REANALYSING INSTITUTIONAL AND REMEDIAL CONSTRUCTIVE TRUSTS

Ying Khai Liew[*]

Abstract:
It is often said that English law does not impose "remedial" constructive trusts because it is manifestly inappropriate and fundamentally unjustified to impose trusts through the exercise of judicial discretion and with retrospective effect. This paper observes the definitional deficiencies in this understanding, and reanalyses constructive trusts in terms of the rights which they give effect to. This understanding reveals that English law sets its face against the exercise of discretion in relation only to some "remedial" constructive trusts and not others, and that the perceived difficulties with remedial constructive trusts are often exaggerated. It ends by noting some crucial implications of the reanalysis for the future development of the law.

Keywords: *institutional constructive trusts, remedial constructive trusts, discretion, primary and secondary rights, precedent, retrospectivity, Australia, Canada*

I. INTRODUCTION

It is often said that English law recognises only "institutional" constructive trusts, and does not impose "remedial" constructive trusts. Whatever the position in other Commonwealth jurisdictions, many English jurists perceive the imposition of trusts which reflect the "critical features of judicial discretion and retrospectivity"[1] as manifestly inappropriate and fundamentally unjustified. The fervency with which this view is often asserted gives the impression that "institutional" and "remedial" constructive trusts have non-contentious, well-settled meanings. However, upon close inspection, "many judges and jurists have used the expression 'institutional' without explaining its import, while those who have paused to clarify the matter have tended to use the term in quite different ways".[2] And in relation to remedial constructive trusts, little time has been spent to account for the different degrees and dimensions of discretion, or to investigate whether the timing at which a constructive trust takes effect necessarily determines its nature.

This paper observes the definitional deficiencies in the present understanding of "institutional" and "remedial" constructive trusts, and reanalyses constructive trusts in terms of the rights which they give effect to. In the light of this understanding, the status of English law and the credibility of the antagonistic attitude will be revisited. It will be seen that English law sets its face against the exercise of discretion in relation only to

[*] Lecturer in Law, University College London. Versions of this paper were presented at the "Modern Studies in the Law of Trusts and Wealth Management" conference at the Supreme Court of Singapore in July 2015 and the Property and Trusts/Restitution subjects combined session of the SLS Annual Conference at the University of York in September 2015. I am grateful to those present for their stimulating discussions. I also thank Charles Mitchell for his comments on an earlier draft.

[1] *London Allied Holdings Ltd. v Lee* [2007] EWHC 2061 (Ch) at [273]; *Crossco No. 4 Unlimited v Jolan Ltd.* [2011] EWCA Civ 1619 at [84].

[2] Craig Rotherham, *Proprietary Remedies in Context* (Oxford 2002), 13.

some "remedial" constructive trusts and not others, and that the perceived difficulties with remedial constructive trusts are often exaggerated. This paper ends by observing some crucial implications of the reanalysis for the future development of the law.

II. DEFINITIONAL DEFICIENCIES

It is well known that the distinction between institutional and remedial constructive trusts can be traced back to 1922 when Roscoe Pound first distinguished between "remedial" and "substantive" constructive trusts.[3] Yet, although the distinction prevails almost a century later, a precise definition of these terms remains elusive.

A. Definitions

Institutional constructive trusts are commonly understood as trusts which are imposed without the exercise of judicial discretion. Two related points are often cited in support of this view. First, they are created by, and arise from, the occurrence of pre-defined facts or real-world events[4] relating to "the conduct of the parties".[5] Secondly, these real-world events are pre-defined in accordance with settled principles, and therefore there is no room for the exercise of judicial discretion.[6] In terms of timing, institutional constructive trusts are said to arise "automatically"[7] from the occurrence of those pre-defined facts, leaving the court the role merely of declaring that such a trust had arisen in the past.[8] As a result, the consequences which flow from the recognition of an institutional constructive trust, in particular its potentially detrimental effects on third parties, are said to be "mandatory":[9] they are the mere upshots of the events which trigger the trusts' existence.[10]

In contrast, the imposition of remedial constructive trusts is understood to be at the discretion of the judge, who has liberty to consider whether or not to create new property rights on a case-by-case basis.[11] The exercise of discretion is guided only by whether it is "just" to impose a constructive trust in a particular case.[12] Hence, it is impossible to predict in advance whether a constructive trust will be awarded, and claimants are said to have "no rights born of any facts which have happened outside the court".[13] Since courts can impose these trusts "without … having to satisfy any

---

[3] Roscoe Pound, "The Progress of the Law 1918 – 1919" (1920) 33 Harv. L.R. 420, 420-21. The term "institutional" was substituted for "substantive" in R.H. Maudsley, "Proprietary Remedies for the Recovery of Money" (1959) 75 L.Q.R. 234, 237.

[4] *Westdeutsche Landesbank Girozentrale v Islington L.B.C.* [1996] A.C. 669, 714. See too Donovan D.M. Waters, Mark Gillen, and Lionel Smith, *Waters' Law of Trusts in Canada*, 4th ed., (Toronto 2012), 508.

[5] The Right Hon Millett L.J., "Equity — The Road Ahead" (1995 – 1996) 6 K.C.L.J. 1, 18.

[6] Millett, "Equity — The Road Ahead", p. 18, Lord Neuberger, "The Remedial Constructive Trust — Fact or Fiction", speech at the Banking Services and Finance Law Association Conference, Queenstown, 10 August 2014 <http://www.supremecourt.uk/docs/speech-140810.pdf>, [27].

[7] Neuberger, "The Remedial Constructive Trust — Fact or Fiction", para. [7], Millett, "Equity — The Road Ahead", p. 18.

[8] *Westdeutsche Landesbank Girozentrale v Islington L.B.C.* [1996] A.C. 669, 714. See too *Fortex Group Ltd. v MacIntosh* [1998] 3 N.Z.L.R. 171, 172.

[9] *Commonwealth Reserves v Chodar* [2001] 2 N.Z.L.R. 374 at [19].

[10] *Westdeutsche Landesbank Girozentrale v Islington L.B.C.* [1996] A.C. 669, 714.

[11] *Crossco No. 4 Unlimited v Jolan Ltd.* [2011] EWCA Civ 1619 at [84]; *Turner v Jacob* [2006] EWHC 1317 (Ch) at [85]; *Westdeutsche Landesbank Girozentrale v Islington L.B.C.* [1996] A.C. 669, 714.

[12] Neuberger, "The Remedial Constructive Trust — Fact or Fiction", para. [28], Millett, "Equity — The Road Ahead", p. 18, Lynton Tucker, Nicholas le Poidevin, and James Brightwell (eds), *Lewin on Trusts*, 19th ed., (London 2015), [7-026].

[13] Peter Birks, "Three Kinds of Objection to Discretionary Remedialism" (2000) 29 University of Western Australia Law Review 1, 6.

established or elucidated rules and requirements",[14] their imposition would reflect the absence of a "rationale for the availability of proprietary remedies".[15] In terms of timing, the perceived relevance of discretion means that remedial constructive trusts necessarily exist for the first time when they are imposed by the court.[16] The effects of the trusts are also said to be within the discretion of the court. Thus, judges have latitude to decide whether the proprietary consequences take effect retrospectively or prospectively.[17]

B. Deficiencies

Upon close scrutiny, these definitions do not fully account for the distinction between institutional and remedial constructive trusts, and fail accurately to reflect the true state of the law.

