

Reining in the Constructive Trust

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Abstract

‘Constructive trust’ is an opaque label. It obscures important differences between the various situations which it seeks to describe. Construing the relationship between the parties to a dispute as a relationship of trustee and beneficiary has multiple consequences. It is not necessarily the case that all of those consequences are normatively justified in all of the situations. Subsuming a series of normatively dissimilar legal responses within a category of ‘constructive trusts’ is prejudicial to the coherent development of the law. There is a risk that courts and litigants will be beguiled into attaching the whole bag of ‘trust’ consequences to situations in which only some of those consequences are normatively justified. It is proposed that the nomenclature of constructive trusteeship be ‘reined in’ so as to cover only those situations in which the full proprietary consequences of trusteeship are normatively justified.

Introduction

Few legal concepts have proved to be more troublesome than the constructive trust. It has been described as ‘equity’s chameleon’.¹ It has proved to be impossible to explain all instances of the constructive trust phenomenon according to a single juridical principle. In this respect, the constructive trust stands in contrast to the other categories with which it is usually aligned, namely, the express trust and the resulting trust. Express trusts exist to give effect to actual dispositive intention on the part of transferors of property. While nobody actually intends to create a resulting trust, a resulting trust can never arise contrary to an expressed actual intention of the relevant party.² Resulting trusts arise in situations where there has been a transfer of property or a conferral of a benefit but there is a lack of evidence

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¹ GE Dal Pont, ‘Equity’s Chameleon — Unmasking the Constructive Trust’ (1997) 16 *Australian Bar Review* 46. See also Ross B Grantham and Charles EF Rickett, *Enrichment and Restitution in New Zealand* (2000) 405–6.

² *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 708 (Lord Browne-Wilkinson). See *Re Gillingham Bus Disaster Fund* [1958] Ch 300 and *Re West Sussex Constabulary’s Widows, Children and Benevolent (1930) Fund Trusts* [1971] Ch 1, as to whether a resulting trust can exist in the face of an intention to abandon property, and *Calverley v Green* (1984) 155 CLR 242 and *Muschinski v Dodds* (1985) 160 CLR 583, as to whether an intention to make an outright gift rebuts a presumption of resulting trust.

as to the transferor's or conferrer's actual intention. In these situations, the law makes the commonsense assumption that human beings act in a self-interested manner, so do not give away their property without either receiving something in return or being motivated by natural affection or a sense of personal obligation towards the donee.³

Therefore, while express trusts and resulting trusts arise in a range of particular situations, the situations which fall within each of those categories have the same normative essence. Saying that two or more situations have the 'same normative essence' is merely saying that, from the point of view of the members of the relevant politico-legal community, those situations resemble one another in terms of the type of injustice which the law must correct. The shared essence is derived from a shared social attitude towards a group of events, rather than the common physical attributes of the events. Legal categories, like other categories of the social sciences, are 'selections of certain elements of a complex picture on the basis of a theory about their coherence'.⁴ Obviously, the recognition that a particular set of categories express the 'law' is predicated upon the general acceptance and use of those categories within the relevant politico-legal community. In the case of express trusts, the law gives effect to an actual intention of a transferor of property. The law binds the transferor to its choice. Of course, the personal obligations of express trustees vary from trust to trust. For example, a trustee of a deceased estate has administrative duties which differ significantly from those of a solicitor who holds clients' funds in a trust account.⁵ Nevertheless, these situations may plausibly be seen as belonging to a single, coherent category of legal phenomena on the basis that they are all cases in which the recognition of beneficial ownership by someone other than the legal owner is justified by reference to an actual dispositive intention. Resulting trusts have the same normative essence as express trusts: they give effect to a disponent's intention to separate beneficial ownership from legal ownership. They differ from express trusts in so far as the operative intention is presumed on the basis that the transaction belongs to a recognised class of transactions, there being no evidence that the relevant party had an actual contrary intention.

If a shared normative essence is the bedrock of a useful legal category, then serious questions may be raised about the value of maintaining a category of 'constructive trusts' (at least as it is conventionally conceived). Some so-called constructive trusts certainly do give effect to a person's dispositive intention in relation to particular property.⁶ Other so-called constructive trusts perform a different type of work. In particular, a distinction may be made

³ John Glover, 'Re-assessing the Uses of the Resulting Trust: Modern and Medieval Themes' (1999) 25 *Monash University Law Review* 110, 119. The implied intention theory of resulting trusts is not universally endorsed. Perhaps the most notable alternative view is that resulting trusts are a response to the unjust enrichment of a transferee. See especially Robert Chambers, *Resulting Trusts* (1997) 222–3.

⁴ Friedrich Hayek, *The Counter-Revolution of Science: Studies on the Abuse of Reason* (1952) 55.

⁵ Compare the scope of the duty of the trustee in *Re Dawson (dec'd)* [1966] 2 NSW 211 with the duty of the trustee solicitor in *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, and note the effect that this had on the measure of compensation for breach of the duty in each case. See especially the comments of the High Court in *Youyang* at 503–4.

⁶ As acknowledged by Millet J in *Lonrho plc v Fayed (No 2)* [1992] 1 WLR 1, 9.

between a constructive trust which gives effect to a pre-existing obligation to transfer *particular property* to another, and one which merely serves as a medium for the disgorgement of *value* which the constructive trustee acquired by way of a breach of duty. The principal contention of this article is that subsuming a series of normatively dissimilar legal phenomena within a category of ‘constructive trusts’ is prejudicial to the coherent development of the law. There is a risk that courts and litigants will be beguiled into attaching the whole bag of ‘trust’ consequences to situations in which only *some* of those consequences are normatively justified. Accordingly, it is proposed that the use of the constructive trust concept be ‘reined in’ so as to capture only those situations in which the invariable feature of an express trust — that is, a person other than the legal owner has the benefit, to the exclusion of others, of identifiable property — is normatively justified.

No Single Theory

Major treatises on the law of trusts typically begin their discussion of constructive trusts with the statement that a constructive trust, unlike an express or resulting trust, may exist in the absence of, or even contrary to, any intention on the part of the legal owner of the relevant property.⁷ Constructive trusts are defined negatively: whatever they are, they are not express or resulting trusts. According to Professor Birks, this is rather like knowing that ‘some birds are not sparrows’.⁸ Having accepted that ‘constructive trusts’ is a residual category, treatises on constructive trusts then proceed to enumerate the situations in which courts have used the phrase ‘constructive trust’, or a variant thereof, to describe either the relationship between the parties or the relief imposed by the court.⁹

The lack of a single normative idea has far-reaching consequences for legal reasoning. Extension of constructive trusteeship to novel situations, if it is to occur at all, must occur on the basis of factual analogy, which potentially might proceed on the basis of *any* factual resemblance between the novel case and a situation which has hitherto been recognised as giving rise to a constructive trust. Where legal categories can be explained according to a single normative idea, on the other hand, the extension of the category is controlled by the normative theory.¹⁰ The normative theory operates as a ‘higher-level mediator of norms’:¹¹

⁷ See, eg, HAJ Ford and WA Lee, *Principles of the Law of Trusts* (3rd ed, 1996) [22020]; AJ Oakley, *Constructive Trusts* (3rd ed, 1997) 1.

⁸ Peter Birks, ‘Definition and Division: A Meditation on *Institutes* 3.13’ in Peter Birks (ed), *The Classification of Obligations* (1997) 1, 33.

⁹ See, eg, Oakley, above n 7. Cope has previously remarked upon this tendency. See M Cope, *Constructive Trusts* (1992), 18.

¹⁰ The author, in making this assertion, acknowledges Kit Barker’s suggestion (which draws upon Wittgenstein’s idea of ‘family resemblances’) that one can ‘*meaningfully refer*’ to a category of private law even though it prescribes a diverse range of types of behaviour. A legally meaningful category can be ‘a *mixed bag* without being an *incoherent bag*’ (emphasis in original). See Kit Barker, ‘Understanding the Unjust Enrichment Principle in Private Law: A Study of the Concept and its Reasons’ in Jason W Neyers, Mitchell McInnes and Stephen GA Pitel (ed), *Understanding Unjust Enrichment* (2004) 79, 95. Barker was concerned with the concept of ‘unjust enrichment’. While ‘unjust enrichment’ is certainly a heterogeneous category, it is,

it directs the adjudicator to the permissible basis for an analogy between the novel case before the adjudicator and previous cases in which the legal norm has dictated a result of the type which the claimant seeks. In so far as a category does not correspond with a single normative idea, it cannot be of assistance in legal reasoning and its use therein may be counter-productive.

The invocation of the concept of trusteeship invites further complications and scope for confusion. The consequences of trusteeship are multifaceted. As mentioned previously, trusteeship involves *both* personal obligation on the part of the trustee *and* equitable ownership of the trust property on the part of the *cestui que trust*. The idea of ownership is itself associated with two distinct types of consequence, which are the establishment of a claim to the traceable proceeds of an asset (including any appreciation in that asset's value) and the establishment of claims to the asset which are enforceable against the entire world. The different normative characteristics of different constructive trust situations may call for emphasis upon one or another of these consequences. Saying merely that we construe the circumstances of the case so as to enable one or more of these consequences to follow does not say anything which marks out a category of cases which have a single normative rationale.

