme, results in ethnocide. However, there is a nuanced distinction between the two phenonoma that must be acknowledged. Ethnic cleansing symbolises more than an attack on a civilian population while ultimately failing to meet the criteria for genocide. In codifying ethnic cleansing, we can appropriately recognise the phenonoma, practically incorporate it into the fold of international criminal law and pay deference to Lemkin in recognising the importance cultural destruction.

[27] Karazsia, Zachary A. "An Unfulfilled Promise: The Genocide Convention and the Obligation of Prevention." *Journal of Strategic Security*, vol. 11, no. 4, 2018, pp. 20–31.

For the Safety of Mankind: Rethinking the No-Profit Rule after Rukhadze

Tom Spencer

Introduction

Can a fiduciary reduce disgorgement by proving that, had they sought consent, their principal would likely have agreed to profit-sharing?

The Supreme Court in *Recovery Partners GP Ltd v Rukhadze*[1] held that they could not. The case concerned three fiduciaries who appropriated an asset recovery opportunity while employed, earning £15 million. The trial judge found they would "most likely" have secured 50% profit-sharing had they sought consent. Nevertheless, a seven-justice panel of the Supreme Court rejected this defence.

Yet this unanimous result concealed profound disagreement. Four judgments diverged fundamentally. Lord Briggs led the majority, while Lords Leggatt, Burrows, and Lady Rose each wrote separate concurrences.

This exposed three foundational questions. First, does the obligation to account arise automatically or only when a court orders relief? Second, must breach be "the" cause of profit or merely "a" cause? Third, are the no-conflict and no-profit rules distinct or unified?

Duty of remedy?

Consider a fiduciary who receives a £1 million secret commission, invests it successfully, then becomes insolvent. Can the principal trace into the investment and claim priority over creditors, or is the principal merely an unsecured creditor? The answer depends on whether, and when, the fiduciary holds the profit on constructive trust for the principal: automatically upon receipt, or only when a court so orders?

Lord Leggatt treats the constructive trust as a legal fiction imposed only upon judgment as a remedy, meaning no proprietary interest exists until then.[2] Lord Briggs holds the opposite: the duty to account and constructive trust arise automatically upon receipt.[3]

Briggs' approach should be preferred. Although some cases suggest "a trust might arise once the court had given judgment", these are problematic.[4] This approach means principals cannot know their rights until courts exercise discretion, impeding efficient bargaining. This is because *ex ante*

[1] [2025] 2 W.L.R. 529

[2] *Ibid*, [233]

[3] *Ibid*, [20]-[25].

[4] Graham Virgo, 'Profits obtained in breach of a fiduciary duty' (2011) 70(3) CLJ 502, 503.

allocation enables parties to negotiate from known positions with minimal transaction costs. *Ex post* allocation through litigation requires establishing rights before negotiating improvements. Furthermore, *ex-ante* allocation prevents self-deception, since a well-intentioned minded fiduciary who knows profits immediately belong to another cannot as easily rationalise retention.[5] These twin rationales support preferring bright-line rules throughout fiduciary law.

Must the breach have been "the" cause of profit, or merely "a" cause

The appellants advanced a creative counterfactual defence. Liability should reflect what would have happened absent breach. Since the trial judge found they would "most likely" have secured 50% profit-sharing through consent, they should retain half their gains. This transforms account of profits from prohibition into proportionality assessment. The argument appears superficially attractive because it seems to produce "just" results matching actual wrongdoing.

Lord Leggatt accepted counterfactual reasoning while rejecting the defendants' conclusion. For him, "but for" causation is inherent in equity and fundamental to the law of obligations.[6] This asks whether the profit could have been made but for the breach. Since these defendants could not have earned these particular profits without breaching, the opportunity belonged to their principals and was appropriated while still in post. Thus, full disgorgement follows. Critically, Leggatt's test differs from the appellants'. He asks whether breach enabled profit, not whether hypothetical consent negotiations would have produced profit-sharing.

Yet counterfactual reasoning should be rejected entirely. Three difficulties arise. First, determining "minimum compliance" introduces exactly the contested, fact-intensive analysis that undermines bright-line clarity. Second, once courts engage in counterfactual reasoning, the slippery slope becomes difficult to resist. If we ask "what would have happened without breach," why not "what would have happened with consent?" Third, counterfactual analysis imports concepts appropriate for a restitutionary regime that sit uneasily with the deterrent approach in fiduciary contexts.

Lords Briggs and Burrows both rejected counterfactual reasoning, departing decisively from Lord Leggatt's approach. As both emphasise, quoting *Parker v McKenna*, "the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry" into what principals might have consented to.[7] The question is not what would have happened in a hypothetical world, but whether the profit is attributable to the fiduciary position.

Yet their formulations of attribution diverge. Lord Briggs asks whether profit "owed its existence to a significant extent" to fiduciary position, property, or information.[8] This language is

[5] Irit Samet, 'Guarding the Fiduciary's Conscience—A Justification of a Stringent Profit-Stripping Rule' (2008) 28 OJLS 763, 781-84

[6] *Rukhadze* (n 1), [162]

[7] (1874) 10 Ch App 96, 124-25

[8] *Rukhadze* (n 1), [36]

problematic. As Professor Conaglen observes, causation language itself risks bringing confusion when courts must identify which profits are attributable to breach.[9] Instead, we should ask whether breach was "a cause" not "the cause" of the gain, analogous to duress or fraudulent misrepresentation where the wrongful act need only be "a" reason for the outcome.[10] Degree-based assessments like "significant extent" invite precisely the proportionality litigation equity seeks to avoid.

Lord Burrows' formulation should be preferred. He adopts attribution completely. Fiduciaries must disgorge profits obtained "by reason of, or out of the position of, being a fiduciary".[11] This asks whether the position contributed at all, avoiding degree-based assessment entirely. It provides the bright-line rule equity requires. If the profit was obtained by reason of the fiduciary position, it must be disgorged.

Are the no-conflict and no-profit rules separate or unified?

Orthodoxy treats profit-stripping as merely one application of the wider no-conflict principle. Lord Upjohn articulated this view in *Boardman v Phipps*: the duty not to profit is "part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict".[12] Lord Briggs endorses this traditional unification, grounding all fiduciary regulation in conflict prevention.[13] The logic appears compelling because making unauthorised profit from fiduciary position necessarily creates conflict between the duty to serve the principal and personal interest in retaining gains.

This traditional unification, whilst reflecting centuries of authority,[14] faces mounting challenge. Lord Leggatt fundamentally disagreed with its existence. For him, "transactions in which a fiduciary exploits relevant information or a business opportunity for personal gain do not necessarily involve a conflict of interest".[15] Post-termination exploitation presents his clearest counterexample because after resignation, no fiduciary relationship continues and therefore no possibility of conflicted judgment exists. Yet primary legislation explicitly permits profit duties to survive.[16] If profit were merely a species of conflict, Parliament could not permit profit duties to continue when conflict duties necessarily end.

More fundamentally, profit liability can attach even where fiduciary interests align perfectly with the principal's interests. In *Regal (Hastings) Ltd v Gulliver*, the fiduciaries' personal investments

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[9] Matthew Conaglen, 'Identifying the Profits for Which a Fiduciary Must Account' (2020) 79 CLJ 38, 62-63

[10] Charles Mitchell, 'Causation, Remoteness, and Fiduciary Gains' (2006) 17 KLJ 325, 332-34

[11] *Rukhadze* (n 1), [269]

[12] *Boardman v Phipps* [1967] 2 AC 46, 123

[13] *Rukhadze* (n 1) [16]

[14] Julius Grower, 'Causation, Accounts of Profit, and the Content of the Fiduciary Duty of Loyalty' (2025) 141 LQR 500, 504

[15] *Rukhadze* (n 1) [118]

[16] Companies Act 2006, s 170(2)(a)

actually benefited the principals by enabling transactions the principals wanted.[17] No conflict existed because duty and self-interest pointed in the same direction. Yet profit liability attached because the opportunities belonged beneficially to the principals. This is conceptually impossible to explain if profit is merely a species of conflict, because alignment of interests negates conflict by definition.

Recognising separation explains the different remedies each rule provides. Conflict breaches permit rescission of tainted transactions; profit breaches require disgorgement of gains. *Keech v Sandford* exemplifies this distinction.[18] The trustee obtained a lease renewal through personal contract after the landlord refused to renew for the beneficiary. No exercise of fiduciary power occurred, yet profit liability attached. Keech sought not to set aside the lease, but to strip Sandford of profits. The distinction reflects fundamentally different protective purposes. The no-conflict rule prevents potentially tainted exercises of judgment when fiduciaries wield discretionary powers: it protects the integrity of decision-making. The no-profit rule, by contrast, ensures fiduciaries do not appropriate benefits belonging to principals: it protects property rights rather than judgment quality. Leggatt's separation should therefore be preferred.

Conclusion

This essay has argued for three specific resolutions. First, account operates as automatic duty, not discretionary remedy—proprietary rights arise at receipt, not judgment. Second, causation demands attribution not counterfactual speculation: profits obtained "by reason of" fiduciary position must be disgorged. Third, the no-conflict and no-profit rules are distinct principles protecting different interests.

Yet unanimity remains elusive. The Supreme Court's inability to coalesce exposes deeper uncertainty: should fiduciary regulation prioritise deterrence through rigid prophylaxis, or fairness through flexible proportionality? The law cannot answer both ways at once. Until that fundamental choice is resolved, the doctrinal fractures Recovery Partners exposed will continue to undermine commercial certainty and predictability

[17] [1967] 2 AC 134; Lionel Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another' (2014) 130 LQR 608, 627.