Take first the element of discretion. It is difficult to accept the proposition that the exercise of judicial discretion *necessarily* entails that constructive trusts do not have proprietary effect from the occurrence of certain facts. Nor is it necessarily the case that the exercise of such discretion indicates the lack of settled principles and proper rationales. As Etherton J (as he then was) observed in *London Allied Holdings Ltd. v Lee*,[18] such a view of judicial discretion may be "overly emphatic, having regard, for example, to the strong discretion in the Court to decide upon the appropriate form of relief for proprietary estoppel, including whether it should be personal or proprietary and whether it should be to protect the claimant's expectations or compensate for reliance loss." A claimant (A) in proprietary estoppel obtains an "equity by estoppel"[19] when B induces A to assume that B will cede an interest in property B owns to A, and A relies on the assumption to A's detriment. This indicates that proprietary estoppel undoubtedly gives effect to A's right born of facts which have happened outside the court. Moreover, the remedial discretion cannot be exercised *simply* based on whether it is "just" to do so on the facts of a particular case, but must reflect settled and established principles. Thus, the remedy must be proportionate, and courts must impose only the "minimum equity" to do justice[20] to *compensate* A for his detrimental reliance.[21] Where a constructive trust is awarded, its proprietary consequences "ha[ve] effect from the time the equity arises" (that is, from the occurrence of the relevant facts) "as an interest capable of binding successors in title."[22]

The source of the difficulty lies in the manifest unsuitability of using discretion *per se* as a distinguishing criterion. In a different context, it has been said that "'discretion' is a somewhat protean word. It connotes the exercise of judgment in making choices. In a sense, most decisions involve the exercise of discretion … [T]here can also be discretion even in the hammering of a nail".[23] Discretion is not a binary, all-or-nothing concept; there are different degrees and shades to it. It is therefore impossible properly to define institutional and remedial constructive trusts merely in terms of whether discretion is or

---

[14] Andrew Butler (ed.), *Equity and Trusts in New Zealand*, 2nd ed., (Wellington 2009), [13.3.1].
[15] Millett, "Equity — The Road Ahead", p. 19. See too *Re Goldcorp Exchange Ltd. (in receivership)* [1995] 1 A.C. 74, 104.
[16] *Re Polly Peck International plc (in administration) No. 2* [1998] 3 All E.R. 812, 830; *Re Sharpe (a bankrupt)* [1980] 1 W.L.R. 219, 225. See too *Fortex Group Ltd. v MacIntosh* [1998] 3 N.Z.L.R. 171, 175; *Commonwealth Reserves v Chodar* [2001] 2 N.Z.L.R. 374, 383.
[17] *Westdeutsche Landesbank Girozentrale v Islington L.B.C.* [1996] A.C. 669, 714-15; *Muschinski v Dodds* (1985) 160 C.L.R. 583, 451.
[18] *London Allied Holdings Ltd. v Lee* [2007] EWHC 2061 (Ch) at [274].
[19] Land Registration Act 2002, s. 116(a).
[20] *Henry v Henry* [2010] UKPC 3 at [65]; *Crabb v Arun District Council* [1976] Ch. 179, 198.
[21] See e.g. *Campbell v Griffin* [2001] EWCA Civ 990; *Jennings v Rice* [2002] EWCA Civ 159; *Ottey v Grundy* [2003] EWCA Civ 1176; *Henry v Henry* [2010] UKPC 3.
[22] Land Registration Act 2002, s. 116(a). This section merely confirms what was already the norm: see Law Com. No. 271.
[23] *Carty v London Borough of Croydon* [2005] EWCA Civ 19, [2005] E.L.R. 104 at [25].

is not exercised.

The element of timing also fares no better. In the first place, it is not an essential characteristic of remedial constructive trusts that it gives judges the ability to determine on a case-by-case basis the timing at which proprietary effects first arise. For instance, the Canadian Supreme Court in *Rawluk v Rawluk* held that remedial constructive trusts are "deemed to have arisen at the time when the unjust enrichment first occurred".[24] Thus, remedial constructive trusts in Canada remain "remedial" in nature even though they invariably have retrospective effect. It might then be suggested that remedial constructive trusts should be confined to such "backdated" trusts, but this view causes even more confusion. Thus, Lord Neuberger has recently suggested that "remedial" constructive trusts which are of retrospective effect are in reality "imposed at once as an institutional trust".[25] Yet, confining "remedial" constructive trusts only to its prospective effect robs the trusts of much of their content. As Peter Birks has argued, such "trusts" amount to no more than mere orders for specific delivery of an asset, a jurisdiction already inherent in the common law.[26]

C. Senses of "Remedy"

A significant factor which influences one's definition of "institutional" and "remedial" constructive trusts is one's understanding of what a remedy entails. This is obvious from various judicial observations. For instance, the oft-quoted observation by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington L.B.C.* states that "[a] remedial constructive trust … is a judicial *remedy* …";[27] Nourse L.J. has defined a remedial constructive trust as "an order of the court granting, by way of a *remedy*, a proprietary right …";[28] and Lewison J observed that remedial constructive trusts are situations where "the court will impose a constructive trust by way of a *remedy*".[29]

Given its centrality to the debate, it is curious that the meaning of "remedy" is left unexplained. It appears that "remedy" is used in this context simply to refer to the exercise of remedial discretion at the date of judgment, in contradistinction to a mere "declaration" of the claimant's pre-existing property right. However, this does not overcome the difficulties associated with the element of discretion, as discussed earlier. Moreover, Birks has explained that there are at least five possible meanings of the word "remedy",[30] and without identifying which of these is at play, it remains impossible properly to distinguish between institutional and remedial constructive trusts. In fact, without first identifying what a "remedy" means, there is a real possibility that the phrase "remedial constructive trusts" might even be taken to refer to legal devices that are not *trusts* at all. For example, in a recent paper by Bruce Collins Q.C.,[31] that phrase was equated with a *personal* liability to account in the context of accessory liability, since, on one reading, a "remedy" is "nothing more

---

[24] *Rawluk v Rawluk* [1990] 1 S.C.R. 70, 92. See too *Re Polly Peck International plc (in administration) No. 2* [1998] 3 All E.R. 812, 823; *Crossco No. 4 Unlimited v Jolan Ltd.* [2011] EWCA Civ 1619 at [84].

[25] Neuberger, "The Remedial Constructive Trust — Fact or Fiction", at para. [15]. This led Lord Neuberger to question whether "remedial" constructive trusts imposed by the Australian courts are in fact "institutional" in nature: ibid., at para. [22].

[26] Peter Birks, "The End of the Remedial Constructive Trust?" (1998) 4 T.L.I. 202, 205–6.

[27] *Westdeutsche Landesbank Girozentrale v Islington L.B.C.* [1996] A.C. 669, 714 (emphasis added).

[28] *Re Polly Peck International plc (in administration) No. 2* [1998] 3 All E.R. 812, 830 (emphasis added).

[29] *Ultraframe (UK) Ltd. v Fielding* [2005] EWHC 1638 (Ch) at [1515] (emphasis added).

[30] Birks, "Three Kinds of Objection to Discretionary Remedialism", 3–6. See too Rafal Zakrzewski, *Remedies Reclassified* (Oxford 2009), chs. 2–4.

[31] Bruce Collins Q.C., "The Remedial Constructive Trust 'Between a Trust and a Catch-Phrase'" (2014) 10 Trusts & Trustees 1055, 1058.

than a formula for equitable relief".[32] As the Supreme Court has recently confirmed, however, accessory liability makes the defendant liable "*as if he were* a trustee",[33] whereas the subject matter at hand — constructive trusts — involve making the defendant a *trustee* properly so-called.

III. RIGHTS AND REMEDIES

In spite of their instability, the elements of discretion and timing persistently find themselves at the heart of the discussion. The tendency to focus on these elements reveals an underlying desire to understand the different *sources* of constructive trusts. It is suggested that a more precise and structured response to this desire is to explore how constructive trusts as *remedies* relate to the claimant's *rights*.[34] The term "remedy" is taken simply to refer to an order of the court,[35] which is "the core meaning of the term … most commonly expressly adopted by those who write on remedies."[36] On this understanding, a "constructive trust" is simply the subject matter of a court order, no more and no less. This leaves open the questions of *what* rights trigger the trusts and *how* the trusts relate to those rights. The answers to these questions require an analysis of how constructive trusts, as remedies, relate to the parties' rights and duties.

This section lays the groundwork for such an analysis by exploring the relationship between rights and remedies in private law.

A. Primary and Secondary Rights

While there are various ways in which private law remedies might be analysed,[37] one particularly powerful method is to understand whether and how remedies give effect to the claimant's substantive (primary or secondary) rights.

The distinction between primary and secondary rights was first made in English jurisprudence by John Austin in his lectures. According to Austin, primary rights are rights that exist "*in* and *per se*"; secondary rights "arise out of violations of primary rights".[38] Where A has a primary right against B, B owes a primary duty towards A which does not arise from a wrong. The primary right and duty make up a legal *relationship* between A and B which does not hinge on B committing a breach of a duty. On the other hand, when B commits a civil *wrong* by breaching a primary duty,[39] A obtains a secondary right against B.

B. Types of Remedies

---

[32] *Paragon Finance plc v DB Thakerar & Co.* [1999] 1 All E.R. 400, 409.

[33] *Williams v Central Bank of Nigeria* [2014] UKSC 10 at [80] (emphasis in original).

