

EXPLAINING THE “*PALLANT V MORGAN* EQUITY”

JULIUS A. W. GROWER*

“If it can be explained ... it can be explained away”.¹

I. INTRODUCTION

Open an English trusts law textbook and go to the chapter on constructive trusts. The chances are that you will find a section on the “*Pallant v Morgan* equity”.² It will detail a specific type of constructive trust arising in certain peculiar circumstances.

The “*Pallant v Morgan* equity” is given separate treatment because it is thought to be unclear how it fits in with any other type of constructive trust. Some have tried to place it within certain larger groups,³ but for different reasons each of these attempts is ultimately unconvincing.

The purpose of this paper is to argue that this separate treatment is unjustified. It is not that any of the aforementioned explanations are actually right, but simply that no true “*Pallant v Morgan* equity” is anything more than a constructive trust arising in response to an agent’s breach of fiduciary duty. Every instance can be accounted for under that quite orthodox heading.

Now this is not the first paper to put forward such an analysis,⁴ but it will be the first to properly argue in favour of it. While they do state that the “*Pallant v Morgan* equity” is no more than a trust arising in response to an agent’s breach of fiduciary duty, the earlier contributions never look to explain why. This paper will examine the foundational “*Pallant v Morgan* equity” cases in detail and show that this idea really is not just capable of explaining their results, but also accurately reflects the reasoning within them.

This paper is also the first paper to properly link the presence of fiduciary duties in these cases to the operation of the law of agency. Some have asserted that there might be such

* Teaching Fellow, Faculty of Laws, UCL. Thanks are due to Charles Mitchell, Nick McBride, Ian Williams and Ying Liew. Any errors are solely my own.

¹ A. Bennett, *The History Boys*, p. 74 (London, 2004).

² See, for example, Section 6 of Chapter 15 of B. McFarlane and C. Mitchell (eds.), *Hayton and Mitchell: Text, Cases and Materials on the Law of Trusts and Equitable Remedies*, 14th ed. (London, 2015), and Section 4.5 of Chapter 10 of A. Oakley (ed.), *Parker and Mellows: The Modern Law of Trusts*, 9th ed. (London, 2008).

³ See, for example, B. McFarlane, Constructive trusts on a receipt of property *sub conditione* (2004) L.Q.R. 667, and Y. Liew, *Rochefoucauld v Boustead* (1897), in C. Mitchell and P. Mitchell (eds.), *Landmark Cases in Equity* (Oxford, 2012).

⁴ See, for example, J. Ugucconi, *Buyer Beware* [2011] J.B.L. 160, at 163.

a connection, but not in a definite⁵ or comprehensive⁶ way. By delineating a number of different aspects of the law of agency this paper will develop a new and much more coherent description of what rules of law really do apply.

The idea that the “*Pallant v Morgan* equity” can be rationalised and explained by reference to ordinary principles of the law of agency is at odds with most of the modern English jurisprudence on the matter. With one exception,⁷ the cases treat the “*Pallant v Morgan* equity” like the textbooks do: as a special – perhaps even *sui generis* – type of trust. By looking in detail at the recent case of *Generator Developments LLP v Lidl (UK) GMBH*⁸ this paper will show why that view is wrong. As shall be explained, “subject to contract” cases like that one raise insurmountable problems for the law’s currently preferred analysis. Properly understood however, they also offer important insights as to what the true position is.

II. A TYPICAL CASE

From time to time two parties enter into discussions about the purchase of a plot of land owned by another. Rather than competing with each other they come to an understanding that only one of them will attempt to purchase the land and that if they are successful they will grant the other an interest in it.⁹

A problem arises when the acquiring party succeeds in buying the land but then refuses to hand over any part of it. What can the non-acquiring party do?

If the parties’ understanding has been sufficiently well-formalised so as to constitute a contract, the non-acquiring party could, of course, look to obtain an order for specific performance. However, if – for whatever reason – the parties’ arrangement is found not to have given rise to a contract, some other remedy will have to be sought. By invoking the “*Pallant v Morgan* equity” the acquiring party may be held to be a trustee of some or all of the land in their counter-party’s favour.

⁵ See, for example, N. Hopkins, *The Pallant v Morgan ‘Equity’* [2002] Conv. 35, at 42.

⁶ See, for example, M. Yip, *The Pallant v Morgan Equity Reconsidered* (2013) 33 L.S. 549, at 565 – 567. Yip’s analysis is critiqued in Section V, below.

⁷ See Section VI, Part A, below.

⁸ [2016] EWHC 816 (Ch).

⁹ Usually by way of a sale.

III. THE CASES

A. *Pallant v Morgan Itself*

The label “*Pallant v Morgan* equity” seems to originate from a decision of Megarry J. made during the *Holiday Inns Inc. v. Broadhead* litigation.¹⁰ He used the term to describe the type of trust held to have arisen in *Pallant v Morgan*¹¹ itself.

The claimant in *Pallant* was the defendant’s neighbour. The two had entered into discussions to try to determine the fate of certain plots of land that lay adjacent to their properties and which were due to be sold at auction. By the time of the auction, no specific agreement over which plots each of them would attempt to purchase had been reached, but, just before it began, the two parties’ agents did come to an agreement in respect of one particular plot – lot 16 – for which both of them had been given instructions to bid.

The claimant’s agent – who was authorised to make a bid of up to £2,000 – would not in fact make any bid at all and if the defendant’s agent – who was authorised to make a bid of up to £3,000 – successfully obtained it, the defendant would convey certain to-be-agreed portions of the land, to the claimant, for a price determined according to what was then only a partially-agreed pricing scheme.

Ultimately the defendant’s agent did acquire lot 16 – for £1,000 – but thereafter his principal refused to conclude any division agreement.

Harman J. held that, while the agents’ pre-auction agreement was too uncertain to amount to a specifically enforceable contract – something which, from the moment the land was acquired by the defendant, would have given the claimant an interest under a *Lysaght v Edwards* constructive trust¹² – this did not mean that he had no interest in the property at all.¹³ In fact, he did, but under a different type of trust.

His Lordship said that while a court could not compel the two parties to agree, it could “decree that the property [was] held [on trust] by the defendant for himself and the [claimant] jointly [until they agreed upon terms of division]”.¹⁴

The question is: exactly what type of trust was it?

¹⁰ See *Holiday Inns Inc. v. Broadhead*, (unreported) 19th December 1969, Ch. D.

¹¹ [1953] Ch. 43.

