HAPPY PARTNERS OR STRANGE BEDFELLOWS: THE BLENDING OF REMEDIAL AND INSTITUTIONAL FEATURES IN THE EVOLVING CONSTRUCTIVE TRUST

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[In Baumgartner v Baumgartner[1] *the High Court approved without elaboration the exposition of the constructive trust by Deane J in* Muschinski v Dodds, *making it the new orthodoxy. The effect was to liberalise the traditional institutional conception of the constructive trust by admitting some remedial features while denying others. In constructive trust cases decided since* Baumgartner, *the author discerns a movement towards incorporation of an additional remedial element, namely the dissociation of liability and remedy. The constructive trust head of liability is increasingly functioning as the vehicle for other personal and proprietary remedies. The blending of institutional and remedial features has brought about unresolved conceptual tensions in the Australian, US and Canadian constructive trust doctrines.]*

INTRODUCTION

In 1920 Roscoe Pound contrasted two views of the constructive trust: that it is a 'substantive institution' like an express trust (a view which he held to be erroneous) and that it is a purely remedial doctrine like the doctrines of subrogation or contribution.[2] Since then, scholarly debate concerning the legal nature of the constructive trust has been mediated by Pound's dichotomy of remedy and institution. The remedial label has commonly been assigned to the US and, since 1980,[3] Canadian versions of the trust, while it is said that the institutional conception of the constructive trust is the one traditionally favoured by English and Australian lawyers.[4]

The relevance of the distinction has been in doubt in Australia following the observation of Deane J in *Muschinski v Dodds*[5] that the institution-remedy dichotomy was illusory. Like all trusts, he pointed out, the constructive trust

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1 (1987) 164 CLR 137 ('*Baumgartner*').

2 Roscoe Pound, 'The Progress of the Law - Equity' (1920) 33 *Harvard Law Review* 420, 420-1.

3 In *Pettkus v Becker* [1980] 2 SCR 834, 847 the Supreme Court of Canada adopted unjust enrichment as the basis on which the remedy of constructive trust may be imposed.

4 Phillip Pettit, *Equity and the Law of Trusts* (7th ed, 1993) 61; Roy Goode, 'Property and Unjust Enrichment' in Andrew Burrows (ed), *Essays on the Law of Restitution* (1991) 215, 216; *contra* John Glover, *Commercial Equity: Fiduciary Relationships* (1995), ¶ 6.23. Sir Peter Millett argues that there is no place for a remedial trust since its discretionary nature is at odds with the fixed and inalienable nature of property rights. Rather, equity should extend the institutional categories by adhering to established principles: Sir Peter Millett, 'Equity: The Road Ahead' (1995) 9 *Trust Law International* 35, 42.

5 (1985) 160 CLR 583 ('*Muschinski*').

originated as a remedy.[6] It still served a remedial purpose, but over time it had come to be administered in accordance with precedent. Due to an elliptical process of reasoning because of the consistency with which equity granted the remedy and the maxim that 'equity treats as done that which ought to be done', the trust's existence could be anticipated prior to judicial declaration.[7] This perfected its status as a substantive institution of the law.

To describe the constructive trust as remedy and institution is to describe the same construct from two angles. The institutional trust arises to serve a remedial end, and the institutional features are the means by which the remedial purpose is effected. 'For a student of equity', said Deane J, 'there can be no true dichotomy between the two notions'.[8] The constructive trust, he said, is a 'remedial *institution*'.[9]

It is indeed unfortunate that Pound omitted to define his terms and to explain how the two conceptions differ. As a result, much of the debate, as Deane J noted, has been conducted at cross purposes,[10] leading some commentators to observe that the distinction was sterile.[11] There is clearly no point in conducting a debate using terms of classification that have no agreed meaning.

Despite its imprecision, Pound's terminology has persisted because it captures a fundamental conceptual tension underlying the constructive trust. The utility of the remedial and institutional conceptions as paradigms or analytic devices is not diminished by the objection that, in their pure form, they are practised nowhere. Each model comprises a cluster of features but in reality the features are intermingled, so that the various constructive trust doctrines applied in common law jurisdictions exhibit different blends. No country has a version that is purely institutional or purely remedial.[12] Much of the confusion in the debate stems from uncertainty as to which necessary and sufficient features justify assigning the labels of 'institutional trust' and 'remedial trust' to a particular version.

My purpose in this article is, firstly, to seek some definition for the remedial and institutional conceptions by breaking them down into their component features. Secondly, to demonstrate the continued utility of the dichotomy by using it as a framework for analysing recent developments in Australian law and by comparing Australian, Canadian and US conceptions of the constructive trust. I will argue that the Australian constructive trust since *Muschinski* has acquired

6 Ibid 613. See also H Ford & W Lee, *Principles of the Law of Trusts* (2nd ed, 1990) ¶ 2202: 'Constructive trusts, like trusts generally in their formative period, are remedial devices' (citing Pound, above n 2, 421).

7 Margaret Stone describes this process of conceptualising the concept of the trust as a 'real entity' as 'reification': Margaret Stone, 'The Reification of Legal Concepts: *Muschinski v Dodds*' (1986) 9(2) *University of New South Wales Law Journal* 63, 74.

8 *Muschinski* (1985) 160 CLR 583, 614.

9 Ibid (emphasis added).

10 Ibid 613.

11 Donovan Waters, 'The Constructive Trust in Evolution: Substantive *and* Remedial' (1991) 10 *Estates & Trusts Journal* 334.

12 Dewar said that the dominant view in England is that the trust was mainly institutional and sometimes remedial, although there is no agreement on where the dividing line should be drawn: John Dewar, 'The Development of the Remedial Constructive Trust' (1982) 60 *Canadian Bar Review* 265.

certain remedial features while retaining some institutional attributes. While the High Court in *Muschinski* started the movement towards incorporation of remedial aspects, subsequent decisions of lower courts have loosened the nexus between constructive trust methodology and the trust remedy without express doctrinal announcement.

The final section of the article argues that significant conceptual difficulties in the US, Canadian and Australian versions of the constructive trust can be traced to tension between remedial aspects and a common institutional feature — the doctrine that the trust exists before a court declares it.

THE INSTITUTION-REMEDY DICHOTOMY

In Canada, where the Supreme Court in 1980 expressly adopted the remedial conception of the constructive trust,[13] the distinction is more clearly expounded, notably in the writings of Donovan Waters (whose 1964 work, *The Constructive Trust*, was referred to by Deane J in *Muschinski*) and John Dewar. Dewar defined the remedial trust as one imposed by a court to right a wrong, and which is taken to have arisen at the time the wrong was committed.[14] The conception of the trust as a substantive institution, he says, is:

> one which arises as a necessary legal consequence, and which necessarily connotes certain legal consequences, whenever certain facts, which are recognised by law as being essential to the creation of the trust, are found to exist.[15]

The institutional conception as explained by Dewar comprises three aspects. First, it arises in a defined class of factual situations. That is, it is confined to established categories, although these may be extended by analogy in accordance with the leeways of the doctrine of precedent and the nature of equitable discretions.[16] The remedial trust, on the other hand, is unconstrained by the need to find analogies. In novel situations it can proceed directly from a finding of breach of an equitable principle or standard. In the US and Canada, the relevant principle is unjust enrichment.

Secondly, the constructive trust is regarded as a species of trust rather than as an equitable remedy like, for example, specific performance.[17] Once it arises it is said to have the 'institutional' features of an express trust, or at least those which Deane J described as 'the staple ingredients of those trusts: subject-matter, trustee, beneficiary (or, conceivably, purpose) and personal obligation attaching

[13] *Pettkus v Becker* [1980] 2 SCR 834, 849-50.

[14] Dewar, above n 12, 265, fn 4.

[15] Ibid.

[16] Deane J strongly endorsed this point in *Muschinski* (1985) 160 CLR 583, 615.