[34] Where A has a right against B, B has a correlative or equivalent duty towards A: Walter Wheeler Cook (ed), Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, reprint ed., (New Jersey 2010) 36, 38. We can therefore speak of rights and duties interchangeably.

[35] An "order" includes "judgments, decrees, orders, and pronouncements": Zakrzewski, *Remedies Reclassified*, p. 44.

[36] Zakrzewski, *Remedies Reclassified*, p. 17. See e.g. W. Blackstone, *Commentaries on the Laws of England*, 1st ed., (London 1768) vol. 3, 396; Birks, "Three Kinds of Objection to Discretionary Remedialism", p. 5; and the cases and commentators cited in Zakrzewski, *Remedies Reclassified*, pp. 17 and 44.

[37] For an overview of the different analyses commonly made, see Donal Nolan and Andrew Robertson, "Rights and Private Law" in Donal Nolan and Andrew Robertson (eds.), *Rights and Private Law* (Oxford 2014), 18–21.

[38] R. Campbell (ed.), John Austin, *Lectures on Jurisprudence*, 5th ed., (London 1885), 762. Hohfeld, too, was of the view that, quite apart from a primary right/duty relationship, a new, secondary right/duty relation arises when a primary right is infringed: see discussion in Nolan and Robertson, "Rights and Private Law", p. 19.

[39] See generally James Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Oxford 2002), 32–63.

1. Replicative Remedies

When courts enforce A's primary right directly, the range of potential remedial responses is narrow and limited.[40] Discretion is neither exercised over the *goal* nor *content* of the awarded remedy, the former involving the making of policy choices which dictate the purpose or object of the remedy and the latter involving the selection of the manner of realising its goal.[41] The absence of such discretion reflects the fact that these remedies are logically restricted to compelling B to carry out his primary duty: it give A "the very thing to which he or she is entitled."[42] For instance, in actions for a contractual debt due[43] or actions by a beneficiary to hold a trustee liable to account for trust property,[44] courts are concerned solely with compelling the debtor or trustee to carry out his primary duty: the awarded remedy simply restates the parties' rights and duties as revealed in their contract or trust instrument. It also follows that B need not be shown to have breached the contract or trust, and issues of causation, remoteness, and mitigation of loss do not arise.

Given that they simply restate and replicate primary rights, remedies which enforce primary rights can be labelled "replicative" remedies.[45]

2. Reflective Remedies

To obtain a remedy which gives effect to A's secondary right, B's breach of duty is a necessary ingredient of the cause of action in question. Where B's breach causes A to suffer loss, issues of causation, remoteness and mitigation become relevant,[46] and A can be (and often is) awarded damages as a remedy. This can be seen, for instance, in actions for damages following a breach of contract[47] and actions against a trustee for negligently investing trust property.[48] The breach of contract or trust must be proved and shown to have caused a loss, and the breaching party will only be liable for losses which are not too remote.

In contrast to primary rights, secondary rights provide for a wider remedial potential[49] since, in principle, there is no logical restriction to the plethora of possible methods by which B's breach of his primary duty can be corrected. This is not to downplay the significance of the doctrine of precedent, which demands that like cases are to be treated alike, and which significantly diminishes the ability to reconsider an established precedent where the precedent was set by a higher court. But the doctrine of precedent applies regardless of the type of remedy in question.[50] The point presently

---

[40] Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 University of Western Australia Law Review 1, 14.

[41] Paul Finn, "Equitable Doctrine and Discretion in Remedies" in W.R. Cornish, Richard Nolan, Janet O'Sullivan *et al* (eds.), *Restitution Past, Present and Future* (Oxford 1998), 268–70.

[42] Nolan and Robertson, "Rights and Private Law", p. 20.

[43] *White and Carte (Councils) Ltd. v McGregor* [1962] A.C. 413.

[44] Sir P. Millett, "Equity's Place in the Law of Commerce" (1998) 114 L.Q.R. 214, 225–27. Apparently, a different approach is taken in relation to cases involving bare commercial trusts: *AIB Group (UK) plc v Mark Redler & Co. Solicitors* [2014] UKSC 58 at [70], [106]; but see J.E. Penner, "Falsifying the Trust Account and Compensatory Equitable Compensation" in Simone Degeling and Jason Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Oxford 2016).

[45] Zakrzewski, *Remedies Reclassified*, p. 55. Zakrzewski also labels remedies which give effect to *secondary* rights as "replicative" remedies. This is, however, misguided: see text to note 55 below.

[46] Lionel Smith, "The Measurement of Compensation Claims against Trustees and Fiduciaries" in Elise Bant and Matthew Harding (eds.), *Exploring Private Law* (Cambridge 2010), 373.

[47] *Photo Production Ltd. v Securicor Transport Ltd.* [1980] A.C. 827, 349.

[48] Charles Mitchell, "Equitable Rights and Wrongs" (2006) 59 C.L.P. 267, 283–84.

[49] Birks, "Equity in the Modern Law: An Exercise in Taxonomy", p. 12.

[50] Judges also have so-called "discretion" to determine whether a case before the court is sufficiently identical to a previous case in order for the previous case to be binding by making factual findings in order to bring cases within, or push cases without, the scope of a rule (for a discussion of this point in relation to the family homes context, see Ying Khai Liew, "The Secondary-Rights Approach to the 'Common Intention Constructive Trust'" (2015) 79 Conv. 211,

made is that it is inherent in the nature of remedies which give effect to secondary rights that they have a remedial potential which is not as logically restricted as those giving effect to primary rights.

It is sometimes thought that A does not obtain a secondary *right* from the moment B infringes A's primary right. For example, Stephen Smith writes that awards of damages do not confirm or affirm an existing duty to pay damages, but are created by court orders.[51] However, as Allan Beever has noted, the secondary "duty to repair" reflects a fundamental *right*: "[t]here is surely no remedy more basic than the repair of a wrong."[52] On the other hand, it is sometimes thought that remedies which give effect to secondary rights are indistinguishable from replicative remedies. For example, Rafal Zakrzewski says that an award of damages "redresses the *non-performance* of a secondary right to the payment of damages arising from a wrong",[53] and further, that a remedy which gives effect to secondary rights "*simply restate[s]* prior substantive rights".[54] However, it is doubtful whether it is ever possible for B properly to discharge his secondary duty prior to a court order, since B would not be in a position to determine what the appropriate liquidated sum of damages would be. Even if performance were attempted, this would not discharge the duty, since "pre-payment is no defence to a claim in damages".[55]

Ultimately, a proper analysis calls for a nuanced approach by taking a middle ground between the two exaggerated views. The fact that a secondary right is *created* when B breaches A's primary right is not inconsistent with the view that that right already in existence requires *liquidation* by a court to determine the extent of the remedy, taking into account the criterion of remoteness.[56] This is reflected in the remedial discretion involved: such remedies allow for some discretion *as to content* to be exercised, but do not provide for the exercise of discretion to re-evaluate the *goal* of the remedy on a case-by-case basis. As John Gardner writes, "the secondary obligation is a rational echo of the primary obligation, for it exists to serve, so far as may still be done, the reasons for the primary obligation that was not performed when its performance was due."[57] In addition, as Paul Finn observes, there are doctrines which "suggest what is the goal of the remedy but leave it to the "appropriateness" principle to determine the manner of that goal's realisation".[58] So, although remedies which give effect to secondary rights provide for a wider remedial potential than replicative remedies, the "remedy is not at large."[59]

215–16). But such "discretion" also applies regardless of the type of remedy in question, and so has no bearing on the present discussion concerning the nature of remedies.

[51] See e.g. Stephen A. Smith, "Duties, Liabilities, and Damages" (2011 – 2012) 125 Harv. L.R. 1727.

[52] Allan Beever, "Our Most Fundamental Rights" in Donal Nolan and Andrew Robertson, "Rights and Private Law" in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Oxford 2014), 81.

[53] Zakrzewski, *Remedies Reclassified*, pp. 166–67 (emphasis added).

[54] Zakrzewski, *Remedies Reclassified*, p. 203 (emphasis added).

[55] Stephen Smith, "Why Courts make Orders (And What This Tells us About Damages)" (2011) 64 C.L.P. 51, 74. See *Edmunds v Lloyds Italico & l"Ancora Compagnia di Assicurazione e Riassicurazione SpA* [1986] 1 W.L.R. 492, 496.

