The Foundation of Rectification in the Corporate Opportunity Doctrine

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Abstract: In this paper, I discuss the proposal that directors or officers’ breaching the loyalty duty to the corporation by usurping the corporate opportunities is a wrong which ought to rectify according to the corrective justice. My aims are to clarify that usurping a corporate opportunity is a civil wrong and to discuss the rationale of the Corporate Opportunity Doctrine for achieving justice and the constructive trust’s corrective function for the rectification of a wrong in corporate opportunities. I try to show that in the context of usurping corporate opportunity in breach of loyalty duty, a constructive trust can be employed to do restitution for a wrong, for it produces justice and fairness. In the process, I show that corrective justice impose the duty to repair the wrong done by usurping the corporate opportunity, a constructive trust imposed shall achieve the aims of corrective justice in this context.

The Corporate Opportunity Doctrine is the rule of loyalty on the part of corporate fiduciaries, which is against misappropriation of corporate opportunities by directors and officers. If a business opportunity is deemed to be a corporate opportunity of a given corporation, then the fiduciaries of that corporation—its directors, officers, and controlling shareholders—may not take or usurp the opportunity for themselves. Accordingly, directors and officers are prohibited from appropriating themselves business opportunities which in fairness should belong to the corporation. Directors or officers’ breaching the loyalty duty to the corporation by usurping the corporate opportunities is a wrong which ought to rectify according to the corrective justice.

1. To usurp a corporate opportunity: a civil wrong

1.1 The Connotation of a Civil Wrong: Breach of a Duty

According to Austin a person may be said to have a right when another or others are bound or obliged by law to do or forbear towards or in regard of him. In Kantian right theory, one’s action requires to be consistent with the other’s freedom, that is, right and duty has a specific form of correlativity. Thus having a right implies that others are under the duty to refrain from infringing it. Someone wrongs another whenever he invades that person’s rights, namely, wrongs are invasions of rights. A wrong presupposes a right, right and wrong are correlatives. Whether a particular act constitutes a wrong depends on the content of the relevant right. However, a duty is a correlative of a right because, just as a wrong entails a right, so a right entails a duty: every time a person has

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a right, one or more others have a duty. Every time there is duty owed to someone, there is a right owned by the person to whom the duty is owed, and vice versa. A right is the reverse side of one or more duties. Thus, a wrong is the violation of a right and therefore a breach of duty owed to individuals.

In English law, a civil wrong is no more or less than a breach of legal duty owed to a plaintiff, while it violated rights of victim in the civil law, which is not contradictory within the realm of the correlativity of right and duty. A wrong is a breach of duty according to the normative system in question, namely, the law. Thus, wrongdoing is a failure to perform a duty to comply with a relevant norm; a wrong is an action contrary to another’s right. If there is no duty breached, there can be no wrong. In a word, a legal wrong derives from a breach of legal duty. As legal wrongs, the infringements ought to be recognized by the law of some jurisdiction, but if the particular jurisdiction recognizes no legal duty to respect the rights of other persons such as privacy, their invasion cannot be a legal wrong. A breach of duty owed to someone else is an infringement of a right. That is, a wrong is a breach of a duty and the infringement of a correlative right.

Conduct that is invasive of a right or in breach of a duty is a wrong. A wrong is the violation of a right entails that it is a breach of duty, nonetheless, not all breaches of duty are wrongs.

1.2 Usurping a Corporate Opportunity: A Wrong

1.2.1 Breach of One Element of Fiduciary Duty

A fiduciary has a fiduciary duty to undertake to act for the benefit of another person. A fiduciary duty generally consists of two elements: the duty of care and the duty of loyalty. One element of a fiduciary duty is to avoid conflicts of interest. Just as Millett LJ expressed in Bristol and West Building Society v. Mothew (1998) Ch1., “The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his entrustor. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict...”. Essentially, in the corporate context, the duty of loyalty aims to prevent conflicts of interest between the directors or officers and the corporation. A corporate officer or director occupies a fiduciary relationship with the corporation and becomes a fiduciary thereby. Thereupon it, he necessarily restricts his freedom in personal business dealings, which stems from the fiduciary’s duty of undivided loyalty. A director or officer owes to his corporation the fiduciary duty of loyalty, which broadly forbids him to pursue his own interests in a manner injurious to the corporation and requires that a director or officer acts solely in the best interest of the corporation. “The duty of loyalty requires directors to exercise their powers in the interests of the corporation and not in the directors’ own interest or in the interest of another person . . . or organization. Simply put, directors should not use their corporate position to make a personal

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11 See Ballantine, Corporations, (Callaghan and Company 1946), § 79, pp.204-209.
12 Guttman v. Huang, 823 A.2d 492, 506.
profit or gain or for other personal advantage.”

With regard to breach of the fiduciary duty, in the Regal case Lord Wright held that: “If a person in a fiduciary relationship makes a secret profit out of the relationship, the court will not inquire whether the other person is damned or has lost a profit which otherwise he would have got.”

Where a director or officer has exploited a corporate opportunity which should have been secured for the benefit of the corporation by appropriating a particular business opportunity for himself or for other business interests with which he is associated, he has breached the fiduciary duty of loyalty. For this, Section 175 of the (UK) Companies Act 2006 gives statutory force to the fiduciary obligation that prohibits directors placing themselves in conflict situations and exploiting any property, information or opportunity.

