What Exactly is a Remedial Constructive Trust?

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Ten years ago the late Harold Ford invited me to revise the chapter on constructive trusts in Ford and Lee's 'Principles of the Law of Trusts'. He warned me that it is impossible to understand the law of constructive trusts in its entirety, and the experience of editing the chapter has confirmed my view that, to adapt Donald Rumsfeld's dictum, in this area of equity there are definitely some 'known unknowns', and perhaps even some 'unknown unknowns.' Harold spent a year at Harvard in the 1950s studying under Austin Scott, best known for his magnum opus 'Scott on Trusts'. Harold's chapter on constructive trusts in Ford and Lee is influenced by Scott's thinking, and includes a paragraph on remedial constructive trusts written before the topic became a matter for general debate among Australian equity lawyers. Harold and I occasionally spoke and emailed each other about remedial constructive trusteeship; he well understood the potential and limitations of remedialism. This paper is dedicated to the memory of an outstanding and kindly scholar who rekindled my interest in the law of constructive trusts.

1. Setting the Scene

Judicial and academic discussion of constructive trusts resembles a bazaar, not unlike the Grand Bazaar at Istanbul. It is very noisy; it is easy to lose your way in the labyrinthine pathways, and you cannot be sure that your purchase works properly until it has been tried out at home. Just as in the gloom of the

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covered market it can be hard to distinguish between vendors and purchasers, so in this area it can be hard to distinguish between judges and academics, if their identities are not known. Some judges approach constructive trust adjudication from the level of high theory while some academics ignore theory and are obsessed by practical considerations. The tourist leaves the constructive trust bazaar invigorated but confused. Two examples, tediously familiar to the equity lawyer or teacher, illustrate the bewildering and occasionally exotic field of choice available to would-be purchasers from two of the stalls.

Consider first D, who owes fiduciary obligations to P, and who accepts a bribe from X with which he buys land. The property appreciates in value. Acceptance of the bribe is a flagrant breach of D's fiduciary obligations. D is personally accountable to P for the amount of the bribe.[1] Is P entitled to a constructive trust over the land D has purchased with the bribe money?

The reported judgments and academic commentary offer a variety of answers to this question. On one side are those who say that P is entitled to an immediate constructive trust over the land.[2] On the other are those who insist that P's only liability is to account for the amount of the bribe.[3] Some writers advocate an intermediate position. We might decide to impose the constructive trust on property acquired by some fiduciaries, such as bribe taking public officers, but award only personal relief against others, such as

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[1] *Boston Deep Sea Fishing Co v Ansell* (1888) 39 ChD 339 (CA); *Mahesan v Malaysian Government Officers' Co-operative Housing Society* [1979] AC 374 (PC).

[2] *Att-Gen for Hong Kong v Reid* [1994] AC 324 (PC); *Thahir Kartika Ratna v PT Pertambangam Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3SLR (R) 312 (Singapore CA); *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6 (Full Federal Court); Sir Peter Millet, 'Bribes and Secret Commissions',[1993] *Restitution Law Review* 7; DJ Hayton, 'Proprietary Liability for Secret Profits' (2011) 127 *LQR* 487.

[3] *Lister & Co v Stubbs* [1890] Ch 1 (CA); *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347 (CA); *FHR European Ventures LLP v Mankarious* [2013] EWCA Civ 17 (CA); Sir Roy Goode *passim* but most recently, 'Proprietary Liability for Secret Profits' (2011) 127 *LQR* 493; Darryn Jensen,' Reining In the Constructive Trust' (2010) 32 *Sydney Law Review* 87, 93-94.

commercial agents.[4] Alternatively, we might award P an account of profits, assessed at the appreciated value of the land, but deny proprietary relief.[5] Finally, we might reject the application of the automatic constructive trust, crystallising at the moment of the fiduciary's receipt of the bribe, but instead allow P to elect for the imposition of a constructive trust taking effect from the exercise of the election.[6]

If we are prepared to accept that a constructive trust can be imposed over D's land, at least in some circumstances, let us consider a supplementary question. Will the availability of the constructive trust be affected by the fact that D is bankrupt at the time proprietary relief is under consideration? In *Grimaldi v Chameleon Mining NL (No2)* the Full Federal Court was of the opinion that in the case of actual bankruptcy the imposition of an equitable lien over D's land may be sufficient to achieve "practical justice" in the circumstances of the case.[7] Relegating P from constructive trust relief to the status of a secured creditor in D's bankruptcy was justified by reference to the recognition of the remedial constructive trust in Australian equity. Whether D's insolvency ought to preclude the award of a constructive trust, assuming that all other preconditions are satisfied, raises some important questions of legal policy and method which I this paper examines.

Now consider the second stall in the constructive trust bazaar. Suppose that P pays $1 million to D by mistake. D buys a beach property with the money. Is P entitled to the benefit of a constructive trust over the property?

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[4] Sarah Worthington, 'Fiduciary Duties & Proprietary Remedies: The Failure of Equitable Formulae', [2013] *Cambridge Law Journal* (forthcoming).

[5] Peter Birks, 'Property in the Profits of Wrongdoing' (1994) *University of West Australia Law Review* 8.

[6] Contracts between fiduciaries and principals which are voidable for breach of obligation can give rise to the imposition of a constructive trust taking effect from the date of election to avoid : *Daly v Sydney Stock Exchange Ltd* (1985) 160 CLR 371 (HCA). The availability of the election model outside the established categories of voidable contract is uncertain but see B Häcker, fn 11, below, for a structured model of election-based relief.

[7] [2012] FCAFC 6 at [583]. The case did not involve the taking of a bribe and the dictum is obiter.

Intending purchasers at this stall are spoilt for choice and there is a real risk of making an unwise purchase. One possible response is to hold that a D is a constructive trustee at the moment of receipt, the trust now attaching to the property purchased with the payment.[8] Another is to apply dicta of Lord Browne-Wilkinson[9], adopted and refined in an important New South Wales decision,[10] and hold that the constructive trust attaches to the payment or its product when the recipient becomes aware of circumstances indicating to a reasonable person that the payment was mistaken. Another compromise solution –plaintiff rather than defendant centred –is to impose the trust from the time when P elects to set aside the transfer.[11] And then there are solutions which are grounded in notions of commercial risk-taking. One of them would limit the award of the constructive trust to cases where, by analogy to the position of a secured creditor, the claimant has not taken the risk of the defendant's insolvency.[12] Application of this principle would result in the award of a constructive trust in most cases of mistaken payments. Exceptionally, proprietary relief will be denied, for example where the payer deliberately chooses to make an unsecured payment under a contract vitiated by mistake.[13]

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[8] *Chase Manhattan Bank v Israel British Bank* [1980] Ch 105. See also *Shields v Westpac Banking Corp* [2008] NSWCA 268 (fundamental mistake justifies imposition of automatic constructive trust).