[18] (1726) Sel Cas Ch 61

Legal professional privilege: structural problems and institutional solutions

Rory Wilson

I. Introduction

Post Office Limited ('POL') and its wrongful prosecution of hundreds of subpostmasters ('SPMs') has been called the greatest miscarriage of justice in British legal history.[1] Successive revelations of POL's conduct have also demonstrated the doctrinal and structural vulnerability of legal professional privilege ('privilege') to systemic abuse. POL presided over a 'culture of secrecy and excessive confidentiality'[2]; criminal investigations and prosecutions of SPMs were characterised by 'pervasive failures of investigation and disclosure'[3]; and POL habitually utilised privilege to improperly 'cloak' documents.[4] Recent scholarship persuasively frames POL's 'deeply problematic' abuse of privilege as revelatory of a dual failure of doctrine and enforcement and has called for a 'thorough review' of privilege by the Law Commission.[5] This article considers how to operationalise reform and minimise abuse of privilege through changes to structural enforcement.

II. Failures of structural enforcement

Bad-faith privilege claims are sustained by several mutually enforcing factors.

First, the courts cannot effectively police privilege due to the implications of inspection. Parties can apply under CPR 31.19(5) to challenge the withholding of privileged documents. However, inspection requires a judge to review the privileged documents, consequently creating an inequality between the parties that may violate CPR r.1.1(2)(a) and may require the inspecting judge to be debarred from trying the case.[6] The Courts therefore treat the assertion of privilege as conclusive absent a 'reasonable certain[ty]' of falsity.[7] POL exploited this. Fraser J condemned their secretive culture and misuse of privilege in the 2019 group litigation, yet such claims were rarely successfully challenged. For example, he criticised POL's privilege claim over the name of a POL Horizon working group as absurd, but the claimants still failed to meet the threshold to trigger inspection. Only POL's enforced waiver of privilege to facilitate the Inquiry's investigations finally revealed hundreds of improper privilege claims.

Second, the complexity of the doctrine enables gaming. The law of privilege is a 'labyrinth'[8] manipulable by bad actors. For example, POL used the *Three Rivers (No.5) v Bank of England*

[1] R. Sunak, Prime Minister's Questions, (10 January 2024).
[2] *Bates v POL (No.3)* [2019] EWHC 606 (QB), [36].
[3] *Hamilton v Post Office Limited* [2021] EWCA Crim 577, [120].
[4] POL, Closing submissions for Phases 5/6/7, [72].
[5] A. Higgins and R.Moorhead, 'Reforms to privilege laws', Post Office Project (January 2025), 1-5.
[6] *WH Holding v E20* [2018] EWCA Civ 2652, [40].
[7] *West London Pipeline v Total UK* [2008] EWHC 1729 (Comm), [86].
[8] Lord Sumption, 'Foreword', *Privilege* (Sweet & Maxwell; 2010), xi.

principle – that legal advice privilege in a corporate context only applies to a nominated individual or committee – to suppress the circulation of the 2016 Swift Review. An early government-commissioned report into the emerging scandal, the Swift Review was highly critical of POL's approach to prosecutions and disclosure. However, POL used privilege to withhold the full report, only providing a bowdlerised summary to the government that confirmed that 'no further enquiries' were required.[9] POL's chairman told the Inquiry that this approach was pursued because he was advised that privilege over the Review was specific to him and would be waived if shared.[10]

Third, a weak regulatory regime fails to deter or punish breaches. A privilege claim is unusual in requiring lawyers to act as 'the judges in their own client's cause' in determining whether communications are privileged.[11] This presupposes objective neutrality. However, lawyers are socialised to 'strongly identify' with their clients' goals and interests.[12] As the complicity of lawyers in the Post Office scandal illustrates, professional duties do not go far enough to address potential conflicts. For example, in a 2011 email POL's principal lawyer instructed employees to 'try to structure the [operational] document[s] in such a way' that privilege could be claimed and to mark all communications 'legally privileged and confidential' even when inappropriate.[13] This illustrates how professional duties fail to deter abuse. Indeed, the SRAs Code of Conduct does not provide any privilege guidance at all. This absence is justified by claiming that privilege belongs wholly to the client[14], but this obscures common law duties to advise properly in relation to privilege and withdraw if your client does not comply.[15] This shortfall is reflected in the paucity of regulatory action. Despite the SRA and BSB's wide-ranging disciplinary powers, I was unable to find record of a single case regarding privilege abuses heard by either the Solicitors Disciplinary Tribunal or BSB disciplinary committee.[16]

Privilege abuse extends beyond POL. Empirical surveys have concluded that 'assertions of privilege often lack merit'.[17] In *Commissioner of Taxation v PriceWaterhouseCoopers* [18] a dip-test of 15,500 privilege claims found only 52% were valid. Judges have noted litigants' desire to 'blanket' communications in privilege.[19] These issues, revealed starkly by POL, have remained largely hidden from scrutiny.

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[9] POL, URN POL00024913, pg.5 – Unique Reference Numbers ('URN') refer to documents held by the Inquiry.
[10] T. Parker, Evidence Transcript (03 July 2024), 77-84.
[11] *Bank Austria Aktiengesellschaft v Price Waterhouse*, Unreported, 16 April 1997.
[12] R. Nelson, *Partners with Power* (University of California Press, Berkeley 1988), 5.
[13] POL, E. Springford, Email re JFSA Claims, (URN POL00107696).
[14] SRA, 'Guidance; Confidentiality of client information' (30 June 2022) - accessed 09 October 2025.
[15] Myers v Elman [1940] AC 282.
[16] SDT and BSB judgement records. Further, I wrote to the SDT Senior Clerk, who was unable to recall a specific case regarding privilege abuses.
[17] V. Alexander, 'The Corporate Attorney - Client Privilege: A Study' (1989) 63 *SJLR* 191, 266.
[18] [2022] FCA 278.
[19] *WH Holding* (n 6) at [26].

III. Institutional solutions

Discrete institutional reform could offer a solution.

A. Disclosure Officers

The inspection barrier identified above demands institutional innovation. Instead of trial judges inspecting documents, a specialist cadre of disclosure officers should conduct CPR 31.19(6) challenges in separate, sealed proceedings. 'Disclosure officers' could be established on the same model as independent counsel in regulatory investigations.[20] Documents could be considered singly or by dip-sample, with final appeal available to an overseeing judge. Costs would initially be borne by the party referring the documents and awarded proportionally to upheld challenges. This would resolve the inspection dilemma, maintain confidentiality, and allow legitimate challenges to succeed. POL's absurd privilege claims – over Horizon 'known error logs', internal security reports, operational communications – would likely have been exposed. Genuine review will also act as a strong deterrent towards bad-faith claims. While resource intensive, the cost is justified by the preventing injustice from material non-disclosure.

B. Statutory Footing

Doctrinal complexity enables gaming. This should be met by statutory clarity. Privilege should therefore be placed on a statutory footing in civil proceedings. As M.M. Cronin argues, clearly establishing the boundaries of privilege will encourage compliance with its principles.[21] Section 10(1) Police and Criminal Evidence 1984, which substantively reproduces the common law of privilege in criminal proceedings, could be used as a template for a form of statutory words. Statutory guidance should also be created to authoritatively set out privilege 'best practice'. For instance, the Australian Tax Office's *Legal Professional Privilege Protocol* provides a comprehensive guide to the applicable legal tests and requirements of privilege claims. Guidance should be prescriptive, setting out case studies and common scenarios. A confidential advisory service could also be created to assist practitioners. Authoritatively stating privilege best practice in this way will encourage compliance and reduce attempts to exploit doctrinal ambiguity. For example, coherently setting out the ambit of the *Three Rivers (No.5)* committee requirement would reduce the risk of specious interpretations such as pursued by POL in restricting the circulation of the Swift Report. Moving complicated principles from the realm of interpretation to application will deter bad-faith claims.

C. Regulatory Reform

Privilege requires muscular regulation and enforcement. Professional ethics should be augmented by positive obligations to continually review parties' compliance with privilege requirements.

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[20] E.g. 'Bar Council Independent Counsel Guidance' (2023).

[21] M.M. Cronin, 'Slow and steady: why it is time to establish a corporate legal advice privilege' *PSILR* (2008) 26, 913-934.

Specific regulatory guidance should be developed to assist practioners; indeed, it is striking that neither regulator have published privilege guidance. This should be accompanied by novel powers such as yearly 'privilege audits'. Firms and chambers would be required to produce randomly selected casefiles to their regulators for confidential analysis. The SRA already has powers under ss.44B-44BC Solicitors Act 1974 to order disclosure of privileged material. A similar 'Independent Peer Review' is deployed by the Legal Aid Agency to ensure compliance with quality standards; 12 files are selected randomly and assessed confidentially.[22] Audits would create a powerful tool for focussed enforcement action and a strong deterrent.

IV. Conclusion

The Post Office scandal reveals systemic failings in the capacity of our institutional frameworks to deter, identify, and challenge the abuse of privilege. Only innovation, as set out above, can address these structural problems. As Wigmore argued, privilege 'ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle'.[23] These reforms will restore this powerful rule of evidence to its proper limits.

[22] See *Independent Peer Review Process Document* (November, 2021).
[23] J. Wigmore, *Evidence* Vol.8 (Little Brown; 1961), [2291].

The Fabled Certainty of "Death and Taxes": The incompatibility between the Terminally Ill Adults (End of Life) Bill and VAT rules for independent healthcare providers in England and Wales

"... in this world, nothing is certain except death and taxes".[1]

Sophie Sherman

List of Acronyms

AD: Assisted Dying
NHS: National Health Service
TIAB: Terminally Ill Adults (End of Life) Bill
VAT: Value-Added Tax

List of Terms

Palliative care: the reduction of pain and distress at the end of life
Private healthcare: healthcare that is not part of NHS England
Private practitioner: a registered medical professional who offers medical services on a private basis (for profit)
Self-pay healthcare: for present purposes this constitutes out-of-pocket, fee-charging planned healthcare

Introduction

Medical oversight in AD is steadily approaching legality in England and Wales. Far from ever being 'commonplace legislation',[2] this issue is untethered from any government manifesto or party lines. Instead this apolitical legal reform is both a matter of conscience and a sign of the times.[3]

Hitherto TIAB has received "more than 100 hours" of scrutiny in the House of Commons prior to reaching the House of Lords.[4] This means it should be workable and pragmatic across the full spectrum of healthcare provision. Yet the current draft is sector-agnostic. Leaving aside all questions of medical ethics, the omission of mere reference to the private health sector jeopardises legal and economic clarity.