A breach of the duty of loyalty generally involves a conflict between an officer or director’s personal interest and the interest of the corporation. More particularly, within the extent of the no-conflict duty lies the so-called “corporate opportunity doctrine”. According to this doctrine, the no-conflict duty will be breached where a director or officer usurps a corporate opportunity for his or her own benefit.

Hence, under the corporate opportunity doctrine, an officer or director breaches the duty of loyalty if that person pursues a business opportunity for his or her own benefit, without first giving the opportunity to the corporation, if it is reasonably foreseeable that the corporation would be interested in such an opportunity. An officer or director, as a fiduciary, who successfully pursues a profit which might have tempted him to sacrifice the interests of his beneficiary, the corporation, commits the wrong of breach of fiduciary duty even though he believed he was acting in the best interests of his beneficiary and thought that he had made a full disclosure.

1.2.2 A Wrong from Breach of Duty of Loyalty

Rights are special ways of protecting legitimate interests or rights. Right and duty are connected because the content of right is the object of duty. Therefore, a violation of a right is a breach of a duty.

A corporation has legitimate interests or rights in the business, especially has legitimate interests or rights over a corporate opportunity and confidential information, which is a “corporate property”. A corporate opportunity is a business opportunity in which the corporation has an interest or expectancy or which is essential to the corporation. Accordingly, if a director or officer engages in the usurpation of a corporate opportunity, he has done a wrong, ipso facto, for the usurping violates the corporation’s exclusive right over the corporate opportunity. In the case of the corporate opportunity, the director has a duty to perform his duty of loyalty, ie, not to take advantage of the corporation to whom he or she owes a fiduciary duty by failing to offer or give a particular business opportunity to that corporation and instead taking it himself or herself, either for that director’s own account or for another entity in which that director has a material financial interest or to which that director also owes a fiduciary duty. Because of the director’s or officer’s fiduciary duty, he is not permitted to take profitable business opportunities that belong to the

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13 The American Bar Association’s The Corporate Director’s Guidebook
14 Regal (Hastings )Ltd v Galliver (1942)1 All ER 378 (HL)392 (Lord Wright).
15 See Boardman v Phipps, (1967) 2 A.C.46.
The duty of loyalty requires not usurping the corporation's interests if there is a conflict between the officer's or director's duty to the corporation and his own personal self-interest. A breach of this duty of loyalty occurs if the director makes use of the corporate opportunity not for the sole benefit of the corporation but for the benefit of the officer or director. The corporate opportunity doctrine will be applied when the corporation has a legitimate interest or expectancy in, and the financial resources available to take advantage of, a particular business opportunity. “Where a business opportunity is in the line of the corporation's activities, and is one in which the corporation has a legitimate interest or expectancy, the opportunity belongs to the corporation.” Officers and directors have no more right to usurp corporate opportunities for their own benefits than they have to appropriate corporate property. A corporate officer or director who usurps a corporate opportunity has done wrong and commits a breach of fiduciary duty. That is, if a business opportunity presented to a director is taken by a director for his or her own personal benefit, his taking is wrongful.

A corporate fiduciary who makes profits from the corporation in violation of his fiduciary relationship is personally liable for all of those profits, even when the profits are acquired by a third party. Thus, the harm that the corporate opportunity doctrine protects against is that the director may be making for him or herself a profit that should otherwise belong to the corporation. At any rate, the misappropriation of such “property” is held to be a wrong leading to a duty to make good the loss or to give up the benefit obtained.

However, in many but not all jurisdictions the fiduciary may raise the defense that the corporation was financially or legally unable to take the opportunity. If he proves such corporate incapacity, then his taking was not wrongful. He may also defend himself by showing that the corporation rejected or abandoned the opportunity or that it explicitly approved his taking it.

2. The corporate opportunity doctrine: achievement of justice (fairness and equality)

A duty is what one ought to do. A wrong is a breach of duty, which stems from the violation of a right. In the context of corporation, a breach of a fiduciary duty is also a wrong, which derives from the violation of a corporation’s rights. A wrong results from the conduct or wrongdoing in breach of a legal duty, which is an act of injustice. Because wrongdoing is the infliction of the suffering by violating the rights or breaching the duty, it causes the injustice. The wrongdoer and sufferer of an injustice is linked by corrective justice in terms of their correlative positions.

2.1 Corrective justice concerned with fairness and equality

Justice is the true criterion of right and wrong; it is only by comparison with Justice that Injustice is recognized. Justice involves the achievement of to ison, which in Greek signifies both fairness and equality. Justice is in connection with equality, which is firmly and prominently held by Aristotle building on the fact that the Greeks used their word for “equal” to express the idea of “fair”, showing an association between justice and equality.

References:

21 Imperial Group (Texas), Inc. v. Scholnick, 709 S.W.2d 358, 363 (Tex. App.–Tyler 1986, writ ref'd n.r.e.).
22 In re Safety Inr'l, Inc., 775 F.2d 660, 662 (5th Cir. 1985).
24 International Bankers Life Ins. Co. v. Holloway, 368 S.W.2d at 577; Interfirst Bank Dallas v. Risser, 739 S.W.2d 882, 899 (Tex. App.–Texarkana 1987, no writ); Poe v. Hutchins, 737 S.W.2d at 584.
2.1.1 Aims and Function of Corrective Justice

The idea of corrective justice comes down from Aristotle. According to his account of corrective justice, he thinks that corrective justice is a matter of arranging things in terms of equality or “arithmetical proportion”. Corrective justice is concerned with a straightforward equality, so the two parties are considered as having been equal before the wrong was done, and they must be restored to that position of equality. Aristotle stresses the idea of equality more than the idea of restoration. He holds the view that justice requires a wrongdoer to suffer some hurt against what he has inflicted, that is, justice is “reciprocity” or “requital”, but not simply “reciprocity” or “requital”. Aristotle exaggerated the association in fastening upon an alleged equality in corrective justice between a wrongdoer’s gain and his victim’s loss.