[9] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669,705. See also Ben McFarlane, 'Trusts and Knowledge' in, Jamie Glister & Pauline Ridge eds, *Fault Lines in Equity* (Hart Publishing, Oxford,2012) 169.Contrast *Maqsood v Mahmood* [2012] EWCA Civ 251, Ward LJ at [37], noting that Lord Browne-Wilkinson's dictum was tentative and not part of the ratio of *Westdeutsche*.

[10] *Wambo Coal Co Pty Ltd v Ariff* [2007] NSWSC 589. The recent decision of the Singapore Court of Appeal in *Wee Chiaw Sek Anna v Ng Li – Ann Genevieve (sole executrix of the estate of Ng Hock Seng dec'd)*[2013] SCCA 36, [169]-[184] recognises a remedial constructive trust only on the basis of the defendant's knowledge of the facts entitling the plaintiff to the benefit of the trust.

[11] B Häcker, 'Proprietary Restitution after Impaired Consent Transfers: A Generalised Power Model' (2009) 68 *Cambridge Law Journal* 324; Elise Bant & Michael Bryan, 'Constructive Trusts and Equitable Proprietary Relief: Rethinking the Essentials' 5(2011) *Journal of Equity* 171,181-185.

[12] Andrew Burrows, *The Law of Restitution* (3rd ed, 2011, OUP) 176-180. Similar versions of risk theory have been canvassed in the North American literature: D Pacciocco, 'The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors' (1989) 68 *Canadian Bar Review* 315, 339; E Sherwin, 'Constructive Trusts in Bankruptcy' [1989] *Illinois Law Review* 297.

[13] Andrew Burrows, *The Law of Restitution*, fn 12, 178.

Finally, there are those who would confine the mistaken payer to a personal claim in unjust enrichment.[14] Moreover, some judges and commentators reject the thesis that a constructive trust awarded to P in this scenario is a response to unjust enrichment.[15]

So there are a number of potential responses to the mistaken payment conundrum. Each has been justified either in terms of authority, policy, or the logic of equitable title- sometimes all three. Each has its particular merits and defects; none has been authoritatively accepted as the 'right answer'. But here also I pose a supplementary question. Assuming that in at least some situations equity imposes a constructive trust over a mistaken payment or its traceable product, will the imposition be affected by D's bankruptcy at the time of application? Bankruptcy supplies the backdrop to most cases in this category[16], but there is no suggestion in any of them that, for example, an equitable lien ought to be awarded as an alternative to the constructive trust.

The trust imposed over a mistaken payment, or its proceeds, is said to be an example of an institutional constructive trust.[17] Why, in a system of equity that recognises both institutional and remedial constructive trusts, the mistaken payment should be regarded as institutional and non-discretionary, whereas the trust imposed over the proceeds of a breach of fiduciary duty is remedial and discretionary, has not been explained. Third parties, including

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[14] William Swadling, 'Policy Arguments for Proprietary Restitution' in, S Degeling & J Edelman eds, *Unjust Enrichment in Commercial Law* (Thomson Reuters, Sydney,2008) criticises the arguments adduced for proprietary relief in unjust enrichment cases but does not argue that relief should be confined to personal restitution.

[15] Graham Virgo, *The Principles of the Law of Restitution* (2nd ed, 2006, OUP) 11-18,569-576. The property analysis, as opposed to the unjust enrichment analysis, of tracing the proceeds of a breach of fiduciary duty was approved in *Foskett v McKeown* [2001] 1 AC 102 (HL).

[16] An exception is *Shields v Wespac Banking Corp*, fn 8, where the constructive trust was imposed as a precondition to a proprietary claim to property in the hands of third parties.

[17] *Wambo Coal Co Pty Ltd v Ariff* [2007] NSWSC 589 at[40].

creditors, have as much interest in the award of one type of proprietary constructive trust as the other.

Some writers have objected to the notion that the availability of a remedy can be determined by reference to the solvency of the defendant or to the impact of the remedy on third parties to the litigation.[18] To permit the selection of remedy to be influenced by the presence or absence of third parties interested in the selection- in other words consequentialism – focuses on ends at the expense of means. When an interest under a trust is claimed, so the argument runs, then either the plaintiff is entitled to that interest, applying the established rules for recognising a trust, or he does not. It is impermissible to find that the defendant has a property right for the purposes of deciding an 'inter partes' dispute but only a personal right where third party interests are at stake. In the words of a critic of consequentialist reasoning, "the virtue of [legal] concepts lies in their relative invariance to context and thus in their applicability to a broad range of situations."[19]

The aim of this paper is to examine whether courts apply consequentialist reasoning when deciding whether to impose a constructive trust[20] and, if they do, whether we ought to mind about it. The dictum of the Full Federal Court in *Grimaldi* assumes that an analysis of the consequences of the award of equitable relief is desirable, perhaps even unavoidable. The critics argue that consequentialism subordinates the consistent application of equitable

[18] William Swadling, 'Policy Arguments for Proprietary Restitution', fn 14 above. Ben McFarlane, 'Rights and Value: Means and Ends' in, C Mitchell & W Swadling eds, *The Restatement Third: Restitution and Unjust Enrichment* (Hart Publishing, Oxford, 2013) ch1.

[19] Ben McFarlane, 'Rights and Value: Means and Ends', fn 18, 30.

[20] The inquiry is limited to a consideration of constructive trusts which, in at least some of their applications, confer proprietary protection on the beneficiary. Constructive trusteeship awarded as a formula for personal relief, for example for knowingly assisting the commission of a breach of fiduciary duty: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22;(2007) 230 CLR 89;*Westpac Banking Corp v Bell Group Ltd (in liq)* [2012] WASCA 157, on appeal to HCA : [2013] HCA Trans 49. Cf Pauline Ridge 'Constructive Trusts, Accessorial Liability & Judicial Discretion' in, E Bant & M Bryan eds, *The Principles of Proprietary Remedies* (Thomson Reuters, Sydney, 2013), suggesting that 'knowing assistance' liability may in rare cases may attract proprietary relief.

concepts to the view taken of the contexts in which they arise. The disagreement is fundamental to how courts exercise discretion when ordering proprietary relief. To anticipate my conclusion, some claims to constructive trusteeship cannot be satisfactorily determined without account being taken of the interests of third parties. This is true of constructive trusts imposed in order to enforce expectations, such as estoppel and *Muschinski* constructive trusts. These are genuinely remedial. But other claims should not be decided by reference to the existence of third party interests. Specifically, constructive trusts imposed in order to enforce a claimant's title, or to restore title to the claimant, should not be subjected to remedial treatment. Constructive trusts imposed on fiduciaries to compel disgorgement of unauthorised gains occupy a contested middle ground between the other categories.