¹² (1875-76) L.R. 2 Ch. D. 499, at 505f.

¹³ *Ibid.* at p. 48.

¹⁴ *Pallant*, at 50. This is uncommon. Where the parties have agreed upon what parts of the property the claimant is to get the court will declare that only those specific parts are held on trust.

B. The Reasoning in Pallant

It is clear that Harman J.'s conclusion that the defendant held the property on trust for himself and the claimant jointly was predicated on his finding that the parties' agreement, formed by their agents just before the start of the auction, had the effect of rendering the defendant an agent of the claimant in respect of his own (agent's) acquisition of the land. As His Lordship said: "the proper inference from the facts [was] that the defendant's agent, when he bid for lot 16, was bidding for both parties".¹⁵

This mattered because it meant that "to allow the defendant to retain lot 16 [in] these circumstances would be tantamount to [the court] sanctioning a fraud on his part",¹⁶ and this belies a breach of fiduciary duty analysis.

Remember, all agents are fiduciaries.¹⁷ They owe their principals duties of loyalty which have two core facets: a fiduciary may not put themselves in a position where their personal interests conflict with their performance of the task which they have undertaken to do, and they must not make an unauthorised profit when doing so.¹⁸ The making of an unauthorised profit is therefore a breach of fiduciary duty.

Now, although his language is oblique, it is clear enough that Harman J. thought that in refusing to convey any part of the property to the claimant – in retaining all of lot 16 – the defendant was making an unauthorised profit out of his position and thereby committing a breach of fiduciary duty.

Historically, in equity, the term "fraud" was broad enough to cover, amongst other things, a breach of a fiduciary duty. It indicated that a defendant's behaviour was "unconscientious" in the sense that it was the courts of equity, as courts of conscience, that objected to it in some way.¹⁹ In light of what was found to have been done, it is therefore perfectly understandable that the defendant's behaviour was given that label.

As to the remedy, it has always been the case that where a fiduciary makes an unauthorised profit by taking advantage of an opportunity which came to him as a result of

¹⁵ *Ibid.*

¹⁶ *Ibid.* at p. 48.

¹⁷ *New Zealand Netherlands Society "Oranje" Inc. v Kuys* [1973] 1 W.L.R. 1126, at 1129f.

¹⁸ *Bray v Ford* [1896] A.C. 44.

¹⁹ *Nocton v Lord Ashburton* [1914] A.C. 932, at 954.

his position, his principal is entitled to a proprietary remedy in the form of a constructive trust imposed on that profit.²⁰

Thus, there was nothing remarkable about the trust which Harman J. held to exist. In refusing to hand over any of the land, the defendant exploited an opportunity which his agency had presented him with and generated for himself an unauthorised profit: he kept those parts of the land which, once there was an agreement, would have been transferred to the claimant. This was a breach of the fiduciary duty which he as an agent was necessarily subject to, and, consistently with doctrine, a trust was imposed to strip him of that profit.

C. *What Lies Beneath*

The same can be said of the one case cited in *Pallant: Chattock v Muller*.²¹ *Chattock* concerned an agreement that the defendant would purchase a specific plot of land – different halves of which he and the claimant each desired to own – and then convey half to the claimant in return for a specified sum. Unfortunately, once the land had been obtained, the defendant refused to hand anything over.

Notwithstanding the fact that in his judgment the parties' agreement constituted a binding contract which could be specifically performed,²² Malins V.C. was clear that, absent a contract (and a *Lysaght v Edwards* constructive trust), the claimant would still have had an interest in the land.

He held that “the defendant [had acquired the property] partly on his own account and partly as the [claimant's] agent”,²³ and so that in purporting to be the owner of the entire estate he had committed “a flagrant breach of duty, which [in equity had] always been considered ... fraud”.²⁴ In order to remedy this, the defendant would be held “to be a trustee ... of the [portion of land] which it had been arranged that [the claimant] should have”.²⁵

This is an agency analysis. As an agent the defendant would have owed the claimant a duty of loyalty in respect of his purchase of what was to be their half of the land and so in refusing to hand over any part of it once its acquisition was complete he made an

²⁰ See, for example, *Bowes v City of Toronto* (1858) 11 Moo. P.C. 463 (on a mayor said to be in a directly analogous position to an agent), *Bagnall v Carlton* (1877) 6 Ch. D. 371 (on more orthodox agents), and *Boardman v Phipps* [1967] 2 A.C. 46 (on solicitors).

²¹ (1878) 8 Ch. D. 177.

²² *Ibid.* at pp. 181-182.

²³ *Ibid.* at p. 181.

²⁴ *Ibid.*

²⁵ *Ibid.*

unauthorised profit and committed a breach of that duty or “fraud”. To prevent the making of that profit the relevant half of the land would be stripped from the defendant by becoming the subject matter of a trust in the claimant’s favour.

Indeed, even the cases on which Malins V.C. based his own decision were reasoned on the basis that an agent had breached their fiduciary duty. In *Lees v Nuttall*,²⁶ Leach M.R. decreed that the defendant was a trustee of the property he had purchased because he had made the purchase “as ... agent” for the claimant.²⁷ In *Heard v Pilley*,²⁸ Selwyn L.J. held that the defendant, who tried to pass himself off as a contracting party (and therefore an owner) in his own right, held the benefit of a contract of sale he had entered into on trust for the claimant, due to “the fact of the agency” that existed between them.²⁹

Thus, in all of the traditional “*Pallant v Morgan* equity” cases a trust was imposed in order to capture the profits of an agent’s breach of fiduciary duty.

D. The Explanation in Banner

The principle underlying these cases was reimaged in *Banner Homes Group Plc. v Luff Developments Ltd.*³⁰ *Banner* concerned an informal agreement to acquire a certain plot of land which was then to be developed and sold. The owner wished to deal with just one purchaser so the parties agreed that one of the defendant’s companies would acquire the land and that, once their joint venture was fully formalised, the claimant would acquire half the shares in that company so as to become, in effect, the joint owner of the land.

After the defendant’s company acquired the land but before anything was authoritatively concluded between the two sides, the defendant changed its mind about a joint venture and ended the negotiations. It was left, through its company, as the sole legal owner of the land.

Before the Court of Appeal the claimant argued that it had an interest in the land under a “*Pallant v Morgan* equity”, but, rather than adopting an agency approach, Chadwick L.J. introduced an agreement-based analysis into the law.

²⁶ (1829) 1 Russ. & M. 53.