Fairness requires reparation of such rights violated by wrongs. So corrective justice requires the rectification of wrongs. Corrective justice requires that wrongs be annulled by imposing a duty to repair them on the right-invader. Corrective justice operates to create and impose a duty which is to correct or annul that which one did that triggered corrective justice in the first place, namely, wrong. The principle of corrective justice is the following: corrective justice imposes the duty to repair the wrongs one does. The duty one has in corrective justice arises as a result of wrong or wrongdoing, not as a result of wrongful losses. Although the duty is to repair the wrong, repairing the wrong is repairing the losses as a result. Therefore, repairing the losses, if there is, is the sub duty in corrective justice. So repairing the losses is the consequence of repairing the wrong if it occasions. In this sense, fully to repair the wrong is to repair not only the wrong but its consequences as well. That would mean giving up whatever gains one has secured as a result of the wrong as well as compensating for whatever damage one has caused others to suffer. Indeed, repairing the wrong is to return the world to where it would have been had the wrong never been committed. Corrective justice imposes on wrongdoers the duty to repair their wrongs and the wrongful losses their wrongdoing occasions. The latter is the consequence of the former. Reparations, according to Black’s Law Dictionary, involve “payment for an injury; redress for a wrong done”.

Wrongful conduct, correlativity and reparation lie at the core of corrective justice. Corrective justice involves “the correlativity of doing and suffering harm”. If one commits and the other suffers injustice or if one has inflicted and the other has suffered harm, corrective justice can be a principle of holding people responsible for repairing the wrongful losses that they inflict on others. Corrective justice presupposes some reason (or sets of reasons) for regarding certain acts as wrongful and for rectifying their consequences. The presupposition is that corrective justice requires a wrong or a right violation. However, where nothing is done to rectify this wrong, justice will be violated. On a broader interpretation of corrective justice, the undoing of wrongful gain might be as much a matter of corrective justice as the repair of wrongful loss. The principle corrective justice requires the annulments of both wrongful gains and losses. Thereupon it,
Corrective justice aims to restore the equality disturbed by the wrong. When the wrongful gains or losses exactly result from a wrong, satisfying the demands of corrective justice suffices to satisfy the demands of fairness and equality.

As man is a social animal and every aspect of human activity contains relevant social factors, justice has to intervene to establish social harmony which has been or could be imperiled by a wrongful allocation of resources and social honors. If one has got an unfair advantage and the other has suffered an unfair disadvantage, injustice arises. Justice requires first and foremost that we restore the exact same thing whenever possible. In cases of wrongdoing, the requirements of justice rest squarely with the wrongdoer and with what the wrongdoer must do to make things right. There is, therefore, a wrong which needs redress—an inequality which has to be equalized. There ought to be remedies for wrongs, otherwise, there will be no check on wrongdoing.

To rectify something is to set it right. Wrongdoers ought to rectify their wrong by activating a corrective machinery. Hence, corrective justice is to set unjust situations right. In a word, corrective justice is concerned with the rectification of injustices inflicted by one person on another. Corrective justice is to restore the status quo that existed before the wrong was done. Its function is restorative and preserving an existing structure. The legal responses to the restoration of the equality or the wrongs are two as follows: to repair the losses and to disgorge the wrongful gains.

2.1.2 Legal Responses to Restoration of Wrongs

Corrective justice is also a paramount principle to restore the primary right. Corrective justice involves or gives rise to liability for wrongful conduct and wrongful losses must be shifted back onto the parties responsible for them, so it responds to repair past wrongs.

A. To repair the losses

Corrective justice focuses on who has done what to whom. Just as Jules Coleman asserts that the principle of corrective justice “states that individuals who are responsible for the wrongful losses of others have a duty to repair the losses”, so wrongdoers must repair the wrongful losses they have inflicted on their victims. It will restore the equality disturbed by the wrong, which need to restore the balance in a relationship impaired by a wrongful conduct.

Wrongful losses, harms or rights violations from breach of duty result from wrongful conduct, which is condemned or disproved. Wrongful losses are inflicted by wrongful conduct, so they are attributable to another’s wrong. Wrongfulness gives us a reason to hold people responsible for the losses that they inflict on others. Having a wronged person seek reparation from the wrongdoer who has injured him or her is the most natural way to give institutional expression to the principle that persons who are responsible for wrongly injuring others ought to repair the harm they have done. The causation of doing and suffering connects the wrongdoer to the loss wrongfully suffered by the victim and so plays an essential role in establishing the special responsibility of the wrongdoer for that loss.

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Thus corrective justice deals with the rectifying of all wrongs to individuals\textsuperscript{45} by repairing the wrongful losses. Corrective justice is concerned with redressing legal wrongs so that it imposes on wrongdoers the duty to repair the wrongful losses their conduct occasions, losses for which they are responsible. Firstly, the concern of corrective justice is wrongs or wrongdoings and wrongful losses resulting from wrongs or wrongdoings which ground the claim of wrongful losses. Secondly, the duty to repair the wrongful losses under corrective justice is the resulting of his wrongdoing. Jules Coleman says, “Corrective justice imposes the duty on the wrongdoer to compensate his victims…”\textsuperscript{46} As regards the victim’s physical loss, the wrongdoer will have to restore the status quo ante as far as possible, if the wrongdoer’s benefit is directly related to the wrong.