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[1] Benjamin Franklin, in his letter to Jean-Baptiste Le Roy, November 1789

[2] HC Deb, 22 January 2025, vol 760 col 1034.
[3] Fergus Walsh and Vicki Young, 'The Assisted Dying Bill Explained' (BBC Newscast, 12 November 2024) < https://www.bbc.co.uk/programmes/pok4248p > accessed 4 June 2025.
[4] The Bill presently resides at Committee Stage as of November 2025; See 'Assisted Dying Bill' (dignityindying.org, 2025) < https://www.dignityindying.org.uk/assisted-dying/assisted-dying-bill/> accessed 3 May 2025.

Stemming from a key characteristic of this country's basic healthcare framework, namely that there is a public *and* private healthcare sector, this paper flags the crucial question of taxation. Frankly, this has not been addressed in neither parliamentary nor academic discourse. Consequently, the potential VAT implications for this delicate topic have yet to be conceived by lawmakers.

This paper aims to contribute an informed analysis as to why AD delivered by private medical practitioners could attract VAT by virtue of four factors: (1) concurrent statutes; (2) HMRC guidelines; (3) case law, and taxation principles endorsed by the highest court of the land. This paper is structured according to these three themes. In any event, if one point can be made certain from the outset, it is that TIAB's silence on this point exacerbates legal uncertainty.

Section 1: Statutes

Section 1 will illustrate how TIAB's sector-agnostic undermines the various statues governing the private healthcare tax model. Under the NHS Act 2009, Part 9, ss 172 (1)(a) and 173 (1)(a), the self-employed status of private medical practitioners means that payment for their services is only lawful in the private sector with few exceptions. NHS and private end-of-life care can also be differentiated by reference to the contractual parties. Privity of contract, the established doctrine whereby reciprocal rights and obligations only bind the parties to the original contract,[5] means that the self-employed practitioner and the patient, as opposed to the NHS hospital trust, form a unilateral contract. In short, an exchange of money between doctor and patient is only lawful in the private sector.

Now to address the tax itself. VAT is essentially 'the value added at each stage of the production process', forming a percentage of the overall value of the final product or service.[6] Applying the provisions under the Financial Act 2025, ss 47-49, and the Value-Added Tax (VAT) Act ("VATA") 1994, ss 1(a) and 3(1), the private medical practitioner is the "taxable person" and the private provision of AD, theoretically a medical service, is the "taxable supply". As a matter of law, VAT is effectively collected by the service-provider on behalf of HMRC.[7] Therefore, in the absence of reference to either Act, TIAB is silent on whether practitioners should charge VAT or in any event whether there may be an exchange of money at all.

Section 2: HMRC Guidelines

VAT policy design requires the determination of key principles such as 'standard' and 'reduced' rates as well as which services are afforded 'exemption' status. In England and Wales, most private medical services are exempt provided they meet the legal threshold under VAT Notice 701/57,

[5] *Tweddle v Atkinson* (1861) 1 B & S 393; *Edwards v Skyways* [1964] 1 WLR 349.

[6] For clarity, the NHS does not ordinarily attract VAT as it is state-funded service; See Stuard Adam et al, *Tax by Design*, Ch 7 (Institute of Fiscal Studies, 13 September 2011), 168.

[7] Businesses only pay VAT when turnover exceeds an annual threshold in the region of £85,000; see Stephen Smith, *Taxation* (Oxford University Press, 2015), 81.

Group 7, Schedule 9, s 2.3.[8] This threshold is measured by way of a two-limb test consisting of the following:

(1) "The services are within the profession in which a person is registered to practice, and
(2) The primary purpose of the service is the protection, maintenance or restoration of health of the person concerned."

Fundamentally lawmakers rarely have to consider whether medical services are in the interest of protecting or restoring health. '*Primum non nocere*' ('First, do no harm'), the Hippocratic oath taken by every English and Welsh medical practitioner before qualification reinforces this norm.[9] This test has seen relatively little legal challenge hitherto, perhaps partially explaining why it been skimmed over in parliamentary debates on AD.

In the absence of further guidance under s 2.3, it would appear applying a straightforward interpretation means AD would not meet the threshold. Put plainly, any efforts intended to deliberately cause death contradict the second limb. The primary purpose underlying TIAB is also entirely incompatible with VAT Notice 701/57.[10] Whilst there is a spectrum of "assistance" required under TIAB, from a counselling role to the provision of well-documented, rebuttable professional opinions and actually administering the lethal substance. For VAT purposes, all types of 'assistance' will eventually need to be either treated as one continuing chain of assistance, or instead categorised and dealt with in isolation. On this basis, the perhaps controversial argument is that AD cannot be neatly defined as a singular service for it involves the provision of different medical assistance at different stages.

Section 3: Case law

Regarded as a "cornerstone" of both domestic and European VAT systems,[11] the principle of 'fiscal neutrality' means that similar supplies of services, from the perspective of the *consumer*, are to be taxed on an equal basis in the eyes of the law. In the words of Lindsay J, fiscal neutrality means "fiscal parity".[12] Subsequently, the UK Supreme Court has recognised fiscal neutrality as underpinning 'domestic law jurisprudence in relation to VAT'.[13] Accordingly, case law has upheld

[8] HMRC, 'Guidance - Health professionals and pharmaceutical products: VAT Notice 701/57 s 2.4 (*gov.uk*, 28 July 2014) < https://www.gov.uk/guidance/health-professionals-pharmaceutical-products-and-vat-notice-70157#overview > accessed 10 May 2025.
[9] Spyros Retsas, 'First do no harm: the impossible oath' (*BMJ*, 19 July 2019), < ttps://doi.org/10.1136/bmj.l4734> accessed 9 June 2025.
[10] The Terminally Ill Adults (End of Life) HC Bill (2024-5) 112, Long title, to "allow adults who are terminally ill, subject to safeguards and protections, to request and be provided with the assistance to end their own life…".
[11] Dr Michael Taylor, 'Our changed approach to EU law: the impact on VAT' (*Tax Adviser*, 18 September 2023).
[12] Cited in 'V1.230B VAT and the principle of fiscal neutrality' (LexisNexis, 2025) < https://www.lexisnexis.co.uk/tolley/tax/commentary/de-voil/part-v1-general-principles-rates-of-tax/v1-230b-vat-the-principle-of-fiscal-neutrality> accessed 8 June 2025.
[13] *DCM Optical Holdings* [2022] UKSC 26 at [34].

legal certainty, even providing express confirmation that VATA must be interpreted in accordance with the principle of fiscal neutrality. [14]

On this premise, sufficient weight must be given to the patient's experience. Through their eyes, AD and end-of-life care largely appear interlinked. To illustrate, at face value a private consultation with a palliative care specialist introducing potential treatment options appears identical in practice to the first legal safeguard laid out under TIAB, the 'preliminary discussion'. By simply "indicat[ing] a wish to seek assistance" for AD,[15] this discussion emulates the format of an ordinary consultation whereby the patient's health condition is assessed with primary reference to medical records. Therefore, there is significant discrepancy between VAT guidelines that point to the outright enforcement of VAT balanced against taxation principles that leave AD's VAT liability unlikely in favour of consistency across the law for consumers.

Conclusion

The primary purpose of this paper has been to highlight how the private sector has been neglected by lawmakers' throughout the drafting process of TIAB. This paper has also illustrated the opaque nature of AD's interaction with VAT law governing the private sector. Fundamentally the inevitable tax uncertainty for private practitioners who opt-in to provide AD should be resolved *before* the Bill becomes law, in the interests of all parties involved.

[14] *Rank Group Plc v HMRC* (Cases C-259/10 and C-260/10) at [32]-[35], [42]-[44]; *Prescription Eyewear v HMRC* [2013] UKFTT 357 (TC).
[15] TIAB, ss 5(3).

'*cui bono*?' Absence of intention and resulting trusts

Saul Agar-Ward

The theoretical basis of the resulting trust has evaded law students, academics, and senior judges for decades. Two dominant explanations are the practical assertion that 'Equity abhors a vacuum', so otherwise ownerless property reverts to the donor, and the Birks-Chambers model, that the donor lacks an intention to benefit the donee, and so under unjust enrichment a trust is formed in their favour. Lord Browne-Wilkinson argued for a 'presumed intention' model, whereby the trust follows the law's inference of the donor's intention. Any satisfactory theory should explain, analytically, all resulting trusts, and be normatively satisfying. This essay argues that the Birks-Chambers view best meets both requirements when grounded in property rights rather than unjust enrichment, following a traditional English concern expressed by Lord Millett. Following the lead of the Singaporean Court of Appeal, this hybrid view explains resulting trusts while preventing judicial overreach.

Presumed intention resulting trusts

The 'vacuum' model cannot analytically explain all resulting trusts. Megarry J in *Vandervell (No.2)* described two categories: the traditional, presumed intention resulting trust (*Dyer v Dyer* [1788]), and the automatic resulting trust, for which the vacuum explanation was given.[1] Traditional resulting trusts are inexplicable by the vacuum view, since no gap in ownership exists: necessarily the resulting trustee has purchased the property from a third party, rather than a failed transfer from the beneficiary. The vacuum theory also fails to explain why the presumption is rebuttable, since trusts arising by operation of law should not be displaced by evidence of a different intention.[2] Clearly Lord Browne-Wilkinson's presumed intention explanation in *Westdeutsche Landesbank v Islington* [1996] is preferrable.[3] Alternatively, the 'absence of intention' explanation advanced by Birks and Chambers works equally – the provider of the monies had no intention to benefit the transferee, and so the resulting property should be presumed to be in the transferor's name.[4] Like positive presumed intention, it is rebuttable, according with the position in law. The vacuum explanation would demand a resulting trust *whenever* a third party funds a purchase.

By explaining the traditional resulting trust, the intention-based views provide a more convincing analytic taxonomy than the vacuum view.