[17] In Australia, as in England, treatises on the law of trusts invariably include a chapter devoted to constructive trusts while treatises on equitable remedies do not: Craig Rotherham, 'The Redistributive Constructive Trust: "Confounding Ownership with Obligation"?' (1992) 5 *Canterbury Law Review* 84, fn 2; Malcolm Cope, *Constructive Trusts* (1992) 30.

to the property'.[18] The conception of the constructive trust as a true trust is expressed by Pettit as follows:

> the constructive trust is a substantive institution. It is in principle like any other trust, the difference lying in the mode of creation. Express trusts and constructive trusts are two species of the same genus.[19]

Austin's term 'monolithic trust' adequately captures this notion of the constructive trust carrying with it a fixed bundle of rights and consequences.[20] In this sense it 'necessarily connotes certain legal consequences',[21] as Dewar said.

Thirdly under Dewar's institutional conception of the trust, it is said to arise by operation of law independently of judicial decree whenever the circumstances essential to its creation (the defining circumstances) are found to exist. The court does not create the trust but gives relief because the trust already exists as a 'substantive institution'. The institutional conception of the constructive trust assumes that the defining factual circumstances are a matter of settled law, and that the existence of the beneficial interest is not dependent upon judicial discretion.[22] It is not inconsistent with this position to concede to judges a measure of discretion as to the grant of relief and its terms, in accordance with general principles regarding the administration of equitable remedies,[23] but judicial recognition of the trust is expected to follow as a matter of course.[24] In a loose sense, the institutional trust can be said to be 'automatic' rather than discretionary.[25]

The practical significance of this view is that if the trust arises automatically, the judicial decree giving effect to it should also date from when the defining circumstances occurred. Under a remedial conception, the trust, as the product of the remedy, should date from the order unless the court declares otherwise. It will be shown that in the US and Canada, the dominant view on this point is aligned with the institutional trust for reasons of policy. This is despite criticism that it is logically inconsistent with the remedial conception of the trust.

Waters adds a fourth important difference: absent in the institutional conception, but central to the remedial trust, is a clear distinction between the remedy and the principle underlying liability.[26] This point can best be explained by

[18] *Muschinski* (1985) 160 CLR 583, 614. The analogy with the express trust is a limited one since the result of the imposition of a constructive trust is a judicial decree ordering the trustee to transfer the property to the plaintiff; it does not establish a continuing relationship: Emily Sherwin, 'Constructive Trusts in Bankruptcy' [1989] *University of Illinois Law Review* 297, 301; Glover, above n 4, ¶ 6.18.

[19] Pettit, above n 4.

[20] Robert Austin, 'The Melting Down of the Remedial Trust' (1988) 11 *University of New South Wales Law Journal* 66, 69-70.

[21] Dewar, above n 12.

[22] Millett, above n 4, 41.

[23] For a comprehensive list of these principles, see I Spry, *Principles of Equitable Remedies* (4th ed, 1990) 4-6.

[24] Michael Tilbury, *Civil Remedies* (1990) vol 1, 1, fn 1.

[25] David Hayton, 'Equitable Rights of Cohabitees' (1990) *The Conveyancer and Property Lawyer* 370, 371-2.

[26] Waters, above n 11, 355. For an 'institutional' exposition of the view that right and remedy are 'indissolubly connected', see *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*

contrasting North American and English approaches to the grant of the trust remedy. In the US, and in Canada since *Pettkus v Becker*, liability depends upon a finding of unjust enrichment which requires 'an enrichment, a corresponding deprivation, and the absence of any juristic reason for the enrichment.'[27] The imposition of a constructive trust in those jurisdictions does not follow automatically from a finding of unjust enrichment. The selection of the trust remedy is discretionary and depends upon the inadequacy of alternative remedies (like account and *quantum meruit*) and on the existence of a link between the contribution that founds the action and the specific property in which the interest is claimed.[28]

In the US and Canada the trust is understood to be a remedy the court selects from an array of personal and proprietary remedies. It makes its appearance not at the outset, but at the end of the analysis once liability has already been established under the rubric of unjust enrichment. Instead of extending the trust remedy incrementally by analogy with previous cases, the court returns to first principles to decide whether the trust is the appropriate remedy for the unjust enrichment in the instant case. This is not to deny that some interdependence of liability and remedy necessarily remains, since the circumstances of the unjust enrichment are a relevant consideration in the selection of the appropriate remedy. New Zealand courts are also tending to separate rights or liabilities from remedies, in contrast to the English approach which assumes a necessary connection between the two.[29]

Separation of the trust remedy from the principle underlying liability opens up a two-way flexibility. Not only can the trust remedy flow directly from a finding of unconscionability in novel situations, but the finding of unjust enrichment does not dictate the form of the remedy. Under the institutional conception, by contrast, liability and remedy are inextricably linked. If liability is established by fitting the facts within an existing liability category, the constructive trust follows as a matter of course. There is no intermediate step of selecting the remedy. This was the approach taken in *Gissing v Gissing*,[30] and indeed, the inflexible nature

[1981] 1 Ch 105, 124 (Goulding J). (Note that *Chase Manhattan Bank N A v Israel-British Bank (London) Ltd* has been reconsidered recently by the House of Lords: *Westdeutsche Landesbank Girozentrale v Council of the London Borough of Islington* (House of Lords, Lords Goff, Browne-Wilkinson, Slynn, Woolf and Lloyd, 22 May 1996) ('*Westdeutsche*'). Publication deadlines precluded detailed examination of this case.)

27 *Rathwell v Rathwell* [1978] 2 SCR 436, 455 (Dickson J). The test was adopted unanimously by the Supreme Court of Canada in *Pettkus v Becker* [1980] 2 SCR 834, 848.

28 *Sorochan v Sorochan* [1986] 2 SCR 38, 47 (Dickson CJ); *Rawluk v Rawluk* [1990] 1 SCR 70, 103-7 (McLachlin J); *Pettkus v Becker* [1980] 2 SCR 834, 852 (Dickson J); *Peter v Beblow* [1993] 1 SCR 980, 987-8 (McLachlin J), 1019-20 (Cory J).

29 Julie Maxton 'Equity' (1994) *New Zealand Recent Law Review* 246, 246-7. She contrasts the English view as illustrated by the Privy Council's decision in *Attorney-General for Hong Kong v Reid* [1994] 1 NZLR 1, with the New Zealand and Canadian approaches in cases like *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 and *LAC Minerals Ltd v Corona Resources Ltd* [1989] 2 SCR 574; *Gillies v Keogh* [1989] 2 NZLR 327, 335 where Cooke P stated that 'the Canadian cases show that, on occasion, a simple monetary award is the most appropriate way of satisfying the equity.' (See also discussion of *Westdeutsche* above n 26.)

30 [1971] AC 886 ('*Gissing*').

of the *Gissing* constructive trust has been cited by Hayton as a reason for merging it with the doctrine of proprietary estoppel. This allows the court to fashion a remedy to fit the case.[31]

In summary, the distinguishing features of the institutional conception are that:

(a) the trust remedy is available within defined categories;
(b) the trust remedy is a fixed bundle of rights closely analogous to those created by an express trust;
(c) since the trust interest pre-exists, the court order should give effect to it from the date when the defining events occurred; and
(d) where constructive trust categories are used to found liability, the trust remedy follows as a matter of course.

It is possible to analyse recent developments in the Australian constructive trust in terms of the institutional and remedial features identified above.