Corrective justice is to eliminate, rectify, or annul wrongful (or unjust) losses,\textsuperscript{47} which deals with the wrongful consequences of a wrong, since it is the wrong itself, not the wrongful loss as the basis of responsibility. Accordingly, wrongdoers have a duty to repair the wrongful losses for which they are responsible. Any conception of corrective justice requires conceptions of loss, wrongfulness and responsibility. A loss is a diminution in the welfare or well-being as judged relative to an appropriate baseline. A loss must be wrongful in the sense required by corrective justice if it results either from wrongdoing or a wrong. Wrongdoing is conduct that falls below the relevant norm or standard of behavior. Someone wrongs another whenever he invades that person’s rights.

Conduct that is wrongful because it involves either wrongdoing or a wrong can give rise to wrongful losses, losses for which those responsible can incur a duty to repair in justice. Wrongful losses can result either from wrongs, that is, invasions of rights, or breach of duties. Corrective justice imposes a duty of reparation on those responsible for the wrongful losses of others. Corrective justice connects wrongdoers with losses by the criterion of responsibility.\textsuperscript{48} When wrongful losses are sustained, corrective justice requires the rendering of something equivalent in value to that which was lost.

To reestablish the initial equality, corrective justice requires the doer to repair the loss by returning the gain to the sufferer.\textsuperscript{49} A wrong is a breach of duty which, in corrective justice, triggers a response to repair. Reparation of losses seeks to nullify the loss of the victim. This result can be achieved through different avenues which all share the characteristic that the transfer of wealth from the wrongdoer to the victim is justified by the victim’s loss. After restitution, the wrongdoer should be in a position of indifference as regards his pre-wrong and post-restitution situation.\textsuperscript{50}

B. To disgorge wrongful gains

The injustice does not necessarily have to bring about the same quantity of gain and loss. A wrongful act is detrimental to the victim, not because it causes a patrimonial loss, but because it places the victim in the position of sufferer from an injustice. A wrong which has caused no patrimonial loss, but has enriched the wrongdoer, must be detrimental too. Thus the wrongful enrichment is a consequence of a wrong which has created a correlativity between the wrongdoer

\textsuperscript{50} Francesco Giglio, The Foundations of Restitution for Wrong, (Hart Publishing 2007),p34.
and his victim as the doer and the sufferer of an injustice. The wrongful gain is the consequence of a wrongful conduct which the victim can claim. Because corrective justice aims at the restoration of equality disturbed by wrongful conduct, so we can infer that it requires that wrongdoer must disgorge wrongful gains.

Where a wrongdoer secures a gain thereby, because the gain is the resulting of wrongdoing, it is a wrongful gain. Securing a wrongful gain makes him a candidate for liability in corrective justice.

A fundamental tenet of English law is that “No man shall profit from his own wrong”. 51Justice is effected by the direct transfer of resources from one party to the other. Accordingly, corrective justice also requires that the party who has more gives to the party who has less to restore the equality disturbed by wrongs. Indeed, sometimes wrongdoer’s profits is independent of the victim’s loss while sometimes his gain is directly connected to a financial loss. Whatever, corrective justice deals not only with reparation of wrongful loss but also of wrongful gain. That is, corrective justice is to take away from the wrongdoer a benefit accruing to him as a consequence of the perpetration of the wrong, even though the sufferer has not suffered any patrimonial losses. If it can demonstrated that a wrongdoer has gained a benefit and that benefit would not have been gained but for the wrongdoing, he should be required to make restitution.

In a word, corrective justice furnishes legal response to wrongdoing, which triggers a restitution for repairing wrongful gains. However, it is quite a different restitution which presupposes a wrongful gain. Where a doer has deliberately set out to enrich himself by committing a wrong against the sufferer, he ought to be liable to make restitution of that profit. 52

Under the heading of restitution for wrongs, disgorgement is usually a remedy to punish wrongs and vindicate rights that exist and are enforced outside of the law of Restitution. 53

Restitution is the legal remedy for repairing wrongful gains, which consists in causing one person to give up to another a benefit received at his expense or its value in money, 54which is somewhat like that for unjust enrichment, but they are quite different. The difference between restitution for wrongs and that for unjust enrichment is that unjust enrichment does not require the perpetration of a wrong for its activation while restitution for wrongs is a response to a wrongful behavior of the agent.

Restitution should be used in the sense of “giving back” the benefit wrongly obtained from the wrong by wrongdoer. Restitution for wrongs means an award, normally of money, calculated so as to effect surrender of gains accruing to the wrongdoer from his wrong. Etymologically, the term “restitutio” was used by the Romans to indicate both “giving up” and “giving back”. 55 A benefit has been wrongly obtained by the wrongdoer and should be transferred to the victim of the wrong. The wrongdoer is deprived of ill-gotten gains and gives back what he benefits. For this aspect, restitution for wrongs does relate to corrective justice. Because corrective justice aims not only to make good the victim’s loss, but also to compel the agent to disgorge his benefit. Just as Weinrib says, “Corrective justice thus treats the wrong, and the transfer of resources that undoes it, as a single nexus of activity and passivity where actor and victim are defined in relation to each

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The equality lies at the heart of corrective justice. Whether to repair the losses or to disgorge the wrongful gain are all the legal responses to the wrongdoing within the corrective justice, whose ultimate goal is to restore the equality disturbed by wrong. Accordingly, a justification for restitution for wrong can be found in corrective justice.