[56] The award of replicative remedies in certain contexts may also require an exercise of "liquidation", for instance where A's right to a contractual debt due is couched in terms of a "reasonable price" (see generally Rafal Zakrzewski, "The Nature of a Claim on an Indemnity" (2006) 22 J.C.L 54). But these cases are distinguishable from those presently discussed: these cases do not provide courts with any discretion as to the extent to which the defendant will be liable, since this is determined by the primary relationship between the parties and all that is left to do is to render certain the uncertain term. In particular, no assessment of the remoteness of loss or gain is necessary.

[57] John Gardner, "What is Tort Law For? Part 1: The Place of Corrective Justice" (2011) 30 Law & Philosophy 1, 40. See too Robert Stevens, "Rights Restricting Remedies" in Andrew Robertson and Michael Tilbury (eds.), *Divergences in Private Law* (Oxford 2016), 160–61.

[58] Finn, "Equitable Doctrine and Discretion in Remedies", p. 269.

[59] Finn, "Equitable Doctrine and Discretion in Remedies", p. 270.

In order to reflect the fact that remedies which respond to secondary rights give effect to A's substantive right but nevertheless provide for the exercise of discretion as to content, they can be labelled "reflective" remedies.

3. Transformative Remedies

A third category of private law remedies, which can be labelled "transformative" remedies, provide for the widest remedial potential. Their imposition *creates* "a legal relation that significantly differs from any legal relation that existed before the court order was made".[60] They transform and substantially alter A's substantive rights.[61] Examples of such remedies are an order giving guidance to trustees,[62] and a court's ability to allow the recovery of incurred expenses where a contract is discharged due to frustration "if it considers it just to do so having regard to all the circumstances of the case".[63] One can hardly say that beneficiaries have a substantive *right to* the particular guidance given to their trustees, or that a contracting party has a substantive *right to* the recovery of incurred expenses where the contract is frustrated.

The transformative nature of these remedies is brought to bear in their provision for the exercise of discretion as to both the goal and content of the appropriate remedy. Instead of merely replicating or liquidating A's pre-trial rights, the imposition of a transformative remedy requires "many of the policy choices that are entrenched in the law relating to substantive rights ... to be reopened."[64] It is therefore usually[65] difficult to predict in advance whether a transformative remedy will be awarded and (if it is) what its content would be. On the other hand, the flexibility of transformative remedies allows courts to respond to the sensitivities of the facts of a particular case.

IV. REPLICATIVE, REFLECTIVE, AND TRANSFORMATIVE CONSTRUCTIVE TRUSTS

Using the foregoing analytical framework of private law remedies, constructive trusts can be understood either as replicative, reflective, or transformative in nature. This section observes how a number of different constructive trust doctrines fit within this restructured understanding of remedies.

A. Replicative Constructive Trusts

The doctrine in *Rochefoucauld v Boustead*[66] and secret trusts are examples of doctrines by which constructive trusts are imposed as replicative remedies. The former doctrine typically involves B informally agreeing to hold A's land on trust for A, and A acting in reliance by transferring the legal title of the land to B. The latter doctrine typically involves a testator (A) naming B as apparent legatee in A's will, with B informally agreeing to hold the legacy for the benefit of another (C), and A acting in reliance by leaving his will unchanged until his death. In both doctrines, once A acts in reliance on

[60] Zakrzewski, *Remedies Reclassified*, p. 203.
[61] Zakrzewski, *Remedies Reclassified*, p. 102.
[62] *Chapman v Chapman* [1954] A.C. 429, 446.
[63] Law Reform (Frustrated Contracts) Act 1943, s. 1(2).
[64] Zakrzewski, *Remedies Reclassified*, p. 98.
[65] Again, the doctrine of precedent may constrain the exercise of such discretion in practice, but this does not detract from the fact that it is inherent in the nature of transformative remedies that they allow for discretion as to the goal and content of the remedy to be exercised.
[66] *Rochefoucauld v Boustead* [1897] 1 Ch. 196.

B's promise by transferring the property which is the subject matter of the promise to B, a constructive trust arises for the benefit of the intended beneficiary when B acquires the property. It is under that trust that A (in the context of the *Rochefoucauld* doctrine) or C (in the secret trusts context) acquires the promised interest.

It is necessary briefly to consider and refute the suggestions some commentators have put forward that the constructive trust imposed in these doctrines is a "fiction",[67] and that the trusts enforced are in fact express in nature.[68] As a facilitative device, express trusts respond to A's properly manifested intention to create a trust.[69] In relation to the doctrines presently discussed, A's intention to create a trust is never properly manifested, usually due to the lack of compliance with certain formality requirements.[70] The express trusts analysis regrettably entails "disapplying" or ignoring the relevant statutory formality requirements.[71] On the other hand, a constructive trust analysis respects Parliament's sovereignty by leaving those provisions intact.[72] Furthermore, on the facts of some cases, none of the parties involved were able properly to declare an express trust; and so the trust enforced by the courts can only properly be analysed as constructive in nature.[73] It is unsurprising, therefore, that the position taken by the majority of commentators[74] and the overwhelming weight of authority[75] is that the trusts in question are constructive in nature. This analysis must be correct.

In these doctrines, the constructive trust remedy replicates A's primary right which arises from the moment B acquires the property. As replicative remedies, their award is not conditional upon B committing a wrong: "his trusteeship is independent of and precede[s] the breach of trust".[76] Thus, B incurs custodial duties[77] and a duty to

---

[67] William Swadling, "The Fiction of the Constructive Trust" (2011) 54 C.L.P. 399.

[68] William Swadling, "The Nature of the Trust in *Rochefoucauld v Boustead*" in Charles Mitchell (ed.), *Constructive and Resulting Trusts* (Oxford 2010). See also Philip H. Pettit, *Equity and the Law of Trusts*, 11th ed., (Oxford 2009), 98; Paul Matthews, "The Words which are Not There: A Partial History of the Constructive Trust" in Mitchell, *Constructive and Resulting Trusts*; J.E. Penner, *The Law of Trusts*, Core Text Series, 9th ed., (Oxford 2014), [6.10].

[69] Robert Chambers, "Constructive Trusts in Canada" (1999) 37 Alberta Law Review 173, 183. See also Robert Chambers, *Resulting Trusts* (Oxford 1997), 220ff; Peter Birks, *An Introduction to the Law of Restitution*, ,Revised ed., (Oxford 1989), 65.

[70] The relevant statutory formality requirements are: in the context of the doctrine in *Rochefoucauld v Boustead*, Law of Property Act 1925, s. 53(1)(b); in the secret trusts context, Wills Act 1837, s. 9.

[71] Swadling, "The Nature of the Trust in *Rochefoucauld v Boustead*", p. 113; Matthews, "The Words which are Not There: A Partial History of the Constructive Trust", p. 89.

[72] Simon Gardner, "Reliance-Based Constructive Trusts" in Mitchell, *Constructive and Resulting Trusts*, p. 64–65.

[73] Examples of such cases are *Rochefoucauld v Boustead* [1897] 1 Ch. 196 and *De Bruyne v De Bruyne* [2010] EWCA Civ 519, [2010] 2 F.L.R. 1240. In these cases, no one owned the property absolutely at the outset in order to be capable of declaring an express trust over the entire beneficial interest in the property, which was what the ultimate beneficiary under the trust was held to be entitled to. For an analysis of this point in relation to the case of *Rochefoucauld*, see Ying Khai Liew, "*Rochefoucauld v Boustead*" in Charles Mitchell and Paul Mitchell (eds.), *Landmark Cases in Equity* (Oxford 2012). This point has recently found approval in Ben McFarlane and Charles Mitchell, *Hayton and Mitchell: Text, Cases and Materials on the Law of Trusts and Equitable Remedies*, 14th ed., (London 2015), para. [15-034].

[74] See, e.g. G.P. Costigan Jr., "The Classification of Trusts as Express, Resulting, and Constructive" (1913–14) 27 H.L.R. 437; T.G. Youdan, "Formalities for Trusts of Land, and the Doctrine in *Rochefoucauld v Boustead*" (1984) 43 C.L.J. 306; M.P. Thompson, "Using Statutes as Instruments of Fraud" (1985) 36 N.I.L.Q. 358; Gbolahan Elias, *Explaining Constructive Trusts* (Oxford, 1990), 108; Patricia Critchley, "Instruments of Fraud, Testamentary Dispositions, and the Doctrine of Secret Trusts" (1999) 115 L.Q.R. 631; Ben McFarlane, "Constructive Trusts Arising on a Receipt of Property *Sub Conditione*" (2004) 120 L.Q.R. 667; A.J. Oakley, *Parker and Mellows: The Modern Law of Trusts*, 9th ed., (London 2008), [10–273]; Simon Gardner, "Reliance-Based Constructive Trusts" in Mitchell, *Constructive and Resulting Trusts*, p. 68.