LIBERALISATION OF THE CATEGORIES

Prior to the High Court's decision in *Muschinski* the operation of the constructive trust in Australia appeared to be confined to a heterogeneous collection of defined situations, such as mutual wills, breach of fiduciary duty, completion of a gift in equity (the rule in *Re Rose*[32]), secret trusts and specifically enforceable contracts for the sale of land. It was unclear whether there was any common principle underlying these categories, or whether they were simply diverse examples of a Chancery habit of invoking the trust analogy wherever an equitable doctrine operates to sever legal and equitable title.[33]

One category of constructive trust developed that proved particularly useful in resolving family property disputes in the interstices of statutory redistribution schemes.[34] The essential features of the new trust were laid down by the House of Lords in *Gissing*[35] and *Pettitt v Pettitt* [36] and were summarised as follows by Holland J in *Ogilvie v Ryan*:

[31] Hayton, above n 25. For a discussion of the inflexible nature of the trust, see J Davies, 'Constructive Trusts, Contract and Estoppels: Proprietary and Non-Proprietary Remedies for Informal Arrangements Affecting Land' (1980) 7 *Adelaide Law Review* 200. Proprietary estoppel is often pleaded as an alternative to the *Gissing* constructive trust since the requisites for the two doctrines overlap: M Neave, C Rossiter and M Stone, *Sackville and Neave Property Law Cases and Materials* (5th ed, 1994) ¶ 5.111. This can have the effect of masking the inflexibility of the constructive trust remedy since judges are not always explicit about which doctrine founds the order actually granted.

[32] [1952] Ch 499.

[33] Julie Dodds, 'The New Constructive Trust: An Analysis of its Nature and Scope' (1988) 16 *Melbourne University Law Review* 482, 486; Ronald Maudsley, 'Proprietary Remedies for the Recovery of Money' (1959) 75 *Law Quarterly Review* 234, 236. Waters said that the language of trust was 'a convenient and available language medium for describing equity's manner of redressing a wrong': Donovan Waters, *The Constructive Trust* (1964) 13-14. Cope suggests that this is the unifying theme for the various categories of constructive trust: Cope, above n 17, 19.

[34] The doctrine is not confined to disputes between married or cohabiting couples: *Ogilvie v Ryan* [1976] 2 NSWLR 504; *Thwaites v Ryan* [1984] VR 65; *Allen v Snyder* [1977] 2 NSWLR 685, 689 (Glass JA); *Glouftsis v Glouftsis* (1987) 44 SASR 298; *Kidner v Department of Social Security* (1993) 31 ALD 63.

[35] [1971] AC 886.

[36] [1970] AC 777.

> [A]n appropriate constructive trust will be declared in Equity to defeat a species of fraud, namely, that in which a defendant seeks to make an unconscionable use of his legal title by asserting it to defeat a beneficial interest in the property which he ... has agreed to or promised; or which it was the common intention of the parties that the plaintiff should have, in return for benefits to be provided by, and in fact obtained from, the plaintiff in connection with their joint use or occupation of the property.[37]

Like the resulting trust and the older categories of constructive trust, the *Gissing* constructive trust was generally understood to operate within a paradigm that included the factual elements of unmet promises or common intention, and detrimental reliance. Australian law on the constructive trust was structured mainly by liability categories derived from the facts of precedent cases,[38] although it was occasionally acknowledged that liability might be deduced more directly from fundamental equitable principles.[39]

In his landmark judgment in *Muschinski*, Deane J affirmed that the principle of preventing unconscionable insistence upon legal rights might be mediated through other equitable doctrines to establish a constructive trust in novel situations which did not conform to the established categories.

The situation that presented itself in *Muschinski* was apt to test the limits of the constructive trust, since the facts eluded its established categories. The parties had been living in a de facto relationship when they decided to purchase land and to effect improvements there to provide them with a home and business premises. It was agreed that Mrs Muschinski would provide the purchase price and that Mr Dodds would pay for the improvements at a later time. The land was transferred to them as tenants in common in equal shares. Before the improvements could be effected, the relationship ended. Mr Dodds had contributed only $2550 while the plaintiff had paid $25,259. Mrs Muschinski failed in her claim that Mr Dodds held his half share on resulting trust for her and appealed to the High Court.

The High Court decided unanimously that there was no resulting trust, Mrs Muschinski having intended that Mr Dodds would take his half share as beneficial co-owner. A majority found that the parties held their interests on trust to reimburse each party's respective contributions and to distribute the residue equally between them. Chief Justice Gibbs reached this conclusion by applying the equitable doctrine of contribution. The parties were jointly liable for the purchase price under the contract of sale. Mrs Muschinski, having paid more than her share to discharge Mr Dodds' liability, was entitled to contribution from him

[37] [1976] 2 NSWLR 504, 518.

[38] Waters, above n 11, 340; *Bryson v Bryant* (1992) 29 NSWLR 188, 197 (Kirby P). For an exposition of the social changes fuelling pressure for new solutions, see Patrick Parkinson, 'Doing Equity Between De Facto Spouses: From *Calverley v Green* to *Baumgartner*' (1988) 11 *Adelaide Law Review* 370, 372-3.

[39] In *Allen v Snyder* [1977] 2 NSWLR 685, 699 (Samuels JA), 704 (Mahoney JA) it was recognised that if a common intention was lacking, a constructive trust might be imposed on the basis of unconscionable conduct or breach of fiduciary duty. In *Re Bulankoff* [1986] 1 Qd R 366 (decided prior to *Muschinski*) a constructive trust was imposed, in the absence of a common intention, to prevent unconscionable retention of a beneficial interest. See also Ashley Black, '*Baumgartner v Baumgartner*, the Constructive Trust and the Expanding Scope of Unconscionability' (1988) 11 *University of New South Wales Law Journal* 117, 120.

to the extent that her payments exceeded her share. She was also entitled to an equitable charge over his half interest for the amount owing. Chief Justice Gibbs concurred in the order proposed by Deane J, although he did not express agreement with the reasons for it.

The major significance of the case lies in the reasoning of Deane J, with whom Mason J (as he then was) agreed. He found that the parties held their interests on constructive trust, because upon the failure of the parties' joint venture it would be unconscionable for Mr Dodds to retain the benefit of his half interest without making allowance for Mrs Muschinski's greater contributions. He reached this conclusion by creative analogy with rules applicable to frustration of contracts and failure of a partnership or joint venture,[40] justifying the extension of the constructive trust by reference to the common principles underlying the diverse categories of equitable relief.

The declaration that the parties held their interests on constructive trust did not and could not rest upon the *Gissing* doctrine since the Court found that there was no evidence of a common intention to hold the beneficial interest in proportions other than in accordance with the legal title. But Deane J pointed out that the *Gissing* constructive trust was only one of the equitable doctrines that could support the remedy:

> Once its predominantly remedial character is accepted, there is no reason to deny the availability of the constructive trust in any case where some principle of the law of equity calls for the imposition upon the legal owner of property, regardless of actual or presumed agreement or intention, of the obligation to hold or apply the property for the benefit of another.[41]

Justice Deane reaffirmed the view that he had previously expressed in *Hospital Products Ltd v United States Surgical Corporation*[42] that the constructive trust is not confined to cases where an antecedent fiduciary relationship is established, adding that 'neither principle nor authority requires ... that it be confined to that or any other category or categories of case.'[43] The remedy was a developing one, not to be confined to the factual circumstances of precedent cases. It was in this sense that Deane J described the trust as 'remedial' in the following oft-quoted passage:

> Viewed in its modern context, the constructive trust can properly be described as a remedial institution which equity imposes regardless of actual or presumed agreement or intention (and subsequently protects) to preclude the retention or

[40] The concept of joint venture does not have a fixed legal meaning: Paul Finn, 'Case Note: *LAC Minerals Ltd v Corona Resources Ltd*' (1989) 8 *Australian Mining and Petroleum Law Association Bulletin* 143, 144. Deane J in *Muschinski* (1985) 160 CLR 583, 620 referred to the case of *Atwood v Maude* (1868) 3 Ch App 369 where, upon the premature dissolution of a legal partnership at the instigation of the defendant, the defendant was ordered to refund to the plaintiff a portion of the premium paid by the latter in the expectation that the partnership would run its full term. The court said that the defendant's retention of the benefit in the circumstances would be unconscionable.

[41] *Muschinski* (1985) 160 CLR 583, 616-17.

[42] (1984) 156 CLR 41.

[43] *Muschinski* (1985) 160 CLR 583, 616.

> assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle.[44]

If the remedy can operate beyond the existing categories, how may its boundaries be shifted? The answer proposed by Deane J has two elements. First, the extension of the trust to new contexts must be informed by an understanding of the common principle or principles underlying not merely existing trust categories but equitable relief in general. Referring to authorities unrelated to the constructive trust cases, he noted that the 'traditional equitable notion of unconscionable conduct ... persists as an operative component of some fundamental rules or principles of modern equity.'[45] In his analysis, unconscionability figures as but one of the guiding principles. He was however willing to admit the possibility that the principle of unjust enrichment might eventually emerge as the basic principle underlying the various manifestations of the constructive trust.[46]

Secondly, he said that the extension of the remedy to new factual situations must occur in accordance with the constraints and leeways of the doctrine of precedent (which guides the evolution of equity as it does the common law), that is, the traditional processes of legal reasoning, deduction, induction and analogy.[47] The starting point for analogy is not, it seems, confined to existing categories of constructive trust. Chief Justice Gibbs concurred in a declaration of constructive trust based, according to his reasons, upon a right of contribution, while Mason and Deane JJ used the analogy of rules relating to failed joint ventures, premature dissolution of partnership and frustration of contracts to support the extension of the trust remedy to a novel situation.

The minority views of Deane and Mason JJ were unanimously approved by the High Court in *Baumgartner*.[48] Chief Justice Mason, Wilson and Deane JJ, with whose reasons Gaudron J expressed general agreement, took the further step of identifying 'the traditional concept of unconscionable conduct' as the conceptual link underlying the diverse applications of the constructive trust. They attributed this insight to Deane J in *Muschinski*:

> his honour acknowledged (at 616) that general notions of fairness and justice are relevant to the traditional concept of unconscionable conduct, this being a concept which underlies fundamental equitable concepts and doctrines, *including the constructive trust.*[49]

[44] Ibid 614.

[45] Ibid 616. The examples referred to are *Legione v Hateley* (1983) 152 CLR 406, 444 and *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, 461-4, 474-5.

[46] *Muschinski* (1985) 160 CLR 583, 617. Justice Toohey in *Baumgartner* also suggested that unjust enrichment might serve as a foundation for constructive trust liability: (1987) 164 CLR 137, 152-4. Some restitution scholars would exclude constructive trust from the ambit of unjust enrichment on the ground that the former can be about enforcing expectations while the latter is about restoring value to one unjustly deprived of it: see, eg, Burrows, above n 4, 238; Peter Birks, *An Introduction to the Law of Restitution* (1985) 292.

[47] *Muschinski* (1985) 160 CLR 583, 615.

[48] (1987) 164 CLR 137.

[49] Ibid 148 (emphasis added).

They found further authority for it in a remark of Mahoney JA in *Allen v Snyder* referring to certain matrimonial situations:

> It will be necessary, from time to time, to determine whether, in such situations, the failure to recognize that the one or the other has a proprietary interest in the home is so contrary to justice and good conscience that a trust or other equitable obligation should be imposed.[50]

The reference to 'contrary to justice and good conscience' should, the judges said, be understood as 'unconscionable'. With this modification, the remark of Mahoney JA could be read as meaning that the ground for imposition of a constructive trust in this type of case is that:

> a refusal to recognize the existence of the equitable interest amounts to unconscionable conduct and that the trust is imposed as a remedy to circumvent that unconscionable conduct.[51]

The doctrine thus refined was applicable to the instant case. The parties had for some years lived in a de facto relationship, pooling their earnings to provide for joint living expenses and mortgage instalments on a property owned by the man that was intended to be their family home. There was no common intention that the woman was to have an interest in the property except in the event that they married. Since that contingency did not occur, there was no relevant common intention for the purposes of application of the *Gissing* constructive trust. Upon the breakdown of the relationship it was unconscionable, said the Court, for the man to assert that the home was his and his alone. It was this unconscionable conduct that attracted the imposition of a constructive trust under which the man held the property for both parties in shares proportional to their respective contributions.

The decision demonstrated that the 'new' remedial constructive trust was not confined by the commercial joint venture analogy since the remedy was granted in the context of a purely domestic relationship with no accompanying commercial undertaking as had existed in *Muschinski*.[52] One issue that the decision left unclear was whether the extension of constructive trust liability to a novel situation could proceed directly from a finding of unconscionable abuse of title rights without passing through an intermediate doctrine or equitable principle, such as the analogy of rules relating to a failed joint venture employed in *Muschinski*. A few judges in post-*Baumgartner* cases have understood that the High Court was deducing trust liability directly from a finding of unconscionability, the material facts discussed in the judgments being merely the particular grounds for the finding.[53]

[50] [1977] 2 NSWLR 685, 706.

[51] *Baumgartner* (1987) 164 CLR 137, 147.

[52] Marcia Neave, 'Three Approaches to Family Property Disputes — Intention/Belief, Unjust Enrichment and Unconscionability' in Timothy Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 247, 268-9.

[53] For example in *Carson v Wood* (1994) 34 NSWLR 9, 17-18, Sheller JA appeared to understand that *Muschinski* contemplated that liability could flow directly from a finding of unconscionability.

But the habit of conceptualising the constructive trust as a 'collection of liability situations'[54] is not easily displaced. Most of the subsequent cases reveal a judicial assumption that *Muschinski* and *Baumgartner* extended the constructive trust remedy to a new category, delimited by an abstraction of the material facts in those cases. The doctrine is understood to require something in the nature of a joint venture or pooling of funds in pursuit of a common financial goal. In *K T & T Developments Pty Ltd v Tay*[55] Parker J observed that 'some clear equitable principles must be identified before relief will be granted', such as the analogy of the failed joint venture in *Muschinski.*[56] The doctrine was inapplicable in the instant case because the plaintiff had never been a party to a joint endeavour with the defendants, nor was he party to any fiduciary relationship. The pooling of funds element in *Baumgartner* was extended by analogy to a pooling of labour in *Miller v Sutherland*[57], and in *Hibberson v George*[58] to a situation where the cohabiting parties by agreement applied their respective funds to joint expenses.

While acknowledging that the categories of constructive trust liability are not closed, judges in the post-*Baumgartner* cases have not responded to the High Court's invitation to extend the trust to new situations by moulding and creatively extending the existing categories of relief. Several commentators have rued the conservatism of the lower courts which have declined to seize the opportunity presented to them, preferring to apply the doctrine in *Baumgartner* and *Muschinski* only where the factual analogy is sufficiently close.[59] Consistently with the persistence of 'categories' thinking, courts generally regard the new doctrine as existing alongside the *Gissing* constructive trust rather than subsuming it under a broader principle derived from a standard of conduct.[60]

THE DISSOCIATION OF REMEDY AND LIABILITY

One remedial feature of the US and Canadian trust which Deane J did not adopt in *Muschinski* was the distinction between the liability (or the corresponding right) and the form of the remedy. He did not endorse the remedial view that the court can bypass the constructive trust and impose an alternative remedy. Instead he proposed a greater degree of flexibility in the terms of relief *within* the institution of the trust. The actual order in *Muschinski* provides an example. In

54 Donovan Waters, *Law of Trusts in Canada* (2nd ed, 1984) 385.

55 (Supreme Court of WA, Parker J, 23 January 1995.)

56 Ibid 6.

57 (1990) 14 Fam LR 416.

58 (1989) 12 Fam LR 725.

59 Marcia Neave, 'The New Unconscionability Principle — Property Disputes Between De Facto Partners' (1991) 5 *Australian Journal of Family Law* 185, 186-7; Michael Bryan, 'The Conscience of Equity in Australia' (1990) 106 *Law Quarterly Review* 25, 27; Michael Bryan 'Constructive Trusts and Unconscionability in Australia: On the Endless Road to Unattainable Perfection' (1994) 8 *Trust Law International* 74; Rebecca Bailey-Harris, 'Property Disputes Between De Facto Couples: is Statute the Best Solution?' (1991) 5 *Australian Journal of Family Law* 221, 225.

60 See, eg, *Kidner v Department of Social Security* (1993) 31 ALD 63, 74-5 (Drummond J) (Federal Court); *Green v Green* (1989) 17 NSWLR 343; *Rasmussen v Rasmussen* [1995] 1 VR 613, 616.