Since there does not seem to be a single normative theory for the constructive trust, it is appropriate to ask whether we should abandon the nomenclature altogether. At the very least, it needs to be confined to a narrower category of cases in which all of the consequences of separation of legal and equitable ownership are normatively justified. The rubble of particular constructive trust situations needs to be incorporated into new structures, each of which is held together by a single normative theory which justifies one or more particular consequences of trusteeship. Since the full proprietary consequences of trusteeship are not justified in every situation which has traditionally attracted the constructive trust label, it would be better to label as trusts only those situations where those proprietary consequences are justified.

There is one treatise on constructive trusts which deserves some special attention on account of the fact that its author departed from the dominant strategy of treating the category of 'constructive trusts' as a miscellany of otherwise unrelated situations, and proceeded to discern themes which were common to groups of constructive trust situations. That work is Gbolahan Elias' *Explaining Constructive Trusts*.¹² From the outset of his work, Elias made it clear that he sought to 'rationalize the rules' rather than to provide a general

nonetheless, coherent because it is bound together by a single normative idea, ie, those who receive benefits to which they are not entitled must give the benefits back. The normative idea shapes the law's response as restitutionary in all of the relevant cases, notwithstanding that there is a great deal of variety as to the circumstances which justify treating these cases as cases of *unjust* enrichment. The category of 'constructive trust' does not enjoy even that minimal level of homogeneity.

¹¹ Ibid 91.

¹² Gbolahan Elias, *Explaining Constructive Trusts* (1990).

definition of the constructive trust.¹³ A definition would be ‘truly significant’ only in so far as ‘it provides conceptual orderliness and justifiable practical results’.¹⁴

Elias’ thesis was that all of the rules about constructive trusts are ‘means for the rational furtherance of three good aims’.¹⁵ These aims are ‘the perfection aim’, that is, ‘one who has chosen to dispose of his options in favour of another person should abide by the choice’; ‘the restitution aim’, that is, ‘one who has made a pecuniary gain through another person’s loss gives up the gain to the other person’ and ‘the reparation aim’, that is, ‘one who has caused loss to another repairs the loss’.¹⁶ The rule concerning the equitable interest of a purchaser of land and the secret trust rule are examples of rules concerned with the perfection aim. The rule in *Keech v Sandford*¹⁷ concerning fiduciaries who renew leases in their own names is, according to Elias, an example of a rule which furthers the restitution aim. The rule concerning strangers who knowingly assist in a breach of trust or fiduciary duty is an example of a rule concerned with the reparation aim. Significantly, Elias conceded that there is ‘no intrinsic reason’ why a rule which furthers an aim other than one of those three aims could not be a rule about constructive trusts; Elias asserted that ‘it just so happens that the rules on constructive trusts do further the three aims’.¹⁸

The virtue of Elias’ approach to the subject matter is that each of the various classes of situations in which the law has, hitherto, recognised a constructive trust is rationalised in normative terms according to a theme which it shares with some other constructive trust situations. These rationalisations are credible, if not incontrovertible. This provides a controlling mechanism for the extension of those classes of situations: extension of a rule recognising a constructive trust to a novel fact situation is warranted only where doing so would not exceed the rationale of the constructive trust in the relevant class of situations. Elias, in stating that all of the constructive trust situations which we know about today are instances of perfection, restitution or reparation, conceded, in effect, that different features of the trust relationship were being invoked in different cases in which the outcome was constructive trusteeship. If there is, in fact, no single rationale for constructive trusts, it makes sense to describe the categories of equitable intervention according to the particular feature of trusteeship which is justified and the normative basis on which it is justified. This seems to be the logical end-point of Elias’ line of argument. To identify all of these situations as constructive trusts is to imply the importation of the entire basket of the consequences of trusteeship in these situations.

¹³ Ibid 3.

¹⁴ Ibid.

¹⁵ Ibid 4.

¹⁶ Ibid.

¹⁷ (1726) Sel Cas T King 61; 25 ER 223.

¹⁸ Elias, above n 12, 5.

Justifying Proprietary Consequences

Any relabelling of the various constructive trust situations must be predicated upon the best possible justification for the imposition of the relevant consequences of trusteeship within the framework of the law as a whole. This section of the article considers different theories as to what justifies giving the claimant the benefit of the consequences of ownership. As mentioned previously, there are two consequences of ownership, namely, the ability to claim traceable proceeds of an asset, and the ability to assert a claim to the asset which is enforceable against the whole world. Three particular constructive trust situations — the purchaser's constructive trust, the constructive trusteeship of fiduciaries who have received bribes, and constructive trusts arising by way of proprietary estoppel — are then compared in order to demonstrate how, in the second and third situations, the normative justification for a legal response — that is, for any legal response at all — does not necessarily provide a justification for conferring both incidents of ownership upon the claimant.

As already noted, each of Elias' three aims corresponds roughly to one of three distinct consequences of trusteeship. Perfection of a choice to confer an interest in property upon another is furthered by the separation of legal and equitable ownership. The equitable owner obtains priority over the legal owner's unsecured creditors. Restitution of unjust enrichment is furthered by the constructive trustee's personal liability to account for a gain received. The concept of equitable ownership may, in this context, have more to do with the measure of the gain to be disgorged than the conferral upon the claimant of priority over the constructive trustee's creditors. A trustee's personal liability to compensate the *cestui que trust* for the losses it suffers as a result of the trustee's wrongdoing furthers the reparative aim.

While it would be tempting, for the sake of simplicity, to restrict the proprietary consequences of trusteeship — that is, claims to value acquired and claims against third parties — to cases in which the aim is to perfect an intention to confer ownership, there are reasons for hesitation. The aim of restitution may, in principle, be served by separation of legal and beneficial ownership, in the sense that saying that a recipient of a benefit is a trustee for the person who conferred the benefit has the effect of restoring the beneficial ownership thereof to the conferrer.¹⁹ Nevertheless, a restitutionary 'constructive trust' cannot logically be the presumptive response to unjust enrichment in the same way that a perfectionary 'constructive trust' is logically the presumptive response to an enforceable undertaking to confer an interest in property upon another. The foundation of the much-used distinction between 'institutional' constructive trusts and 'remedial' constructive trusts rests upon this observation. As Grantham and Rickett have explained, institutional constructive trusts are the consequence of property rights which have already been created and the trust is

¹⁹ Grantham and Rickett, above n 1, 399.

‘deemed in order to give [those rights] transparency’.²⁰ A remedial constructive trust is merely a ‘potential response’ to an unjust enrichment claim.²¹ The existence of a claim for the restoration of unjust enrichment is not a sufficient condition for the imposition of a remedial constructive trust. Indeed, a personal remedy is ‘the presumptive form in which restitution will be effected’.²² The conferral upon the claimant of beneficial *ownership* of property representing the defendant’s gain requires an additional justification.

The problem which confronts us, then, is that we cannot rule out proprietary remedies for unjust enrichment claims, but the concept of unjust enrichment does not, of itself, justify awarding a proprietary remedy — that is, a transfer of *particular property* — rather than a personal remedy for the transfer of *value*. We need to look beyond the unjust enrichment principle in order to justify a proprietary remedy. This situation differs from other instances of remedial duality in the law. Whether a party who is suing for breach of contract is awarded specific performance or damages depends, in part, upon whether damages would be adequate to place that party in the position it would have occupied had the contract been performed. When dealing with contracts for the sale of land, that question will usually be answered in the negative, so the party who is not in breach will be taken to have a *prima facie* right to specific performance. The justification for specific performance refers to the central theme of the cause of action, which is to hold the defendant to the performance of its undertaking. In so far as it has not ceased to be possible for the defendant to perform that undertaking, the defendant will have to perform it. In an unjust enrichment case, on the other hand, it will not suffice to say that, if, in the particular circumstances of the case, the claimant’s success in depriving the defendant of its unjust enrichment depends upon the imposition of the proprietary consequences of trusteeship upon the defendant, then the proprietary response must be preferred.²³ To do so may serve to express our ‘moral indignation’ as to the defendant’s conduct, but it is not clear why the law’s apparent need to express that indignation should be satisfied potentially at the expense of the defendant’s unsecured creditors.²⁴ Saying that the defendant is a trustee may serve to *quantify* the unjust enrichment (such as where the ill-gotten gain consists of the profits of a business or investment conducted by the defendant), but giving the claimant a proprietary interest in that enrichment which prevails over the claims of the defendant’s creditors requires a further justification.²⁵

²⁰ Ibid 414.

²¹ Ibid.

²² Ibid 399.

²³ Ibid 416.

²⁴ Roy Goode, ‘Proprietary Restitutionary Claims’ in W R Cornish, Richard Nolan, Janet O’Sullivan and Graham Virgo (ed), *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (1998) 63, 71–2.