Two recent developments have given resonance to the debate about consequentialism. One is the Australian recognition of the remedial constructive trust; the other is the promulgation by the American Law Institute of *The Third Restatement: Restitution and Unjust Enrichment*.[21] A brief word needs to be said about each of them before returning to my theme of consequentialist reasoning in constructive trust jurisprudence.

2. The Remedial Constructive Trust: Origins and Australian Reception

On a long view of equity history constructive trusts have always been remedial, for much the same reason that express and resulting trusts are remedial. All trusts exemplify the power of courts of equity to invoke its powers so as to affect the conscience of a title holder of property where it would be inequitable for the titleholder to deal with the property as his

[21] American Law Institute, 2011. Reporter: Andrew Kull.

own.[22] Lord Nottingham LC's assertion in *Coke v Fountain*[23]that equity "never presumes a trust, but in case of absolute necessity" lest "a way is opened to the Lord Chancellor to construe or presume any man in England out of his estate" identifies what modern lawyers might characterise as the danger of judicial overreach: that trust relief can be unpredictable in its consequences and is capable of destabilising title to property unless the award of relief is carefully controlled. As a matter of equity history, control has been exercised by a combination of regulated discretion (exemplified by the bars to relief, such as laches and hardship) and by limiting the award of a constructive trust to discrete categories of equitable intervention, such as breaches of trust and other fiduciary obligations.

The credit or blame for importing the term 'remedial constructive trust' into the equity lawyers' lexicon belongs to the American legal philosopher and polymath, Roscoe Pound.[24] In a Harvard Law Review article published in 1920 Pound rounded off an analysis of some contemporary American constructive trust decisions with the observation that the constructive trust was, functionally speaking, a remedy.[25]While conceding that some decisions treated the trust as 'something substantive'[26] Pound left the reader in no doubt that such thinking was in his view erroneous. He drew attention to a possible distinction between substantive and remedial constructive trusts only for the purpose of rejecting it. Although its award depended on the

[22] Title is not necessarily legal. See *Halloran v Minister Administering National Parks & Wildlife Act 1974* [2006] HCA3, (2006) 229 CLR 545 at [72]-[73] on the application of constructive trusts to equitable title.

[23] (1676) 3 Swanst 600-601, 36 ER 987. See Mike McNair, 'Coke v Fountain' in, Charles & Paul Mitchell eds, *Landmark Cases in Equity*, (Hart Publishing, Oxford 2012) 32. McNair notes at 58-59 that Lord Nottingham did not consistently apply the classification of trusts expounded in *Coke v Fountain* although his insistence that trusts should be parsimoniously implied represented his settled opinion, as well as that of the legal profession of his day.

[24] Roscoe Pound (1870-1964) was a botanist before establishing a reputation as a pioneer of sociological jurisprudence.The fungus Roscoepoundia is named after him. See David Wigdor, *Roscoe Pound: Philosopher of Law* (Greenwood Press, Connecticut, 1974) chs 7 & 8; Neil Duxbury, *Patterns of American Jurisprudence* (OUP 1995) 54-63.

[25] R Pound, 'The Progress of the Law 1918-1919' (1920) 33 *Harvard Law Review* 420, 420-421.

[26] Ibid at 422.

application of recognised equitable means, the trust itself was simply the 'end' to which the 'means' were directed. This meant, as the reporters of the *First Restatement of Restitution* [27] duly recognised, that the trustee did not have to perform the duties to which the trustee of an express trust was ordinarily subject, but was compelled only to convey the subject-matter of the trust to the beneficiary.

Australian equity did not engage with the concept of the remedial constructive trust for another fifty years. In *Muschinski v Dodds* [28] Deane J drew attention to the ongoing debate as to whether constructive trusts should be classified as "institutional" or "remedial", and opined that the trust was a "remedial institution".[29] The award of the constructive trust in *Muschinski v Dodds* was remedial in one sense of that word, namely it resembled other remedies in taking effect from the date on which the High Court delivered judgment. This was done '[l]est the legitimate claims of third parties be adversely affected'.[30]

The 'date of judgment' constructive trust imposed in *Muschinski v Dodds* has since played only a minor role in constructive trust adjudication. The jurisdiction to make such an order undoubtedly exists. But very few Australian decisions since *Muschinski v Dodds* have imposed a 'date of judgment' constructive trust, and some of those decisions have later been disapproved.[31] Moreover, some judgments confuse the imposition of a 'date of judgment' constructive trust with postponing enforcement of the equitable interest under the trust to a later-created interest. The latter is

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[27] § 160 *Restatement (First) of Restitution*, American Law Institute, 1937, reporters: Austin Scott & Warren Seavey.
[28] (1985) 160 CLR 583 (HCA).
[29] Ibid at 613-614.
[30] Ibid at 623.
[31] *Re Osborn* [1989] FCA 494; (1989) 25 FCR 547 (Fed Ct), disapproved in *Parsons v McBain* [2001] FCA 376; (2001) 109 FCR 120 at [8]-[13]. An unusual case of post-dating is *O'Brien v Sheahan* [2002] FCA 1292 where the official receiver made representations to the bankrupt inducing the latter to make improvements to his own property. The constructive trust awarded in favour of the bankrupt was postdated to the date of discharge from bankruptcy.

simply an application of the principles governing priority of interests which have been settled for centuries and has nothing to do with awarding a remedial constructive trust.[32]

Dicta in High Court judgments handed down since *Muschinski v Dodds* have emphasised a second meaning of 'remedial'. In *Bathurst City Council v PWC Properties Pty Ltd* [33] the Court stipulated that constructive trust relief must not be ordered where "there are other means available to quell the controversy".[34] In *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* [35] the High Court recognised the concept of the remedial constructive trust although the principal issue in the case was whether a joint venture agreement created fiduciary obligations. Passages in the judgment were directed to two aspects to remedialism. One was whether, assuming that breach of the agreement had been proved, an account of profits or equitable compensation were more proportionate responses to the breach than a constructive trust.[36]

The other remedial aspect was directed to identifying third parties who might be prejudiced by the imposition of the constructive trust. A third party claiming to be an equitable mortgagee of the presumptive trust property identified itself at a relatively late stage in the litigation. The High Court held that any person who would be affected by the making of a proprietary order is a 'necessary party' who must be joined to the litigation.[37] Further, if for any reason the third party has not been joined, that party has standing to have

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[32] *Shropshire Union Railways & Canal Co v The Queen* (1875) LR 7 HL 486, 506, Lord Cairns LC. See also the discussion of *Secretary, Department of Social Security v Agnew* [2000] FCA 59 in *Parsons v McBain* [2001] FCA 376 at [14]-[16].
[33] [1998] HCA 59; (1998) 195 CLR 566 (HCA). See also *Giumelli v Giumelli* (1999) 196 CLR 101, emphasising the remedial alternatives available in estoppel.
[34] Ibid at [42]
[35] [2010] HCA 19; (2010) 241 CLR CLR 1.
[36] Ibid [37]
[37] Ibid [131].

the constructive trust set aside.[38] This part of the judgment is unabashedly consequentialist: the High Court has established a process for enabling parties affected by the imposition of a trust to argue against the imposition.