²⁷ *Ibid.* at p. 54.

²⁸ (1868-69) L.R. 4 Ch. App. 548.

²⁹ *Ibid.* at p. 551.

³⁰ [2000] Ch. 372.

His Lordship advanced five propositions highlighting what he thought would give rise to a “*Pallant v Morgan* equity”,³¹ and these can be condensed into three key points:

- 1) There must be an agreement – which need not be contractually enforceable – between two or more parties that one or more (but not all) of them should acquire property.
- 2) The agreement must provide that the non-acquiring party/parties will, as a result of the acquiring party’s/parties’ acquisition of the property, gain an interest in that property.
- 3) The non-acquiring party/parties must (each) *either* suffer a detriment *or* confer a benefit on the acquiring party/parties, in reliance on that term of the agreement.

Chadwick L.J. said that when those features were present it would be “unconscionable to allow the acquiring party [or parties] to retain the property ... in a manner inconsistent with the arrangement ... which enabled [them] to acquire it”,³² and so they must hold it on constructive trust for themselves and the non-acquiring party/parties (in the proportions that had been agreed, where they could be clearly established).

This meant that the claimant in *Banner* did have an interest in the land. The parties had formed an agreement that the defendant would acquire – through their company – a certain property, and one of the terms of that agreement was that once the joint venture was properly formalised the claimant would acquire an interest in it by way of having an interest in the company. The claimant acted to its detriment in reliance on this agreement because, pursuant to it, it abdicated its opportunity to bid for the land itself.

E. The Problems with Banner

Unfortunately, there are three reasons why Chadwick L.J.’s analysis is problematic. The first is that it is simply not a faithful representation of the reasoning in any of the classic “*Pallant v Morgan* equity” cases. This is not to say that it is impossible for English law to accommodate such an analysis, but it is to say that this is just not what was understood to be going on when a trust arose in those cases.

³¹ *Ibid.* at pp. 397-399.

³² *Ibid.* at p. 398.

The second is that there are some cases – the “subject to contract” cases – in which on an agreement-based analysis of the “*Pallant v Morgan* equity” there should be no trust, but in which the conduct of the parties is similar if not otherwise identical to the conduct of the parties in regular “*Pallant v Morgan* equity” cases and in which it might be thought to be a good idea to have a trust in the non-acquiring party’s favour. This means that Chadwick L.J.’s analysis may not exhaust the field of explanation as to when a trust will be imposed in such circumstances, and we face the undesirable prospect of having to innovate and describe at least one more rule of law to do so. The *Banner* analysis may offend the principle of Occam’s razor.

The third reason is that there is a certain lack of conceptual coherence around Chadwick L.J.’s analysis. As has been alluded to, its place within the law of constructive trusts is unclear and so both its exact requirements and its underlying justifications can be doubted.

F. The Implications of Crossco v Jolan

This last point can be seen particularly clearly from the judgments in *Crossco No.4 Unlimited v Jolan Ltd.*,³³ the most recent Court of Appeal decision on this issue.

Because of its focus on an agreement, the argument has been made that Chadwick L.J.’s analysis is simply a common intention constructive trust one,³⁴ and this was accepted by judges in that case.³⁵

Crossco concerned a dispute surrounding the demerger of a company into two parts: a property side and a trading side. After the division, the property side purported to exercise a break clause to terminate a lease of premises held by a business owned by the trading side. The trading side tried to stop this, claiming that, due to certain pre-division negotiations they shared, the property side held their title on constructive trust so as to give effect to the arrangement embodied in the lease, notwithstanding the existence of the break-clause, but the court unanimously rejected this contention.³⁶

³³ [2011] EWCA Civ 1619.

³⁴ See, for example, M. Thompson, *Constructive Trusts and Non-Binding Agreements* [2001] Conv. 265.

³⁵ *Crossco*. at [97], [119], and [129], respectively.

³⁶ *Ibid.* at paras. [96]-[97], [123], and [132].

Arden L.J., whose reasoning McFarlane L.J. endorsed, invoked the general law on common intention constructive trusts which she identified as starting with *Gissing v Gissing*³⁷ and as going right up to *Stack v Dowden*³⁸ and *Jones v Kernott*.³⁹

To establish an interest in property under such a trust a claimant must show both that there was, prior to that property's acquisition, "[an] agreement, arrangement or understanding ... that the property [was] to be shared beneficially [with them]", and that they had "acted to [their] detriment ... in reliance on [that] agreement".⁴⁰

Thus, Her Ladyship said that the trading side's claim could not succeed. There was no agreement that the freehold which the property side was to acquire after the demerger was to be shared in order to give effect to the terms of the lease.⁴¹

Yet this approach is not in fact completely compatible with what Chadwick L.J. said. Clearly it is the case that anyone who can satisfy the first two *Banner* requirements can also prove a common intention that they were to have a beneficial interest in the property, because these requirements are identical.

However, while under the law of common intention constructive trusts a claimant must also prove that they have suffered a detriment in reliance on that common intention, according to Chadwick L.J. a failure to do this will not necessarily prove fatal to a claim founded on a "*Pallant v Morgan* equity". One could still establish an interest by showing that they conferred a benefit on their counterparty in reliance on the agreement.

Indeed, this is precisely how Chadwick L.J. said *Pallant* itself would fit with his analysis.⁴² The claimant's agent could not have out-bid the defendant's agent at the auction and so even if the parties had not agreed that he would keep out of the bidding before it began he would still have failed to acquire an interest in the property. There was no detrimental reliance and, if one had been made, a claim asserting an interest under an orthodox common intention constructive trust would have failed.

What mattered, according to Chadwick L.J., was that on top of the bare fact of the agreement by agreeing to keep out of the bidding the claimant gave an advantage to the defendant who was "able to obtain the property for a lower price than would otherwise have been possible": £1,000, rather than at least £2,001.⁴³

³⁷ [1971] A.C. 886.

³⁸ [2007] UKHL 17.

³⁹ [2011] UKSC 53.

⁴⁰ *Lloyds Bank Plc. v Rosset* [1991] 1 A.C. 107, at 132.

⁴¹ *Crossco*, at [131].

⁴² *Banner Homes*, at 398-399.

⁴³ *Ibid.* at p. 398.

Two different things are going on here.

G. Banner's Place in the Law of Constructive Trusts

So if the law of common intention constructive trusts and Chadwick L.J.'s agreement-based approach are not in fact the same thing, what is the relationship between them?