[75] In the context of the doctrine in *Rochefoucauld v Boustead*, see *Taylor v Davies* [1920] A.C. 636, 650–51; *Bannister v Bannister* [1948] 2 All E.R. 133, 136; *Re Densham (A Bankrupt)* [1975] 3 All E.R. 726, 732; *Chattey v Farndale Holdings Inc* (1998) 75 P. & C.R. 298, 316; *Paragon Finance plc v D.B. Thakerar & Co.* [1999] 1 All E.R. 400, 409; *Banner Homes Holdings Ltd. (formerly Banner Homes Group Plc) v Luff Developments Ltd.* [2000] Ch. 372, 383–84; *J.J. Harrison (Properties) Ltd. v Harrison* [2001] EWCA Civ 1467 at [36]; *Samad v Thompson* [2008] EWHC 2809 (Ch) at [128]; *Staden v Jones* [2008] EWCA Civ 936 at [31]; *De Bruyne v De Bruyne* [2010] EWCA Civ 519 at [51]; *Crossco No. 4 Unlimited v Jolan Ltd.* [2011] EWCA Civ 1619 at [94]; *Groveholt Ltd. v Hughes* [2012] EWHC 3351 (Ch) at [14]. In the secret trusts context, see *Kasperbauer v Griffith* [2000] 1 W.T.L.R. 333, 343.

[76] *Paragon Finance plc v DB Thakerar & Co.* [1999] 1 All E.R. 400, 408.

account[78] from the moment of acquisition: B's "assumption to act ... itself"[79] gives rise to his liability to account for the trust property.

B. Reflective Constructive Trusts

An example of a doctrine providing for the imposition of reflective constructive trusts is proprietary estoppel. Proprietary estoppel arises where B induces A to assume (through a promise, assurance, or acquiescence in A's mistaken belief) that B will cede an interest in property he owns to A, and A detrimentally relies on the assumption. Guided by the notion of the "minimum equity to do justice to the plaintiff",[80] the imposed remedy aims to achieve proportionality between A's detriment and B's role in inducing it.[81] A constructive trust is often imposed,[82] but compensatory damages (or "equitable compensation") may also be awarded.[83] The availability of damages where B's breach causes a loss is a "sure test"[84] and a "powerful indicator"[85] that the remedy is wrong-based. After all, "'damages' means … a monetary award given for a wrong."[86] It follows that remedies awarded following a successful proprietary estoppel claim, whether in the form of a constructive trust or damages, give effect to A's secondary right. There must therefore be a causal link between B's promise or assurance and A's detriment,[87] which is established when A demonstrates the element of reliance. Rules of remoteness also come into play through the application of the "minimum equity" concept, which prevents B from being liable for any of A's detriment which is too remote.

In explaining the wrong-based analysis, Michael Spence defines the primary duty B breaches as a "duty to ensure the reliability of induced assumptions".[88] He writes:[89]

> The primary obligation is that [B] must, in so far as he is reasonably able, prevent harm to [A]. "Harm" consists in the extent to which [A] is worse off because the assumption has proved unjustified than he would have been had it never been induced. The secondary obligation is that, if [A] does suffer harm of the relevant type, and [B] might reasonably have prevented it, then [B] must compensate [A] for the harm he has suffered.

This provides an explanation for why the elements of assurance or promise, reliance, and detriment are required.[90] When B induces A to assume that A will obtain an interest in B's property and A relies on that assumption, B incurs a primary duty to prevent harm to A by making good B's expectation. If, however, B refuses to do so, B breaches his primary duty, causing A to suffer detriment. A obtains an "equity by

---

[77] *Banner Homes Group Plc v Luff Developments Ltd.* [2000] Ch. 372, 399. This case reflects the doctrine in *Pallant v Morgan* [1953] Ch. 43, which Millett L.J. in *Paragon Finance plc v DB Thakerar & Co.* [1999] 1 All E.R. 400, 409 also cited as a doctrine falling within the same category as the doctrine in *Rochefoucauld v Boustead* and secret trusts.
[78] *Rochefoucauld v Boustead* [1897] 1 Ch. 196, 212.
[79] *Selangor United Rubber Estates Ltd. v Cradock (No. 3)* [1968] 1 W.L.R. 1555 (Ch), 1579.
[80] *Crabb v Arun District Council* [1976] Ch. 179, 198.
[81] *Henry v Henry* [2010] UKPC 3 at [65].
[82] Susan Bright and Ben McFarlane, "Proprietary Estoppel and Property Rights" (2005) 64 C.L.J. 449, 458.
[83] *Campbell v Griffin* [2001] EWCA Civ 990; *Jennings v Rice* [2002] EWCA Civ 159; *Ottey v Grundy* [2003] EWCA Civ 1176; *Henry v Henry* [2010] UKPC 3.
[84] Andrew Burrows, *The Law of Restitution*, 3rd ed., (Oxford 2010), 622.
[85] James Edelman, "Equitable Torts" (2002) 10 Torts L.J. 64, text between fns. 56 and 57.
[86] Edelman, *Gain-Based Damages*, p. 5.
[87] Andrew Robertson, "Estoppels and Rights-Creating Events: Beyond Wrongs and Promises" in Jason W. Neyers, Richard Bronaugh, and Stephen G.A. Pitel (eds.), *Exploring Contract Law* (Oxford 2009), 219; Sean Wilken Q.C. and Karim Ghaly, *Wilken and Ghaly: The Law of Waiver, Variation, and Estoppel*, 3rd ed., (Oxford 2012), [11.53].
[88] Michael Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Oxford 1999), 2.
[89] Spence, *Protecting Reliance*, p. 2.
[90] *Thorner v Major* [2009] UKHL 18 at [29].

estoppel" against B, giving A a cause of action in proprietary estoppel. This "equity" requires liquidation by a court, following which a proprietary or personal remedy may be awarded. The "equity" is "capable of binding B's successors in title",[91] and thus if a constructive trust is determined to be the appropriate remedy, then the proprietary effect of such an award is backdated "by virtue of some doctrine of relation back"[92] to the time of B's breach.

C. Transformative Constructive Trusts

Commonwealth jurisdictions such as Australia and Canada have explicitly developed a "remedial constructive trust" device. This device allows for the award of transformative constructive trusts, which provides for the ability to exercise discretion both as to the goal and content of the appropriate remedy on a case-by-case basis.

1. Australia

In Australia, courts are able to impose "remedial constructive trusts" to prevent unconscionable conduct in a wide array of cases, such as those involving property acquired in the course of a de facto marriage,[93] estoppel,[94] breach of fiduciary duty,[95] and knowing receipt.[96] The imposition of these trusts unmistakably involves judicial discretion. It has repeatedly been said that the constructive trust is to be imposed only as a last resort, that is, after other "lesser" — personal — remedies have been considered and found to be wanting in a particular case.[97] This reflects an exercise of discretion as to the *content* of the appropriate remedy, akin to the "minimum equity" approach taken by English courts in relation to proprietary estoppel. Such discretion is also reflected in the ability of Australian courts to decide whether the trust will take effect from the date of judgment or from some other earlier point in time.[98]

The extent of discretion does not stop there, however: courts go further by exercising discretion as to the *goal* of the remedy on a case-by-case basis. This is indicated by the open-ended list of potential purposes or objects pursuant to which these trusts may be awarded. For instance, "unconscionability" has been defined as a situation which the court deems to be "contrary to justice and good conscience".[99] This indicates that there is no limit to the potential objects for which the remedy may be awarded, so long as courts do not "disregard legal and equitable rights and simply do what is fair".[100] Similarly, while courts are guided by the "principle of appropriateness" whereby "the purpose (or imperatives) served by the individual doctrine" informs a judge in the selection of the appropriate remedy,[101] there is also "the requirement to do 'practical justice'", which allows courts to refuse to impose a constructive trust for any policy reason. For instance, a judge may be informed by concerns relating to the proportionality

---

[91] Land Registration Act 2002, s. 116(a).

[92] Kevin Gray and Susan Francis Gray, *Elements of Land Law*, 5th edn., (Oxford 2009), [9.2.89].