2.2 Rectification of a wrong done by usurping the corporate opportunity

From the perspective of corrective justice, the point of rectification is to undo that injustice, and so the rectification must mirror the structure of the injustice. 57

2.2.1 A Prophylactic Approach for a Wrong by Usurping the Corporate Opportunity

Wrongful losses and wrongful gains are those that result from the invasion of property right. According to the conjunction of right and duty, fiduciary’s violation of a corporation’s property right over the corporate opportunity consists in the breach of loyalty duty owed to the corporation, from which a wrong derives. Owing that a corporation has an exclusive right over the corporate opportunity, it has the power to require fiduciaries who seek such an opportunity to secure its consent first. Failure of fiduciaries constitutes conduct contrary to its right, and taking under those conditions constitutes a wrong to her. If the fiduciary misuses such a particular “property”, he will breach a non-conflict duty. Moreover, the duty breached by the fiduciary must be with respect to the embodiment of the right whose infringement is the ground of the corporation’s cause of action. Accordingly, the fiduciary has committed a conduct that violates a duty incumbent on the fiduciary correlative to the corporation’s right, what he has done can be regarded as wrongdoing.

The universal rule of directors and officers of a corporation is that they occupy a fiduciary position and, as such, owe a duty of loyalty to the corporation. This duty is to act only in the best interests of the corporation. “No man shall profit from his own wrong.” 58 “…a person in a fiduciary capacity must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his interest and duty conflict.” 59 Where a fiduciary makes profits by usurping the corporate opportunity from the breach of duty, a wrong will arise from the acquisition of profits and the account of profits can be awarded even if the fiduciary has behaved honestly. It is corrective justice which, in the context of fiduciaries, paves the way to such a restitutionary claim. As Edelman observes, “the institution of trust and confidence is regarded as such an important one that the rule is strict to prevent the possibility of departure from it.” 60 The imposition of non-profit duty (loyalty duty) reduces the opportunities for the fiduciary to obtain personal profit.

If the fiduciary enriches himself instead of pursuing the beneficiary’s interest, the corporation will compel the fiduciary to give up the benefit, which lies at the heart of corporate opportunity doctrine. The doctrine as a prophylactic approach operates to prevent the fiduciary acting in his own interest because he knows that he will have to transfer his profit to the beneficiary and that the agent knows that the consequences of his wrongful behavior will be undone as far as possible, which highlights a characteristic common to all wrongs.

2.2.1 Reparation of the Wrongs Required by Corrective Justice

In Aristotle’s sense, wrongful conduct is unlawful and subject to legal sanctions, which

59 Boardman v Phipps (1967) 2 AC 46 at 123.
society wants to prevent because it causes injustice. If no machinery is provided for actually imposing sanctions, something is amiss. The need for correction is built into the definition of the wrong. The failure to redress injustice that ought to be redressed is considered a failure to do justice. Thereupon it, corrective justice imposes the duty to repair the wrongs one does.

The main aim of corrective justice is in the rectification of injustice. In the realm of corrective justice, restitution for wrong is the legal response to the restoration of the equality by repairing the losses and disgorging the wrongful gains, which requires annulling gains and losses owing to the invasion of an individual’s rights. In light of corporate opportunity doctrine, if a fiduciary usurps a business opportunity that rightfully belongs to the corporation, he has violated his fiduciary duty to the corporation, from which a wrong arises. As a consequence of such a wrong, rectification requires that the fiduciary is compelled to give up a gain accrued to him through such a wrong. The corporation should claim a benefit accrued to the fiduciary which is independent of any loss, however, measured, sustained by the corporation, for any benefits from a wrong ought to be disgorged.

When the agent has benefited from the perpetration of a wrong, he will repair the losses or disgorge the wrongful gains. Accordingly, if a fiduciary does take a corporate opportunity, and has no good defense, the corporation may recover the appropriated asset or business project from the usurper or the profits that he made on it. The usurping fiduciary gets no offset because of the fact that the later value of the project (or the size of the profits made) increased as much as it did because of his personal efforts. Thus, where a fiduciary makes a gain in breach of the duty by usurping the corporate opportunity, the corporation’s right to sue for that breach of duty and recover that gain is not dependent on proof of losses, because a wrong need not in principle cause anybody losses. A wrong is not analytically dependent on loss: it might cause some, it might cause none, in fact it might conceivably benefit the person whose right has been violated. A fiduciary who successfully pursues a profit which might have tempted him to sacrifice the interests of the corporation commits the wrong of breach of fiduciary duty even though he believed he was acting in the best interests of the corporation and thought that he had made a full disclosure.

For good and sufficient reasons the corrective justice protects the corporation’s interest in disinterested management. Within the corrective justice, the infringement of that protected interest suffices to create the standing to sue. Thus, when the fiduciary breaches a duty correlative to the corporation’s right, the corporation is entitled to reparation, granted by the corrective justice.

In a word, whether the reparation of loss or gain can realize the fairness and equality disturbed by a wrong from usurping the corporate opportunity.

3. The Rectification of a Wrong in Corporate Opportunities: Constructive Trust’s Corrective Function

The normative foundations of corrective justice is that wrongdoing merits rectification. Hence a wrong committed in corporate opportunities merits rectification.

Corrective justice specifies grounds of rectification and links the measure of the response to a wrong with the loss suffered by the victim and with the gain acquired by the wrongdoer.