The answer is that it is still a very close one. Indeed, there seems to be a link between the two.

Consider why the two reliance requirements exist. In *Gissing* Lord Diplock said that a common intention constructive trust would arise “[after] a transaction between [two parties] in connection with the acquisition by [one of them] of a legal estate in land whenever [that party] has so conducted himself that it would be inequitable to allow him to deny [his counter-party] a beneficial interest in [it]”.

He also said that that the acquiring party would be held to have so conducted himself if “he has induced the [non-acquiring party] to act to his own detriment in the reasonable belief that by so acting he was acquiring [such] a beneficial interest”.⁴⁴

The first of these two remarks aligns exactly with Chadwick L.J.'s explanation of why the presence of his three requirements would give rise to a “*Pallant v Morgan* equity”. Both judges say that a constructive trust arises whenever it would be unconscionable for the owner of property to deny another's beneficial interest in it and that the reason why it would be unconscionable derives from a repudiation of a pre-acquisition agreement. All they come apart on is the issue of what further facts must be shown, besides an agreement, to “complete” the unconscionability.

Thus, rather than establishing a totally different doctrine, Chadwick L.J. might be understood as merely extending the range of situations in which a defendant's denial of a claimant's interest is unconscionable in such a way as to give rise to a common intention constructive trust. His Lordship said that the defendant's receipt of a benefit is an alternative to the claimant's suffering of a detriment and this suggests that he saw it as another way of establishing the same type of trust as would arise when (only) a detriment was shown.

Unfortunately, this is a deeply unattractive idea and its acceptance has caused the most unhelpful confluences between these two areas of law.

⁴⁴ *Gissing*, at p. 905.

H. Treating the “*Pallant v Morgan Equity*” as a Common Intention Constructive Trust

The law of common intention constructive trusts is used in – and usually confined to⁴⁵ – the resolution of disputes about the division of non-marital domestic property because it has been shaped by, and reflects a number of subtle factual and policy considerations which apply in and only to, that context.

Thus, because as a matter of fact couples do not usually reduce their understandings as to their respective property entitlements to either specifics or even writing – something reflective of fact that such actions are to some degree inconsistent with the sort of mutualistic relationship they share – the law of common intention constructive trusts has developed generous rules as to what evidence is capable of proving that there was an agreement capable of being relied upon. Any evidence of discussions, “however imperfectly remembered and however imprecise their terms may have been”, can suffice.⁴⁶

Similarly, when it comes to establishing detrimental reliance, the evidential threshold for doing so is very low. This reflects the fact that the financial lives of cohabiting couples are very often disorganised, with much expenditure shared on an ad hoc or arbitrary basis. It is not just evidence of direct contributions to the purchase of a property which may suffice, but evidence of indirect contributions like a contribution to mortgage payments, too. Indeed, even evidence of the sorts of payments which, by being made, enabled the other partner to make such contributions by saving them from facing some other form of necessary domestic expenditure,⁴⁷ might be enough. Baroness Hales’ famous paragraph 69 in *Stack* – which listed the factors which could, in the right circumstances, be taken into account – was explicitly non-exhaustive.⁴⁸

However, none of this is true for the sort of cases in which “*Pallant v Morgan equity*” claims usually arise.

Commercial parties usually do take legal advice and, even when the words “subject to contract” are used, they usually do reduce their agreements to writing. They need to know what their rights are at the time that property is acquired and want to be able to make that determination by reference to clear facts: their own writing, or, in its absence, the amount of money provided towards a property’s acquisition.

⁴⁵ See *Stack*, at [3] and [69], and *Jones* at [24]-[25], respectively.

⁴⁶ *Rosset*, at 132.

⁴⁷ Such as paying of utility bills.

⁴⁸ *Stack*, at [70].

Unfortunately, by aligning the “*Pallant v Morgan* equity” with the common intention constructive trust, the rules governing the latter have started to be used to decide cases relating to the former, and in being so used they are undermining the respect for certainty which should underpin that area of law.

It is not appropriate for the rights of commercial parties to be determined by the retrospective examination of their conduct and words over the entire period that they have interacted, yet as *Crossco* itself demonstrates, this is now precisely what is happening. The form and the substance of Arden L.J.’s analysis is like that which we would expect in a non-married family home case: Her Ladyship first looked for an agreement and then – had she found it – would have turned to the suffering of detriment in reliance on that agreement. In the absence of writing, commercial parties do not expect their rivals to acquire rights in their property unless they have made clear contributions to its acquisition, but now there is the risk of exactly that.⁴⁹

In contrast, none of this criticism applies to the aforementioned agency analysis. No huge uncertainty attaches to modern agency law, or the imposition of fiduciary duties on agents under it. This part of our law was developed in the commercial courts and is tailored to suit the commercial context. Its constituent rules are clear and long settled, and support the promotion of commercial certainty.

I. *The Latest Case*

*Generator Developments*⁵⁰ is a recent case dealing with the question of whether a “*Pallant v Morgan* equity” can arise where two parties’ pre-acquisition dealings were expressly “subject to contract”.

The claimant – Generator – was a property developer and the defendant – Lidl – was a discount supermarket chain. They entered into negotiations over a certain plot of land and Generator began making offers to buy that land “in conjunction with [their] joint venture partners Lidl”.⁵¹ However, neither side took steps to formalise their relationship. All of their interactions were “subject to contract”.

⁴⁹ The result in *Crossco* would not have been different had the *Banner* analysis itself been applied. The lack of an agreement would have been fatal to the application of that doctrine too.

⁵⁰ [2016] EWHC 816 (Ch).

⁵¹ *Ibid.* at para. [47].

After Generator had a bid accepted, Lidl asked if it could be named as the buyer in the contract of sale and Generator agreed.⁵² Lidl bought the land but then changed its mind about a joint venture. It denied that Generator had any interest in the property.

The question for Nicholas Lavender Q.C., sitting as a Deputy Judge of the High Court, was whether this was right. Generator claimed that it did have an interest in the land – under a “*Pallant v Morgan* equity” – but this was dismissed. The judge said that despite the parties’ use of the words “subject to contract”, a trust might – in theory – still have existed, but that on the facts of the case as a whole one had not arisen.

Now this decision is not, in and of itself, a remarkable one. The case required an application of Court of Appeal authority to some not overly-complicated facts and the result was correct in principle. Despite this, Lavender Q.C.’s judgement is interesting because it exposes the underlying inadequacy of the *Banner* approach.