[93] e.g. *Muschinski v Dodds* (1985) 160 C.L.R. 583; *Baumgartner v Baumgartner* (1987) 164 C.L.R. 137.

[94] *Giumelli v Giumelli* (1999) 196 C.L.R. 101.

[95] *Grimaldi v Chameleon Mining NL (No. 2)* [2012] F.C.A.F.C. 6.

[96] *Robins v Incentive Dynamics Pty Ltd. (in liquidation)* [2003] NSWCA 71. Cf. *Wambo Coal Pty. Ltd. v Ariff* [2007] N.S.W.S.C. 589 at [42], where it was suggested by White J. that a constructive trust imposed on a mistaken payment where the recipient knew of the mistake and still retained the money was an "institutional" trust.

[97] *Bathurst C.C. v PWC Properties Pty. Ltd.* (1998) 195 C.L.R. 566 at [42]; *Giumelli v Giumelli* (1999) 196 C.L.R. 101 at [4]; *John Alexander's Clubs Pty. Ltd. v White City Tennis Club Ltd.* [2010] H.C.A. 19 *at* [128], *Farah Constructions Pty Ltd. v Say-Dee Pty. Ltd.* (2007) 230 C.L.R. 89 at [200].

[98] *Muschinski v Dodds* (1985) 160 C.L.R. 583, 451.

[99] *Baumgartner v Baumgartner* (1987) 76 A.L.R. 75, 83.

[100] *Muschinski v Dodds* (1985) 160 C.L.R. 583, 436.

[101] *Grimaldi v Chameleon Mining NL (No. 2)* [2012] F.C.A.F.C. 6 at [505], [509].

of the remedial response,[102] the protection of third party creditors who are "materially interested" or "directly affected" by the award,[103] or the desire to deter the defendant from keeping the proceeds of his wrongdoing.[104] As Deane J observed in *Muschinski v Dodds*,[105] the constructive trust may be "moulded and adjusted to give effect to the application and inter-play of equitable principles in the circumstances of the particular case." The clear ability to exercise discretion as to the goal of the appropriate remedy indicates that Australian courts impose constructive trusts as transformative remedies.[106]

This conclusion is fortified by the rule adopted by the High Court in *John Alexander's Clubs Pty Ltd. v White City Tennis Club Ltd.* that "where a court is invited to make, or proposes to make, orders directly affecting the rights or liabilities of a non-party [such as a constructive trust], the non-party is a necessary party and ought to be joined."[107] Such third parties are able not only to make a case against the claimant's "substantive case", but also to argue that the award of a constructive trust remedy would unfairly prejudice them. In view of this rule, it is hardly possible to say that courts are concerned with replicating or reflecting a claimant's pre-existing right, since the decision whether or not to award a constructive trust hinges on factors which are extraneous to considerations relating to the claimant's rights.

2. Canada

Canadian courts have also developed a so-called "remedial constructive trusts" device, which is available in two types of claim, namely unjust enrichment and wrongdoing. Unjust enrichment claims are made out when three requirements are satisfied: the defendant received an enrichment, the claimant suffered a corresponding deprivation, and there is an absence of juristic reason for the enrichment which renders the defendant's retention of the enrichment unjust.[108] A wrongdoing claim is made out where the defendant is under an equitable obligation in relation to the activities giving rise to the assets in his hands, and it is shown that the assets were acquired as a result of the defendant's deemed or actual agency activities in breach of that obligation.[109] Such claims have arisen in cases relating to the acquisition of property by fraud or breach of fiduciary duty.[110]

Once an unjust enrichment or wrongdoing claim is made out, courts have latitude to exercise discretion in order to determine the appropriate remedy. A "minimum equity"-like approach is detected, which indicates the exercise of discretion as to content. Thus, personal remedies must be deemed inadequate before a constructive trust can be awarded.[111]

---

[102] *Grimaldi v Chameleon Mining NL (No. 2)* [2012] F.C.A.F.C. 6 at [505], [511].
[103] *John Alexander's Clubs Pty. Ltd. v White City Tennis Club Ltd.* [2010] H.C.A. 19 at [131], [139].
[104] *Robins v Incentive Dynamics Pty. Ltd. (in liquidation)* [2003] N.S.W.C.A. 71 at [77].
[105] *Muschinski v Dodds* (1985) 160 C.L.R. 583, 451.
[106] For this reason, Lord Neuberger's suggestion that remedial constructive trusts imposed in Australia are in fact institutional in nature (noted at n 25 above), is misguided.
[107] *John Alexander's Clubs Pty. Ltd. v White City Tennis Club Ltd.* [2010] H.C.A. 19 at [131]–[132].
[108] *Pettkus v Becker* [1980] 2 S.C.R. 834, 848; *Peter v Beblow* [1993] 1 S.C.R. 980, 987; *Garland v Consumers" Gas Co.* [2004] 1 S.C.R. 629 at [30]; *Kerr v Baranow* [2011] 1 R.C.S. 269 at [36]–[45]. It should be noted, however, that this does not entail a "pure juristic reasons approach" (see Lionel Smith, "Demystifying Juristic Reasons" (2007) 45 Can. Bus. L.J. 281, 291) but one where there is a mix between "juristic reasons and reasons for restitution" (Smith, ibid., p. 290). This is obvious from the Supreme Court's decision in *Garland* (at [44]–[46]). The means by which this element of the claim is to be made out is by reference to a list of established categories of juristic reasons; and although the list was said to be closed, it remains possible to expand that list by adding "other valid common law, equitable or statutory obligations" (*Garland* at [44]), or by the defendant's attempt to rebut the claimant's claim through relying on "the reasonable expectations of the parties" or "public policy concerns" (*Garland* at [46]).
[109] *Soulos v Korkontzilas* [1997] 2 S.C.R. 217, 241.
[110] *Soulos v Korkontzilas* [1997] 2 S.C.R. 217, 238.
[111] *Rawluk v Rawluk* [1990] 1 S.C.R. 70, 107; *Peter v Beblow* [1993] 1 S.C.R. 980, 988.

In addition, however, courts also exercise discretion as to the *goal* of the appropriate remedy. Consider first the cases based on the defendant's wrongdoing. A constructive trust is awarded where the claimant can show a "legitimate reason for seeking a proprietary remedy", and where there are "no factors which would render imposition [*sic*] of a constructive trust unjust in all the circumstances of the case".[112] This indicates a non-exhaustive approach to the potentially relevant purposes or objectives to be achieved by the awarded remedy. Consider the case of *Soulos v Korkontzilas*,[113] which demonstrates the multifarious policy factors which may be taken into account. B was A's real estate broker, who in breach of his fiduciary duty arranged for his (B's) wife to purchase a property which B was meant to acquire on A's behalf. The majority of the Supreme Court held that a constructive trust was the appropriate remedy. In relation to the requirement to demonstrate a legitimate reason, this was fulfilled by the fact that the property in question held special value to A because the tenant was A's banker, and being the landlord of one's banker was prestigious in his community.[114] The award was also justified by the policy aim of "ensur[ing] that agents and others in positions of trust remain faithful to their duty of loyalty".[115] In relation to the requirement to demonstrate that the imposition of a constructive trust was not "unjust in all the circumstances of the case", the court took into account the fact that undue prejudice would not be caused either to B or to any third party.[116]

The unjust enrichment cases also reveal an open-ended approach to the goal of the awarded remedy, where the constructive trust is used as "a broad and flexible equitable tool … to determine beneficial entitlement to property".[117] For a constructive trust to be imposed, it is necessary to show some "reason to grant to the plaintiff the additional rights that flow from recognition of a right of property";[118] and it appears that any relevant policy factor can be taken into account. Among these are: the appropriateness of granting the claimant priority in bankruptcy, preventing the wrongdoer from retaining any increase in value of the property, the uniqueness of the property in question, the moral quality of the defendant's act,[119] the probability of the defendant paying up a personal award,[120] and the potential "psychological benefits derived from pride of ownership".[121] The discretion to determine the purpose or object of the remedy in a particular case indicates that these constructive trusts are transformative in nature.