²⁵ It might be noted, in passing, that even if one sees the resulting trust as being the vehicle for proprietary restitution, as Robert Chambers does, then one still needs to go beyond the unjust enrichment principle in order to justify the imposition of trusteeship. All resulting trusts may (in Chambers’ opinion) be instances of unjust enrichment, but not all unjust enrichments bring about resulting trusts. Chambers said that the resulting trust ‘embodied’ the proprietary base justification for proprietary restitution. See Chambers, above n 3, 233–5.

The academic literature on restitutionary remedies reveals no clear consensus upon the justificatory question, although one might identify two broad approaches to the matter. These might be described as the ‘proprietary base approach’ and the ‘secured creditor analogy approach’.²⁶

Roy Goode’s approach to the question exemplifies the proprietary base approach. This approach insists that a restitutionary claim cannot have proprietary consequences unless the benefit in the defendant’s hands which represents that defendant’s enrichment is ‘derived from’ an asset of the claimant.²⁷ The ambit of this approach is not limited to cases of partially complete gifts and enforceable promises to transfer property to the claimant. A proprietary response would be available where the claimant’s claim is to the return of the very asset which it transferred to the defendant or to the ‘identifiable proceeds’ of the asset.²⁸ It would also be available where the defendant’s gain is traceable to property of which the claimant has been directly deprived, and where a third party transfers to the defendant something which the claimant could have claimed from the third party.²⁹ A proprietary response would not be available in respect of gains procured by the defendant through a breach of fiduciary duty, in so far as these gains are not directly at the expense of the claimant — for example, where the fiduciary receives a bribe³⁰ — or in respect of failures of consideration.³¹

Elias’ approach to the question overlaps with that of Goode. The claimant should, within the scope of the three aims of perfection, restitution and reparation, have a proprietary claim in any ‘sufficiently factually relevant property’.³² Obviously, the phrase ‘sufficiently factually relevant’ has to do a lot of work in this context and needs considerable elaboration. Elias suggested that, for the purposes of that part of the law in which the ‘constructive trust’ nomenclature has been used, there are three types of situations in which property is ‘sufficiently factually relevant’, namely, where the property falls ‘within the scope of the defendant’s disposition of his options in favour of the [claimant]’, where the ‘receipt’ or ‘enhancement’ of the property is ‘a gain made through the [claimant’s] loss’, and where the claimant has ‘wasted money or time and effort on it’.³³ Elias did not think that the claimant’s claim necessarily sounded in property rights in every single instance of these three types of situations. Elias’ point was merely that proprietary consequences could not, in these cases, be ruled out as a matter of logic. Nonetheless, what makes claimants in these cases potentially eligible for proprietary relief is that there is a connection between the

²⁶ See D Paciocco, ‘The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors’ (1989) 68 *Canadian Bar Review* 315, 323–5. Paciocco speaks of ‘the proprietary interest justification’ and ‘the acceptance of risk justification’.

²⁷ Goode, above n 24, 69.

²⁸ *Ibid* 67.

²⁹ *Ibid* 68.

³⁰ *Ibid* 70. Goode queried the outcome in *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 to this extent.

³¹ *Ibid* 75.

³² Elias, above n 12, 34.

³³ *Ibid* 36.

property which constitutes the defendant's gain and the property which the claimant has lost. A breach of fiduciary duty in which the defendant's gain is not at the expense of the claimant would not attract proprietary relief.

The alternative type of approach — the secured creditor analogy approach — has been advocated by Andrew Burrows. This approach focuses directly upon the competition which would arise between the claimant and the defendant's creditors in the event of the defendant's insolvency. The law should prefer the claim of the claimant — and, accordingly, grant proprietary relief to the claimant — in cases where the claimant 'has not taken the risk of the defendant's insolvency'.³⁴ It is supposed that, where a claimant's consent to the conferral of a benefit upon the defendant has been vitiated — such as in cases of mistake or duress — that claimant has not generally taken the risk of the defendant's insolvency.³⁵ The claimant must be treated as if it never had any intention to confer title to the transferred property upon the defendant. Where, on the other hand, the ground for seeking restitution is failure of consideration — as in the case of a void, unenforceable or discharged contract — it is supposed that the claimant *has* intended to confer title to the transferred property upon the defendant and has taken the risk that the defendant might become insolvent. The claimant did not intend the defendant to be enriched in the circumstances which came about, but the claimant took the risk that the desired circumstances might not come about.³⁶ Where the enrichment of the defendant is not the product of a transfer of wealth from the claimant to the defendant, but results from the defendant's commission of a wrong, such as a breach of fiduciary duty, the defendant's enrichment does not necessarily correspond with a subtraction from the wealth of the claimant. In relation to the property which constitutes the defendant's enrichment, it makes no sense to talk about the claimant taking or not taking a risk, so a proprietary claim ought not to be available to the claimant.³⁷

Burrows' rejection of the proprietary base approach rests, in large part, on the notion that property has explanatory force only in relation to the 'pure proprietary claim' in which the defendant retains precisely the thing of which the claimant has been deprived and which the claimant now wishes to take back.³⁸ Where substitution has occurred, the tracing of the original asset into the new asset answers the 'at the expense of' question (and, accordingly, leads to a conclusion that the defendant has been unjustly enriched), but does not explain why the claimant has a claim to the new asset *in specie*. Nevertheless, Burrows' preferred approach presents its own difficulties. First, it leaves the question of whether proprietary

³⁴ Andrew Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 *Law Quarterly Review* 412, 425.

³⁵ *Ibid* 426. Burrows recognised exceptions to this general rule, notably, the situation where the claimant's mistake is a mistake of law in believing that a contract under which it conferred credit without security was a valid contract at law: at 426–7.

³⁶ *Ibid*.

³⁷ *Ibid* 427.

³⁸ *Ibid* 417.

responses are *justified* severely underdetermined. As William Swadling has pointed out,³⁹ the central argument of this approach is essentially a negative one: that certain types of claimants should *not* be able to make proprietary claims because they had the opportunity to make arrangements to protect themselves in the event of the defendant's insolvency. This does not provide a positive reason why other types of claimants — those who have not taken that risk — *should* be able to make a proprietary claim. Swadling suggested that it does not justify a proprietary claim any more than a negation of the proposition that smoking causes blindness provides a reason for someone to smoke.⁴⁰ Second, the 'analogy' is a strained one. The recognition that certain types of claimants have proprietary rights has the potential to place those claimants in a *better* position than a secured creditor. Those claimants acquire a claim to increases in value and substituted assets, and not merely security for the payment of the original debt.⁴¹

The proprietary base and secured creditor analogy approaches were articulated with the particular problem of proprietary restitution of unjust enrichment in mind. We can perhaps shed more light on the justification of proprietary claims by moving the discussion away from that particular legal problem towards a more general reflection upon what it means to say that a legal remedy — that is, any legal remedy — is *justified*. The recognition of a right on the part of a claimant involves the imposition of a correlative duty on the part of a defendant wrongdoer (and, perhaps, third parties claiming through the wrongdoer) to yield something to the claimant victim. To put it simply, since the law is concerned with justifying the coercion of others, claiming rights can never be understood in isolation from the effect that those claims have upon other people's freedom of action. Professor Weinrib explained the correlativity of claimant and defendant in this way:

To think of something as an injustice is not to refer to a brute event but to make a normative ascription. The correlativity of the injustice is the correlativity of the normative considerations that underlie that ascription. Because the defendant, if liable, has committed the same injustice that the plaintiff has suffered, the reason the plaintiff wins ought to be the same as the reason the defendant loses.⁴²

One must examine the nature of the injustice which the claimant has suffered and ask what remedy would correct that injustice (that is, the extent to which the defendant is better off than they should be according to the law's conception of justice), but do no more than correct that injustice. Ultimately, all remedial questions must refer to the questions of *what measure* of relief is needed in order to correct the injustice which the claimant suffers and *from whom* may the required measure of relief be exacted. When considering whether the remedy should be proprietary in nature, one needs to ask whether saying that the claimant owns something in the hands of the defendant (or anyone else) takes too much away from

³⁹ William Swadling, 'Policy Arguments for Proprietary Restitution' (2008) 28 *Legal Studies* 506.

⁴⁰ *Ibid* 526.

⁴¹ *Ibid* 528.

⁴² Ernest J Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 *University of Toronto Law Journal* 349, 350–1.

the defendant (or other person), bearing in mind the nature of the injustice which the defendant has perpetrated and from which the claimant suffers.⁴³

In asking whether a proprietary remedy takes too much away from the defendant or anyone else, one must remember that property involves two types of consequences, namely, claims to increases in value and persistence of claims against people other than the principal wrongdoer. Therefore, to ascertain the extent to which the legal remedy must involve proprietary consequences, we need to ask two questions in sequence:

1. Do the normative considerations which justify recognising that a claimant, C, has a claim (at all) against a defendant, D, also justify allowing C to recover a proprietary measure of relief (that is, the value acquired by D by reason of the breach) from D?
2. Do the normative considerations which justify recognising that C has a claim (at all) against D also justify allowing C to recover a proprietary measure of relief from T, a third party claiming through D?