North America, the interposition of third party claims is regarded as one of the indicators against selecting the trust remedy. Justice Deane preferred to accommodate this consideration within the trust remedy by modifying the effective date of the order.

Despite the lack of High Court approval, the detachment of remedy from liability has become a significant feature of the way the lower courts are administering remedies where a constructive trust is pleaded. In 1988, Austin observed that the practices of Australian courts applying constructive trust reasoning was out of step with authoritative doctrine.[61] He observed that courts are increasingly using constructive trust reasoning to determine liability, then bypassing the trust in favour of a different remedy.[62] Where the trust remedy is used, courts are modifying its normal proprietary consequences, such as priority over unsecured creditors, the right to trace property into substituted forms, and the right to share proportionately in the increased value of the property.[63]

Austin describes the developments as a 'melting-down' of the 'monolithic trust' (the concept of the trust as a fixed bundle of rights and consequences).[64] The remarkable feature of these developments is that they are taking place in an *ad hoc* fashion, uninformed by (or even contrary to) express doctrine. Austin suggests that there are three ways of responding to them. Firstly, we can treat them as anomalous exceptions or even as 'bad law', thereby preserving the integrity of the trust paradigm. Secondly, we can try to accommodate them as implicit theories within trust doctrine. The third option, Austin's preferred one, is to regard them as new and less specific types of equitable rights which operate alongside the trust.[65] But in so far as these new equitable rights function as alternative remedies, once trust reasoning has been used to establish liability, the institutional trust loses its coherence — the fixed association of liability and remedy is interrupted, thereby necessarily modifying the trust concept.

Uncertainty concerning the import of the remarks by Deane J in *Muschinski* has fuelled the tendency of courts to dissociate the trust remedy from the principle underlying liability. In a rare judicial attempt to interpret the remarks, Cole J in *Australian National Industries Ltd v Greater Pacific Investments Pty Ltd (in liq) (No 3)*[66] made the following *obiter* comments:

> The passages in *Muschinski* do not deny the proposition that where a constructive trust is found, but the question of relief is reserved for consideration after determination of other circumstances material to that question of relief, the issue of what relief, if any, should be granted remains open. Nor do the passages compel a conclusion that a constructive trust having been recognised, relief

61 Austin, above n 20, 67.

62 Ibid. The finding of a constructive trust does not preclude the co-existence of an alternative remedy, eg a remedy for debt: *Attorney-General (Hong Kong) v Reid* [1994] 1 AC 324, 331; *Zobory v Federal Commissioner of Taxation* (1995) 129 ALR 484, 485. Austin makes the point that alternative remedies are being accessed under constructive trust reasoning rather than pleaded under other discrete doctrines: ibid.

63 Austin, above n 20, 67.

64 Ibid.

65 Ibid 67-8.

66 (1992) 7 ACSR 176.

> must be granted. In circumstances where a constructive trust is recognised, but no damage flows from it or where to declare the trust would result, for instance, in unjust enrichment to the beneficiary of the trust, the court would grant no relief.[67]

Justice Cole understood the passages to mean that the finding of a constructive trust does not dictate the form of the relief. There is a suggestion here that there is an intermediate step of determining the appropriate form of relief, taking other circumstances into account. Moreover, even where the court recognises that a constructive trust has arisen, the trust may be wholly unenforceable where the court withholds relief.

Under this interpretation we have a trust which arises independently of judicial decree but which may be stripped of some or all of its normal consequences at the judge's discretion. Justice Cole also contemplates with equanimity the possibility that the court may, by withholding relief altogether, allow the trust relationship to continue indefinitely. This contradicts the constructive trust's function as a mere device to compel the legal owner to hand over the property. It looks as if the finding that a constructive trust has 'arisen' is little more than a declaration of liability which is not determinative of the type of relief to be granted.

While few judges have ventured to express an opinion on the legal effect of *Muschinski*, the outcomes of several post-*Baumgartner* cases suggest that Cole J is not alone in his remedial conception of the trust. One way that this conception is manifested is by the practice of using the constructive trust as the vehicle for administering a different remedy. This is unremarkable in the case of equitable liens which are imposed by the court as adjunctive relief where a constructive trust is pleaded but the trust property cannot be traced.[68] The notable development is that even where there is no impediment to applying the trust remedy, courts are increasingly using constructive trust reasoning to determine liability, then granting an alternative type of relief.

In *Kais v Turvey*[69] during a period of cohabitation the male respondent discharged the mortgage secured on the home of the female appellant and paid for improvements to the property. They became engaged during the period of cohabitation. Upon termination of the relationship by the appellant, the respondent sought relief under alternative claims: first, he sought a declaration that the property was held on constructive trust, and secondly, that the appellant was required to repay the amount of his expenditure on the property.

The Full Court of the Supreme Court of Western Australia applied the reasoning in *Muschinski* to hold that it was unconscionable for the appellant to retain the benefit of the respondent's gift, made in contemplation of marriage, after failing to marry him. The Court ordered the respondent to pay the appellant the sum of $30,505 being the total amount of his expenditure plus interest from the

[67] Ibid 190.
[68] Glover, above n 4, ¶ 6.19-6.20.
[69] (1994) 17 Fam LR 498.

date of separation. It was further held that he was entitled to an equitable charge on the land to secure the sum.

Chief Justice Malcolm who gave the leading judgment did not explain why he did not proceed to declare a constructive trust, having expressly found the doctrinal requirements in *Muschinski* and *Baumgartner* to be satisfied. Neither did Ipp J offer a relevant explanation whilst essentially granting the same remedy. By implication, the Court treated the remedies of constructive trust and monetary restitution secured by equitable charge as alternative remedies accessible through the constructive trust head of liability. Had the court imposed a constructive trust, the equitable charge would have been redundant because the appellant's interest as a co-owner in equity would have been sufficiently secure.

This approach can be contrasted with the more orthodox trust reasoning in *Hibberson v George*.[70] After nine years of cohabitation, during which two children were born of the relationship, Ms Hibberson placed a caveat on the property which had been their joint home and which was purchased in the sole name of Mr George. He had paid the deposit, mortgage and outgoings while Ms Hibberson had worked and spent her own money on the house, its contents and the family. The issue was whether she had a caveatable interest in the property. The De Facto Relationships Act 1984 (NSW) was not applicable, and the matter fell to be determined under general equitable principles.

By a majority, the Supreme Court of New South Wales held that the assertion of full beneficial ownership by Mr George was unconscionable in the circumstances. Each party had spent money for the purposes of their joint relationship, in the expectation that part of their combined resources would be used to provide a home. This called for the imposition of a constructive trust 'as a remedy to circumvent the unconscionable conduct of the legal owner' in accordance with the principle laid down in *Baumgartner*.[71] After taking account of Mr George's greater financial contribution to the cost of acquisition, there being no evidence of the amounts each contributed for the benefit of the relationship, the majority was satisfied that the circumstances warranted a departure from the starting point of 'equality is equity'. The court held that the beneficial interest should be apportioned as to 60% to Mr George and as to 40% to Ms Hibberson and 'adjustments should be made to compensate for other moneys'.[72]

It is instructive to note the conventional steps in framing the order for relief. Having applied constructive trust reasoning to determine whether Ms Hibberson had a proprietary claim to the property, the court proceeded to declare a constructive trust without considering alternative remedies. It then determined the extent of her share as equitable co-owner expressed as a proportion of the beneficial ownership. The next step was to terminate the trust by directing that the property be sold and the net proceeds divided in the specified proportions, after repaying to each of the parties an amount representing his or her respective contribution to the cost of acquisition and improvement plus interest from the

[70] (1989) 12 Fam LR 725.
[71] Ibid 742 (McHugh JA).
[72] Ibid 743-4.

date of separation. This method of administering the trust remedy conforms to the doctrinal requirements of the institutional constructive trust. It was the approach followed by the High Court in *Baumgartner* and by the majority in *Muschinski.*

It is tempting for courts to omit the intermediate step of declaring and quantifying the claimant's equitable interest under the constructive trust, and to proceed straight to giving directions for a monetary payment or distribution. In *Booth v Beresford*[73] the parties had lived in a de facto marital relationship for eleven years. For most of this time they resided in a property bought by Mr Beresford in his sole name and financed solely by him. Ms Booth had contributed her funds and labour in renovating the house, and had been promised an opportunity to purchase a half share in the property. Upon the breakdown of the relationship, Ms Booth sought a declaration that she had an interest under a constructive trust by virtue of her contributions.