It is telling that the judge struggled to apply Chadwick L.J.’s analysis. His reasoning is convoluted and unconvincing. This is because that analysis simply cannot work in a “subject to contract” case, despite the obvious judicial inclination for it to (sometimes) do so.

IV. THE MERITS OF SIMPLICITY

There are three good reasons for thinking about a “*Pallant v Morgan* equity” as a trust arising in response to an agent’s breach of fiduciary duty.

The first is that, unlike the approach set out in *Banner*, this view is consistent with the reasoning in all the old “*Pallant v Morgan* equity” cases.

The second is that there is no lack of coherence with this explanation as an explanation. Unlike the agreement-focused analysis, the rules of agency law that apply have been settled for many years and are of a clear and distinct scope. Nobody thinks that the principles of agency law undermine the need for commercial certainty. Indeed, in being so clear and precise, they reinforce it.

The third reason is that, unlike Chadwick L.J.’s approach, it can be used to sensibly generate or deny a trust in cases where the parties have used the words “subject to contract” during their negotiations.

⁵² There were two reasons for this: this is what Lidl normally did, and, as per the parties’ negotiations, it was Lidl who were to be providing the funding for the purchase: *ibid.* at paras. [90]-[91].

A. “Subject to Contract”

A “subject to contract” case looks like the typical case described in above, but for the fact that the parties’ pre-acquisition discussions are qualified as “subject to contract”.

Now recall the first of Chadwick L.J.’s three requirements: that there must be an agreement – which need not be contractually enforceable – between two or more parties that some (though not all) of them should acquire specific property.

There is, of course, a middle ground between not having an enforceable contract and not having an agreement at all: for example, the agreement in *Pallant* failed to identify any specific portions of land and was therefore too uncertain to constitute a binding contract but even so – in Chadwick L.J.’s opinion – it was a good enough agreement on which to ground a constructive trust. But it is impossible to see how there can be any such agreement at all in a case like *Generator Developments* where all of the negotiations were undertaken “subject to contract”.

The phrase “subject to contract” means that nothing is agreed so as to impose any obligations to act in a certain way until a contract to that effect has actually been formed. As Mummery L.J. has said, where it is used the parties proceed “on the basis that no concluded [duty-imposing] agreement [has] been reached and ... that such an agreement might never be reached”.⁵³

Applying Chadwick L.J.’s analysis, this should mean that wherever the parties have expressed their dealings to be “subject to contract” there is no possibility of a “*Pallant v Morgan* equity” arising. One cannot simultaneously both have and not have an agreement that one person should acquire a certain piece of property.

Despite this, in *Banner* Chadwick L.J. suggested the opposite, and cited *Island Holdings Ltd. v Birchington Engineering Co Ltd.*⁵⁴ as authority for this proposition.⁵⁵

Now granting that in *Island Holdings* – a “subject to contract” case – a trust was rightly held to exist, and granting that it might otherwise be seen as a classic “*Pallant v Morgan* equity” case, it is nonetheless impossible to say that that decision is consistent with Chadwick L.J.’s conception of the law.

The parties in *Island Holdings* were interested in acquiring different parts of the same land. Previously, they had agreed that the defendant would attempt to acquire a 99-year lease,

⁵³ *London and Regional Investments Ltd. v TBI Plc.* [2002] EWCA Civ 355, at [47].

⁵⁴ (Unreported) 7th July 1981, Ch. D.

⁵⁵ *Banner Homes*, at 398.

and that if it was successful the defendant would sell the claimant its interest over that part of the land which the claimant wanted to acquire, but this contract fell away when the owner then offered to sell the defendant the freehold instead.

The claimant and the defendant formed a “subject to contract” agreement in respect of the freehold with analogous terms to their previous contract, but after the sale was complete the defendant refused to hand over any part of it.

Goulding J. held that from the moment the defendant acquired the land the claimant had an interest in it, but that this was not because the parties’ second agreement amounted to a contract: their use of the term “subject to contract” meant that no even potentially enforceable sales agreement was formed. Instead, a different type of trust had arisen.

Thus Chadwick L.J.’s position that, on his own analysis, *Island Holdings* was rightly decided is clearly unsustainable. Goulding J.’s findings mean that the first of the three *Banner* requirements was not met in that case. There was no pre-acquisition agreement that the defendant should go and acquire the freehold because no such contract had been signed.

Yet this does not mean that the case was in fact wrongly decided. It is merely that Chadwick L.J.’s conception of the law does not work. The result in *Island Holdings* can be coherently explained by adopting an agency-focused analysis.

Note the findings that although the parties “were once in a position of equal opportunity to obtain [an] interest in the site [they] agreed that instead of competing the [claimant] should leave it to the defendant alone to exploit the opportunity with a view to the subsequent benefit of both [of them]”.⁵⁶

Before the parties’ initial (contractual) agreement was formed there was no relationship of agency between them, hence why they were legally “equal”, but when they formed that contract the defendant not only became duty bound to acquire the property but also became the claimant’s agent in respect of their acquisition of one part of it. It was left to it to conduct both parties’ business from that point onwards.

Despite the fact that the first deal came to nothing, Goulding J. observed that the parties’ initial agency relationship “was carried forward into [the] new situation” so that when it came to the acquisition of the freehold it could be said that “the defendant [only] obtained an opportunity to purchase [it] as a direct result of [the original] arrangement”.⁵⁷

Thus, in refusing to hand over the relevant part the plot, the defendant may not have been in breach of any duty to grant the claimant an interest in the land, but it breached the

⁵⁶ *Island Holdings*, at 18-19.

⁵⁷ *Ibid.*

non-profit rule which applied to it. As in every case where an agent misappropriates an opportunity arising in the course of his work and makes himself a profit, a constructive trust was imposed.

B. The Judgment in Generator Developments

In *Generator Developments*, the Deputy Judge sought to resolve the tension between Chadwick L.J.’s agreement-focussed approach and the parties’ use of the term “subject to contract” in two equally unconvincing ways.

The first was to distinguish Mummery L.J.’s observation about the effect of the term “subject to contract” on the basis that the case in which he made it was distinguishable from the one before him,⁵⁸ but this point has no weight at all. The strength of an observation like Mummery L.J.’s does not depend on the facts of the case in which it is made, and it does not need to be part of the *ratio* of a factually analogous authority to be relevant. The point is that all other things being equal, “subject to contract” means “subject to contract”, something always true, regardless of the context.