In this formulation, ‘proprietary measure of relief’ refers to relief which gives C a right to the particular property which D or T (as the case may be) has acquired — not necessarily directly from C or at C’s direct expense — by reason of D’s breach of duty. If one answers ‘yes’ to both 1 and 2, then the full proprietary consequences of a trust should *prima facie* be available to C. This means that, if D misappropriated property held on trust for C or applied to D’s own use property which D had undertaken to acquire for C, then D would be liable to give that property (or what survives of it) to C. If T acquires that property from D and there are no circumstances which provide T with a defence to a proprietary claim (for example, T is a bona fide purchaser for value of the legal estate without notice), then T, to the extent that T holds the traceable proceeds of the property, would be visited with the full proprietary consequences of trusteeship. Vindicating C’s pre-existing claim against D that D hold or acquire a particular asset for C demands that both D and T should be restrained from applying the traceable proceeds of that asset to their own use. No confusion is created by saying that a trust of some sort arises in these circumstances.

If one answers ‘yes’ to 1 but ‘no’ to 2, then C is entitled to a full account from D in respect of the value which D has acquired through D’s interference with C’s right. If the relationship between C and D involves an undertaking by D that D will act in C’s interests with respect to particular matters (that is, it is a fiduciary relationship or one which gives rise to a duty of confidence), then the law is justified in treating C as having a better claim than D to the fruits of D’s efforts. D’s undertaking to C does not, on the other hand,

⁴³ Cf RP Austin, ‘The Melting Down of the Remedial Trust’ (1988) 11(1) *University of New South Wales Law Journal* 66, 85. Austin offered this formulation: (1) is there a justification for imposing an obligation?; (2) is there a justification for a proprietary obligation of one kind or another? Austin stated that the justification relevant to Question 1 ‘may influence the shape of the proprietary remedy’. ‘Shape’, in this context, could be taken to refer, *inter alia*, to whether a compensatory or disgorgement-oriented measure of relief is required.

necessarily justify treating C as having a better claim than T has to any gain which has passed into T's hands or which T might be able to claim in the event of D's bankruptcy. Where T is knowingly involved in D's breach of duty, T may, on the basis of T's own wrongdoing, become personally liable to account to C for its own gain, but C cannot have a claim to property in the hands of T merely on the basis of D's undertaking to C. There is, of course, a tension between this conclusion and the reasoning of the Privy Council in *Attorney-General for Hong Kong v Reid*.⁴⁴ That tension is considered later in this article.

If one answers 'no' to both questions, then one is saying that the normative considerations which justify acceding to C's claim do not warrant conferring upon C the advantages of being a *cestui que trust* in relation to benefits held or received by D. A restitutionary claim on the ground of failure of consideration exemplifies this class of cases. In such a case, C has exercised its choice to transfer the ownership of property to D. Where the basis for the transfer is removed by subsequent events, the law is justified in imposing upon D an obligation to transfer back to C the value *which D received from C* on the ground that D has been unjustly enriched at C's expense. It is not justified in giving C a claim to the traceable proceeds of the property or a claim to the particular property against the entire world. C is entitled to get back the value which D acquired at C's expense, but nothing more.

The Australian case of *Muschinski v Dodds*⁴⁵ may be used to illustrate the point. Mrs Muschinski had contributed more than one half of the cost of acquiring and improving some land which she and Mr Dodds owned as tenants in common in equal shares. When their joint endeavour failed, Mr Dodds was certainly obliged to account to Mrs Muschinski with respect to her larger contribution. On the other hand, since the parties had agreed to engage in a joint endeavour for their mutual benefit, Mr Dodds did not have to disgorge his one half share of the property's appreciation in value. Mr Dodds' retention of a one half share of the appreciation in value was explained by the agreement.⁴⁶ He had to account to Mrs Muschinski only for what he had received at her expense. Deane J, while describing the relief as a constructive trust, proposed the postponement of the effect of the constructive trust to the date of judgment in order to ensure that the claims of the parties would not take priority over the claims of their existing creditors.⁴⁷ Surely, Mrs Muschinski's claim against Mr Dodds is best understood as a personal claim for restitution of the gain which he procured directly at her expense. Mr Dodds' liability (and Mrs Muschinski's claim) related to an amount of money which Mrs Muschinski had contributed to the joint endeavour, rather than to a share of the property. Mrs Muschinski willingly gave her property away. She may have acted on the understanding that her joint endeavour with Mr Dodds would be successful, but the subsequent failure of the joint endeavour merely justified a claim for the

⁴⁴ [1994] 1 AC 324 ('*Reid*').

⁴⁵ (1985) 160 CLR 583 ('*Muschinski*').

⁴⁶ *Muschinski* (1985) 160 CLR 583, 623 (Deane J).

⁴⁷ *Muschinski* (1985) 160 CLR 583, 623–4 (Deane J).

return of the value which she had contributed. It did not reverse her conferral of ownership upon Mr Dodds. When Mrs Muschinski's claim is understood in this way, it is difficult to see what justification there is for giving her the advantage (over Mr Dodds' other creditors) of beneficial ownership of part of Mr Dodds' holdings.

Particular Constructive Trust Situations

No attempt will be made, in the space of this article, to explain how the general approach to proprietary questions set out in the previous section applies to each and every potential constructive trust situation. The remainder of this article will, instead, focus upon three situations, each of which corresponds with one of the three types of outcome contemplated by this general approach, namely:

- (a) where both the defendant wrongdoer and third parties claiming through the defendant wrongdoer ought to be liable to yield a proprietary measure of relief;
- (b) where the defendant wrongdoer, but not necessarily third parties, ought to be liable to yield a proprietary measure of relief; and
- (c) where the normative considerations which justify awarding a remedy *at all* do not justify the liability of either the defendant or third parties to yield a proprietary measure of relief in respect of every claim of that type, but there is a subset of those claims for which only a proprietary measure of relief will do the necessary remedial work.

The Purchaser's Equitable Interest

It was once commonplace to say that a vendor under a contract for the sale of land, in respect of which the purchaser had paid a deposit, was a constructive trustee for the purchaser. An important consequence of this classification of the relationship between vendor and purchaser was that a vendor who then conveyed the land to someone other than the purchaser had converted the land; that is, the vendor had dealt with the land in a way which was inconsistent with the ownership of the purchaser. The trust characterisation could be (and has been) pressed further by the recognition that the purchaser is entitled to claim any profit which the vendor makes by selling to another party. Since the vendor is contractually bound to deal with the legal estate for the benefit of the purchaser — that is, the vendor is contractually bound to transfer the legal title to the purchaser and the purchaser can obtain specific performance of the obligation to transfer — the purchaser ought to be entitled to the proceeds of the sale to the third party, less any outstanding portion of the purchase price under the purchaser's contract with the vendor.⁴⁸

⁴⁸ See *Lake v Bayliss* [1974] 2 All ER 1114; *Bunny Industries Ltd v FSW Enterprises Pty Ltd* [1982] Qd R 712, 717. Cf *Attorney-General v Blake (Jonathan Cape Ltd Third Party)* [2001] 1 AC 268 ('*Attorney-General v Blake*'). Lord Nicholls of Birkenhead characterised the relief in *Lake v Bayliss* as 'having the same effect as an order for an account of profits': at 284. One hastens to add that, while the relief may have effectively deprived the vendor of its profit on resale, the relief was also consistent with the performance measure of relief; that is,

Judicial comment in recent decades has signalled a retreat from the language of trusteeship.⁴⁹ The trusteeship of the vendor is premised upon the purchaser's standing to obtain the remedy of specific performance. Therefore, where performance of a contract is subject to a contingent condition — such as a 'subject to finance' condition — neither party will be obliged to perform the contract until the condition is satisfied or waived. Furthermore, the vendor's breach of contract must be one for which damages would not be an adequate remedy, and the purchaser must be ready, willing and able to perform its obligations under the contract. Contingent conditions pose no great difficulty for the trust analogy. Whether the vendor ultimately has an obligation to convey title is governed by terms which are fixed at the contract date. Once the condition is satisfied or waived, the vendor has no freedom not to convey the title to the purchaser. The question of inadequacy of damages is normally straightforward in the case of a failure to convey land.⁵⁰ It is the 'ready, willing and able' requirement which poses the difficulties. Certainly, that is what the High Court of Australia emphasised in *Tanwar Enterprises Pty Ltd v Cauchi*:

[T]he 'interest' of the purchaser is commensurate with the availability of specific performance. That availability is the very question in issue where there has been a termination by the vendor for failure to complete as required by the essential stipulation. Reliance upon the 'interest' therefore does not assist; it is bedevilled by circularity.⁵¹

Tanwar was a case in which the purchaser responded to the vendor's termination of the contract by claiming relief against the forfeiture of the purchaser's equitable interest. The claim for relief against forfeiture of the interest was nonsensical in the circumstances of the case. The purchaser had failed to meet the conditions for being able to assert that the vendor had no freedom to refuse to transfer the title to the land. That being the case, the options of the vendor were not to be limited to performance of the contract. The Privy Council, in *Union Eagle Ltd v Golden Achievement Ltd*, said of the vendor's right to rescind:

Its purpose is, upon breach of an essential term, to restore to the vendor his freedom to deal with his land as he pleases. In a rising market, such a right may be valuable but volatile. Their Lordships think that in such circumstances a vendor should be able to know with reasonable certainty whether he may resell the land or not.⁵²

Accordingly, the law would limit the vendor's option to rescind only in circumstances where the purchaser has observed those limitations on its own options which it had accepted by agreeing to the terms of the contract, such as payment of the purchase price by a

the original purchaser received the benefit of the second sale, a sale which he could have made himself, had the vendor performed the original contract.