Justice Perry held that there was no common intention to create a trust with respect to the land, but that a constructive trust should be imposed because the breakdown of the relationship had deprived Ms Booth of the opportunity to purchase a half share in accordance with the undertaking which had existed during the cohabitation. His Honour referred to the authority of *Baumgartner* and *Muschinski*, indicating that he was relying on constructive trust reasoning to establish liability. He then proceeded to quantify her interest, not as a proportion of beneficial ownership, but in a monetary sum based upon the past value of her contributions. As if to underline the confused nature of the remedy he was granting, he reserved the question of 'whether or not there should be a decree in equity that the plaintiff be entitled to a charge on the property to that amount.'[74]

Constructive trust reasoning and methodology was used to establish liability but exerted little influence on the form of the remedy. On one interpretation, Perry J was indeed employing the constructive trust as a remedy but without its full array of institutional features. On another analysis, he intended to grant a monetary restitutionary remedy instead of a remedy by way of constructive trust which would have given Ms Booth too much. In support of the latter interpretation one can point to the judge's failure to quantify the plaintiff's beneficial share in proportional terms, and his willingness to entertain the proposition that an equitable charge might be needed to secure her interest.

An equitable charge was actually superimposed upon a constructive trust in *Miller v Sutherland.*[75] The Supreme Court of New South Wales, applying an analogy with the material facts in *Baumgartner,* held that the plaintiff had a one quarter equitable interest under a constructive trust arising from the pooling of labour to provide a home for the parties. There were no plans for a sale and the court did not order that the property be sold. Instead it found that the defendant held the property subject to a charge in favour of the plaintiff for a fixed amount of $87,500. The finding of a constructive trust should have been sufficient to secure her interest without the need for a charge. Further, in circumstances where

[73] (1993) 17 Fam LR 147 (Perry J).
[74] Ibid 155.
[75] (1990) 14 Fam LR 416 (Cohen J).

the trust relationship was not about to be terminated, she should as co-owner have been entitled to share in future increments in the value of the property. The court's finding that she was entitled to a fixed monetary amount, irrespective of when it was paid, deprived her of one of the rights normally enjoyed by a co-owner.

Uncertainty concerning the extent to which the terms of a constructive trust order may be 'moulded and adjusted'[76] to fit the circumstances leads to some strange blends of trust elements and 'fairness' considerations in the terms of relief. In *Nichols v Nichols*[77] the Supreme Court of New South Wales imposed a constructive trust upon a woman in favour of her former lover who had built on her land a mansion for both her and their children. The trust was imposed because it would be unconscionable for her to retain the benefit of the man's gift once the relationship had ended. The court gave directions for the property to be sold and the proceeds paid to the man subject to retention by the woman of sufficient funds to provide accommodation for her and the children according to the more modest standards of her neighbours.

The finding that the man held the entire beneficial interest was perplexing, since he had erected the house on land owned by the woman which had been a gift from her father.[78] Her claim may have been intended to be off-set by the allowance for her to re-house herself but the adjustment in her favour was not traced to equitable doctrine. The court seemed more concerned to achieve an outcome that was 'fair' in all the circumstances than to justify its order in principled terms. It may be doubted that this is what Deane J envisaged when in *Muschinski* he proposed flexibility in the terms of the trust order.

Trends in the Recent Australian Cases

In summary, we find in the post-*Baumgartner* cases a degree of confusion concerning first, the relationship between liability and remedy and secondly, the extent of remedial flexibility permissible within the institutional trust. This can in part be attributed to the ambiguities in *Muschinski*, where Deane J described his conception of the trust as 'remedial', and where an unspecified degree of latitude in the terms of relief was licenced. But as Austin's 1988 analysis shows, much of the confusion stems from long-term changes in the function, application and incidents of the constructive trust, in Australia and in England.

In practice some judges are exercising the kind of remedial flexibility associated with the US and Canadian constructive trusts or with proprietary estoppel, unguided by any explicit doctrinal justification. They substitute other remedies for the trust because it seems to them to be reasonable, convenient or necessary to do so, and because the various doctrines used to resolve informal arrangements concerning land overlap so much that it seems pedantic to confine the relief to

[76] The term used by Deane J in *Muschinski* (1985) 160 CLR 583, 615.
[77] (1987) DFC 95-042.
[78] Parkinson, above n 38, 388.

the categories pleaded.[79] It could be said that the fourth remedial feature — the dissociation of liability and remedy — is already part of Australian law, albeit operating at the level of an implicit theory guiding judicial choices.

One of the implications is that one can no longer assume that a constructive trust or other proprietary remedy would be granted on given facts to prevent an abuse of legal title. Even if constructive trust reasoning is used to determine liability, the court might fashion a personal or some other proprietary remedy to fit the circumstances at the time. A range of factors may influence the form of the remedy, either expressly or implicitly. These include the effects on third parties,[80] the reasonableness of allowing the claimant to share as beneficial co-owner in the windfall of capital appreciation,[81] whether the contribution can be traced to specific property in the hands of the legal owner,[82] the expectations of the parties,[83] the existence of any offsetting benefits such as free accommodation,[84] the defendant's ability to pay a monetary award,[85] the duration of the relationship[86] and the degree of moral outrage evoked by the defendant's conduct.[87]

FROM WHEN DOES THE TRUST ORDER OPERATE?

In *Muschinski* Deane J proposed another modification to constructive trust doctrine.[88] He said that the court could mould the form of relief in order 'to give

79 In *Lipman v Lipman* (1989) 13 Fam LR 1, 20-1, Powell J suggested that the true nature of proprietary estoppel and the constructive trust was the same.

80 *Muschinski* (1985) 160 CLR 583, 615, 623 (Deane J); *Re Osborn* (1989) 91 ALR 135, 142; *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 377-9 (Gibbs CJ); *National Australia Bank Ltd v Maher* [1995] 1 VR 318, 335-6 (Ormiston J).

81 *Muschinski* (1985) 160 CLR 583, 623 (Deane J); *In the Marriage of Toohey* (1991) 14 Fam LR 843, McCall J confined the husband's parents' recovery to the sum they had paid in discharge of the mortgage, saying that they should not benefit from the increase in the value of the property that had been transferred to them by the husband and the wife. In *Miller v Sutherland* (1990) 14 Fam LR 416, 425 Cohen J specifically took the capital appreciation into account in augmenting the plaintiff's share; cf *Rawluk v Rawluk* [1990] 1 SCR 70, 109-11 (McLachlin J).

82 *Bryson v Bryant* (1992) 29 NSWLR 188, 230-1 (Samuels JA); *Rathwell v Rathwell* [1978] 2 SCR 436, 454 (Dickson J); *Peter v Beblow* [1993] 1 SCR 980, 995 (McLachlin J).

83 *Sorochan v Sorochan* [1986] 2 SCR 38, 52-3 (Dickson CJ); *Peter v Beblow* [1993] 1 SCR 980, 996-7 (McLachlin J).

84 *Kardynal v Dodek* (1980) AFLC 75,194, 75,204; *Cooke v Head* [1972] 1 WLR 518, 522 (Denning MR); *Public Trustee v Kukula* (1990) 14 Fam LR 97, 102-3 where Handley JA (Samuels and Clarke JJA concurring) said that the trial judge erred in failing to allow a set-off for the value of the deceased's work on the plaintiff's farm.