The second way was to say that that *Banner* itself was implicitly a “subject to contract” case so there could be no objection to the application of the doctrine in such circumstances.⁵⁹ This, however, misses the point being made in this paper that the imposition of a trust in such cases does not turn on whether the parties have made an agreement that the defendant would acquire the relevant property, enforceable or otherwise, but on a materially different set of principles.

As said above, the Deputy Judge decided the case against the claimant. He reasoned that although the parties agreed that Lidl would acquire the property – and so that the first of Chadwick L.J.’s three requirements was met – they did not agree that after their acquisition, Generator would obtain an interest in it, and so no trust existed.⁶⁰

However, while this decision was probably correct in principle, the reasoning supporting it was unnecessarily complex and at times incoherent. To come to his conclusion the judge took into account no less than nine factors. Some of these were genuinely important – indeed, the third should have determined the outcome of the proceedings on its own – but others were surely irrelevant.

⁵⁸ *Generator Developments*, at [187].

⁵⁹ *Ibid.* at para. [192].

⁶⁰ *Ibid.* at para. [205].

Consider the judge’s first reason: that each party “well understood ... the meaning and effect of the words ‘subject to contract’ which appeared in [all their communications]”.⁶¹ This makes no sense. All other things being equal, no two parties’ use of the term “subject to contract” can at once both bar the existence of an agreement that one of them will obtain some interest in a piece of land that the other of them is going to acquire, but not bar the existence of an agreement that the other one of them should actually acquire that land. Parties in these situations only share one course of dealings and, by the time of acquisition, they will have come to only one multi-termed resolution. Either the words “subject to contract” negative a mutual intention to form *any* potentially duty-imposing agreement with one another or they do not.

Similarly, the judge’s eighth reason was that “the steps which Generator took to protect its position fell short of requesting, let alone obtaining, a written commitment from Lidl that Generator would have an interest in the property”.⁶² Yet if such an agreement was embodied in a contract then there would have been no issue here unless that contract was not specifically enforceable for some extraneous reason. Why would one look for a “*Pallant v Morgan* equity” at all?

Remember, the claimant in *Pallant* himself failed to get – or even ask for – a written commitment from the defendant that he would have an interest in the land. Indeed, he and the defendant had utterly failed to agree on what parts of the land either of them were to get. Yet in *Banner*, Chadwick L.J. did not suggest that this could negative the fact of a common intention shared by the parties that once the property was acquired the claimant should have some specific interest in it, in any way.

C. Properly Explaining the Case

In contrast to the above, an agency analysis can be used to coherently explain the existence (or non-existence) of a constructive trust in all “subject to contract” cases, including *Generator Developments*.

It is true that all genuine agency is created through the forming of an agreement⁶³ – two parties must share a common intention to be each other’s agent and principal with respect

⁶¹ *Ibid.* at para. [195].

⁶² *Ibid.* at para. [203].

⁶³ The principles which underpin “agency of necessity” are sufficiently different to mean it is best treated as a distinct area of law: see, Chapter 18 of C. Mitchell, P. Mitchell, and S. Watterson (eds.), *Goff and Jones The Law of Unjust Enrichment*, 8th ed., (London, 2011).

to some activity⁶⁴ – but such an agreement is different from the sort of agreement – discussed in cases like *Balfour v Balfour*⁶⁵ – that one party will owe another a potentially enforceable positive duty, such as a duty to acquire a specific piece of property.

A central example of the latter sort of agreement is the agreement that lies at the heart of every contract, but it is clear that there is simply no necessary connection between the existence of a contract and the existence of a relationship of agency.

A gratuitous agent is just as much of an agent as a paid one. They owe their principals duties of care for the same reason that non-gratuitous ones do, and the standard of care expected of them is the same.⁶⁶ They are all just as much fiduciaries.

In *Norwich and Peterborough Building Society v Steed*⁶⁷ the Court of Appeal made clear that an individual who lacks contractual capacity can still validly be another's agent and so can enter their principal into contracts which they could otherwise not form for themselves in their own personal capacity.

Of course, in the absence of a contract an agent owes his principal no positive duty to actually do anything, but they still share a legally meaningful relationship and when that agent acts within the scope of his undertaking he will be subject to the norms of agency law.

Crucially, while it is a duty imposing agreement that is both the agreement which Chadwick L.J. seems to demand and which is negated by the use of the words “subject to contract”, it is the existence of an agency creating agreement which actually matters.

Thus, the defendant in *Island Holdings* had initially agreed not only to become the claimant's agent in respect of the front portion of the land, but he had also agreed to owe him a (contractual) duty to sell part of it to him. That duty ceased to exist when the contract for the purchase of the lease was set aside, but, without more – as Goulding J. made clear – those events could and did not affect the existence of the parties' relationship of agency.

Though the parties then took care to prevent the formation of a new agreement which might impose any new potentially enforceable positive duties upon either of them, when the time came that the defendant refused to hand over the front part of the property they were still an agent and that is what counted.

In contrast, in *Generator Developments* the parties were scrupulous not just to prevent the formation of any agreement that one or the other of them should be under a potentially

⁶⁴ *Garnac Grain Co Inc. v HMF Faure and Fairclough* [1968] A.C. 1130, at 1137.

⁶⁵ [1919] 2 K.B. 571.

⁶⁶ *Chaudhry v Prabhakar* [1989] 1 W.L.R. 29.

⁶⁷ [1993] Ch. 116.

enforceable positive duty to go out and acquire the property,⁶⁸ but also to prevent Lidl from ever becoming an agent.

As the Deputy Judge observed – though this was merely the third factor he took into account – according to the “terms” of their pre-contractual discussions, when it came to the purchase the risk was all on Lidl. Generator was not to provide any of the money to fund any part of the purchase, and Lidl had no right to ask it for a contribution. If the land proved to be worth less than it seemed, Lidl would bear the whole of the loss itself.⁶⁹

These features are anathema to the idea that a relationship of agency might have existed. If Lidl was acting as an agent in respect of any part of the land it acquired, it would – all other things being equal – have been entitled to an indemnity from its principal in respect of the cost of it, but nothing it had agreed with Generator was enough to give it such a right. When it acquired the land, Lidl was acting solely on its own behalf.