⁴⁹ See *Chang v Registrar of Titles* (1976) 137 CLR 177, 189–90 (Jacobs J); *Kern Corporation Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164, 191–2 (Deane J).

⁵⁰ ICF Spry, *The Principles of Equitable Remedies: Specific performance, injunctions, rectification and equitable damages* (7th ed, 2007) 61.

⁵¹ (2003) 217 CLR 315, 333 (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ) ('*Tanwar*').

⁵² [1997] AC 514, 520 ('*Union Eagle*').

specified time. For the purchaser to insist upon performance (or relief against the forfeiture of its interest which would result from the denial of performance), would be to insist upon a restriction of the vendor's freedom under the contract without acceptance of a corresponding restriction of the purchaser's own freedom under the same contract.

The comments in *Tanwar* and *Union Eagle* emphasise the conditional nature of the purchaser's equitable interest. On the other hand, the fact that equity's recognition and enforcement of the purchaser's interest is (in a sense) subject to the purchaser's good behaviour is not inconsistent with the notion that the vendor has, in relation to a number of possible scenarios, disposed of its options in favour of the purchaser. To that extent, the language of trusteeship remains pertinent to the situation. The enforceability of the trust at the suit of the purchaser is merely subject to the purchaser's readiness to perform its own obligations.

There are, of course, other reasons why a court may refuse to make a decree of specific performance — such as hardship to the defendant, difficulties in enforcement and lack of mutuality — but these so-called discretionary defences do not affect the *standing* of a purchaser to bring an action seeking the remedy of specific performance.⁵³ If specific performance is refused for any of these reasons, the purchaser may be prevented from asserting a claim to the property against the entire world, but is able to claim relief in substitution for specific performance which is proprietary in its *measure*. If, for example, the vendor breaches the contract by selling the property to a third party, a court will not decree specific performance of the contract (because the vendor is no longer able to convey the title to the land), but, since specific performance was *prima facie* available to the purchaser, the purchaser will be able to claim the proceeds of the second sale (in the hands of the vendor), less the contract price for the first sale.⁵⁴ In so far as the third party does not have the protection of either the 'bona fide purchaser for value' defence or statutory indefeasibility, the purchaser's interest in the land takes priority over that of the third party.⁵⁵ Furthermore, it is arguable that the damages which may be awarded in substitution for specific performance under *Lord Cairns' Act* are not limited to the value of the land at the date of the breach less the contract price. In *Wroth v Tyler*,⁵⁶ a case in which the land to be conveyed under the contract was, at the date of judgment, worth £5500 more than the contract price, Megarry J awarded damages of that amount. Only that amount of damages could be

⁵³ Spry, above n 50, 90–1.

⁵⁴ See above n 49.

⁵⁵ Note that, in jurisdictions in which the Torrens 'title by registration' regime applies, purchasers under contracts for the sale of land can be regarded as having caveatable interests: see *Cobbold v Barrett* [2006] WASC 252, [29]–[31]; *Boni v Kingsoak Pty Ltd* [2007] WASC 174, [40]–[42]. It has even been found that a purchaser under a contract where the performance is subject to the consent of a third party (such as approval and registration of a plan of subdivision) may have a caveatable interest on the basis that 'the court might by injunction order the vendor to do what was necessary to enable to purchaser to obtain any necessary consent': *Jessica Holdings Pty Ltd v Anglican Property Trust Diocese of Sydney* (1992) 27 NSWLR 140, 151.

⁵⁶ [1974] 1 Ch 30.

regarded as a true substitute for specific performance.⁵⁷ This measure of relief equated with the proprietary measure of relief. It is consistent with the supposition that the purchaser was entitled to the appreciation in value of the property between the date of the contract and the date of judgment.

The foregoing analysis demonstrates how it continues to make sense to say that a vendor of land is a trustee for the purchaser. By entering into a contract with certain terms, the vendor has given up its freedom to deal with its title to the land in any way that it subsequently chooses to do so. Whether the vendor could assert that damages would be an adequate remedy (so as to justify a refusal to transfer title) is largely to be determined by reference to the subject matter of the contract. The contract may provide other grounds of termination (such as for non-satisfaction of contingent conditions), but the vendor's options are circumscribed by its contractual undertaking. If the purchaser is ready, willing and able to perform the contract according to its terms, the vendor has one choice only: to transfer the legal title to the purchaser. The recognition of the purchaser's proprietary rights in the subject matter of the contract — that is, the recognition that the measure of the purchaser's claim is the land itself or its traceable proceeds — is justified by the vendor's consent to the terms of the contract. It is not altogether misleading to say that a trust arises in this situation. There is a strong sense in which the vendor undertakes to deal with the subject matter of the contract for the benefit of the purchaser and the purchaser trusts the vendor to do so. This is reflected in the type of remedies which the purchaser may obtain in the event of the vendor's failure to convey the land.

Unfaithful Fiduciaries

Where a fiduciary receives a benefit by reason of conduct in breach of its fiduciary obligations, the primary response of the law is to require the fiduciary to disgorge the benefit to the principal. The justification for this response is not that the fiduciary had previously consented to obtaining *that particular benefit* for the principal; the fiduciary may not have done so. Certainly, fiduciaries will typically acquire their fiduciary obligations by reason of an undertaking to act in the interests of another in relation to a particular matter. Trustees undertake to administer the trust estate according to the terms of the trust. Solicitors and other professional advisers undertake the carriage of particular transactions for their clients. Yet, the specifically fiduciary obligations are not concerned with holding the fiduciary to the performance of these positive undertakings. Fiduciary obligations are, as Sarah Worthington has explained, concerned with ensuring that those who have considerable discretion in determining how the interests of another person are to be pursued are restrained from abusing this power.⁵⁸ In so far as a fiduciary takes advantage of its discretionary power to pursue its own interests and, consequently, procures a benefit for

⁵⁷ *Wroth v Tyler* [1974] 1 Ch 30, 58.

⁵⁸ Sarah Worthington, *Equity* (2003), 118. See also Matthew Conaglen, 'The Nature and Function of Fiduciary Loyalty' (2005) 121 *Law Quarterly Review* 452, 472.

itself, the fiduciary cannot be allowed to retain that benefit.⁵⁹ Accordingly, while the obligations of a fiduciary can be conceived as a positive obligation to act in the interests of the principal, the means adopted by the law to hold the fiduciary to its obligation are negative. The law restrains the fiduciary from benefiting from the relationship with the principal and from transactions which give rise to potential conflicts between the fiduciary's duty to the principal and its private interests. Generally speaking, there is no other way in which the law can respond because, as Worthington has pointed out, where the obligation is to exercise one's discretion in the best interests of the principal, there is no end-position which can be used as the measure of the required performance.⁶⁰

When the law responds to a breach of fiduciary duty by saying that the fiduciary holds a benefit which it has procured upon constructive trust for its principal, the law is not vindicating a prior entitlement which the principal had to that particular benefit. The fiduciary's 'trusteeship' is concerned with identifying the measure of the gain which the fiduciary must disgorge. So, in *Chan v Zacharia*, a constructive trust was said to arise from the fact that a personal benefit or gain had been obtained or received by reason of a breach of fiduciary obligation.⁶¹ It was the 'fruits of that abuse of fiduciary position and pursuit of personal interest' that had to be held on trust.⁶² The point may be driven home by considering a case in which a court refrained from saying that the fiduciary became a constructive trustee. *Daly v Sydney Stock Exchange Ltd*⁶³ was a case in which a firm of stockbrokers obtained, in breach of fiduciary duty, a loan from a client. Gibbs CJ said:

In deciding whether or not the money should be held to have been subject to a constructive trust it is not unimportant that the ordinary legal remedy of a creditor would have been adequate to prevent the firm *from being benefited* at the expense of the appellant.⁶⁴

Since the fiduciary was obliged to repay to the principal the amount lent plus interest,⁶⁵ there was no need to treat the fiduciary as if it was a trustee in order to ensure that it did not derive any benefit from its breach of duty. In *Daly*, the fiduciary was insolvent. To treat the principal as a beneficiary, as opposed to a creditor, would have resulted in the withdrawal of funds from the pool available for distribution among the general body of creditors.⁶⁶ Since the principal's claim is that the fiduciary should not benefit from its breach, there is no

⁵⁹ See, eg, *Reading v A-G* [1951] AC 507, 516 (Lord Porter), 517 (Lord Normand); *Boardman v Phipps* [1967] 2 AC 46, 105 (Lord Hodson), 123 (Lord Upjohn); *Chan v Zacharia* (1984) 154 CLR 178, 199 (Deane J).