[1] [1973] 3 WLR 744; EWHC Exch J8.
[2] Fowkes v Pascoe (1875) LR 10 Ch App 343.
[3] [1996] AC 669.
[4] P Birks, 'Restitution and Resulting Trusts', in Goldstein (ed), *Equity and Contemporary Legal Developments* (Jerusalem, 1992); R Chambers, *Resulting Trusts* (Clarendon Press, 1997).

Automatic resulting trusts

One might assume that the vacuum explanation better explains automatic resulting trusts, imposed following a failure to dispose of the beneficial interest, either by failing to create a trust (*Re Shaw*), subsequent trust failure (*Re Gillingham Bus Disaster Fund*), or an imperfect gift (*Vandervell v IRC*).[5] This principle adequately explains examples like *Morice v Bishop of Durham*.[6] Without a beneficiary, the trust fails, the property returning because "[t]here must be somebody, in whose favour the Court can decree performance".[7] This also explains the law's general hostility to non-charitable purpose trusts. The beneficiary principle is concerned with ownership, not intention, and so the automatic, ownership-based view fits these trusts. Cases of trusts fulfilling their purpose also seem to bear this explanation. For example, *Re Gillingham* held a resulting trust arose when the main trust's primary purpose succeeded and the secondary failed as 'an inference of law based on after-knowledge of the event', independent of donor intention.[8] However, this is problematic: Harman J considered it relevant that the donors intended to part absolutely with the money, which should be irrelevant if the trust truly arose through operation of law.[9] This leaves *Re West Sussex Constabulary Trusts*, where resulting trusts did not arise for donors presumed to have gained an ancillary benefit, at odds with *Gillingham*.[10] Even the automatic resulting trust, the best fit for the vacuum theory, seems affected by the donor's intention.

It is for this reason Rickett and Grantham call failing trusts "the clearest case for a presumption of non-beneficial intent" (2000, p.19).[11] This analysis explains *Re West Sussex*: the evidence simply rebutted the strong presumption of resulting trust in favour of *bona vacantia*.[12] It can also explain *Vandervell v IRC*. Vandervell, asked whether he would prefer the property to land with him or the Crown, would not have answered in Her Majesty's favour. However, some cases defy this explanation. In *Re Ames Settlement*, a trust instrument providing for the failure of a marriage was found to have failed on marital annulment.[13] The property went back to the donor's estate, notwithstanding the absence of any actual intention, given the donor thought he had made adequate provision for failure.

The benefit of the Birks-Chambers model is that it explains all resulting trusts without either explanation's pitfalls. Presumed intention resulting trusts operate largely as before, but under an opposite presumption, rebuttable by evidence of a positive intention to benefit. Difficult 'automatic' resulting trusts like *Re Ames* can be explained via a (demonstrable) lack of intention to benefit in such circumstances, rather than the fiction of an active intention to retain.

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[5] [1957] 1 WLR 729; [1958] Ch 300; [1967] 2 AC 291.
[6] [1805] 32 ER 656.
[7] *Ibid*, 658.
[8] *Gillingham* (n 2.2), 310.
[9] *Ibid*, 309.
[10] [1971] Ch 1.
[11] C Rickett and R Grantham, 'Resulting trusts: the trust nature of the failing trust cases' LQR 2000, 116, 15-21 at 19.
[12] *Ibid*..
[13] [1946] 1 Ch 217.

The Birks-Chambers view best describes resulting trusts as they actually exist.

Normative issues

Grounding the resulting trust in the notion that the law will not permit ownerless property empowers the judiciary to determine beneficial ownership, and modify, even against express intention, who owns what. This strains the conception of the separation of powers underlying modern democratic societies (per Montesquieu), letting the judiciary illegitimately interfere with the citizen's most fundamental rights contrary to a major purpose of Equity (hence such remedies as specific performance).

The Birks-Chambers view is on far stronger normative ground. Judicial usurpation issues do not arise, while the strong presumption against *bona vacantia* is rather an absence of intention to benefit the Crown than merely being Equity's 17th-century decision (c.f. Waters, (1984), p.363), again adding legitimacy.[14] The absence of intention framework has even found judicial support in Lord Millett, while not "the most widely held view".[15] Per his Lordship in *Air Jamaica v Charlton*, a resulting trust "responds to the absence of any intention … to pass a beneficial interest to the recipient".[16]

A more serious difficulty with both presumed intention and absence of intention is dumping: if property can be ownerless, it might be renounced. This is obviously undesirable. However, Lord Millett in *Air Jamaica* again resolves this, noting that property must be given: a mere disclaimer is insufficient.[17]

Of course, there are critiques. Lord Browne-Wilkinson argued in *Westdeutsche* that this view would expand the resulting trust to all cases of mistaken payment (since mistake vitiates the actual intention), which would have profound consequences for the doctrine, commerce, and third-party rights[18]. While this concern is valid, it is not fatal. Just because intention to benefit is vitiated under unjust enrichment does not mean it has to be for the purpose of a resulting trust.[19] Indeed, accepting the lack of intention view need not necessitate subsuming all private law into unjust enrichment.[20] The Singaporean Court of Appeal adopted the lack of intention analysis in *Chan Yuen Lan v See Fong* but were eager to reject the unjust enrichment grounding because of those very fears of commercial uncertainty and disturbing third-party rights.[21] Leow and Liau argue the judgement reflects an English concern to frame equitable principles as operating under property law, not unjust enrichment.[22] Particularly, they cite Lord Millett in *Foskett v McKeown* [2001] 1 AC,

[14] D Waters, *Law of Trusts in Canada* (2nd ed.) (Toronto, 1984), 363.
[15] Cf. J Glister, J Lee, *Hanbury & Martin: Modern Equity*, (23rd Ed) (Sweet & Maxwell, 2024), 11-002.
[16] [1999] 1 WLR 1399, 1412.
[17] *Ibid.*
[18] *Westdeutsche* (n3), 708-9.
[19] G Virgo, *Principles of the Law of Restitution* (4th ed.) (Oxford, 2024), 598.
[20] cf. *Resulting Trusts* (n11), 102.
[21] [2014] SGCA 36, [48].
[22] R Leow and T Liau, "Resulting Trusts - A Victory For Unjust Enrichment?" (2014) 73 CLJ 500, 501.

arguing that property rights are based upon "fixed rules and settled principles".[23] Lord Millett's approach, vindicating property rights over abstract, policy-tinged conceptions of justice, thus seems cogent. A resulting-trust model based on absence of intention can operate independently of unjust enrichment. Equity's use of resulting trusts is not so much an interference with property rights as their vindication, reflecting its protective function, while supported by normative justifications of the separation of power.

As such, we need not revert to Swadling's view that automatic resulting trusts defy legal analysis.[24] Nor need we accept the normatively unattractive and analytically insufficient view that they arise to fill a gap. While positive presumed intention cannot explain all resulting trusts, absence of intention can, and the problems of uncertainty can be mitigated by separation from the doctrine of unjust enrichment, as the Singaporean approach demonstrates.

[23] *Ibid.*

[24] W Swadling, "Explaining resulting trusts", LQR 2008 72-102, 102.

The Responsibility Vacuum: English Law's Struggle Against the Decentralisation Defence in Cryptocurrency

Rania Sorfina Binti Yamani Hafez

Decentralisation, which, while a core tenet of blockchain technology, has been increasingly employed as a shield against legal accountability, creating a perilous "responsibility vacuum". The vacuum arises from the architectural design of many cryptocurrency systems, which are intended to operate without a central intermediary.[1] This decentralisation can be a mirage,[2] with significant power often concentrated in the hands of a small group of developers. This essay argues that the "responsibility vacuum" is not merely a technical gap but a fundamental confrontation between the rule of law and the "rule of code". This essay argues that although English courts have identified the "responsibility vacuum" in decentralised cryptocurrency systems, the obstacles are structurally rooted in causation, jurisdiction, and enforcement difficulties that resemble long-standing problems in digital banking. Effective accountability therefore requires coordinated legislative, regulatory, and industry intervention rather than placing an unsustainable burden on the judiciary.

The Illusion of Decentralisation in *Tulip Trading*

Tulip Trading Ltd v Van der Laan concerned a company that lost access to Bitcoin worth $4.5 billion after a hack deleted its private keys.[3] *Tulip* argued that core developers owed fiduciary and tortious duties to help recover its assets. The High Court held that Bitcoin developers, as a "fluctuating and unidentified body," cannot owe fiduciary duties and that, even assuming de facto control, imposing ongoing obligations on individuals who never consented to act for users and participate only sporadically would be unsound.[4] This reluctance reflects Haque's view that blockchain developers neither receive a delegation of power or property from cryptocurrency holders nor accept authority to act on their behalf, meaning the essential relational foundation for fiduciary obligations is absent.[5] Yet, taken together, they preserve the decentralisation defence, leaving control without legal obligation.

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[1] Uniswap, 'Pools' (*Uniswap Documentation*, 2024) https://docs.uniswap.org/contracts/v2/concepts/core-concepts/pools accessed 20 November 2025.

[2] DA Zetzsche and others, 'Remaining Regulatory Challenges in Digital Finance and Crypto-Assets after MiCA' (2023) UNSW Law Research Paper 23-27, 17 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4487516 accessed 20 November 2025.

[3] *Tulip Trading Ltd v Bitcoin Association for BSV and others* [2023] EWCA Civ 83

[4] *Tulip Trading Ltd v Van Der Laan and others* [2022] EWHC 667 (Ch)

[5] RS Haque and others, 'Blockchain Development and Fiduciary Duty' (2019) Wake Forest Univ Legal Studies Paper https://ssrn.com/abstract=3338270 accessed 21 November 2025.

The Court of Appeal judgment recognised that the decentralisation defence may not be absolute. Birss LJ found that there can be a "negative duty" for developers not to introduce code for their own advantage that would compromise users security, and a positive duty to implement updates on the platform for the benefit and functioning of the platform for the users.[6] This reasoning aligns with Angela Walch's thesis that users' structural reliance on developer expertise mirrors traditional fiduciary relationships, and that fiduciary duties are justified because developers, serving numerous entrustors in a standardised manner, acquire power far greater than that held by fiduciaries acting for individuals.[7] Walch's analysis provided the normative foundation for Birss LJ's approach where developers' control creates dependency, and dependency demands responsibility.