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From the correlation of rights and responsibilities, those who have the duty in corrective justice to make repair must be made liable to do so. There are two components in the concept of corrective justice: wrongfulness and responsibility. Only the wrongdoer has a duty to return or repair in corrective justice. If one person has wronged another, then corrective justice imposes a duty on the wrongdoer to rectify his wrong. The fact that one person wrongs another affects the system of rights and responsibilities between them. Justice merely creates a scheme of rights and responsibilities between individuals. The justice grounds the specific agent’s conduct. Wrongful losses as such are normatively unimportant. Their existence does not trigger the application of the principle of rectification, but the fact that someone wrongs another creates the relevant duty in corrective justice. Losses have nothing to do with it. Except for annulment of losses, there are other institutional forms available for satisfying the justice or through which the wrongdoers are liable for his wrongdoing under corrective justice, which are compatible with justice. Corrective justice is simply part of the meaning of rights. The duty to repair and the right to repair for the invasion of rights derive from the principle of corrective justice.

3.1 Constructive Trust’s Function: Reparation

A constructive trust arises by operation of law, which can be imposed as a result of the conduct of the fiduciary. A constructive trust “is a trust imposed by law whenever justice and good conscience require it....It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.” Because reparation “sets things straight” or “gives satisfaction” and involve restitution, which is the restoring of the status quo ante culpum and the “act of making amends for the wrong.” Thus its function is reparation of a wrong by a culpable party, ultimately to restore the equilibrium disturbed by wrongdoing.

General notions of fairness and justice is relevant to the traditional notion of unconscionable conduct which persists as an operative component of some fundamental rules or principles of modern equity. Equity attaches legal consequences to the circumstances by imposition of a constructive trust. So the function of the constructive trust is to reflect and enforce the principles of the law of Equity. “Equity will raise a constructive trust and compel restoration, where one through actual fraud, abuse of confidence reposed and accepted, or through other questionable means, gains something for himself which, in equity and good conscience, he should not be permitted to hold.”

Constructive trust is used as a general reparation means to do justice. Injustice done by fraudulent or unconscionable conduct or inequitable conduct will lead to the imposition of a constructive trust. To prevent results which would have been inequitable, unfair or unequal, such as being contrary to good conscience, obtaining unjust benefit, a constructive trust will be imposed to bring the result into line with the requirements of justice. “In accordance with the principles under which a constructive trust may be imposed as the appropriate form of equitable relief in circumstances where a person could not in good conscience retain for himself a benefit or the

74 Restatement of Restitution (1st) §160(1937).
proceeds of a benefit, which he has appropriated to himself in breach of his contractual or other legal or equitable obligations to another."76 Thereupon it, the legal responses to the wrongful gains in breach of loyalty duty or against the good conscience is to repair the wrongdoing by imposition of constructive trusts. In other words, a constructive trust is imposed where the conduct of the person in question amounts to a legal wrong and the imposition of the constructive trust is the recognized method of redressing the particular wrong done. It is a remedial device which is used as a means to compel a wrongdoer to restore property to her or his victim when the property is unfairly or unjustly withheld from the party seeking relief and which is withheld to the benefit of the withheld.

A constructive trusts can be imposed for reparation of a wrong in breach of fiduciary duty. Besides it, a constructive trust is imposed whenever property is acquired in such circumstances that holder of the legal title may not in good conscience retain the beneficial interest.77 In America and Canada, constructive trust is imposed in order to prevent unjust enrichment. In Australia, constructive trust is imposed in breach of the contractual or other legal or equitable obligations to others.78

3.2 Grounds for Imposition of Constructive Trust

What can be used in determining when a constructive trust should be imposed? Justice. Because justice is getting what one deserves.79 How to achieve justice? Reparation. Reparation is the main and sufficient manner by which to rectify inequality between the wrongdoer and the party wronged. Restitution properly belongs in a series words denoting responses.80 Restitution is the response which consists in causing one person to give back something to another.81 The aim of restitution is to restore to the persons what is rightfully theirs. The thing or person to receive restitution has merely suffered a loss or damage requiring to be made good. Restoration is much the same and the two are often interchangeable. There can be restoration of a thing or person to an earlier condition and restitution of a thing to a person. Accordingly whether restitution or restoration as a kind of reparation ought to be pursued for the sake of corrective justice.82

A fiduciary’s breach of loyalty duty constitutes a wrong. Once the fiduciary has actually made the acquisition in question, for such injustice deserves rectification, the only way is restitution. Here, restitution is the desire to guard against a wrong.83 However, a constructive trust is the duty to make restitution,84 so it can be deemed to have arisen when the duty to make restitution arose.85 Restitution for a wrong is involved in the rules on constructive trusts, which amounts to reparation. Because the occurrence of a breach of loyalty duty thereupon causes the enriched party to become a constructive trustee, a constructive trust can be imposed where a fiduciary has obtained a benefit as a result of a breach of the duty of loyalty which he owes to his principal, which is concerned with the consequences of alleged misconduct by fiduciary. In Hussey v. Palmer (1972) 1 W.L.R.1286, a constructive trust is invoked as an equitable remedy to

76 Hospital Products International v. United States Surgical Corporation (1984) 156 C.L.R. 41 at 125
78 Hospital Products International v. United States Surgical Corporation (1984) 156 C.L.R. 41 at 125
do justice inter partes. The use of the constructive trust to do justice inter partes must, in some cases, involve the imposition of constructive trusts upon parties in any way guilty of a legal wrong. A constructive trust is “an equitable remedy that a court imposes against one who has obtained property by wrongdoing.” 86 It is a remedy for a wrongful act. 87