3. The Third Restatement

Paragraph 55(1) of the third *Restatement on Restitution and Unjust Enrichment* provides: "if a recipient is unjustly enriched by the acquisition of legal title to identifiable property at the expense of the claimant or in violation of the claimant's rights, the recipient may be declared a constructive trustee, for the benefit of the claimant, of the property in question and its traceable product."

The paragraph applies to cases of unjust enrichment and of "violation of the claimant's rights". 'Violation of rights' is the phrasing used to describe restitution for wrongs – the bribe-taking fiduciary, for example. An award of a constructive trust under the *Restatement* is discretionary, and later paragraphs specify circumstances in which full trust relief is not permitted. The trustee is subject to only one obligation under §55(2), namely "to surrender the constructive-trust property to the claimant, on such conditions as the court may direct."

Most of the analysis of the constructive trust provisions of the *Restatement* has focused on the limitations to trust relief. One restriction relates to the defendant's knowledge of the ground on which the plaintiff claims a constructive trust. A claimant is not entitled to a constructive trust over consequential gains made by an innocent defendant that would not have been recoverable in a personal claim for unjust enrichment.[39] So, in the second example, if D was unaware of P's mistake in paying him $1 million

[38] Ibid [137].
[39] *Restatement Third* §50 (4.)

prior to P claiming relief, P is confined to an equitable lien over the beach house to secure repayment of $1 million, together with interest. Another restriction effects a compromise between the claimant and the defendant's creditors. The former will not be permitted to obtain a profitable recovery in restitution at the expense of adequate provision for creditors and dependants of the recipient.[40]

The *Third Restatement* has become the lightning conductor for a debate about judicial method, as it applies to private law litigation, in England and the United States. The constructive trust provisions feature prominently in the debate. Critics argue that there can be no justification, absent legislation, for remitting the holder of a right under a constructive trust to the secured status enjoyed by the holder of an equitable lien. Property rights are –or should be – applied consistently across private law. The incidents enjoyed by a beneficiary under a trust, including the right to profits generated from property and to its appreciated value, should not be cut down by the exercise of curial discretion. The constructive trust, on this view, is not simply a remedy. The rights enjoyed by the beneficiary, and the duties to which the trustee is subject, assist in explaining the criteria for its award. The vice of a constructive trust dependent on the presence or absence of creditor and family interests for a determination of its scope is ascribed to "the American legal culture", specifically "[t]he pervasive and enduring influence of legal realism."[41] This analysis rejects the *Third Restatement's* conception of the constructive trust as being exclusively a remedy.[42]

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[40] *Third Restatement*,§61.

[41] Ben McFarlane,' Rights and Value: Means and Ends', fn 18 at 29.

[42] Not all writers who characterise the constructive trust as remedial are American realists. See W Swadling, 'The Fiction of the Constructive Trust' (2011) *Current Legal Problems* 399.

4. When, if at all, is Consequentialism Permissible in Awarding Constructive Trust Relief?

Dicta in the High Court decisions of *Bathurst City Council v PWC Properties Pty Ltd* and *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd*, discussed above, are commonly cited in support of the proposition that Australian law recognises the remedial constructive trust.[43] The treatment of constructive trusteeship by the *Third Restatement* provides intellectual support for that recognition. But what manner of beast is the remedial constructive trust in Australia? Leaving aside the availability of the 'date of judgment' constructive trust (which is a rare and sometimes misidentified bird in Australian constructive trust jurisprudence), its principal features can be summarised as follows:

(a) The constructive trust will not be awarded as a proprietary remedy if another remedy can more appropriately do justice to the merits of the case;

(b) In assessing the appropriateness of a constructive trust, the potential impact of the remedy on identified third parties is a relevant consideration.[44]

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[43] *Robins v Incentive Dynamics Pty Ltd (in liq)* [2003] NSWCA 71 at [57]; *Wambo Coal Co Pty Ltd v Ariff* , fn 10, at [40]; *Grimaldi v Chameleon Mining NL (No 2)*, fn 7, at [281] & [505]-[512]. See also Keith Mason, 'Deconstructing Constructive Trusts in Australia' (2010) 4 *Journal of Equity* 98; Keith Mason, 'The Distinctiveness of Law and Equity and the Taxonomy of the Constructive Trust' in, C Mitchell & W Swadling eds, *The Restatement Third: Restitution and Unjust Enrichment* (Hart Publishing, Oxford, 2013), ch 8

[44] The dicta in *John Alexander* giving standing to third parties as 'necessary parties' to the litigation are designed to identify relevant third parties. See text at fns 37-38 above.

These propositions are viewed as no more than common sense by many lawyers. After all, courts are constantly assessing the appropriateness of proposed orders in many different kinds of litigation. Why should the law of constructive trusts be any different? There are, however, two dangers which have to be guarded against in constructive trust disputes. One is the danger that the exercise of discretion will unsettle established title to property. The other, related danger is that the process of taking into account third party interests (which include the interests of unsecured, as well as secured, creditors) may devalue the interest established by the constructive trust claimant.

The following paragraphs identify two situations in which, in my view, a court is entitled to award personal relief in preference to a constructive trust, the second of which involves the application of consequential reasoning. Succeeding paragraphs then identify other categories of constructive trusteeship which ought not to lend themselves to this type of remedial approach. The final section of the paper examines the difficult borderline category of restitution for wrongs.

(a) *Personal Relief Where the Trust Property has Been Dissipated or Consumed*

One situation in which a personal remedy will be preferred to the constructive trust is not a true example of discretionary remedialism and is not based on consequentialist reasoning. Suppose that a proprietary order would have been made but for the fact that the subject-matter of the trust had already been consumed or dissipated. Can it be doubted that the court will make a personal order against the plaintiff, assessed at the value of the property?