⁶⁰ Worthington, above n 59, 118. See also Conaglen, above n 59, 479–80. Worthington acknowledged that duties in relation to confidential information may be distinguishable from fiduciary obligations in this respect. The prevalence of compensation as a remedy for breach of confidence may be underpinned by the notion that the claimant has a chance of bargaining with others for the payment of a price for the right to use that information. A value can be placed upon that chance: at 140–1.

⁶¹ (1984) 154 CLR 178, 199.

⁶² *Chan v Zacharia* (1984) 154 CLR 178, 205 (Deane J). See also at 186 (Brennan J).

⁶³ (1986) 160 CLR 371 ('*Daly*').

⁶⁴ *Daly* (1986) 160 CLR 371, 379 (emphasis added).

⁶⁵ *Daly* (1986) 160 CLR 371, 375. Gibbs CJ commented that the money was lent at 'what was then quite a high rate of interest'.

⁶⁶ *Daly* (1986) 160 CLR 371, 379.

justification for placing the principal in a better position than the other creditors of the insolvent fiduciary. This conclusion is not based upon any premise that remedies for breach of fiduciary duty are concerned with reversing unjust enrichment. The critical point is that the peculiarly fiduciary duties of the fiduciary correlate with an entitlement on the part of the principal that the fiduciary not benefit, as distinct from the principal's entitlement that the fiduciary perform the services which the fiduciary has been engaged to perform.

This is where the difficulty with *Attorney-General for Hong Kong v Reid* resides. It is true that, at the heart of Lord Templeman's reasoning, was the uncontroversial proposition that the fiduciary should not be permitted to derive any benefit from his breach of fiduciary duty:

... if the bribe consists of property which increases in value or if a cash bribe is invested advantageously, the false fiduciary will receive a benefit from his breach of duty unless he is accountable not only for the original amount or value of the bribe but also for the increased value of the property representing the bribe.⁶⁷

Thus far, a trust analogy was appropriate in order to drive home the conclusion that the fiduciary must disgorge the amount received *and* any additional amount which the fiduciary could not have acquired but for the receipt of the bribe. It was, on the other hand, unnecessary to say that the principal *owned* the bribe money and its traceable proceeds.⁶⁸ To import the full proprietary consequences of trusteeship into the relationship between the unfaithful fiduciary and its principal was to exceed the reach of the fiduciary principle. It gave the principal positive ownership of the proceeds of the breach of fiduciary duty and, accordingly, priority over the fiduciary's general creditors to a portion of the fiduciary's estate in the event of the fiduciary's bankruptcy. The principle which justified liability required merely that the fiduciary be deprived of all of the gain which it derived from its breach of duty. Where the competition is between the principal and the fiduciary's third party debtors, it is difficult to see why the former should have priority over the latter.⁶⁹

One possible line of justification for the principal's priority is that the principal's right to the fiduciary's disgorgement of its gains gives effect to an antecedent right to the exclusive benefit of the fiduciary's efforts. Grantham and Rickett have argued along these lines:

The central incidents or attributes of a property right are the "right to use", the 'right to manage' and the 'right to income. ... If ... the law is to give effect to these aspects of the property right, it is necessary to strip the defendant of his gain: it is only through stripping

⁶⁷ [1994] 1 AC 324, 331.

⁶⁸ See Richard C Nolan, 'The Wages of Sin: Iniquity in equity following *A-G for Hong Kong v Reid*' (1994) 15 *Company Lawyer* 3, 7; Ross Grantham, 'Doctrinal Bases for the Recognition of Proprietary Rights' (1996) 16 *Oxford Journal of Legal Studies* 561, 578-9.

⁶⁹ See Thomas Allen, 'Bribes and Constructive Trusts: *A-G of Hong Kong v Reid*' (1995) 58 *Modern Law Review* 87, 91; Darrel Crilley, 'A Case of Proprietary Overkill' [1994] *Restitution Law Review* 57, 69.

the gain that the [claimant's] right to the exclusive use and benefit of the property is fully protected. The same is true of the rights of the beneficiary of a fiduciary duty or of a duty of confidence. Both the fiduciary duty and the duty of confidence have, as a central purpose, that of ensuring that only the beneficiary benefits from the trust property or the confidential information.⁷⁰

On this view of the matter, the disgorgement-oriented response perfects an undertaking by the fiduciary (or holder of confidential information) that it will act for the benefit of the principal (or confider of the information) and nobody else. Accordingly, cases such as *Attorney-General v Blake*⁷¹ are to be understood as cases 'where the [claimant's] interest in performance is so great that it can be said that he has a right to the exclusive benefit of the defendant's performance'.⁷² Since, in *Reid*, the fiduciary's receipt of the bribe related to matters within the scope of the fiduciary relationship, the bribe could be said to have belonged to the principal from the moment at which it was received by the fiduciary.

There may be fiduciary and confidential relationships to which this analysis is pertinent. In a trade secrets case, it would be credible to suggest that an employer which had not previously contemplated selling rights to use its confidential information would ultimately 'have its price'; that is, one could ascertain how much better off the employer would have been had it sold the information rather than sought to keep it confidential. There would be a calculable end-position in relation to the employee's proper performance of its duty of confidence (other than the maintenance of confidentiality). Not all fiduciary relationships are susceptible to this analysis. Where the relationship is concerned with the performance of a public function, such as the due prosecution of criminals, it is inconceivable that the employer-principal might (legitimately) 'have its price' for refraining from prosecution. It could hardly be said to have been within the contemplation of the principal in *Reid* (that is, the Government of Hong Kong) that it would accept financial inducements of the type that Mr Reid accepted. An end-position whereby the principal would have the bribe money for itself would have been entirely beyond the legitimate contemplation of the parties to this employment relationship. Moreover, it is because one cannot always identify the appropriate end-position for a fiduciary relationship, that fiduciary obligations are conventionally conceived as being proscriptive of unauthorised gains rather than prescriptive of the conferral of an identifiable benefit. A trust analogy might inform the measure of the fiduciary's personal obligation to disgorge an unauthorised gain without necessarily providing the principal with a claim against the whole world in respect of the particular property which constitutes the gain. Whether the full proprietary consequences of trusteeship are justified would depend upon the precise subject matter and scope of the confidential or fiduciary undertaking, in particular, whether the undertaking extended to acquiring *that* property for the principal.

⁷⁰ Grantham and Rickett, above n 1, 485 (citations omitted). See also Elias, above n 12, 17.

⁷¹ [2001] 1 AC 268.

⁷² Grantham and Rickett, above n 1, 485.

Another rationalisation of the outcome in *Reid* involves the thesis that the law, as a matter of experience, has arrived at the view that the most effective strategy for vindicating the principal's primary right to the fiduciary's loyalty (at least in a *Reid*-type case) is to recognise that the principal has a proprietary right to the value procured by the disloyal fiduciary. Struan Scott has outlined an elaborate version of this thesis, suggesting that the principal's primary right to the fiduciary's loyalty hides a 'layer of rights'.⁷³ Between that primary right to the fiduciary's loyalty and the recognition that the fiduciary has become a constructive trustee lies a 'secondary right that the fiduciary will not receive a bribe' and a 'tertiary right to receive the value of the bribe and any gains arising therefrom'.⁷⁴ The tertiary right is 'moulded' by a number of 'auxiliary rights', namely, that the fiduciary is precluded from 'denying that he or she was acting in the interests of the principal' and that 'the principal could not have obtained the additional gains personally', and that the fiduciary 'concede that the principal has rights of property in any gains arising from the bribe'.⁷⁵ It should be emphasised that whether these additional layers of rights exist is 'primarily a matter of history'.⁷⁶ A case like *Reid* might, on this basis, be taken to represent the development of the law's understanding of the underlying right and its replication in the remedy, rather than the sudden introduction of a 'wayward' remedy.⁷⁷ Scott noted that, while insistence upon strict correlation between rights and remedies may reduce the slipperiness of remedies, the ongoing quest for greater precision in the characterisation of the right will 'open up a new source of slipperiness'.⁷⁸

The way that rights are characterised determines what remedies are justified. According to Scott's analysis, the outcome in *Reid* was predicated upon the law's historical choice to recognise that the principal has a right *to* the bribe (with or without its traceable proceeds) in order to vindicate its right that the fiduciary not receive a bribe. When we consider that the right that the fiduciary not receive a bribe is secondary to the right that the fiduciary be loyal, then it becomes apparent that the law's choice of secondary right could (as a matter of logic) have equally been that the principal has a right that the fiduciary not benefit from the receipt of a bribe. These historical choices are perhaps influenced by practical concerns about the measuring of relief. Scott gave the example of a fiduciary that has used bribe money to purchase a mansion which is subsequently destroyed in a storm. Scott argued, on the basis of *Reid*, that the fiduciary ought to be personally liable to account for the value of the property prior to the storm.⁷⁹ If we characterise the relevant right as a right that the fiduciary not benefit from the receipt of a bribe, we have the problem that there is an ambiguity about the value of the benefit received. Is the benefit received the (much

⁷³ Struan Scott, 'Rights, Remedies and Wrongs and the Bribe-taking Fiduciary' in Charles EF Rickett (ed), *Justifying Private Law Remedies* (2008) 33, 56.