V. THREE TYPES OF AGENT

Citing agency as the foundation upon which all true “*Pallant v Morgan* equity” cases are built does risk giving rise to some confusion. For example, it has been said that if agency really is in play, then even though there might be a proprietary remedy when the defendant fails to hand over the land, that remedy would be available under a different, non-fiduciary mechanism.⁷⁰

The logic is that if an acquiring party really is an agent then, as his principal, the non-acquiring party would have a contractual right against the original owner of the land in respect of that part of it which he had agreed with his agent that he was to acquire. After all, “a true agent ... puts his principal into a contractual relationship with a third party”.⁷¹

Indeed, from the moment the acquiring party entered into the contract with the vendor, his principal could therefore be said to have had an interest in the relevant portion of land under a constructive trust. There is a long-established extension of the doctrine of anticipation famously described in *Lysaght v Edwards* which applies in favour of principals in such situations,⁷² and so there is no need to resort to fiduciary law to achieve the desired result.

⁶⁸ *Generator Developments*, at [195].

⁶⁹ *Ibid.* at para. [197].

⁷⁰ See, for example, M. Yip, *The Pallant v Morgan Equity Reconsidered* (2013) 33 L.S. 549, at 565-567.

⁷¹ *Potter v Customs & Excise Commissioners* [1985] S.T.C. 45, at 51.

⁷² *Cave v Mackenzie* (1877) 46 L.J. Ch. 564.

Unfortunately, this does not accord with the facts of the cases as we find them. In *Pallant*, where a trust was held to exist, there was no pre-acquisition agreement over which specific portions of land the claimant was to have (and certainly no common intention that they were to share title to the entire plot). It would therefore have been impossible for the defendant to have simultaneously entered himself and the claimant into the contract of sale. He could not have known what portions, if any, the claimant was contracting, through him, to buy.

Moreover, the type of agent in a true “*Pallant v Morgan* equity” case is not the same as the type of agent that can put his principal into a contractual relationship with a third party. There is more than one way to act on another’s behalf recognised by English law.

For example, in contrast to a contracting agent, a collecting agent is not authorised to enter their principal into any contracts with third parties, but they can give good receipt for monies due to them (in such a way as to give rise to an equitable liability to account for its value).⁷³

In *Nelson v Rye*,⁷⁴ the defendant had agreed to collect a variety of sums due to be owed to the claimant and to hand them over on an annual basis, after deducting his commission. Entering the claimant into contracts with third parties was in no way within the scope of his authority, but the defendant was still said to be a real agent and therefore a fiduciary.⁷⁵

Of course, the agent in a “*Pallant v Morgan* equity” case is not a collecting agent, either. He is a “property acquiring agent”. He has neither the capacity to enter his principal into contracts with third parties, nor the capacity to give good receipt for monies owed to them. Instead he is authorised to acquire new property in his own personal capacity, albeit on his principal’s behalf.

In a simple case, to acquire such property a property acquiring agent enters himself into a contract and when he acquires a title under that contract, he is expected to transfer it *in specie* to his principal. He accounts for the property itself and not just for its value.⁷⁶ He is entitled to be indemnified for his expenditure, and he is, as a type of agent, a fiduciary.⁷⁷

Where the agent and their principal share a contract the agent will, of course, be duty-bound to make said transfer, but where they do not, they will not be. Nonetheless, if the agent

⁷³ *Barnett v Creggy* [2014] EWHC 3080 (Ch), at [66].

⁷⁴ [1996] 2 All E.R. 186. *Nelson* was wrongly decided on the facts. In *Paragon Finance Plc. v DB Thakerar & Co (a firm)* [1999] 1 All E.R. 400, at 415-416, Millett L.J. made clear that the manager was a *collecting* agent.

⁷⁵ *Paragon Finance*, at 416.

⁷⁶ *Ibid.*

⁷⁷ *Burdick v Garrick* (1870) L.R. 5 Ch. App. 233.

retains the property this will constitute a breach of fiduciary duty on their part and will allow their principal to bring an equitable proprietary claim in respect it.

In a genuine “*Pallant v Morgan equity*” case, the principal is only usually interested in a predetermined portion of the land. The agent himself is personally interested in the rest of it. As said in *Chattock*, this means that when acquiring the land the agent acts in a dual capacity: “partly on his own account and partly as [an] agent”.⁷⁸ His agency relates only to the part of the land which his principal is meant ultimately to acquire, and his position as regards that part of the land is as stated above.

This is why the non-acquiring party in a “*Pallant v Morgan equity*” case is never said to have any contractual rights against the vendor in respect of any or all of the land his agent acquires. It is also why, despite being the acquiring party’s principal, there is no chance that the non-acquiring party would ever be held liable to the vendor for any or all of the purchase price. The rules which would give both of them such a right – the laws which say that when an agent (disclosed or not) is acting within the scope of his authority and enters into a contract with a third party, the parties to that contract are the third party and their principal⁷⁹ – are not in play. They are peculiar only to the case of a contracting agent and the agent in “*Pallant v Morgan equity*” case is not such an agent.

This is why the Deputy Judge in *Generator Developments* was ultimately right to think that the fact that Generator was not to fund any part of Lidl’s purchase was important in determining whether or not a constructive trust existed. Though he did not say so, it matters because it shows that whatever agreement they had come to was not one which created a relationship of acquisitive agency.

Thus, there is no reason why an agency analysis of the “*Pallant v Morgan equity*” cannot stand as a coherent alternative to that propagated by Chadwick L.J. in *Banner*. Not only are the fiduciary rules in play totally orthodox, but so too are the agency rules which underpin their application.

VI. THE TRUTH IS OUT THERE

In showing that a “*Pallant v Morgan equity*” really is nothing more than a constructive trust arising in response to an agent’s breach of fiduciary duty this paper should not be thought of as bringing forth any particularly great legal revelation. After all, as it has shown, this

⁷⁸ *Ibid.* at p. 181.

⁷⁹ *Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal) Ltd.* [1964] 2 Q.B. 480, at 502-503.

analysis is right there waiting to be drawn out from the cases. What it is trying to do is persuade people to recognise and accept this fact.

Moreover, as noted above, there have been other attempts to substantiate such an explanation, but perhaps due to their brevity, these have not gained any particular traction.

A. *Efforts at Home*

Consider the “one notable exception” referred to in Section I above: the judgment of Etherton L.J. in *Crossco*.