Edmund Davies L.J. in Carl-Zeiss Stiftung v. Herbert Smith (N0.2) enunciated that the golden thread for the imposition of a constructive trust is “a want of probity” in the fiduciary. A fiduciary is liable to account to his principal as a constructive trustee for any authorized remuneration and for any other payments which he may have received as a result of his fiduciary position. Any fiduciary who, without the fully informed consent of his principal, takes up on his own account an opportunity which he has obtained as a result of his fiduciary position will be liable to account as a constructive trustee for any benefits which he may receive. 88 In the instances, the constructive trust is used as a means for making fiduciaries liable to account for property in defined circumstances as if they were trustees for gains improperly made by virtue of their position or relation when their duty and interest conflicted. 89

Equity seeks to avoid the sacrifice of the beneficiary’s interests if the fiduciary pursues an opportunity for his personal profit. Where fiduciaries have obtained a profit by acting fraudulently, unconscionably or inequitably in breach of a duty of loyalty, a constructive trust should be imposed to frustrate fraudulent or unconscionable or inequitable conduct because justice and good conscience are said to require it. Cardozo J.in Beauty v. Guggenheim Exploration Co. 225 N.Y. 380, at p.395 (1919) stated that a “constructive trust is the formula through which the conscience of equity finds expression”. In some cases, the constructive trust will be consequent upon an actual breach of fiduciary duty. In Bray v. Ford (1896) A.C. 44 AT 51-52, Lord Herschell laid down two overlapping principles: a fiduciary cannot be permitted to profit from his fiduciary position and a fiduciary must not allow his personal interest to prevail over his duty of loyalty to his principal. The two principles “while overlapping, are distinct.” 90 Justice Finn stated, “a fiduciary (a) cannot misuse his position, or knowledge or opportunity resulting from it, to his own or to a third party’s possible advantage; or (b) cannot, in any matter falling within the scope of his service, have a personal interest or an inconsistent engagement with a third party unless this is freely and informedly consented to by the beneficiary or is authorized by law.” 91 Dr. R. P. Austin has stated, “once the fiduciary duties are confined to these two, we can be more comfortable with the idea that the appropriate remedies for breach of fiduciary duty are an account of profits or the imposition of a constructive trust or equitable compensation.” 92 In a word, the principle of equity is that a person who is under a fiduciary obligation must be liable to the person to whom the obligation is owed for any benefit or gain which has been obtained or received in circumstances where a conflict or significant possibility of conflict existed between his fiduciary duty and his personal interest in the pursuit or possible receipt of such a benefit or gain or which was obtained or received by use or by reason of his fiduciary position or of opportunity or knowledge resulting from it. Any such benefit or gain is held by the fiduciary as constructive trustee. 93

87 Restatement of Restitution (1st) §160(1935).
93 See Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd (1958) 100 CLR 342, P.350.
Corrective justice achieves the fairness and equality by repairing the wrong: repairing the losses and disgorging the gain. One of the uses of the constructive trust is to effect disgorgement. Here, the purpose of the constructive trust is to remove the profit obtained wrongfully by the wrongdoer. When a fiduciary misapplies property entrusted to him, the beneficiary becomes entitled to the product. In the case of breach of fiduciary duty, the wrongdoer can be compelled to give up the benefits which result from the perpetration of the wrong. The remedy, which is derived from the law of trusts, is a strict one. The Regal case was confirmed as sound law by Boardman v Phipps. This case involved the status of a constructive trustee who took advantage from some information which he had obtained by virtue of his position. In this case, it was established that confidential information which the defendant obtained by acting for the trust was to be considered the “property” of the trust itself and the defendant, who was solicitor to the trustees, was to be treated as fiduciary in relation to some trust matters.

Where a fiduciary makes a profit by using the property of the corporation in the context of corporation, the remedy may be proprietary, through the imposition of a constructive trust over the profit made. In Cook v Deeks (1916)1 AC 554 and Boardman v Phipps (1967) 2 AC 46, the wrongdoer, fiduciary, was held to be a constructive trustee of his ill-gotten gains for the benefit of his beneficiary. In the former case, by usurping corporate opportunity in breach of duty and in the latter, by using confidential information in breach of duty.

At any rate, the misappropriation of such “property” is held to be a wrong leading to a duty to make good the loss or to give up the benefit obtained as a result of the restitution sought and granted. The constructive trust imposed responses to the wrong.

3.3 Liability to repair the wrong by usurping the corporate opportunities

Liability serves to rectify wrongs done to rights. A constructive trust as a term is consistently used to refer to liability; the remedial consequence that flows therefrom is thereby assumed to be recognized and identified. Thus a constructive trust can be a liability and a restitutionary device for the wrong committed by fiduciary from usurping the corporate opportunities.