⁷⁴ *Ibid* 57.

⁷⁵ *Ibid* 56–7.

⁷⁶ *Ibid* 50.

⁷⁷ *Ibid* 50–1.

⁷⁸ *Ibid* 66–7.

⁷⁹ *Ibid* 55.

diminished) value of the property at the date of judgment, or does it include the value of the property as it has been enjoyed by the fiduciary between the date of the acquisition of the mansion and the date of the storm? Arguably, the latter measure is a more accurate reflection of how the fiduciary has benefited from its breach of duty. A characterisation of the secondary right as a right to the bribe (from the moment the bribe money is acquired by the fiduciary) and, accordingly, a continuing right to the disgorgement of the property which represents the bribe, avoids the difficult question about the measure of the required disgorgement. This is an example of the law's use of what Rotherham has called a 'doctrinal bridge'. A doctrinal bridge utilises ideas which are well entrenched in the conceptual armoury of lawyers (such as trusteeship) as a proxy for less familiar or less well-formed concepts (such as unjust enrichment).⁸⁰

The value of trusteeship as a doctrinal bridge in *Reid* was that it identified the appropriate measure of disgorgement as the full value of what the fiduciary acquired by reason of his breach of duty. It drew attention to the doctrinal incoherence of the approach (for which the Court of Appeal's decision in *Lister v Stubbs*⁸¹ is usually taken to be authority) whereby the principal's claim against a fiduciary who has received a bribe is limited to the amount of the bribe. Forensic difficulties in quantifying the value acquired by the fiduciary were overcome by conferring ownership of the property purchased using the bribe money. Nevertheless, this strategy involves a risk. The use of the trust analogy suggests that the principal has a property right which can be enforced against people other than the fiduciary. This distinct consequence requires separate justification. In the case of a solvent fiduciary, the concept of trusteeship achieves the justified response of disgorgement from the *fiduciary* to the *principal*. However, in a situation in which the fiduciary is bankrupt, where the competing claims for the property which represents the improper gain are claims of the *principal* and the *creditors* of the fiduciary, the concept of trusteeship does too much: it diminishes the pool of assets from which the fiduciary's creditors can satisfy their claims. Those people have no antecedent fiduciary obligation towards the principal and, accordingly, no automatic duty to disgorge benefits to which they obtain access by reason of the fiduciary's breach of duty. The language of trusteeship is, therefore, seriously misleading. The language of account and disgorgement, on the other hand, emphasises that the injustice which is to be corrected is the defendant's procuring of a benefit for itself.

Mistaken Improvers and Similar Beasts

Perhaps the most difficult of the incidences of the constructive trust is the category of cases in which (to use Elias' words) a person has 'wasted money or time and effort' upon the improvement of property.⁸² This situation gives rise to particular difficulties because the rationale for giving any remedy at all is contested. In particular, there has been a long-

⁸⁰ Craig Rotherham, 'Proprietary Relief for Enrichment by Wrongs: Some Realism about Property Talk' (1996) 19 *University of New South Wales Law Journal* 378, 394–5.

⁸¹ (1890) 45 Ch D 1.

⁸² See Elias, above n 12.

running debate about whether the principle which informs the cases is focused upon fulfilment of expectations or upon reversal of detriment. Furthermore, whichever rationale one adopts, the principle is not limited to the classic mistaken improver situation which was envisaged by Elias.

The Queensland case of *Riches v Hogben*⁸³ illustrates the issues at stake. A man had been encouraged by his elderly mother to sell his possessions, give up his rent-free council flat in England, and move himself and his family to Australia to reside in a house which the mother would purchase in her name on the understanding that the house would be his home albeit registered in her name. McPherson J declared that the man had an equitable interest in the house. This conclusion was upheld on appeal. The critical elements of the justification for equitable intervention were the defendant's encouragement of an expectation and the claimant's acting to his detriment on the faith of that expectation. McPherson J said:

[The defendant] continued to encourage that expectation after their arrival [in Australia] by saying that, even if in her name, the house would be his. For his part the [claimant] acted on that encouragement by selling his possessions and giving up his house in England; by bringing his family to Australia and by travelling to Brisbane in search of a house, all at considerable loss to himself.⁸⁴

When the justificatory principle is defined in this way, it is apparent that it is not limited to situations where the claimant spends money directly upon the improvement of the property. Indeed, in *Riches v Hogben*, the defendant's encouragement of the claimant's detrimental reliance preceded the identification and acquisition of the land which would become the focus of the dispute. Furthermore, relevant detriment is not limited to actual expenditure on the land.⁸⁵ An opportunity cost — that is, the claimant giving up other potential benefits in order to follow the path which the defendant has encouraged him to follow — would appear to be a sufficient detriment.⁸⁶

Subsequently, the High Court of Australia, in *Waltons Stores (Interstate) Ltd v Maher*,⁸⁷ proposed a unified principle of equitable estoppel under which the injustice which has to be remedied is the claimant's detriment. That the defendant has a role in creating the claimant's expectation is important in so far as it provides the foundation for saying that the defendant is responsible for the claimant's loss and, accordingly, that the reversal of the claimant's loss at the defendant's expense is justified.⁸⁸ Once the law fixes upon the claimant's detriment as the injustice which has to be remedied, it follows that a remedy which fulfils the claimant's expectation is not necessarily justified in every case; it is only

⁸³ [1985] 2 Qd R 292 (McPherson J); [1986] 1 Qd R 315 (Full Court).

⁸⁴ [1985] 2 Qd R 292, 301. See also [1986] 1 Qd R 315, 320 (Kelly SPJ), 326 (Macrossan J), 341–2 (Williams J).

⁸⁵ [1986] 1 Qd R 315, 342 (Williams J).

⁸⁶ See, eg, *Inwards v Baker* [1965] 2 QB 29, 38 (Danckwerts LJ); *Giunelli v Giunelli* (1996) 17 WAR 159, 166 (Rowland J); *Gillett v Holt* [2001] Ch 210, 232–5 (Robert Walker LJ).

⁸⁷ (1987) 164 CLR 387 (*'Waltons v Maher'*).

⁸⁸ *Waltons v Maher'* (1987) 164 CLR 387 404 (Mason CJ and Wilson J), 423 (Brennan J).

justified if it is the only effective means of reversing the claimant's detriment. Most of the reported Australian cases, including *Riches v Hogben* and *Waltons v Maher*, have ended in an award of relief measured by reference to the claimant's expectation, although in at least one case — *Giumelli v Giumelli*⁸⁹ — the final relief took the form of payment of the monetary value of the expectation rather than an interest in property. The relief was framed in this way in order to accommodate the legitimate interests of third parties, which included other members of the Giumelli family.⁹⁰ The preponderance of relief measured by reference to claimants' expectations has led some scholars either to question the coherence of the detrimental reliance theory,⁹¹ or to suggest that there is a prima facie entitlement to expectation relief.⁹² There have, on the other hand, been occasional cases in which monetary relief based on a strict reliance loss measure has been awarded.⁹³

Recent English case law has not followed the same pattern of systematisation as Australian case law. While the creation of an expectation and detrimental reliance are the critical factors which justify liability, the English courts have been reluctant to characterise the relevant injustice purely in terms of either the defeat of an expectation or the suffering of detriment. The task for the court is to engage in 'a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances'.⁹⁴ Accordingly, there is a reluctance to prescribe either the expectation or the detriment as the starting point in determining what ought to be the appropriate relief.⁹⁵ Courts are to exercise 'a wide judgmental discretion' in fashioning appropriate relief for the circumstances of the case.⁹⁶ Accordingly, in *Jennings v Rice*, where the defendant's promises to the claimant were 'couched ... in non-specific terms',⁹⁷ relief measured by reference to the monetary value of the claimant's services was appropriate.

Whether one takes the strict detrimental reliance approach or the more flexible English approach, it is apparent that the relief will not necessarily involve the fulfilment of the claimant's expectation, let alone the recognition of proprietary rights on the part of the claimant. Accordingly, it cannot be said that the existence of a constructive trust is an

⁸⁹ (1999) 196 CLR 101 ('*Giumelli*').

⁹⁰ *Giumelli* (1999) 196 CLR 101, 125.

⁹¹ See, eg, Michael Pratt, 'Identifying the Harm Done: A Critique of the Reliance Theory of Estoppel' (1999) 21 *Adelaide Law Review* 209.

⁹² See, eg, Andrew Robertson, 'Reliance, Conscience and the New Equitable Estoppel' (2000) 24 *Melbourne University Law Review* 218, 230; Fiona R Burns, '*Giumelli v Giumelli* Revisited: Equitable Estoppel, the Constructive Trust and Discretionary Remedialism' (2000–01) 22 *Adelaide Law Review* 123, 156.