85 In *Peter v Beblow* [1993] 1 SCR 980, 1000 (McLachlin J), 1024 (Cory J) one of the considerations influencing the selection of the constructive trust remedy was that the defendant had only a pension income and few assets apart from the real property.

86 *Muschinski* (1985) 160 CLR 583, 621-2 where Deane J suggested that Mr Dodds' assertion of title might not have been unconscionable had the cohabitation survived for years after the collapse of the joint venture. Equality of interest is the starting point in cohabitation of long duration: *Baumgartner* (1987) 164 CLR 137, 149 (Mason CJ, Wilson and Deane JJ); *Bennett v Tairua* (1992) 15 Fam LR 317, 342 (Walsh J).

87 *Bennett v Tairua* (1992) 15 Fam LR 317, 342 (Walsh J). Compare this list of factors with those proposed by Neave as considerations that might be relevant to determining whether the remedy should be proprietary: Marcia Neave, 'Three Approaches' above n 52, 255. Compare also with the different list of considerations proposed by B Hovius and Timothy Youdan, *Law of Family Property* (1991) 147, which was noted in passing by Cory J in *Peter v Beblow* [1993] 1 SCR 980, 1022-3.

88 Waters, above n 11, 341.

effect to the application and interplay of equitable principles in the circumstances of the particular case'.[89] In cases of competition between claims, the court may direct that the consequences of a declaration of constructive trust have only prospective operation from the date of judicial declaration 'or from some other specified date'.[90]

This idea is at odds with the institutional conception of the trust as a 'real entity' that arises, as it were automatically, upon the occurrence of the defining circumstances and carries with it a fixed bundle of incidents. Earlier in his judgment Deane J affirmed that there does not need to have been a curial declaration before equity will recognise the existence of a constructive trust. The trust exists prior to, and independently of, judicial decree. In support of that proposition Deane J cited the views of Austin Scott, a leading American exponent of the remedial trust.[91] But can the doctrine of the trust's independent prior existence be reconciled with the existence of a judicial discretion to postpone the trust's commencement?

Justice Deane stated that the trust exists before judicial declaration, but also asserted that the order might be framed so as to postpone some or all of the trust's consequences. This careful choice of language may have been intended to suggest a distinction between the coming into existence of a trust, and the date from which it becomes operative; just as the date upon which a statute becomes law need not correspond to the date from which it commences operation.

The distinction makes little sense when applied to the constructive trust. If the trust pre-exists, as Deane J affirms, so too does the equitable interest under the trust. The interest arises concurrently with the trustee's obligation, for equity treats a right to the transfer of an asset as equivalent to equitable ownership.[92] What Deane J referred to as 'the trust's consequences' are the proprietary rights consequent upon the beneficial interest. It would make little sense to postpone those rights while affirming the prior existence of the trust, for the trust exists only to serve the interest.

On another interpretation, Deane J might have intended to distinguish judicial recognition of the trust from the consequential relief granted to enforce the rights of the beneficiary. His reminder that the constructive trust also operates *in personam* suggests that relief might be granted on terms that place the beneficiary under a personal duty to another. Under the maxim that one who seeks equity must do equity, the court might make a declaration of constructive trust upon terms that require the beneficiary to make a just allowance for the claims of third parties.[93]

[89] *Muschinski* (1985) 160 CLR 583, 615.

[90] Ibid.

[91] Ibid 614. The work referred to was A Scott, *Law of Trusts* (3rd ed, 1967) vol 5, ¶ 462-4.

[92] David Hayton, *Underhill and Hayton: Law Relating to Trusts and Trustees* (14th ed, 1987) 339.

[93] Black suggests that this would have been a better solution to the competing claims in *Muschinski* than the course actually adopted which involved postponing the consequences of the trust: Black, above n 39, 128.

If this was what Deane J meant, it is curious that his actual order in *Muschinski* makes no distinction between the trust and the terms of the relief. It was the trust itself that was postponed:

> Lest the legitimate claims of third parties be adversely affected, the constructive trust should be imposed only from the date of publication of reasons for judgment of this court.[94]

If Mrs Muschinski held a subsisting beneficial interest in the property that arose prior to the court's decree, the portion of its value that corresponded to her interest would have been available to meet the claims of Mr Dodds' creditors. By postponing the date of imposition of the trust, Deane J was making her interest liable to be defeated by later claims. If one adheres to the Scott position that the trust arises independently of the court order, then it would seem that the effect of the order was to divest her of property, or at least to limit her proprietary rights as beneficial co-owner.

The order had another adverse effect on Mrs Muschinski's interest. The property had appreciated in value between the separation and the trial. Mrs Muschinski would ordinarily have been entitled to a proportionate share in the increment. By declaring the trust to operate only prospectively, the court denied her the increment to which she as beneficial co-owner was presumptively entitled. Justice Deane justified this outcome on the ground that, in the circumstances, there was nothing unconscionable in Mr Dodds retaining the increment.[95]

The effect of the court's order was to deny all retrospective effect to the trust and to the equitable interest that it arose to serve. The distinction between the retrospectivity of the trust, and the prospectivity of its consequences, is illusory. The exposition of Deane J straddles two inconsistent doctrines: the claim to judicial discretion with respect to the trust's operative date contradicts the doctrine that the trust exists as a real entity prior to judicial decree.

Comparison With US and Canadian Conceptions

It may seem curious that Deane J invoked US authority to support his view that the constructive trust exists independently of and prior to the judicial decree that recognises it. Is this not an institutional feature and, if so, how is it accommodated within the predominantly remedial conception of the trust in that country? And does the 'remedial' trust as understood in the US and Canada lay claim to a judicial discretion to make the trust operative only from the date of judgment? These are separate questions but are so closely interrelated that it is convenient to consider them together in examining the North American authorities.

US Authorities

American law regards the constructive trust as a remedy for unjust enrichment. The dominant view in the US is expounded in the American Law Institute's

[94] *Muschinski* (1985) 160 CLR 583, 623.
[95] Ibid.

Restatement of Restitution[96], and in Scott's treatise on the law of trusts[97] written as a companion piece to the *Restatement*.[98] Scott writes that a constructive trust 'arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.'[99] According to the *Restatement* the constructive trust comes into existence when the unjust enrichment first occurs and is a proprietary obligation attached to the specific assets wrongfully held. Scott firmly rejects the view that the constructive trust does not arise until the court declares it:

> It would seem that there is no foundation whatever for the notion that a constructive trust does not arise until it is decreed by a court. It arises when the duty to make restitution arises, not when that duty is subsequently enforced.[100]

In case the misconception is partly semantic, Scott explains that the term 'constructive trust' does not imply that the court 'constructs' the trust, but only that it 'construes' the circumstances, in the sense of interpreting them.[101] The constructive trust dates from when the restitutionary obligation arises, that is, when the unjust enrichment occurs. From that moment the wronged party holds a full equitable interest in the subject matter of the trust.

The equitable interest arises by analogy with the genesis of the equitable interest of the buyer of land under a specifically enforceable contract, and the interest of a mortgagor holding an equity of redemption; that is, by anticipating the remedy. It is not to the point, says Scott, that the court may decline to specifically enforce the constructive trustee's duty where the remedy at law is adequate, or that it may satisfy the claim by ordering an alternative restitutionary remedy.[102] According to the *Restatement* the court's refusal to grant restitution *in specie* because the remedy at law is adequate is merely procedural. It does not mean that the legal owner holds the property free of trust or that the wronged person does not have a beneficial interest.[103]

Although Scott and the *Restatement* cite an impressive number of judicial decisions supporting their views, another substantial body of American opinion holds that the constructive trust comes into existence at the time of the judicial decree.[104] Bogert argues that if factual circumstances give grounds for the

96 Section 160. (The *Restatement* is updated by: *Appendix and Pocket Part to 1987.*)

97 Austin Scott and William Fratcher, *The Law of Trusts* (4th ed, 1987) vol 5. (The fourth edition is updated by: *1993 Supplement.*)

98 Austin Scott, *The Law of Trusts* (1939) vii. Scott had worked as a reporter on the American Law Institute's trust law project and wished to explain the 'rules' adopted by the Institute: Donovan Waters, 'The Role of the Trust Treatise in the 1990s' (1994) 59 *Missouri Law Review* 121, 124.