Haque's advancement of the decentralisation defence conflicts with Walch's position. He argues that fiduciary frameworks from corporate law cannot apply to cryptocurrency because public blockchains operate as multi-level political processes, not hierarchical structures that attracts legal obligation.[8] Thus, information asymmetry or user reliance cannot justify fiduciary duties. Imposing fiduciary duties, he concludes, mischaracterises decentralisation by forcing hierarchical legal logic onto a self-governing, reputation-based system of accountability.
However, imposing fiduciary duties risks overregulation. A static conception of obligation would leave developers uncertain of how to comply, invite strike suits from an unlimited class of users, and undermine the open, decentralised ethos on which blockchain innovation depends.[9] Tulip marks English law's doctrinal confrontation with the decentralisation defence, positing that imposing duties may enhance asset protection. Yet, such duties conflict with blockchain's anti-custodial ethos, creating risks of non-compliance that could destabilise the ecosystem itself.[10] The decision is therefore both a breakthrough and a cautionary tale, revealing that practical enforcement of such liability remains frustratingly elusive.

The Evidentiary Collapse in *D'Aloia*

The case *D'Aloia v Persons Unknown* [2024] concerned a UK investor who lost approximately £2.5 million in a cryptocurrency scam involving USDT.[11] The stolen assets were transferred through fourteen blockchain "hops" across multiple wallets and exchanges before arriving at Bitkub, a Thai-based cryptocurrency exchange.[12] Despite Bitkub's negligence in inexplicably removing a security block on the recipient account, the claim failed on causation.The claimant was unable to prove his

[6] *Tulip Trading* (n 3)
[7] Angela Walch, 'In Code(rs) We Trust: Software Developers as Fiduciaries in Public Blockchains' in Philipp Hacker and others (eds), *Regulating Blockchain: Techno-Social and Legal Challenges* (Oxford University Press 2019) 58.
[8] ibid (n 5).
[9] ibid (n 5).
[10] BS Mondoh and PR Gwele, 'When Code Creates Duty: The Tulip Trading Case and the Future of Liability in Web3 and Blockchain Networks' (2025) https://ssrn.com/abstract=5331037 accessed 19 November 2025.
[11] *D'Aloia v Persons Unknown Category A & Ors* EWHC 2342 (Ch).
[12] ibid.

specific USDT reached Bitkub's wallet due to conflicting expert methodologies and practical difficulties in blockchain tracing.[13]

This evidentiary collapse reveals the inadequacy of current tracing tools when confronted with blockchain's dissipative architecture even where legal doctrines theoretically permit recovery. Furthermore it reflects a deeper structural tension, where the "rule of code" does not necessarily respect "the substantive conditions of the rule of law, such as fairness and equality".[14] Investigations into illegal activities are significantly complicated by crypto mixers through privacy-enhancing protocols that increase anonymity by collecting, pooling, and shuffling crypto-assets from multiple users.[15] Enforcement begins with seeking cooperation from exchanges but it remains "highly uneven depending on the exchange's attitude and domicile".[16] This transforms legal rights into practical favours, fostering a "catch me if you can" dynamic where enforcement rely on the goodwill of the very intermediaries whose negligence enabled the loss. Ironically, efforts to strengthen accountability by imposing heavier liabilities on often-offshore exchanges could make them less cooperative, deepening opacity and driving evidence and actors further beyond legal reach. *D'Aloia* thus reveals that property recognition without effective enforcement produces only symbolic victories.

Historical Context

The challenge facing English courts in cryptocurrency litigation must be understood in proper historical context. Full-year 2024 figures were even starker, with total UK fraud losses reaching £1.177 billion.[17] These figures underscore that recoverability is not a pathology unique to cryptocurrency, but a recurring feature of modern digital finance. Even where the parties are identifiable and intermediaries are regulated, the law routinely fails to restore victims to their pre-loss position. English law's struggle is therefore not a failure of doctrinal imagination, but a reflection of the same evidential, jurisdictional, and causation barriers that persist in established payment systems. The law is forced into a perpetual race it can never entirely win; at best, it can close the gap.

Arbitration

However, a significant emerging obstacle threatens this progress. Cryptocurrency exchanges increasingly deploy mandatory confidential arbitration clauses in their terms of business precisely

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[13] ibid (n 11)

[14] Primavera De Filippi, Morshed Mannan and Wessel Reijers, 'Blockchain Technology and the Rule of Code: Regulation via Governance' (2022) https://ssrn.com/abstract=4292265 accessed 24 November 2025.

[15] *Van Loon v Department of the Treasury* (5th Cir, No 23-50669, 26 November 2024) https://www.ca5.uscourts.gov/opinions/pub/23/23-50669-CV0.pdf accessed 21 November 2025.

[16] Matt Green and Henry Reid, 'Crypto-asset recovery: a short-form practical guide' (Oxford Law Pro, 14 May 2025) https://doi.org/10.1093/9780198972877.003.0028 accessed 5 November 2025.

[17] Greg Stratton, Anastasia Powell and Robin Cameron, 'Crime and Justice in Digital Society: Towards a 'Digital Criminology'?' (2017) 6(2) International Journal for Crime, Justice and Social Democracy 17.

to avoid litigation.[18] The CMS report emphasises, "cryptocurrency disputes determine our law".[19] The absence of litigated judgments will affect the common law where it cannot mature in response to decentralised technologies. The very disputes that should clarify duties, remedies, and governance structures are being diverted into private fora, slowing doctrinal development and sustaining the responsibility vacuum the courts are attempting to close.

English courts have exposed the "responsibility vacuum" in cryptocurrency but remain structurally ill-equipped to close it. While *Tulip Trading* challenged the decentralisation defence by contemplating fiduciary duties, *D'Aloia* illustrates that doctrinal victories are often rendered symbolic by the "rule of code" and evidentiary collapse. Ultimately, the tension between decentralised architecture and legal accountability cannot be resolved by common law alone. As with historical struggles in digital finance, closing this vacuum requires coordinated legislative and regulatory intervention including legislative transparency mandates for exchanges and enhanced cross-border regulatory cooperation. Without such structural reform, the decentralisation defence will continue to shield intermediaries, ensuring that technical sophistication remains an effective barrier to justice.

[18] David Bowman, 'Navigating the rapids: the current state of the English law of crypto-assets' (Weightmans, 27 February 2025) https://www.weightmans.com/media-centre/news/navigating-the-rapids-the-current-state-of-the-english-law-of-crypto-assets/ accessed 24 November 2025.

[19] CMS, *Crypto Disputes Report 2025: Trends, challenges, and projections* (United Kingdom, 28 July 2025) https://cms.law/en/gbr/publication/crypto-disputes-report-2025 accessed 20 November 2025.

Hitting the Nail on the Head?
A Response to the Law Commission's Consultation Paper on Digital Assets in Private International Law

Judy Yi Ting Ma

Introduction

Digital assets are undoubtedly a new frontier when it comes to legal development. The Law Commission has undertaken significant work in this area, publishing a final report on digital assets as personal property in 2023 and proposing a draft Bill to that effect.[1] Recently, the Law Commission published a consultation paper on digital assets in private international law.[2] As responses to the consultation paper are being considered, this essay seeks to add an opinion specifically on the issue of applicable law.

This essay argues that the Law Commission's 'supranational approach' to applicable law is legally uncertain and thus aims to put forward some alternatives. To do so, disputes arising out of a digital asset's proprietary status will first need to be characterised. Having attempted characterisation, the essay will discuss the challenges posed by certain digital assets to established choice of law principles. Third, the essay will canvass the Law Commission's proposal and objections to it. Finally, two alternative rules will be proposed, depending on whether the claim is tortious or proprietary.

The characterisation issue

Before a choice of law rule is applied, the dispute in question must be characterised. In relation to the proprietary status of digital assets, two types of disputes are likely to arise. If a private wallet is hacked or one is otherwise defrauded of their digital asset, then a claim could firstly be brought against the hacker or fraudster for loss and damages suffered. In *AA v Persons Unknown* and *D'Aloia v Persons Unknown*, such a claim was characterised as tortious, with the courts concluding the tort gateway for service out applied, on the basis that the claimant suffered damages in this jurisdiction.[3] If, as a result of the hacking or fraud, the digital asset comes into the control of a third party, then the claimant may also want to establish their superior entitlement to the asset. This would be a priorities dispute involving competing claims to property. These two different disputes require different rules.

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[1] Law Commission, *Digital Assets: Final Report* (Law Com No 412, 2023). Property (Digital Assets etc) Bill (2024-26) 31.
[2] Law Commission, *Digital assets and (electronic) trade documents in private international law: Consultation paper* (Law Com CP No 275, 2025).
[3] *AA v Persons Unknown* [2019] EWHC 3556 (Comm), [2020] 4 WLR 35 [67]. *D'Aloia v Persons Unknown* [2022] EWHC 1723 (Ch) [10]-[11].

The challenge posed by digital assets to established principles

Digital assets arising out of permissionless decentralised ledger technology (DLT) challenge established choice of law principles.[4] With permissionless networks, such as Bitcoin, the ledger is public as participants or nodes work together as part of the peer-to-peer network.[5] The Law Commission quotes Held in its consultation paper, who sees these assets as existing "nowhere and everywhere at the same time".[6]

In terms of non-contractual claims, Art 4(1) of the Rome II Regulation provides that the applicable law is the law of the place where direct damage is suffered. As the network is decentralised, the physical place of direct damage cannot be convincingly pinpointed. Art 4(2) covers a case where the victim and tortfeasor have the same habitual residence but as recent cases involving persons unknown make clear, it will often not be possible to locate the defendant.

If the claim is proprietary, the orthodox lex situs rule applicable to tangible assets would be inappropriate. The asset is not physically located anywhere, participants could be operating computers from anywhere in the world and so to fix a situs would be largely fictional.[7] Features unique to digital assets give rise to the challenge of finding the appropriate applicable law.