V. A RE-ANALYSIS

A few exceptions notwithstanding,[122] judges have repeatedly held that English law recognises only "institutional" constructive trusts; it does not impose "remedial"

---

112 *Soulos v Korkontzilas* [1997] 2 S.C.R. 217, 241. See too *Sun Indalex Finance v United Steelworkers* [2013] 1 S.C.R. 271 [228].
113 *Soulos v Korkontzilas* [1997] 2 S.C.R. 217.
114 *Soulos v Korkontzilas* [1997] 2 S.C.R. 217 at [49].
115 *Soulos v Korkontzilas* [1997] 2 S.C.R. 217 at [50].
116 *Soulos v Korkontzilas* [1997] 2 S.C.R. 217 at [51].
117 *Kerr v Baranow* [2011] 1 R.C.S. 269 at [50].
118 *LAC Minerals Ltd. v Int Corona Resources Ltd.* [1989] 2 S.C.R. 574, 678.
119 All the above-mentioned points are found in *LAC Minerals Ltd. v Int Corona Resources Ltd.* [1989] 2 S.C.R. 574 at 678–79.
120 *Peter v Beblow* [1993] 1 S.C.R. 980, 999.
121 *Rawluk v Rawluk* [1990] 1 S.C.R. 70, 92.
122 *Metall Und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 Q.B. 391, 479; *Westdeutsche Landesbank Girozentrale v Islington L.B.C.* [1996] A.C. 669, 716; *London Allied Holdings Ltd. v Lee* [2007] EWHC 2061 (Ch) at [273]–[274]; *Clarke v Meadus* [2010] EWHC 3117 (Ch) at [82].

constructive trusts.[123] By making this observation, these judges are not simply saying that English law approaches the award of constructive trusts differently from other Commonwealth jurisdictions. Rather, it reflects a much deeper concern, that it is unthinkable to award proprietary remedies through the exercise of judicial discretion and with retrospective effect.[124] To allow such a practice is thought to be unprincipled[125] and "without recourse to further rationalisation",[126] since only with the authority of Parliament can a court "grant a proprietary right to A, who has not had one beforehand, without taking some proprietary right away from B".[127] This reflects two assumptions concerning the imposition of constructive trusts in English law: they are ever only awarded where judges do not exercise discretion,[128] and that the retrospectivity in their award necessarily creates uncertainty in the law,[129] particularly to the prejudice of third parties.

It is crucial to explore whether these assumptions are valid. To do so meaningfully, it is necessary to proceed with an understanding of constructive trusts as replicative, reflective, or transformative remedies, in order to avoid the definitional difficulties in the current understanding, as discussed above.[130]

A. "Institutional" Constructive Trusts

Constructive trusts which have traditionally been identified as "institutional" in nature square easily with an understanding of these trusts as replicative remedies. In this regard, it can be noted that the constructive trusts which were earlier identified as replicative in nature — namely those arising in the context of the doctrine in *Rochefoucauld v Boustead* and secret trusts — have also been described in terms which match those commonly used to identify institutional constructive trusts. Thus, as Millett L.J. (as he then was) observed of these constructive trusts, B's "possession of the property is coloured from the first by the trust and confidence by means of which he obtained it"[131] — that is, "as the result of a transaction by which both parties intend to create a trust from the outset".[132] There is a clear alignment between these constructive trusts and "institutional" constructive trusts, which are said to arise "by operation of law as from the date of the circumstances which give rise to it".[133]

Moreover, the lack of exercise of remedial discretion in relation to "institutional" constructive trusts indicates the replicative nature of the trusts. Thus, in these doctrines, a constructive trust is invariably imposed, which indicates that the remedial response is narrow and limited. Because the remedy merely replicates the parties' primary rights and duties which have arisen pre-trial, judges never pause to consider whether a lesser remedy would be more appropriate.

---

[123] *Re Sharpe (a bankrupt)* [1980] 1 W.L.R. 219, 225; *Lonrho plc v Fayed (No. 2)* [1992] 1 W.L.R. 1, 9; *Re Goldcorp Exchange Ltd. (in receivership)* [1995] 1 A.C. 74; *Re Polly Peck International plc (in administration) (No. 2)* [1998] 3 All E.R. 812 at 827, 831; *Ultraframe (UK) Ltd. v Fielding* [2005] EWHC 1638 (Ch) **at** [1515], [1546]; *Turner v Jacob* [2006] EWHC 1317 (Ch) **at** [85]; *De Bruyne v De Bruyne* [2010] EWCA Civ 519 at [47]–[48]; *Sinclair Investments (UK) Ltd. v Versailles Trade Finance Ltd. (in administrative receivership)* [2011] EWCA Civ 347 at [37]; *Crossco No. 4 Unlimited v Jolan Ltd.* [2011] EWCA Civ 1619 at [84]; *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45 at [47].

[124] *London Allied Holdings Ltd. v Lee* [2007] EWHC 2061 (Ch) at [273]; *Crossco No. 4 Unlimited v Jolan Ltd.* [2011] EWCA Civ 1619 at [84].

[125] *Lonrho plc v Fayed (No. 2)* [1992] 1 WLR 1, 9; *London Allied Holdings Ltd. v Lee* [2007] EWHC 2061 (Ch) at [273].

[126] *Re Goldcorp Exchange Ltd. (in receivership)* [1995] 1 A.C. 74, 104.

[127] *Re Polly Peck International plc (in administration) (No. 2)* [1998] 3 All E.R. 812, 831.

[128] Neuberger, "The Remedial Constructive Trust — Fact or Fiction", at [26]: "property rights are a matter of strict law not discretion."

[129] *London Allied Holdings Ltd. v Lee* [2007] EWHC 2061 (Ch) at [273].

[130] See Section II above.

[131] *Paragon Finance plc v DB Thakerar & Co.* [1999] 1 All E.R. 400, 409.

[132] *Coulthard v Disco Mix Club Ltd.* [2000] 1 WLR 707 (Ch) at 731.

[133] *Westdeutsche Landesbank Girozentrale v Islington L.B.C.* [1996] A.C. 669, 714.

B. "Remedial" Constructive Trusts

On the other hand, both reflective and transformative constructive trusts display characteristics of discretion and retrospectivity, and therefore they both map on to the present understanding of "remedial" constructive trusts.

1. As Reflective Remedies

Proprietary estoppel allows judges to exercise remedial discretion to give effect to A's secondary right, by which a backdated constructive trust might be imposed. Hence, this doctrine can be understood as providing for the imposition of "remedial" constructive trusts. As Etherton J. (as he then was) observed, proprietary estoppel provides for the imposition of:[134]

> a constructive trust by way of discretionary ... relief, the right to which is a mere equity prior to judgment, but which will have priority over intervening rights of third parties on established principles, such as those relating to notice, volunteers and the unconscionability on the facts of a claim by the third party to priority.

These constructive trusts are, however, distinct from those imposed as replicative or transformative remedies. Unlike replicative constructive trust doctrines where B must always perform his promise because he is invariably bound to honour his pre-existing trust relationship with A, here it is less obvious that B should be compelled to carry out the entirety of his promise whenever A suffers a reliance loss. There can be various degrees of detriment suffered and expectations formed; and "[i]t is clear … that these elements are fact sensitive and hugely dependent on the context".[135] The exercise of discretion is therefore essential. At the same time, they are distinct from those awarded as transformative remedies. It is clear that the fundamental object of proprietary estoppel is the correction of reliance losses,[136] or "harm", as Spence calls it. By "seek[ing] to react to multiple considerations",[137] proprietary estoppel provides for the exercise of remedial discretion in order to tailor the content of the remedy to achieve the goal of compensation. Hence, unlike transformative constructive trusts, discretion is not exercised as to the goal of the remedy.

2. As Transformative Remedies

As a remedy which significantly transforms A's pre-trial rights, the "remedial constructive trust" device as developed in Commonwealth jurisdictions such as Australia and Canada allows for the exercise of discretion which goes beyond that provided for under English law. The ability to exercise discretion both as to the goal and content of the appropriate remedy indicates that courts are concerned with the redistribution of property rights to reflect various policy aims. Hence, this device can potentially be imposed in any case and "whatever the field of private law involved".[138]

It is necessary to consider and dismiss two types of observations which might be

---

134 *London Allied Holdings Ltd. v Lee* [2007] EWHC 2061 (Ch).
135 *Aspden v Elvy* [2012] EWHC 1387 (Ch) at [99].
136 Gardner, "Reliance-Based Constructive Trusts", p. 79. See also *Wilken and Ghaly: The Law of Waiver, Variation, and Estoppel*, para. [11.94]: "The prime aim of the discretion [in proprietary estoppel] should be to prevent detriment."
137 Simon Gardner, "The Remedial Discretion in Proprietary Estoppel – Again" (2006) 122 L.Q.R. 492, 507.
138 Donovan Waters, "The Constructive Trust: Two Theses — England and Wales, and Canada" <http://www.step.org/constructive-trust-two-theses-%E2%80%93-england-and-wales-and-canada>.

taken to suggest that transformative constructive trusts have a place in English law. The first is based on the observations that the "remedial constructive trust" device as developed in those Commonwealth jurisdictions may have the object of attaining "the minimum equity to grant a proprietary remedy"[139] or achieving "fairness or good conscience".[140] It might be argued that, if either of these serves as the fixed "goal" of the remedy, then discretion as to goal is not after all exercised, which leads to the conclusion that the "remedial constructive trust" device is, after all, imposed as reflective remedies in reality.