The imposition of a constructive trust potentially produces liabilities both of a proprietary and of a personal nature for the constructive trustee. Either form of liability may be the consequent of the existence of a fiduciary duty and breach thereof. The imposition of a constructive trust necessarily confers on the beneficiary proprietary rights in the subject matter of the constructive trust. Further the constructive trustee is necessarily subject to the liability which is imposed on every trustee to account personally to his beneficiary for his conducts as a trustee. The beneficiary of the constructive trust will clearly have the rights appropriate to the interest in the trust property to which he has been held to be entitled, in the event that the beneficiary is held to have an absolute interest in the property which forms the subject matter of the constructive trust, he will obviously be entitled to call for the transfer of the trust property to him together with any income or other fruits which the property has produced since the moment at which the constructive trust took effect. If the beneficiary chooses to rely on the personal liability of the constructive trustee to account, he will in effect be claiming equitable compensation for breach of trust from the constructive trustee, he would have recovered the value of whatever interest he had been held to

98 See Re Macadam (1946) Ch. 73.
have in the subject matter of the constructive trust, valued as at the moment at which the constructive trust took effect, together with interest thereon. Where the property upon which the constructive trust is imposed is still identifiable in the hands of the constructive trustee, the beneficiary will be able to choose either to exercise his proprietary rights in the subject matter of the constructive trust, or to rely on the personal liability of the constructive trustee to account, or, in rare circumstances, to exercise both of these remedies. Where the property upon which the constructive trust is imposed is no longer identified in the hands of the constructive trustee, it may nevertheless still be identifiable in the hands of a third party. In such circumstances, it may be possible for the beneficiary to recover that property by tracing it into the hands of the third party. It may not be possible for the beneficiary to recover the property on which the constructive trust has been imposed from the third party, either because it has been dissipated as a result of casual expenditure and so has simply disappeared or because the third party is able to resist the proprietary claim by providing some defenses. In this situation, the beneficiary will no longer have any proprietary rights in the subject matter of the constructive trust. Consequently the only remedy available to him will be to rely on the personal liability of the constructive trustee to account.

The duty of loyalty is that the fiduciary cannot profit from the fiduciary relationship, gains can be regarded as the material embodiment of the breach of fiduciary duty. In this light, the fiduciary's liability to disgorge profits is not a policy of deterrence impacting the relationship from the outside, but is rather the remedial consequence that reflects the nature of the obligation owed by the fiduciary to the beneficiary. The sanction for breach of the duty is restitutionary. The facts which constitute the breach of a fiduciary duty by usurping the corporate opportunities will almost always, though not of absolute necessity generate a new and different obligation, namely a remedial obligation to repair a wrong. A constructive trust is "a device for imposing a liability to account," from which arises a fiduciary's liability to account for a profit, benefit or gain made in breach of loyalty duty. At this instance, if a fiduciary wrongly gains profits by the perpetration of a wrong, he becomes a constructive trustee whose breach may be redressed with an award of restitution against him. The fiduciary as a constructive trustee has such a liability to award the recovery of the profits of wrongdoing that a wrong ought to be repaired through disgorgement under the heading of restitution for wrongs. Once liability is established, next is appropriate remedy. The disgorging of profits by a fiduciary may be the appropriate remedy for the breach of the duty of loyalty owed to the corporation. In the context of corporate opportunity, existence of the fiduciary duty means that the loyalty demanded by that duty is included within the corporation’s entitlements, for the fiduciary has wrongly replaced duty with interest, the resulting profits can be thought of as the factual embodiment of the corporation’s right to the fiduciary’s loyalty. The corporation is entitled to recover the gain even without having suffered a corresponding factual loss. Similarly, the fiduciary can be required to surrender unauthorized profits even if those profits could not practically or legally be acquired for the principal. Disgorgement is measured by the actual profit accruing to the fiduciary from the wrong, which is directly related to the pure benefit obtained by the wrongdoer. The generation of value come from the assets of the corporation should be disgorge even though the corporation may not have suffered any financial loss. Thereby, constructive trust can be used for restitution of enrichment which results from a wrong done to the corporation by the fiduciary, which arises from a breach of

fiduciary or other obligation on the part of the fiduciary and an equity between the parties in appropriate circumstances.\textsuperscript{101} Thereon it is clear that the constructive trust has been used as a tool of disgorgement within restitution for wrongs. Within restitution for wrongs, constructive trusts are imposed as a prophylactic measure that wrongdoers will be forced to disgorge their ill-gotten gains.\textsuperscript{102} In Gluckstein v Barnes (1900) AC 240, liability imposed on the wrongdoer is based upon restitution of the wrongdoing. In Industrial Developments Consultants Ltd v Cooley (1972) 1 WLR 443, Roskill J held that it was irrelevant whether or not the company would have obtained the benefit but for the breach of fiduciary duty according to the corporate opportunity Doctrine.

Usurping a corporate opportunity is involved with the breach of the duty of loyalty, the core of fiduciary duty. The characteristic remedial response is that a fiduciary must disgorge the benefits derived from his breach of duty, which is his primary liability. Nonetheless, where the property as the subject matter of a constructive trust is dissipated or disappeared, the beneficiary can resort to the remedy from a constructive trustee’s personal liability, which is secondary liability. The duty to avoid conflicts of interest is directed against both harm to the beneficiary and, equally, gains of the fiduciary. That a constructive trust serves the prophylactic approach is the response to or the restitution for breaches of the fiduciary duty. In the context of usurping corporate opportunity in breach of loyalty duty, a constructive trust is employed to do restitution for a wrong, it produces justice and fairness.\textsuperscript{103} Corrective justice impose the duty to repair the wrong done by usurping the corporate opportunity, a constructive trust imposed shall achieve the aims of corrective justice in this context.

\textsuperscript{101} Macmillan Inc. v Bishopgate Investment Trust plc (No.3)(1995) 1 WLR 978 at 988-989.
\textsuperscript{102} Attorney-General for Hong Kong v Reid (1994) 1 AC3 24.