The Law Commission's proposal and the objections to it

The Law Commission's proposal entirely dispenses with the traditional approach of finding a single appropriate applicable law.[8] Instead, it proposes a 'supranational approach' where no state's law would be appropriate and the overall objective is the just disposal of proceedings, taking into account a wide range of factors including the parties' expectations.[9] The fact that this proposal is legally uncertain has been noted by various stakeholders.[10] There is no apparent metric that could help guide the courts when determining just disposal of the proceedings.[11] The Law Commission only provides that the parties' expectations should be considered but without giving a sense of what 'just' means, the proposal becomes circular. Legal uncertainty undermines the Law Commission's own emphasis on the parties' expectations, as the parties cannot anticipate which

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[4] Law Commission (n 2) paras 2.45-2.46. cf Law Commission, *Property and permissioned DLT systems in private international law: FAQ*, 2025 on why Principle 5 UNIDROIT Principles on Digital Assets fails to adequately cover permissionless DLTs.

[5] ibid.

[6] Amy Held, "Crypto Assets and Decentralised Ledgers: Does Situs Actually Matter?" in A Bonomi, M Lehmann and S Lalani (eds), *Blockchain and Private International Law* (Brill 2023).

[7] Law Commission (n 2) paras 5.140-141. Andrew Dickinson, "Cryptocurrencies and the Conflict of Laws" in D Fox and S Green (eds), *Cryptocurrencies in Public and Private Law* (OUP 2019) para 5.109.

[8] Law Commission (n 2) para 6.63.

[9] ibid para 6.101.

[10] Financial Markets Law Committee (Letter responding to consultation paper, 17 September 2025) <https://fmlc.org/wp-content/uploads/2025/09/FMLC__Letter_Law-Com_Consultation-Response-.pdf> accessed 22 November 2025. Bar Council (Response to consultation paper, 26 September 2025) para 28 <https://www.barcouncil.org.uk/static/0023cfba-8018-46ac-8c8e26022d6e4822/Bar-Council-response-to-the-Law-Commission-Consultation-on-Digital-assets-and-electronic-trade-documents-in-international-priv.pdf> accessed 22 November 2025.

[11] ibid.

body of law would apply. The joint response of the Commercial and Chancery Bar Associations also highlights that for a jurisdiction to unilaterally create a set of supranational rules would be unheard of.[12] The proposal requires some reconsideration.

Alternatives to consider

Focusing on the two types of disputes that may commonly arise, the following alternative rules may be considered.

(i) Tortious disputes

Where a claim is between the fraud victim and the fraudster, the applicable law should be determined by the place of the victim participant's habitual residence.[13] As per Dickinson, this is easy to locate regardless of whether or not the DLT is permissionless, and aligns with the European Commission's proposed rule to determine the law applicable to third party effects of debt assignments based on the place of assignor's habitual residence.[14] Some parallels can then be drawn across intangible assets. The law of the victim's habitual residence also adheres to the Law Commission's emphasis on the parties' expectations. The habitual residence of the holder is likely where they hold the private wallet on a physical medium, where they participate in transactions and where their actions fall to be regulated, such that they can reasonably expect the law of that place to determine their claim.

The main criticisms to this choice of law rule can be overcome. The Financial Markets Law Committee argues that the rule leads to the application of many different laws and artificially splits the distributed ledger record.[15] However, Dickinson highlights that since these fraud claims concern effects of transactions external to the technology, the integrity of the record is not affected.[16] Ng objects to this proposal by claiming it confuses jurisdiction with choice of law.[17] This is unconvincing because although the participant's habitual residence will often be where they suffer damage, the jurisdictional question concerns whether the damage sufficiently connects the claim to the forum to be heard, whereas determining the applicable law focuses on the parties' expectations.

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[12] Commercial Bar Association and Chancery Bar Association (Response to consultation paper, 1 October 2025) para 9.3 <https://www.chba.org.uk/for-members/library/consultations/251001-combar-chba-response-to-lc-digital-assets-consultation.pdf> accessed 22 November 2025.

[13] Dickinson (n 7) para 5.109.

[14] ibid para 5.110.

[15] Financial Markets Law Committee, 'Distributed Ledger Technology and Governing Law: Issues of Legal Uncertainty' (March 2018) para 6.22 <https://fmlc.org/wp-content/uploads/2018/05/dlt_paper.pdf> accessed 22 November 2025.

[16] Dickinson (n 7) para 5.112.

[17] Michael Ng, 'Choice of Law for Property Issues Regarding Bitcoin under English Law' (2019) Journal of Private International Law 315-338, 335.

(ii) Proprietary disputes

Where the claim is brought against an innocent third party over a priorities dispute, it is proposed that the law of the current holder's habitual residence should apply.[18] This is arguably more certain than the law of the owner's habitual residence, since it is the question of ownership that is being decided. Priorities disputes always concern two innocent parties, unlike in tortious claims where applying the law of the fraudster as the current holder of the asset may be seen as improper or contrary to the innocent party's expectations. Legal certainty arguably warrants such a choice of law rule and this at least conforms with the third party's expectations.

Conclusion

The Law Commission is charting new territory when it comes to digital assets and applicable law. However, its unwillingness to grasp the nettle and find a single appropriate applicable law arguably overstates the difficulty of the task. Finding an appropriate applicable law better ensures legal certainty and in turn helps to inform parties' expectations. For now, one waits to see whether the Law Commission, in its final report, can hit the nail on the head.

[18] Permanent Bureau of the HCCH, 'Report of the First Working Meeting of Digital Tokens Project of 10 to 141 June 2024', (Annex II of Report on Exploratory Work: Digital Tokens Project, 2025) p.12 <https://assets.hcch.net/docs/8aad1b4d-c3a7-46b5-99c4-1ee589115685.pdf> accessed 23 November 2025.

Remedies for Dishonest Assistance: Sympathy for the Devil?

Joshua Nurse

Introduction

A dishonest assistant has, by definition, acted dishonestly by the standards of ordinary decent people.[1] The remedies available for such equitable wrongdoing rightly reflect the aim of discouraging dishonest conduct. Moreover, in establishing liability in an action for dishonest assistance, it is just that a claimant does not have to prove a direct causal link between the assistant's actions or omissions and the loss suffered. Rather, the requirement of dishonesty in relation to the breach of fiduciary duty itself satisfies the appropriate causal nexus.[2]

Nevertheless, the punishment should be proportionate to the wrong. In contrast to, for example, Canadian law, English courts have hitherto adopted a decidedly measured position.[3] Dishonest assistants are held jointly and severally liable with the fiduciary to compensate for any *loss* caused to the principal, while they are only liable to account for the profits which they themselves have made. This represents a compromise between two competing features of liability for this equitable wrong. On one hand, it is duplicative of the fiduciary's own position. This serves as a powerful deterrent and disincentive. On the other hand, it is derivative, in the sense that it necessarily depends on the fiduciary's commission of a primary wrong.[4] This secondary, derivative aspect of liability is reflected in the decisions of English judges not to hold dishonest assistants liable to account for the profits made by the defaulting trustee.[5] However, the recent decision of the Supreme Court in *Stevens v Hotel Portfolio II UK Ltd* appears to do so by the back door.[6] This essay seeks to interrogate the frictions at play in that case, and their wider consequences for the boundaries between common law and equitable remedial principles. Dishonest assistants deserve our censure, but do they sometimes deserve our sympathy too?

Stevens in outline

Mr Ruhan was a director of, and thus owed fiduciary duties to, Hotel Portfolio II UK Ltd ("HPII"). HPII sold several London hotels at a fair market value to a company named Cambulo Madeira ("CM"). CM was controlled by Mr Stevens, acting as nominee for Mr Ruhan, who did not disclose this interest to HPII. CM redeveloped and resold the hotels, giving Mr Ruhan profits of £102.26 million, all of which he has since dissipated. Mr Stevens dishonestly assisted in both the making of the profits and their dissipation, and received £1.5 million in return. There was no dispute that

[1] *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ 614, [57]; *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, [389]-[392].
[2] *Grupo Torras SA v Al-Sabah (No 5)* [1999] CLC 1469.
[3] *Canada Safeway Ltd v Thompson* [1951] 3 DLR 295 (BCSC).
[4] S.B. Elliott, C. Mitchell, 'Remedies for Dishonest Assistance' (2004) *MLR* 67/1 16.
[5] *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908.
[6] [2025] UKSC 28.

the £102.26 million constituted an unauthorised profit made in breach of Mr Ruhan's fiduciary duty to HPII. Nor was it in question that Mr Stevens was liable to account for the personal profit that he made through his assistance. The central issue, however, was whether the dissipation of the unauthorised profits gave rise to an equitable compensation claim such that Mr Stevens, as a dishonest assistant, could be held jointly and severally liable for the 'loss' of the £102.26 million, despite the fact that the fraudulent scheme in its totality caused HPII no loss at all. The key conceptual question was therefore whether the dissipation of unauthorised profits held on constructive trust should properly be categorised as a loss for the purposes of remedies against a dishonest assistant.

Two incompatible positions?

The Supreme Court, in a majority judgment by Lord Briggs, found Mr Stevens jointly and severally liable with Mr Ruhan to compensate HPII for the loss of the full £102.26 million. Lord Burrows wrote a lone dissent, arguing that in circumstances in which HPII suffered no 'loss', given that it sold the hotels to CM at a fair market price, Mr Stevens should only be liable to account for the profits he personally made. Both judgments proceed with their own attractive internal logic, but they reveal two fundamentally incompatible positions. Above all else, Lord Briggs protects the sanctity of the proprietary consequences of the institutional constructive trust as it is recognised in English law, refusing to relegate its function to one of mere remedy. On the other hand, Lord Burrows partially sidesteps these seemingly necessary consequences of an orthodox approach to the constructive trust, by focusing instead on the fact that this case involved *one* dishonest scheme, which caused *no loss* to the principal at all. Lord Burrows' dissent thus represents an appealing attempt to integrate common law and equitable remedial principles, but which cannot succeed without a perhaps undesirable reconceptualisation of the constructive trust of unauthorised profits.