Such a view ought to be resisted. It is first necessary to recall that the "minimum equity" approach, on its own, indicates that discretion is exercised only as to content and not as to goal. It dictates that equity's intervention ought to be the least invasive possible to achieve a particular goal; it says nothing about what goal ought to be achieved. So, for example, a "minimum equity" approach might be taken in pursuit of the goal of punishment, or compensation, or equitable redistribution of property rights: the choice of the goal remains at the courts' discretion. Similarly, "fairness" and "good conscience" are not precise enough to act as the goal of the appropriate remedy. This is easily demonstrated by the fact that *any* court order aims to do justice, to achieve fairness, and to accord with good conscience; it leaves open the particular purpose(s) or object(s) for which a transformative constructive trust is imposed.

The second type of observation suggests that *all* constructive trusts are in fact remedial in nature, and therefore there is nothing unique about replicative constructive trusts, since even these can be recast as transformative in nature. For example, Keith Mason writing extra-judicially observes that, even where events trigger the availability of (replicative) constructive trusts, "a stern drill-sergeant roars out 'WAIT FOR IT' … A full-blown proprietary remedy will only be granted if truly necessary and appropriate."[141] Similarly, R.P. Austin writes that "a proprietary remedy should not ever be regarded as mandatory. It should be possible for a court to exercise discretion against decreeing proprietary relief if the circumstances suggest that it would be unwise to do so."[142] Along the same vein, Michael Bryan suggests that "the alternative of ordering personal relief must always be considered, and choice exercised according to flexible but structured criteria."[143]

It would be a distortion of the law to deconstruct constructive trusts in this way. Whatever the historical position may have been,[144] it is an accurate observation of the modern law that no discretion as to goal and content is exercised in relation to the award of replicative constructive trusts. The fact that the law deems the parties' primary rights and duties as worthy of being enforced negates the need for courts to exercise discretion as to the goal of the remedy, and the content of the remedy is determined simply by direct reference to those rights and duties. Allowing even a residual possibility of considering afresh the goal and content of replicative constructive trusts on a case-by-case basis is not only unnecessary, but is also liable to cause contradictions and confusion. Moreover, it would detract from the full meaning of having *rights* at law. Since courts are prepared to say, in the context of the doctrine in *Rochefoucauld v Boustead* and secret trusts, that informally declared trusts will be enforced as constructive trusts, then

---

[139] David Wright, "Third Parties and the Australian Remedial Constructive Trust" (2013 – 2014) 37 University of Western Australia Law Review 31, 48.

[140] Waters, "The Constructive Trust: Two Theses — England and Wales, and Canada", p. 1.

[141] Keith Mason, "Deconstructing Constructive Trusts in Australia" (2010) 4 Journal of Equity 1, 45.

[142] RP Austin, "Constructive Trusts" in PD Finn (ed.), *Essays in Equity* (London 1985), 240.

[143] Michael Bryan, "Constructive Trusts: Understanding Remedialism" in Jamie Glister and Pauline Ridge, *Fault Lines in Equity* (Oxford 2012), 235.

[144] In *Muschinski v Dodds* (1985) 160 C.L.R. 583, 450–51, Deane J took the view that, since constructive trusts were historically "remedial", and because the law in Australia had not outgrown its formative stages, therefore all constructive trusts in the modern law remained "remedial" in nature.

beneficiaries under such trusts have rights enforceable as against their trustees which are similar in this respect to rights of beneficiaries under express trusts. To hold that courts may yet exercise discretion to deprive beneficiaries under such constructive trusts of their rights would suggest that courts may also do so in relation to beneficiaries under any trust. This would in turn cast doubt as to whether beneficiaries have rights at all.

3. Evaluation

Because the present understanding of "remedial" constructive trusts does not take into account the distinction between reflective and transformative constructive trusts, this leads to the unfortunate exaggeration that "remedial constructive trust[s are] not part of English law".[145] The source of the problem is an exaggerated notion of remedial discretion, which fails to recognise that different *degrees* and *dimensions* of discretion are exercised in relation to "remedial" constructive trusts. It has been explained that reflective remedies provide for the exercise of discretion as to content, while transformative remedies allow for the exercise of discretion as to both content and goal. The former gives effect to secondary rights, while the latter has little to do with pre-existing substantive rights. Once this distinction is appreciated, then it becomes clear that it is *transformative* constructive trusts which are not part of English law.

It is obvious that the imposition of transformative constructive trusts is far more contentious than the imposition of reflective constructive trusts, since the former has the *potential* of leading to the unbridled exercise of judicial discretion. This is not an issue in relation to reflective constructive trusts because the exercise of discretion is constrained in terms of the goal of the remedy. Thus, although proprietary estoppel provides for the exercise of remedial discretion, its exercise is constrained by the remedial goal of compensating A for harm suffered through the unreliability of B's induced assumptions. This is why the exercise of discretion and the retrospective effect of a constructive trust award do not cause any uncertainty in this doctrine: it is precisely because proprietary estoppel remedies give effect to the claimant's substantive rights that we can confidently state the choices and constraints on the courts' exercise of discretion, as well as predict with reasonable certainty the possible outcome of any particular case. This also explains why it is demonstrably untrue that the ability to vary proprietary rights can only be granted by an Act of Parliament: as proprietary estoppel indicates, English courts are able to do so in a controlled manner, that is, where the exercise of discretion is constrained as to the goal of the remedy.

VI. THE WAY FORWARD

It remains to be considered what implications this restructured understanding has for the future development of the law. In the first place, it refines the nub of what really troubles English judges. It has been seen that the presence of remedial discretion and retrospectivity in the award of constructive trusts does not necessarily cause uncertainty or reflect a lack of proper principle. Instead, the nub of the concern seems to be the ability to exercise *unconstrained* or *unbridled* discretion. English courts are perfectly comfortable with exercising remedial discretion where the goal of the remedy constrains the exercise of such discretion, as proprietary estoppel indicates, but not where the discretion is "at large".

[145] *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45 at [47].

The recognition of this fact has important implications for the future development of constructive trusts. Instead of considering *whether* discretion ought to be exercised, a proper discussion would focus on how best to *constrain* the exercise of remedial discretion. In this regard, it is apt to note that restricting the goal of the remedy for a particular doctrine is not the only possible means of meeting the desire to avoid the exercise of unbridled discretion. Thus, even in Australia[146] and Canada[147] where transformative constructive trusts are imposed, the apex courts have rejected Lord Denning's "constructive trust of a new model" which can be imposed "whenever justice and good conscience require it",[148] since using this as the sole criterion would entail that judicial discretion is constrained by *no other consideration whatsoever*. Instead, they have highlighted the need for an incremental development of the law, emphasising that they will be "informed by the situations where constructive trusts have been recognized in the past."[149] This indicates that, although transformative constructive trusts *allow for* the exercise of discretion as to the goal of the remedy, the doctrine of precedent provides a control mechanism which militates against the concerns over an unbridled exercise of discretion.

Hence, the crucial question for English courts is this: ought the law recognise transformative constructive trusts which provide the *possibility* for courts to depart from precedent, although this is very *unlikely* to occur? Put in this way, it is not immediately obvious that the answer ought to be a resounding "no", since allowing for the ability to award transformative constructive trusts may provide a desirable balance between certainty and flexibility in the award of proprietary remedies.

[146] See e.g. *Muschinski v Dodds* (1985) 160 C.L.R. 583, 452.
[147] See e.g. *Pettkus v Becker* [1980] 2 S.C.R. 834, 859.
[148] *Hussey v Palmer* [1972] 1 W.L.R. 1286, 1290.
[149] *Soulos v Korkontzilas* [1997] 2 S.C.R. 217 at [34]. See too *Baumgartner v Baumgartner* (1987) 76 A.L.R. 75, 87.