⁹³ See, eg, *Morris v Morris* [1982] 1 NSWLR 61 (amount spent on improvements plus interest thereon); *Public Trustee, as Administrator of the Estate of Percy Henry Williams (dec'd) v Wadley* (1997) 7 Tas R 35 (monetary value of work performed for the deceased owner).

⁹⁴ *Gillett v Holt* [2001] Ch 210, 232 (Robert Walker LJ). See also *Jennings v Rice* [2002] EWCA Civ 159 (Unreported, Full Court) [36] (Aldous LJ), [49] (Robert Walker LJ).

⁹⁵ *Jennings v Rice* [2002] EWCA Civ 159, [21] (Aldous LJ), [50]–[51] (Robert Walker LJ).

⁹⁶ *Jennings v Rice* [2002] EWCA Civ 159, [51].

⁹⁷ *Jennings v Rice* [2002] EWCA Civ 159, [10].

inexorable consequence of the application of the principle which informs these cases. This was recognised by Macrossan J in *Riches v Hogben*.⁹⁸

There would seem to be two ways in which one could, consistently with the general approach outlined earlier in this article, rationalise the drawing of a line between cases in which the recognition of proprietary rights could be justified and those in which it could not be. The first rationalisation focuses upon whether the subject matter of the claimant's expectation has become sufficiently ascertained and identified with particular property, so that it would be reasonable for the claimant to believe that the defendant was committed to dealing with the property for the claimant's benefit. This rationalisation emphasises the expectation-fulfilment aspect of the principle. The normative consideration which justifies recognising a claim at all is that the defendant should have understood that its conduct was viewed by the claimant as an undertaking to confer a particular interest in property upon the claimant, so it would now be unjust for the defendant to refuse to confer that interest. The other rationalisation focuses upon whether the nature of the detriment which the claimant suffers can be repaired only by the recognition of the expected interest in property. This possibility emphasises the detriment-reversal aspect of the principle — that is, the operative normative consideration is that the defendant is responsible for the claimant's suffering of a loss, so the claimant should make good that loss — while recognising that the detriment which a particular claimant suffers might not be measurable in monetary terms and that fulfilment of the expectation is the only effective means of reversing that detriment.

Recent English case law is consistent with the first rationalisation. In *Cobbe v Yeoman's Row Management Ltd*,⁹⁹ the claimant had, prior to the conclusion of negotiations for the purchase of particular land, spent time and money in pursuing an application of planning permission for the land. He was unsuccessful in establishing a claim for proprietary estoppel, but was awarded reimbursement for his expenditure, time and effort in relation to the planning permission application.¹⁰⁰ Lord Walker of Gestingthorpe emphasised that this was a case in which the claimant was an experienced businessman who understood that there was no binding agreement in place and, in pursuing the planning permission application, was 'running a risk'.¹⁰¹ Subsequently, in *Thorner v Major*,¹⁰² a claimant who had, for many years, worked without wages on a relative's farm in the expectation (encouraged more by the relative's conduct than any clear verbal assurances) that he would inherit the farm was successful in his proprietary estoppel claim. While, in *Cobbe*, the nature of the benefit to be conferred upon the claimant remained a matter for negotiation, in *Thorner*, the subject matter of the assurance — that is, a testamentary gift of the farm 'as it existed from time to time'¹⁰³ — was not in doubt. As to the question of

⁹⁸ [1986] 1 Qd R 315, 327.

⁹⁹ [2008] 1 WLR 1752 ('*Cobbe*').

¹⁰⁰ *Cobbe* [2008] 1 WLR 1752, 1774–5 (Lord Scott of Foscote), 1789 (Lord Walker of Gestingthorpe).

¹⁰¹ *Cobbe* [2008] 1 WLR 1752, 1788.

¹⁰² [2009] 1 WLR 776 ('*Thorner*').

¹⁰³ *Thorner* [2009] 1 WLR 776, 803 (Lord Neuberger of Abbotsbury).

whether it was reasonable for the claimant to rely upon that assurance, the different context was crucial. While the claimant in *Cobbe* was a man of great commercial experience who had chosen to apply for planning approval before concluding negotiations, *Thorner* involved a relationship which was ‘familial and personal’.¹⁰⁴ The fundamental question appears to be whether the assurer’s conduct could reasonably be understood by the claimant as amounting to a commitment by the assurer to confer an interest in property upon the claimant.¹⁰⁵

The second rationalisation focuses upon the type of detriment which the claimant suffers. If the monetary compensation would be adequate compensation for the claimant’s detriment, there is no justification for conferring the benefits of ownership of any relevant property upon the claimant. The relevant question is broadly analogous to the question that distinguishes cases in which specific performance of a contract would be awarded from those in which damages would be an adequate remedy. There are different types of antecedent rights in play here. Whether damages would not be an adequate remedy for a breach of contract is something which is identifiable, at the moment the contract is made, on the basis of the type of contract which has been made. Contracts of sale typically fall into the category of specifically performable contracts on the basis of the nature of the subject matter; for example, land, rare antiques or even taxicab licences.¹⁰⁶ In those cases, there is no sum of money which would be adequate to place the purchaser in the position it would have been in had the contract been performed. Similarly, we can identify a class of detrimental reliance cases in which the detriment is inherently incapable of remedy by way of monetary compensation. If the claimant had been led to expect that it would receive a right in respect of identifiable land and, consequently, gave up opportunities to pursue its fortune elsewhere, the claimant is entitled to the conferral of that right to the land because of the type of case that it is.

While none of the judges who heard *Riches v Hogben* endorsed this approach explicitly, the outcome of the case is consistent with it. The claimant and his family had given up a rent-free home in England to move to an unknown situation in Australia. It was far from clear — contrary to the suggestions of counsel for the defendant — that there was any sum of money which could have been adequate to return the claimant to the precise position which he had occupied in England prior to his departure. While the remedy is not to be measured by reference to the expectation, nothing short of fulfilment of the expectation would have provided a reasonable assurance that the claimant would not be left worse off as a result of his reliance. The same could be said about the subsequent case of *Giumelli v Giumelli*. The award of the monetary value of the expectation, so as to avoid relief which goes ‘beyond what [is] required for conscientious conduct’ by the inducing party,¹⁰⁷ was

¹⁰⁴ *Thorner* [2009] 1 WLR 776, 804 (Lord Neuberger of Abbotsbury). See also at 794–5 (Lord Walker of Gestingthorpe).

¹⁰⁵ Ben McFarlane and Andrew Robertson, ‘Apocalypse Averted: Proprietary Estoppel in the House of Lords’ (2009) 125 *Law Quarterly Review* 535, 540.

¹⁰⁶ *Dougan v Ley* (1946) 71 CLR 142.

¹⁰⁷ *Giumelli v Giumelli* (1999) 196 CLR 101, 125.

consistent with the notion that the claimant's entitlement was to be left no worse off by reason of his reliance, rather than to be endowed with the specific property which had been the subject of his expectation. Where, on the other hand, the detriment consists merely of the provision of services which can be valued in money terms or, as in *Cobbe*, wasted expenditure on planning approval, we have a type of case in which monetary compensation is an adequate remedy for the detriment which the claimant suffers. Any 'constructive trust' which arises in a detrimental reliance situation differs from the purchaser's equitable interest in so far as it is a response to the detriment which the claimant has suffered rather than to the legal owner's disposal of his options in favour of the claimant.

What both of these rationalisations avoid is the suggestion that the incidence of property rights (and the consequences for third parties thereof) depends upon the exercise of a court's discretion in fashioning its relief. Where proprietary relief is justified, it is justified by reference to the type of injustice which the claimant has suffered, whether that injustice be defined in terms of the failure of the assurer to confer a particular benefit which it appears to have committed itself to confer (as in *Thorner v Major*), or in terms of the claimant's suffering of a reliance loss which cannot be remedied by a mere payment of money. The characterisation of the injustice which must be corrected frames the remedial work to be done.

Conclusion

The label 'constructive trust' obscures important differences between the various situations it seeks to describe. Some so-called constructive trusts are instances of holding people to their prior choices about the disposition of their property in circumstances in which the law maintains that other people are entitled to hold them to those choices. The full proprietary consequences of trusteeship (including the consequences for third parties) are a normatively justified response to these situations. The circumstances may properly be construed as circumstances giving rise to a trust. There are other situations — such as the case of the fiduciary who receives a bribe — in which it is contentious (to say the least) whether the full proprietary consequences of trusteeship are justified by the antecedent obligations of the alleged trustee. In these contexts, the work which is done by the trust concept is to identify the *value* which the duty-owner must disgorge rather than the *thing* which the duty-owner must transfer. To use the same nomenclature to describe conceptually-distinct legal responses is to undermine the conceptual distinction and, potentially, to give too much to some claimants at the expense of third parties who have claims against the defendant. Conceptual clarity in this area is likely to be enhanced by a vocabulary of legal responses which draws attention to the normative justifications for those responses, in particular, whether the defendant has made a choice to confer a particular benefit on a person or merely a choice not to procure a benefit for itself.