The crux of Lord Briggs' judgment is that the fraudulent scheme in this case was formed of two distinct breaches of trust.[7] The first consisted of the making of the unauthorised profits. Upon receipt of these profits, Mr Ruhan was immediately bound to hold them on constructive trust for HPII. As the beneficiary under this trust, had it known about the creation of the profits, HPII would properly have been able to say 'that's mine', and demand delivery up of the trust property.[8] This is the necessary proprietary consequence of the constructive trust. For it is not merely a remedy for a wrong, dependent on an award by a court akin to damages for breach of contract. Rather, 'it is equity's automatic and immediate response to a set of facts', which confers real proprietary remedies upon the beneficiary.[9]

The second breach was a breach of this constructive trust. The dissipation of Mr Ruhan's unauthorised profits is therefore better conceptualised as a dissipation of HPII's property. In that

[7] For example, *Stevens* at [37].
[8] Ibid, [28].
[9] Ibid, [29].

sense it clearly represented a loss to HPII capable of giving rise to a claim for equitable compensation. To hold otherwise would be to nullify the clear proprietary right that HPII had in the profits. This conclusion is wholly in keeping with orthodox equitable principle.

Yet Lord Burrows' position is equally orthodox in its own way. Its orthodoxy lies in its adherence to remedial principles typically associated with the common law. Namely, that an appropriate compensatory analysis must begin with the question of what position HPII would have been in if the scheme had not been carried out, 'that is if there had been no breach of fiduciary duty by Mr Ruhan *from the start*'.[10] The answer is that HPII would have been in exactly the same position, because it suffered no overall loss. More innovative, and certainly more controversial in light of Lord Briggs' orthodoxy, is Lord Burrows' problematisation of the specific nature of a constructive trust of unauthorised profits. English law does not consider such a trust to be 'remedial' in nature, but it is clearly remedial in function to an important extent. It functions as 'a disgorgement response imposed by the law for equitable wrongdoing by the principal wrongdoer.'[11] It is not a compensatory response, and so on one view to allow a failure of a disgorgement response to give rise to a compensatory remedy is an artificial leap inconsistent with the ineluctable fact that the fraudulent scheme taken in its entirety caused no loss to HPII at all.

Conclusion

Such wrangling at the boundaries of equity and the common law is no doubt of little succour to Mr Stevens. Whatever one thinks of his dishonest and criminal conduct, his eventual liability as a dishonest assistant has on any reading dwarfed the personal profits that he made. But does he deserve our sympathy? The result in *Stevens* is in tune with the consistently strict approach of English law to those who commit and assist breaches of fiduciary duty,[12] but it also has the effect of holding a dishonest assistant liable for profits which he himself did not make, in contravention of the direction and spirit of the law since *Ultraframe*.[13] If the intended effect of a constructive trust is restitutionary, in that a 'defendant is stripped of the benefit accruing from his wrong', then Mr Stevens has in fact been artificially stripped of someone else's benefit, in an undoubtedly punitive and disproportionate manner.[14] Yet, as we have seen, this result has arisen from a clash between two incompatible judicial approaches: the orthodox equitable reasoning of Lord Briggs,[15] and the integrationist remedial analysis of Lord Burrows.[16] The overriding policy goal of discouraging dishonest conduct at all costs has no doubt played a key role in ensuring that the former has won out in this case.

[10] Ibid, [129]. Emphasis added.
[11] Ibid, [132].
[12] Recently, *Rukhadze v Recovery Partners GP Ltd* [2025] UKSC 10.
[13] n. 5.
[14] *Snell's Equity*, 35th ed., 26-001.
[15] Prefigured in J. McComish, 'Remedies for Dishonest Assistance: Heartbreak Hotel' (2024) *CLJ* 83/1, 21.
[16] See A. Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (2019), 545.

Titles in the Air: Reforming Law on Determination of Tenancy by Frustration upon the Destruction of Subject Matter of Long Leases where Premium has been Paid

Bo Shi

Can a lease ever be frustrated? This was a question under much academic speculation. In *National Carriers Ltd v Panalpina (Northern) Ltd*,[1] Lord Hailsham, to his credit as a Gilbert and Sullivan fan, identified two schools of thought on this question: never, or hardly ever.[2] The House of Lords held in favour of the latter: leases may be frustrated in exceedingly rare circumstances. Forty-five years since *Panalpina*, it has been held that neither Covid[3] nor Brexit[4] can frustrate a lease. It seems that no such "vast convulsion of nature"[5] nor supervening human events have yet to constitute such "exceedingly rare circumstances".

This poses the question. What happens to a long lease,[6] where an upfront premium has been paid and the tenant only pays peppercorn rent or a modest service charge, when its subject matter is destroyed? In *Izon v Gorton*,[7] where the second-floor let to the defendants was destroyed by an accidental fire, the defendants remained liable for payment of rent. It seems to suggest that once the subject matter of a lease is destroyed, the leasehold title would float in the air. When (and if) the building is rebuilt, the tenancy in the air will reattach to the physical property. However, this judgment predates *Panalpina* by almost one and a half centuries. *Izon* never contemplated the relevance of the doctrine of frustration. Whilst *Izon* remains good law, academic commentators doubt whether such a tenancy would ever be frustrated.[8] The court has yet to resolve this doubt, but I submit that the application of the doctrine of frustration would be problematic regardless of whether the answer is "never" or "hardly ever".

Why Problematic

If a lease can be frustrated when its subject matter is destroyed, the approach adopted in Ontario with respect to residential property,[9] this would lead to doctrinal and practical problems. Frustration is a doctrine concerning only contractual relationships.[10] It is submitted that the

[1] [1981] A.C. 675 at 688, 692
[2] *ibid at* 690
[3] *Bank of New York Mellon (International) Ltd v Cine-UK Ltd* [2021] EWHC 1013 (QB)
[4] *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch)
[5] *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] A.C. 221 at 229
[6] As defined under Commonhold and Leasehold Reform Act 2002, s.76
[7] (1839) 5 Bingham New Cases 501 at [507]
[8] Stuart Bridge, Elizabeth Cooke, Martin Dixon, *Megarry and Wade: the Law of Real Property*, (10th edn, Sweet&Maxwell 2024), 17-013
[9] Residential Tenancies Act 2006, c.17, s.19
[10] (n.1); Taylor v Caldwell (1863) 3 B&S 826

frustration of personal rights binding only contractual parties should not be taken as a gateway to destroy proprietary interests that bind the world.[11] For instance, a freeholder (A) granted B a 999-year lease of a flat in a high-rise building. There is no covenant of reconstruction upon the destruction of the building.[12] B paid a premium for the grant of the lease. B sublet the flat to C on a monthly periodic lease. Later, an earthquake destroyed the building beyond repair. D subsequently purchased the freehold from A. In this scenario, if B's long leasehold is frustrated, C's proprietary interests would evaporate along with it.[13] B and C's leaseholds would not be able to bind D. This outcome is offensive to the very nature of proprietary interests, as a right that is supposed to bind any disponee is simply erased by the frustration of a contract that binds only the contractual parties.[14] It also creates considerable uncertainties on how much, if any, premium paid by B to A is recoverable.[15]

Megarry and Wade suggests that in the event of the destruction of the subject matter, the "never" approach is the only equitable solution.[16] It is respectfully submitted that this would also be undesirable. Return to the hypothetical scenario above. If D constructed a new building where the high-rise used to stand, but the structure is not tall enough to reach B's now destroyed flat. The new building is expected to stand permanently. In this scenario, there would be no possibility for B to regain exclusive possession of the destroyed flat or recover any part of the premium paid to A. It also creates a doctrinal absurdity where interests in land exist without land.[17]

Proposal for Reform

Therefore, doctrine of frustration is an unsuitable tool to determine a lease when its subject matter is destroyed. However, it would be equally problematic if the leaseholder is trapped in a "title in the air". Urgent reforms are needed, as 4.5 million dwellings (18% of the entire English housing stock) in England are occupied or sublet by long leaseholders.[18] It is only a matter of time before catastrophe strikes, leaving some unfortunate long leaseholders wondering what happens next. I propose the following reforms.

Proprietary Interests Persist

As a starting point, where the subject matter of a long lease, which grant was conditioned upon payment of a premium, is destroyed, the leaseholder (L) retains proprietary interests in the leasehold estate. The doctrine of frustration would not operate to extinguish L's title.

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[11] (n.8) 17-102

[12] No implication of such a covenant: *Kumarasamy v Edwards* [2016] UKSC 40

[13] *Nemo dat quod non habet* (one cannot grant what one does not have): *Bruton v London and Quadrant Housing Trust* [1999] UKHL 26, [2000] 1 AC 402 at 415 B:

[14] *Hill v Tupper* (1863) 2 H&C 121

[15] Edwin Peele, *Treitel: The Law of Contract* (15th edn, Sweet&Maxwell 2020) 19-017

[16] (n.8) 17-103

[17] *ibid*; 16-001; 17-002

[18] Department of Levelling Up, Housing and Community, *Leasehold Dwellings: 2022-2023* (Official Statistics), https://www.gov.uk/government/statistics/leasehold-dwellings-2022-to-2023/leasehold-dwellings-2022-to-2023

"Overreaching"

A modified concept of overreaching is a suitable solution to the doctrinal absurdity where a tenure exists without tenement. This modified concept refers to not only equitable proprietary interests but also legal ones. It operates as follows.

Upon any disposition of the freehold estate, or upon failure of the freeholder (F) to commence and sustain genuine efforts to rebuild the property within 12 years[19] of the destruction, the proprietary interests in the whole or part of the leasehold estate are extinguished, detached from the property, and reattached to monetary compensations. The subject of the disposition can either be the whole or part of the leasehold estate, or the land beneath the whole or part of the leasehold estate. L's pecuniary interests might be calculated as follows: L receives the proportion of the premium paid based on the proportion of the time left of the original lease at the time of "overreaching". In the case where only part of the leasehold property, or the physical land beneath part of the property, is subject to the disposition, L's pecuniary interest is adjusted proportionately. It is the burden of F to ensure sufficient monetary compensation is paid to L.