Like Arden and McFarlane L.JJ., Etherton L.J. held that the *Banner* analysis of the “*Pallant v Morgan* equity” formed part of the law of common intention constructive trusts, but he also went on to say that the suggestion of a connection between that analysis and what was really going on in a true “*Pallant v Morgan* equity” case was “untenable”.⁸⁰ He said that all such cases could actually be explained “by the existence and breach of [a] fiduciary duty”.⁸¹ The courts were “depriving the defendant of [an] advantage obtained in breach of [fiduciary duty]”.⁸²

Unfortunately, this is essentially all he said on this issue. He provided no specific explanation or analysis of what was said in *Pallant* or in any of the other old cases, bar stating the fact that, as in *Chattock*, the defendant acted as the claimant’s agent when they acquired the land.⁸³ He left it to the reader to look back and see whether or not this was really true.⁸⁴

Now one might have thought that, despite its brevity, such a learned plea for revision might have been enough to herald a reversion in approach but subsequent courts have refused to follow it. In *Generator Developments*, the Deputy Judge dismissed Etherton L.J.’s view almost out of hand.⁸⁵ So too did the Deputy Judge in *Credit & Mercantile Plc. v Kaymuu Ltd.*⁸⁶

⁸⁰ *Crossco*, at [87].

⁸¹ *Ibid.* at para. [88]. This was not the first time the Etherton L.J. expressed such a view, but it seems to be the first time he linked a fiduciary analysis to the law of agency. See, T. Etherton, *Constructive Trusts and Proprietary Estoppel* [2009] Conv. 104, at 122-123, and *Constructive Trusts* (2008) C.L.J. 265, at 285-286.

⁸² *Ibid.* at para. [95].

⁸³ *Crossco*, at [87].

⁸⁴ *Crossco* has been noted by academics, but none have looked to properly develop Etherton L.J.’s analysis. See, for example, N. Hopkins, *The Pallant v Morgan ‘Equity’ – Again*, [2012] Conv. 327, and M. Lower, *The Pallant v Morgan Equity*, [2011] Conv. 379.

⁸⁵ *Generator Developments*, at [33].

⁸⁶ [2014] EWHC 1746 (Ch), at [130] and [155].

Similarly, it should be telling that the country's leading agency law textbook claims both *Pallant* and *Chattock* as relevant authorities, but this fact has never been noted in the judgments. Thus, in the 20th Edition of *Bowstead and Reynolds*,⁸⁷ both cases are cited in a chapter on the "Duties of Agents Towards Their Principals" specifically within a section about agents acquiring for themselves, "in breach of duty", an unauthorised benefit from a third party.⁸⁸ Having said that, each case is only mentioned once and even then only in the footnotes.

B. *Hints from Abroad*

Neither New Zealand nor Australia recognise the existence of a particular type of constructive trust like the "*Pallant v Morgan* equity": its existence is a peculiarly English problem. Thus, the way those two jurisdictions treat cases with essentially the same fact pattern should be instructive.

In the New Zealand case of *Chirnside v Fay*,⁸⁹ two property developers came together to develop a site in Dunedin. Their relationship was never formalised, but it was agreed that the defendant – Chirnside – was to acquire the land while the claimant – Fay – was to work to find a future buyer for it. After the land was acquired the defendant repudiated the arrangement.

Now *Chirnside* is unusual because the claimant sought an account of profits rather than a declaration of an interest under a constructive trust, but the Supreme Court was clear that all other things being equal such an alternative claim could have been made.⁹⁰

There was disagreement as to why the defendant became the claimant's fiduciary – Elias C.J. and Keith J. said that the relationship between joint venturers was an inherently fiduciary one,⁹¹ whereas Tipping J., Blanchard J., and Gault J., all said that it was not⁹² – but all agreed that he was one,⁹³ and that in behaving as he did, the defendant "was in breach" of his duty. "He diverted to his own account the entire joint venture, in breach of the no-conflict limb".⁹⁴

⁸⁷ P. Watts (ed.), *Bowstead and Reynolds on Agency*, 20th ed., 1st Supplement, (London, 2016).

⁸⁸ *Ibid.* Article 48.

⁸⁹ [2006] NZSC 68.

⁹⁰ *Ibid.* at para. [92].

⁹¹ *Ibid.* at paras. [14] and [55].

⁹² *Ibid.* at paras. [72]-[87], and [52].

⁹³ *Ibid.*

⁹⁴ *Ibid.* at para. [21].

None of the judges sought to rely on any English “*Pallant v Morgan* equity” cases, and yet each reached the same conclusion that they would have had they followed them precisely. The concept did not need to be invoked for the right result to be reached.

Similarly, when it comes to Australian law, Finn has described the leading English authorities – which have occasionally been referred to but which have never been applied – as “superfluous”. To dispose adequately of such cases, he says, it “needs no separate rule”. “[They] would be dealt with [as involving] a breach of fiduciary duty”.⁹⁵

Admittedly, neither jurisdiction goes so far as saying that the defendant’s status as a fiduciary is grounded on agency rather than on some other legally significant relationship, but this paper’s thesis is directed only at the English “*Pallant v Morgan* equity” cases, which are the only cases which consider the trusts arising within them to be a special type of constructive trust, and in which it always is.

VII. CONCLUSION

So, now we know that the view that no true “*Pallant v Morgan* equity” is anything more than a constructive trust arising in response to an agent’s breach of fiduciary duty is indeed the correct one. It explains not just the outcomes of all the foundational “*Pallant v Morgan* equity” cases, but – crucially – the reasoning contained within them, too.

We also now know for sure that the reason why fiduciary duties come into play at all is because of a routine operation of the law of agency. The defendant in a typical “*Pallant v Morgan* equity” case becomes – by way of an agreement – the claimant’s (gratuitous) property acquiring agent. When he acquires the land, he does so partly on his own behalf and partly for his principal.

In isolation, *Generator Developments* might well appear to be an insignificant decision but “subject to contract” cases like it provide an important insight into what is really going on. They show that the modern view – that the “*Pallant v Morgan* equity” is, at a minimum, an agreement and reliance based constructive trust – is unsustainable and that an agency analysis is capable of making sense of what occurs when a trust is found to have come into existence despite the parties’ use of those portentous words.

Far from reflecting any sort of unusual principle, a “*Pallant v Morgan* equity” is a trust which arises exactly when one would expect it to. The principles which underlie them

⁹⁵ P. Finn, *Common Law Divergences* [2013] Melb. U. Law Rvw. 20, fn. 102.

form first part of the law of agency and then fiduciary law, both long-established and well-settled doctrines. There is therefore nothing particularly special or peculiar about them. In every other case where an agent profitably exploits opportunities presented to them by their role the law employs no special labels. The profit is simply said to be held on constructive trust. Why should it be different here?