I am not aware of any reported decision awarding compensation, as an alternative to a constructive trust, to a successful claimant under a mutual wills arrangement. Suppose that X and Y make mutual wills under which the survivor of X and Y will be entitled to the other's property, each undertaking to leave his or her estate to Z on the death of the survivor. Suppose, further, that Y survives X and makes a new will leaving his estate to A (who of course is not a beneficiary under the mutual wills arrangement). On Y's death his estate passes to A who dissipates or consumes everything left to him before Z can ascertain her rights under the mutual wills. Z could have claimed the estate from Y's executor if she had known about her inheritance. Why should not Z be able to claim from A the value of the estate she ought to have received and which A in fact received? A is of course is a donee, not a good faith purchaser purchaser, and will be amenable to equitable relief.

The same argument can be applied to other applications of the constructive trust. If a thief pays stolen money into his wife's bank account a constructive trust can be imposed over the chose in action constituting the wife's contractual right to withdraw an equivalent sum of money from the account, the wife not being a good faith purchaser for value without notice.[45] But suppose that the wife has spent the proceeds of the theft on food which has been consumed. Can the victim of the theft bring a personal claim against the wife for the money received? The New South Wales Court of Appeal denied the existence of the claim in *Heperu Pty Ltd v Belle* [46], although a personal claim to the amount remaining to her credit succeeded under the puzzling label of "liability as a volunteer". But there is no reason why, subject

[45] *Black v S Freedman & Co Ltd* (1910) 12 CLR 105 (HCA).
[46] [2009] NSWCA 252 at [130]- [132], Allsop P.

to the application of the defence of change of position, a personal remedy for 'value received' should not be available against the wife.[47]

There are a variety of reasons why the personal remedy alternative to a proprietary constructive trust has often not been recognised. Some applications of the constructive trust, such as that arising under the mutual wills doctrine, make only rare appearances in the law reports so that opportunities to explore remedial alternatives have been lacking. In the case of constructive trusts imposed over family homes, statute occupies most of the field, applying its own discretionary regime to the disputed family assets.[48] In yet other cases, such as restitution of a mistaken payment, the personal remedial alternative to the constructive trust can only be claimed in a distinct cause of action, the action for money had and received. This is of course a function of the separation of common law and equity. American law, on the evidence of the *Third Restatement*, allows the proprietary and personal claims to a mistaken payment to be combined in the same cause of action.

The argument that every equitable claim giving rise to a proprietary constructive trust simultaneously gives rise to an equivalent personal claim, when the prospective subject-matter of the trust has been dissipated or consumed, is not radical; it says nothing significant about the remedial constructive trust or about consequential legal reasoning. This is because the court is not faced with a genuine remedial choice in this situation. The proprietary constructive trust cannot be awarded for the simple reason that the putative trust property no longer exists. What else can the court do except to award the plaintiff the personal remedy, if she is not to leave the

[47] *Gertsch v Atsas* [1999] 10 BPR 97,855 suggests that a strict liability personal claim is available, although in that case personal restitution of money paid under a forged will was based on *Re Diplock*, and not on *Black v Freedman*.
[48] *Family Law Act* 1975 s79 (Cth).

court empty-handed? The personal remedy fills a gap in these cases but the gap has been caused only because a basic precondition of any proprietary remedy has not been satisfied.

(b) *Discretion and the Enforcement of Expectations*

Two categories of constructive trust present Australian courts with a genuine choice between proprietary and personal relief, the choice being dictated at least in part by the consequences of awarding the remedy. The first is proprietary estoppel. The leading High Court decision, *Giumelli v Giumelli* ,[49] is a prime example of consequential reasoning determining the mode of relief. The plaintiff had done a substantial amount of work on his parents' farm property, the farm business being structured as a partnership. His parents promised him land, including an orchard, as reward for his unpaid work on the farm. In reliance on the promise he built a house on part of the property on which he had worked. Following a family dispute the plaintiff left the house, and his brother subsequently made further improvements to the property. The High Court held that the plaintiff had made out the elements of a proprietary estoppel claim but that he was not entitled to proprietary relief. He was instead awarded compensation, assessed as the value of the property the plaintiff had improved, charged on the property.

Among the considerations which the High Court took into account were the work undertaken by the plaintiff's brother on the property and the fact that there was a partnership action pending, the outcome of which might be prejudiced by the making of a proprietary order. Third party considerations played a decisive role in the determination of relief in *Giumelli*.

[49] (1999)196 CLR 101 (HCA).

Giumelli is not some kind of Australian aberration in the application of estoppel doctrine.[50] A number of English decisions have adopted an 'in the round' approach embracing many considerations, including third party expectations and the desirability of facilitating a 'clean break' between the parties to the estoppel claim.[51] In *Jennings v Rice*[52]the representee, who began working as a gardener for the representor in his spare time, progressively undertook more work for the representor, all of it unremunerated over ten years, including sleeping at her house in order to provide her with security, on the basis of a commitment that he would be left her house and furniture. The Court of Appeal upheld the trial judge's award of £200,000. Among factors identified by Walker LJ as being relevant in an estoppel case were the reprehensibility of the representor's conduct, the need for a clean break between the parties, alteration in the representor's circumstances, the likely effect of taxation on a proposed order, and other legal or moral claims on the representor.[53]

Many, though not of course all,[54]proprietary estoppel claims arise out of family disputes and belong to family law, in the broadest sense of that term. Claimants cannot turn to contract law, which denies that many of the promises evince an intent to create legal relations and does not award proprietary remedies. Nor can they turn to family law legislation, which offers remedial flexibility but is underinclusive in its coverage of relationships governed by the legislation.

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[50] The remedialism exercised in proprietary estoppel cases is recognised by rights theorists, who nonetheless deplore it. See Ben McFarlane, *The Structure of Property Law* (Hart Publishing, Oxford, 2008) 467-471.

[51] Andrew Robertson, 'Unconscionability and Proprietary Estoppel' in,E Bant & M Harding eds, *Exploring Private Law* (Cambridge 2010) 402, 415-421.

[52] [2002 EWCA Civ 159; [2003] 1 P & CR 100.

[53] Ibid at [52].

[54] Estoppel claims can arise out of commercial negotiations: *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 2964. Such cases raise questions about the limits of the law in reallocating risk outside contract law.

Most other applications of the constructive trust respond either to a wrong, such as a breach of fiduciary duty, or to an event such as unjust enrichment. Estoppel cases, on the other hand, have a temporal dimension: the true impact of expectations created by representations can often only be accurately gauged after a number of years, and that impact will not necessarily be confined to the financial circumstances of the representee. Consequential reasoning in estoppel cases could be avoided by a radical extension of the statutory powers to reallocate property when a relationship breaks down, defining 'relationship' broadly so as to capture the majority of family disputes, but in the absence of such legislation courts can hardly be criticised for indulging in consequentialist reasoning that takes into account third party interests.