This solution is not harsh for F taking into consideration of F's existing statutory duties and commercial realities. For instance, certain tenants can request their landlords to provide them with a summary of, or inspect, the building insurance policies. If landlords fail to comply, they will be criminally liable.[20] Furthermore, the UK mortgage regulator requires the conveyancers of mortgagees to ensure that landlords or the management companies have insured the building that contains long leasehold flats.[21] In addition to the premium paid by L, any potential proceeds from the disposition of the freehold estate, F is invariably insured against the destruction of the building. Therefore, it would not be harsh to request F to bear the financial burden of compensating L.

Sublessee's Interests

Once L's interests have been "overreached", any proprietary interests of L's sublessees will also be extinguished, detached from the property, and reattached to the monetary value received by L. If the sublessees (S) hold long leaseholds for which a premium has been paid, shorter tenancies where rent is paid in advance, or shorter tenancies where terms are fixed but there is no relevant contractual mechanism for termination. S will be entitled to monetary compensation calculated through the same formula as proposed above. For S holding periodic tenancies, he/she shall be entitled to terminate the tenancy immediately upon the destruction of the subject matter. If S continued the periodic licence despite the destruction, S should bear the burden of any associated loss.

[19] In line with statute of limitation for actions to recover land: Limitation Act 1980, s.15

[20] Landlord and Tenant Act 1987, Sch.3, paras.2, 3, 6,

[21] UK Finance Mortgage Lenders' Handbook, para.5.14.5, https://lendershandbook.ukfinance.org.uk/lenders-handbook/englandandwales/?srch=insurance&search=Submit

Mortgagee's Interests

Any mortgage of L/S shall cease to be payable upon the destruction of the subject matter. However, upon "overreaching", L/S are liable to pay mortgagees any outstanding debt from the monetary compensation they have received. Such a liability shall not exceed the amount of monetary compensation actually received by L/S. This is not unfair to mortgagees, as it is common practice for mortgagees to require mortgagors to enter into insurance policies against the destruction of the prop

Has equity swallowed the tort of bribery? An analysis of *Hopcraft v Close Brothers Ltd*

Henrik Tiemroth

Of all the vices proscribed by the civil law, few are condemned so harshly as bribery. Lord Templeman called it "an evil practice which threatens the foundations of any civilised society."[1] Yet despite its iniquity, the Supreme Court in *Hopcraft v Close Brothers Ltd*[2] appears to have effectively extinguished it as a distinct cause of action. While confirming that a tort of bribery exists, the justices held unanimously that it is only actionable where the bribee owes fiduciary duties to the claimant.

This essay considers the extent to which the tort of bribery has been subsumed into actions in equity for breach of fiduciary duties and dishonest assistance. It argues that the imposition of a fiduciary requirement is unsuited to address the mischief towards which the tort is directed – namely, interference with agency or delegation relationships – and that, consequently, the law will either fail to provide a civil remedy in meritorious cases or stretch the doctrine of fiduciaries beyond its proper scope in equity.

Background

Hopcraft concerned four joined appeals in which a claimant buyer entered into a hire purchase agreement to acquire a used car from a dealer. To finance the agreement, the dealers provided brokerage services to secure a loan from lenders in order to complete the purchase. Unknown to the buyers, in return for proffering the loans to the buyers, the lenders paid a commission to the dealers worth a fraction of the deal.

The buyers brought an action against the lenders alleging, inter alia, that (1) the commissions paid by the lenders amounted to bribes and (2) that they were secret profits obtained by the dealers in breach of fiduciary duties, for which the lenders were liable as accessories. The Supreme Court, overruling the Court of Appeal, held that the dealers were not fiduciaries, so neither cause of action could succeed.

Bribery Before *Hopcraft*

Where C bribes B to betray A, A has several avenues to seek a remedy. In equity, A can bring an action against B (the bribee) for breach of fiduciary duties and against C (the briber) for dishonest

[1] *Attorney-General for Hong Kong v Reid* [1994] 1 A.C. 324, 330
[2] [2025] UKSC 33

assistance. A can also pursue both parties jointly and severally in tort for damages consequent upon the bribe or for restitution of the value of the bribe.[3]

Prior to *Hopcraft*, the main difference in the actions was the type of duty engaged. In equity, liability could only arise where B owes fiduciary duties to A. At common law, various dicta described it as either an agency[4] or fiduciary relationship.[5] However, the duty is described as fiduciary only in a "loose sense,"[6] and liability has been established where equity would not regard the bribee as a true fiduciary. Thus, David Richards LJ, as he then was, concluded in *Wood v Commercial First Business Ltd* that a fiduciary duty was not a requirement at law.[7]

Since *Hopcraft*, the distinction has been effectively nullified. Both types of action now respond to fiduciary relationships, only fully-informed consent will negate liability and the remedies of disgorgement, compensation and equitable rescission are available for both. The only distinguishing feature appears to be that, as a practical matter, the claimant can sue the briber in tort without needing to prove dishonesty.

Two Concepts of Fiduciaries

This development creates two risks, identified by David Richards LJ in *Wood*: either civil remedies will be denied in meritorious cases for lack of a fiduciary relationship, or the doctrine of fiduciaries will be stretched beyond its proper scope.[8] This discord can be seen in *Hopcraft* itself, where the Supreme Court appears to adopt two different conceptions of fiduciaries when considering the status of the dealers and when interpreting the authorities generally.

In finding that the dealers were not fiduciaries, the Court took a strict, orthodox approach: a person is a fiduciary where they undertake to act with single-minded loyalty towards the principal, giving rise to the no-conflict and no-profit rules.[9] The dealers, as counterparties to a commercial transaction, could not be under a duty to eschew self-interest, even when providing brokerage services.[10]

However, the justices appear to have adopted a looser definition to read the fiduciary requirement into the authorities on bribery. One case relied upon in *Hopcraft* is *Reading v Attorney-General*,[11] where a British Army sergeant was bribed to misuse his uniform to enable a shipment of illegal spirits to pass through a security checkpoint. The House of Lords held that the Crown was entitled to the bribe money, both at common law and, separately, in equity. Lord Porter did *not* consider that a fiduciary relationship was required for the common law claim but that it provided an

[3] *Mahesan s/o Thambiah v Malaysia Government Officers' Co-operative Housing Society Ltd* [1979] A.C. 374
[4] For example, Slade J in *Industries & General Mortgage Co Ltd v Lewis* [1949] 2 All E.R. 573, 575 referred to a bribe as a payment to the agent of the other person with whom the briber is dealing.
[5] *Prince Eze v Conway* [2019] EWCA Civ 88 at [43]
[6] *Reading v Attorney-General* [1951] A.C. 507, 516
[7] [2022] Ch 123 at [48]
[8] [2022] Ch 123 at [46]
[9] *Bristol & West Building Society v Mothew* [1998] Ch 1, 18
[10] [2025] UKSC 33 at [90]
[11] [1951] A.C. 507

additional ground for recovery.[12] In any case, he noted that "fiduciary relationship" was used in the "loose sense" to include, *inter alia*, where a servant abuses a position of authority gained from his employment.[13]

In *Hopcraft*, the justices rationalised the finding that Sergeant Reading was a fiduciary by analogy to a trust: he was entrusted with his army uniform and thus incurred a duty not to profit from its use.[14] But merely being entrusted with property cannot give rise to fiduciary duties, lest every bailee be a fiduciary. Nor can a uniform make a fiduciary, else every uniformed employee would be one.

Similarly, in *Prince Eze v Conway*, also considered in *Hopcraft*, the Court of Appeal considered that the tort of bribery required a fiduciary relationship "in the loosest sense" which is satisfied where the bribee is in a position to influence the principal's decision-making.[15] A broker would fall squarely within this definition, even though the Supreme Court held otherwise in *Hopcraft*.

In reconciling these cases, the justices cited Fletcher Moulton LJ in *Re Coomber* to argue that a party can have fiduciary relationships in a specific respect without engaging the full range of fiduciary duties:[16]

> "Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other…"[17]

With respect to their lordships, this appears to be a misreading of the dicta. In context, what Fletcher Moulton LJ is actually saying is that there are a variety of relationships which might be described as "fiduciary" but which attract different duties. It is the content of the duties, not the label of "fiduciary," which carries legal weight. The duty of an errand boy to faithfully carry out his task is not the same the duty of absolute loyalty of, say, a trustee. The justices are thus stuck between being strict to find that the dealers were not fiduciaries while being flexible to capture the wrong of bribery generally.

The problem can be illustrated by applying *Hopcraft* to public corruption. Suppose a judge is bribed to give judgment adverse to one party. The party suffers loss as a result, and they should have an action against the briber for compensation. However, they would struggle to argue that the judge was their fiduciary. A judge performs a public function. He owes duties of impartiality and fidelity to the parties but must give judgment as the law requires, regardless of the parties' interests. Therefore, either the claimant will be denied a remedy, or the court must stretch the definition of 'fiduciary' to capture the judge.

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[12] [1951] A.C. 507, 516
[13] *Ibid.*
[14] [2025] UKSC 33 at [175]
[15] [2019] EWCA Civ 88 at [43]
[16] [2025] UKSC 33 at [179]
[17] [1911] 1 Ch 723, 728

Thus, David Richards LJ's warning in *Wood* appears prescient. By placing bribery among the fiduciary actions, the Supreme Court has redirected the tort away from the wrong it is intended to address. Bribery often overlaps with fiduciary breaches, but plainly not everyone who may be bribed is a fiduciary. If judges are tempted to fill this remedial lacuna by abusing the fiduciary doctrine, the very strictness endorsed in *Hopcraft* is at risk.[18]

[18] This essay also benefited from two lectures at the Cambridge Private Law Centre by Professor Graham Virgo "Fiduciary Law in the Supreme Court: Equitable Orthodoxy (Generally) Prevails" on 23 October 2025 and Professor Weiming Tan "Civil Liability for Bribery, Reanalysed" on 20 November 2025.