The same can be said of consequentialist reasoning found in many of the cases decided on the principles laid down in *Muschinski v Dodds*[55]and *Baumgartner v Baumgartner*.[56] The *Baumgartner* 'unconscionability' doctrine was the High Court's response to the artificialities which became manifest when courts tried to adapt the common intention constructive trust to the financing of family home purchase in the 1960s and 1970s. The Canadian version of the unjust enrichment constructive trust[57](which in this context enforces expectations and does not reverse unjust enrichment) and the New Zealand 'enforcement of expectations' trust[58] are similar responses to the well known puzzle of trying to deduce a common intention out of family arrangements where the evidence of intention is, at best, fragmentary and inferential.[59]Although it is a prerequisite to the award of this model of

[55] (1986) 160 CLR 583 (HCA).
[56] (1987) 164 CLR 137 (HCA).
[57] *Pettkus v Becker* (1980) 117 DLR (3d) 257 (SCC)
[58] *Gillies v Keogh* [1989] 2 NZLR 327 (NZCA).
[59] *Stack v Dowden* [2007] 2 AC 432 (HL); *Jones v Kernott* [2011] UKSC 53; [2012] 1 AC 776 (SC) continue to grapple with the difficulties.

constructive trust that the plaintiff must have made some kind of contribution to the acquisition or improvement of the disputed property, the aim of the award is to enforce the expectations reasonably created by the plaintiff's contribution.

Examples of awards of personal relief under the *Muschinski* doctrine where the claim was for a proprietary remedy are not hard to find.[60] In many instances an estoppel claim could just as easily have succeeded as the *Muschinski* claim. This is because the criteria for the award of the latter, namely a joint venture to which the plaintiff has contributed and which has failed without fault on the part of the plaintiff, can usually be reformulated in terms of the requirements of an estoppel claim.

A recent example is the New South Wales decision of *Byrnes v Byrnes*.[61] Title to a large cattle family farm was held by the father who worked the farm as a partnership with his wife and two sons. There was an understanding that both sons would inherit the farm on the father's death. Severe and prolonged drought meant that the farm could not be run without government subsidy. Both sons were married and the farm could not sustain three families. The plaintiff, one of the sons, agreed to leave the farm as part of a plan to restructure the partnership in order to obtain a government subsidy. The plaintiff worked on other properties, suffered from some disabilities and had an invalid wife to support. The family agreed that the plaintiff would be compensated but the plaintiff left the farm before the amount of compensation could be agreed. In the event no agreement was reached. It was held, applying *Muschinski v Dodds*, that the family partnership was a joint venture which had failed without any blame attaching

[60] Early examples are documented by Pamela O'Connor, 'Happy Partners or Strange Bedfellows: the Blending of Remedial and Institutional Features in the Evolving Constructive Trust' (1996) 20 *Melbourne University Law Rev* 735.
[61] [2012] NSWSC 1600 (Lindsay J).

to the plaintiff. Taking into account the interests of other family members in the farm Lindsay J held that the plaintiff was entitled to $575,000, secured by a charge over the farm. He observed that the same result would have been reached if the case had been pleaded as one of estoppel.[62]

Like estoppel cases, constructive trust decisions based on the *Muschinski* doctrine are not based on the commission of a nominate wrong (although some involve wrongdoing, in a general sense), or from an event such as a mistake or failure of consideration which enlivens a claim in unjust enrichment. *Muschinski* constructive trust cases are less common than they used to be because the *Family Law Act* confers adjustive powers on the Family Court where the dispute relates to former spouses and de facto partners, including disputes involving the trustee in bankruptcy of one of the parties.[63] But the doctrine continues to be applied in other kinds of family property litigation, including parent-child and sibling disputes, where consideration sometimes has to be given to the expectations of family members in addition to those of the claimant.

It is certainly possible to analyse a proprietary estoppel or *Muschinski* constructive trust claim as conferring a right to enforcement once the preconditions to relief have been met, the remedy being correlative to that right.[64] The right will then, in the absence of a defence, be enforceable without regard to the consequences of enforcement on third parties. But there are difficulties involved in applying a rights-based approach to estoppel or to the *Muschinski* doctrine.

A special source of difficulty in the family property cases is the problem of conflicting expectations. An estoppel example illustrates the problem. A

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[62] *Byrnes v Byrnes* [2012] NSWSC 1600 at [123]. See also *Germanotta v Germanotta* [2012] QSC 116.
[63] *Family Law Act* 1975 (Cth) ss4,79.
[64] Ben McFarlane, *The Structure of Property Law*, fn 50, 444-475.

farmer has two sons, and represents to the elder one that if he makes improvements to a parcel of land that parcel will be transferred to him. The son makes the improvements. The farmer makes an identical promise to the younger son who also makes improvements. Upon being refused an interest by the farmer, the elder son claims the parcel by virtue of an estoppel created by the father's representation.[65] How is the conflict between the sons to be resolved? The usual method of resolution is to apply the established rules for prioritising interests in property. This will result in a decision in favour of the elder son if the ingredients of that son's claim were established before the younger son undertook work on the parcel. But the priority rules are inoperable if representations were made to both sons over a number of years, and the sons worked on the property simultaneously. Rather than characterising either son's claim as a right, and then relying on the priority rules to sort out the clash of rights, it seems preferable to continue doing what the courts have long been doing, namely treating both sons as having expectations. Expectations are ambulatory and less concrete than rights. They will be enforced or modified, as the circumstances of the case require, and an assessment of the impact of the order on both sons' expectations is both desirable and unavoidable.

5. Impermissible Remedialism: Trusts Imposed to Reverse Unjust Enrichment.

So far I have examined the types of constructive trust whose aim is the fulfilment of expectations. The fulfilment of an expectation involves the exercise of choice which can result in the award of proprietary or personal relief. In exercising the choice the court is entitled to examine the consequences of awarding the relief.

[65] Cf the competing claims of the brothers to a portion of the farm in *Guimelli* , fn 49.

It does not follow, however, that, just because a court will examine the practical consequences of its order in cases of expectation enforcement, it is entitled to do so in all cases when a constructive trust is under consideration. There are many categories of constructive trusteeship; not all result in the award of a proprietary remedy.[66] Moreover, they pursue a number of objectives, including the perfection of imperfect or incomplete transactions, compelling wrongdoers (particularly fiduciaries) to give up property acquired in breach of obligation, and reversing unjust enrichment. In some cases there may well be grounds for doubting whether a constructive trust should be granted at all, as in the cases of the bribe received by a fiduciary. But *if* a proprietary remedy is justifiable, and *if* the basic requirements for imposing such relief (namely traceably identifiable subject-matter, and an identifiable beneficiary or beneficiaries of the trust) are met, there is generally no good reason for abating the remedy to one of personal relief, even if third parties are interested in the outcome of the constructive trust application.[67]

A simple example is the so-called 'stolen money' constructive trust, where a constructive trust is imposed over stolen money or its traceable product.[68] On one view the trust is a restitutionary remedy for wrongdoing; on another, the trust reverses the unjust enrichment of the thief or of a later receiver of stolen property. On either view the victim is entitled to a constructive trust over the amount of money representing the proceeds of the theft in the thief's or receiver's bank account. Restitution of the money is not a matter of discretion, based on an analysis of the impact of the order on the thief or receiver, or the impact on any other creditors knocking on the defendant's

[66] See fn 20.
[67] Defences such as good faith purchase or change of position may defeat a claim, and equitable bars may preclude enforcement, but they raise different considerations. Similarly, the argument assumes that the third party does not hold a prior interest enforceable, not by virtue of an exercise of discretion, but by application of the priority rules.
[68] *Black v S Freedman & Co* [1910] HCA 58; (1910) 12 CLR 105 (HCA).

door. Moreover, if the money has been placed in an interest-bearing account, the constructive trust will extend to interest earned on the account

This outcome has been justified in a variety of ways. One is to assert that the trust is "institutional", and not "remedial", unlike the constructive trust imposed in estoppel cases. But this simply pushes the inquiry further on: why is the trust classified as institutional? Another justification is that the trust protects the title to stolen property enjoyed by the victim of the theft. This reason is more convincing but requires closer analysis. Theft does not destroy a victim's legal title to the stolen property and, strictly speaking, the victim does not need to invoke the law of constructive trusts in order to recover it, although it may be convenient to do so, given the absence, outside land law, of common law actions for specific recovery of property.[69] The victim's title is, however, lost when the thief pays the money into a bank; it is the proceeds of that money, being the increased balance in the thief's account, which is held on trust for the victim. When the proceeds are withdrawn from the account and, as in *Black v Freedman*, paid into the account of the thief's wife, the latter, not being a good faith purchaser without notice of the victim's equitable interest, is bound by the trust.[70] The trust defeats the wife's right, being a chose in action, to compel the bank to pay her an equivalent sum of money. In other words, the function of the 'stolen money' constructive trust is to enable the victim of a theft to claim the proceeds of a theft. Common law title protects the original stolen property.

The victim's equitable title to proceeds under the 'stolen money' constructive trust should not be extinguished or diminished by the exercise

[69] The *Common Law Procedure Act* 1852 (Imp) authorised specific restitution of chattels. See now *RSC* 1991 (Qld) r 52, and its State and Territory counterparts.
[70] Robert Chambers, 'Trust and Theft' in E Bant & M Harding eds, *Exploring Private Law* (Cambridge 2010) 223,240-241.

of judicial discretion. One can test the argument for discretion by reference to the treatment of stolen property in bankruptcy. The victim's legal title to the original property is enforceable against everyone including the thief's trustee in bankruptcy. It is not an asset divisible among the thief's creditors. Why should the creditors have a stronger claim to the traceable proceeds of the theft than to the original stolen property? Even if the proceeds have been successfully invested, withholding the profitable investment from the victim is unjustifiable. After all, the thief has deprived the victim of any opportunity of making the investment.[71]

Judicial discretion should not be applied to extinguish or diminish equitable title if the whole point of the trust is to protect title that the claimant held prior to the event giving rise to the unjust enrichment claim. The 'stolen money' constructive trust entitles the victim of theft to claim the proceeds of money to which the victim held title prior to the theft and payment into the thief's (or another's) bank account. The fact that a thief has other creditors is not a reason for denying or modifying constructive trust relief.

The same analysis applies to other cases of unjust enrichment, such as the mistaken payment example considered earlier. We saw that whether a constructive trust ought to be imposed over a mistaken payment, and if so in what circumstances, are vigorously debated questions. But *if* we decide that, at least in some circumstances, a constructive trust ought to be imposed over the payment, *then* there are no good grounds for qualifying the trust by holding, for example, that the payer is not entitled to recover the invested value of the payment. The purpose of the constructive trust is to protect title to property which has been lost by reason of the defective transfer. The

[71] It is conceivable that an equitable allowance might be awarded in favour of a thief who has demonstrated exceptional investment skills. This raises the controversial question as to the extent to which allowances will be awarded to deliberate wrongdoers: *Boardman v Phipps* [1967] 2 AC 46 (HL); *Warman International Ltd v Dwyer* (1995) 182 CLR 544 (HCA).

law's conception of equitable title is not malleable. It should not be distorted by reference to factors, such as the solvency of the payee, that are not material to equity's purpose in recognising and enforcing that title. If we think that the payer should not be entitled to the payee's successful investment of the payment, we should logically oppose the recognition of a constructive trust over the payment instead of eliminating one of the incidents of title-holding.

5. The Borderline Case: Constructive Trusts Over the Proceeds of Wrongdoing

The constructive trust imposed over the proceeds of a breach of fiduciary duty raises complex issues. This is because breaches can occur in a variety of ways. A fiduciary who misappropriates the principal's property for his own benefit, or who buys property from the principal under a contract which is voidable for breach of duty, not only commits an equitable wrong; he is also unjustly enriched at the expense of the principal.[72] The breach of duty constitutes an equitable wrong; and on these facts the fiduciary has also been unjustly enriched at the expense of the principal. The constructive trust restores to the principal title to property which he held before the breach was committed. As in the unjust enrichment cases considered in the previous section, constructive trust relief, if available, should not be refused or modified on the ground that the fiduciary is bankrupt or has creditors whose likelihood of enforcing payment will be diminished by the award of the trust. The principal's title to the misappropriated property deserves as complete protection in equity as that provided to a victim of a theft or mistaken payment.

[72] In the parlance of the English Court of Appeal this is a 'category one' breach of fiduciary duty: *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2012] Ch 453; [2011] EWCA Civ 347, Lord Neuberger MR, at [88]-[89]; *FHR European Ventures LLP v Mankarious* [2013] EWCA Civ 17, Etherton C at [83]. In the case of the contract entered into by the fiduciary in breach of duty, the principal's entitlement to a constructive trust is conditional on his election to rescind the contract.

In contrast, a fiduciary who obtains information while acting in a fiduciary capacity, and who exploits the information to obtain property for himself which should have been obtained for the principal, is not unjustly enriched at the expense of the principal.[73] No question of enforcing the principal's title to property arises because information does not constitute property in law, and anyway it was obtained from third parties and not from the principal. A constructive trust awarded in this case cannot be premised on the protection of the principal's title since the principal had none prior to the breach. Nevertheless, a strong line of English and Australian authority supports the imposition of a constructive trust over property acquired as a result of the fiduciary's wrongful exploitation of information.[74] The trust has been rationalised in terms of the fiction that the principal has equitable title to property which the fiduciary was under a duty to obtain for the principal. The fiction in turn reinforces the public policy of protecting the integrity of the principal-fiduciary relationship.

The constructive trust in this case does not protect any title to the property the fiduciary enjoyed prior to the commission of the wrong (if we ignore the fiction of equitable title), so the question whether the constructive trust ought to be characterised as remedial, in the sense of being discretionary and taking account of third party interests, depends in the final analysis on the strength of the policy considerations justifying its imposition. It is relevant to note in this connection that a principal might want to claim the benefit of a constructive trust for reasons which have nothing to do with

[73] This is a 'category two' case, exemplified by *Boardman v Phipps* [1967] 2 AC 46: see fn 71 above. Cf Peter Birks, *An Introduction to the Law of Restitution* (Clarendon, Oxford, rev'd edn 1989) 320 who analysed *Boardman* as an application of unjust enrichment, resiled from in Peter Birks, 'Misnomer' in, WR Cornish et al eds, *Restitution Past, Present & Future* (Hart Publishing, Oxford, 1998) 15-18.

[74] *Boardman v Phipps* , fn 70; *Chan v Zacharia* (1984) 154 CLR 178; *FHR European Ventures LLP v Mankarious,* fn 72.Joshua Getzler, 'Rumford Market and the Genesis of Fiduciary Obligations', in A Burrows & Lord Rodger of Earlsferry, *Mapping the Law*,(OUP, 2006) Ch 31. For a challenge to the seminal authority of *Keech v Sandford* (1728) Sel. Cas. t King 61 as authority for proprietary relief see Andrew Hicks, 'The Remedial Principle of *Keech v Sandford* reconsidered' [2010] *Cambridge Law Journal* 287.

obtaining priority in the fiduciary's bankruptcy, such as the desire to obtain specific property, or (as in *Boardman v Phipps*) to assert control over the management of a private company .[75] Courts of equity may well decide to respect these reasons, in addition to the public policy of protecting the integrity of the fiduciary relationship, rather than embarking on a discretionary inquiry possibly resulting in an award of personal relief.

Finally, the case of the fiduciary who takes and invests a bribe, discussed at the beginning of the paper, is the hardest to resolve in terms of principle. Indeed, given the division of opinion among appellate courts and academic writers, it may not susceptible to principled resolution at all and will have to be settled by the brute force of a decision of a court of ultimate authority.[76] But *if* it is authoritatively held that a fiduciary holds the proceeds of a bribe on constructive trust for the principal, there is no good reason for downgrading the equitable protection to which the principal is entitled to unsecured creditor status, or even (by virtue of the operation of an equitable lien) to secured creditor status, on the ground that other creditors are competing for the fiduciary's assets.

The concept of trust –whether express, resulting or constructive- has a settled meaning, well understood by lawyers, financial institutions and other commercial actors. The meaning is constant throughout real and personal property law.[77] A beneficiary under a trust is entitled to the whole or to a proportionate share of the trust property, the share being unaffected by either appreciation or diminution in the value of the property.[78] It follows that the suggestion of the Full Federal Court in *Grimaldi* that the principal is

[75] Michael Bryan, 'Boardman v Phipps' in, C and P Mitchell eds, *Landmark Cases in Equity* (Hart Publishing, Oxford, 2012) ch 581, 603-607; Pauline Ridge, 'Constructive Trusts, Accessorial Liability & Judicial Discretion', fn 20.
[76] Richard Nolan, 'Bribes: A Reprise',127 (2011) *LQR* 19,23.
[77] "Invariant", to adopt Ben McFarlane's apt terminology: Ben McFarlane, *Rights and Value; Means and Ends*, fn 18, 30.
[78] An object of an express trust power is not an exception since he is not entitled to an interest in the trust property: Ford & Lee, *The Law of Trusts* [1130].

entitled to a constructive trust over a bribe received by the fiduciary, unless the fiduciary is bankrupt in which case the principal's interest will be confined to an equitable lien over the bribe or its product, should not be adopted.[79] Likewise, the *Third Restatement*'s provision that a mistaken payer is entitled to a constructive trust over the payment or its product, but that no claim can be made to a profitable investment of the payment if the payee is indebted to others, introduces undesirable plasticity into the definition of constructive trust.[80] Just as"a rose is a rose ...is a rose...is a rose..."[81], so a "constructive trust is a constructive trust...is a constructive trust.. is a constructive trust". A constructive trust no more becomes an equitable lien because the consequences of its imposition are inconvenient than a rose becomes a daffodil when it loses its fragrance.

6. Conclusion

Australian commentators have generally welcomed the High Court's recognition of the remedial constructive trust.[82] The purpose of this paper is not to repudiate it but to sound a note of caution. The remedial trust may well have less impact on the law of constructive trusts in Australia than its supporters hope or its detractors fear. For some categories of constructive trust, specifically the expectation-effectuating doctrines of estoppel and the *Muschinski* constructive trust, the remedial principles enunciated by the High Court establish a helpful framework for adjudication – although courts applying these doctrines had travelled far down the road to remedialism long before the arrival of the remedial constructive trust had been announced.

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[79] *Grimaldi v Chameleon Mining (No 2)* [2012] FCAFC 6 at [583].
[80] *Third Restatement*,§§55,61.
[81] Gertrude Stein, 'Sacred Emily' (1913),*Geography & Plays* (Four Seas Publishing Co, Boston, 1922).
[82] See fn 43.

For trusts which enforce existing title or which effect restitution of a title to property previously held by the claimant, remedialism, in the sense of taking into account third party interests as an integral step in the award of the trust, should have no part to play. Constructive trusts compelling wrongdoers to make restitution of the fruits of wrongdoing are hard cases, and the relevance of third party interests depends in the final analysis on an evaluation of policy considerations, not least the public policy that identifies the defendant as a wrongdoer.

Finally, no one should be under any illusions as to the conceptual potency of a remedial constructive trust to solve the hard cases of proprietary jurisprudence, such as those of the bribe-taking fiduciary and the mistaken payer. Hard cases are just as intractable in a legal system that recognises a remedial constructive trust as they are in a system which has rejected the concept.