99 Scott and Fratcher, above n 97, ¶ 462.

100 Ibid ¶ 462.4.

101 Ibid. See also: R Meagher and W Gummow, *Jacobs' Law of Trusts in Australia* (5th ed, 1986) 281.

102 Scott and Fratcher, above n 97, ¶ 462.3-462.4.

103 American Law Institute, *Restatement of Restitution* (1937), 664.

104 See George Gleason Bogert and George Taylor Bogert, *The Law of Trusts and Trustees* (Rev. 2nd ed, 1978) Ch 24, ¶ 472 and cases cited therein. Sherwin finds that courts in the US have generally followed the view of the *Restatement* with respect to the timing of the trust's commencement: Sherwin, above n 18, 326. See also *Chase Manhattan Bank N A v Israel-British Bank (London) Ltd* [1981] 1 Ch 105, 122 where Goulding J found that, in the context of con-

imposition of a constructive trust, the wronged party, A, has an election whether to hold the legal owner, B, liable as trustee. A must be free to choose a remedy at law or another equitable remedy in preference to the constructive trust. If A elects to hold B as trustee, the decree will be retrospective in its consequences to the date of the 'wrongful acquisition'.[105] Bogert does not suggest that the court has a discretion to fix a different date for the trust to become operative. Waters has observed that the difference of opinion is of mainly academic interest since, according to Bogert, the trust order operates retrospectively to the date of unjust enrichment.[106]

On Bogert's analysis a constructive trust order is always the product of a court order, while in Scott's view no order is needed to constitute the interest. In *Muschinski* Deane J endorsed the views of Scott, which he said coincided with the law of Australia on this point.[107]

Another proposition of Deane J, that the court can make the trust operative from the date of judgment, finds no support in the American authorities on the remedial trust. Under the American conception, the breadth of judicial discretion in the choice of remedy is not matched by a comparable flexibility in the incidents of the trust remedy.

Canadian Authorities

The dominant view in Canada, as expressed in the leading decision of *Rawluk v Rawluk,*[108] is closely aligned with the American authorities.

The question of when an interest under a constructive trust becomes operative is one which rarely arises for determination in litigation between the putative beneficiary and the legal owner. The court normally determines the proportions of beneficial ownership as at the trial date and makes consequential orders.[109] In *Rawluk* the question presented itself directly. The parties married in 1955 and separated in 1984. During the marriage the spouses worked together in two businesses. Several properties were acquired in the sole name of the husband. The properties had appreciated in value in the two year interval between the date of separation and the date of trial.

The wife sought an equalization of property under the Family Law Act 1986 (Ontario) which sets up a scheme for the division of family property as at the valuation date; in this case, the date of separation. The husband claimed that he was solely entitled to any increment in the value of the properties that accrued after the date of separation. The wife argued that she had a constructive trust over the properties giving her a beneficial half-interest in them, and that she as co-

structive trust arising from mistaken payment, the views of Scott and the *Restatement* correctly represent the American law on the point. He also found that it was possible to generalise about 'American law' since the laws of the various States regarding fraud, mistake and unjust enrichment have developed along similar lines. See also discussion of *Westdeutsche* above n 26.

105 Bogert, above n 104, ¶ 472.

106 Waters, above n 11, 366-7.

107 (1985) 160 CLR 583, 614.

108 [1990] 1 SCR 70 ('*Rawluk*').

109 Waters, above n 11, 360.

owner was entitled to share in the increment in value. The wife succeeded at trial and the husband's appeal to the Ontario Court of Appeal was subsequently dismissed.

His appeal to the Supreme Court of Canada was dismissed by a majority of four, three judges dissenting. All judges agreed that the enactment of the Family Law Act 1986 (Ontario) did not preclude the operation of the doctrine of constructive trust. On the contrary, the Act required the court to determine legal and equitable ownership as a step preliminary to applying the equalisation formula.

In a judgment delivered for the majority, Cory J (Dickson CJ, Wilson and L'Heureux-Dubé JJ concurring) said that if the court makes a declaration of constructive trust, then the equitable interest under the trust will be deemed to have arisen at the time when the unjust enrichment took place. He relied on Scott in support of this view, which he maintained was not inconsistent with the remedial nature of the constructive trust.[110] The trust, he said, is *deemed* to have arisen at the time of the unjust enrichment if the court is *asked* to grant a remedy and is willing to do so.[111]

The minority held that the constructive trust remedy should be denied in the instant case because the Family Law Act 1986 (Ontario) provided a remedy for the unjust enrichment of the husband. Although the statutory equalisation scheme excluded the increment in value that occurred after the separation, the circumstances did not call for the imposition of a constructive trust. The husband was not unjustly enriched to the deprivation of the wife by retaining the capital gain brought about fortuitously by market conditions.

In her dissenting reasons, McLachlin J (La Forest and Sopinka JJ concurring) disagreed with Scott's view that the constructive trust comes into existence from the time of the unjust enrichment with its enforcement depending on the discretion of the court.[112] To protect third parties from undue injury, the court must have a discretion to refuse to make a constructive trust order where a less disruptive remedy is available. It follows, according to McLachlin J, that it is not until the court makes a declaration of constructive trust that the claimant acquires an interest in the trust property, although '[t]hat property interest ... *may* be taken as extending back to the date when the trust was "earned" or perfected'.[113]

This formulation appears to contemplate the possibility that the court may determine a different commencement date for the constructive trust. Further evidence for this interpretation may be found in her reference, with seeming approval, to a *dictum* of Lord Denning in *Hussey v Palmer*[114] that '[t]he trust

110 [1990] 1 SCR 70, 91-2.

111 Ibid. Although Cory J relies on Scott, his exposition suggests a synthesis of the ideas of Bogert and Scott. It was Bogert's suggestion, not Scott's, that the retrospective operation of the trust was a legal fiction and that the trust was contingent upon the election of the wronged party to hold the legal owner a trustee: Bogert, above n 104, ¶ 472, fn 51, referring to *Healy v Commissioner of Internal Revenue*, 345 US 278 (1953) where the Supreme Court mentioned the trust's 'retroactive existence in legal fiction'.

112 [1990] 1 SCR 70, 103.

113 Ibid (emphasis added).

114 [1972] 1 WLR 1286, 1290.

may arise at the outset when the property is acquired, or later on, as the circumstances may require'.[115] It seems that McLachlin J may have interpreted the remark to mean that the constructive trust may be operative from a date of the court's choosing. If so, the interpretation is not supported by an examination of the context in which the remark was made.

Lord Denning was making the point that the factual circumstances giving rise to the trust may occur at the time of the property's acquisition, or at a later date. The observation was in rebuttal of a contemporary notion that the beneficial interests in the property had to be fixed at the date of acquisition.[116] That notion was later disapproved by the Privy Council in *Austin v Keele*.[117] Subsequent English authorities have neither claimed nor exercised an expansive power to fix the operative date of constructive trusts.[118] It has been held that the interest under the trust is operative from the date the defining circumstances occurred, irrespective of the damage thereby caused to the interests of third parties.[119]

The Intermingling of Remedial and Institutional Features

The doctrine advanced by Deane J in *Muschinski* that the court fixes the date from which the trust is operative, is a remedial feature.[120] To hold that the terms of the remedy lie within the discretion of the court is consistent with the remedial trust paradigm. Since the US and Canadian conceptions of the constructive trust are actually a blend of institutional and remedial features, we should not be surprised that the American and Canadian authorities do not acknowledge a judicial discretion to postpone the trust's operative date. In this respect, the Australian constructive trust is now more 'remedial' than the US and Canadian versions.

The above examination of the US and Canadian authorities reveals the conceptual tensions that result from an ill-assortment of institutional and remedial features. The Supreme Court of Canada in *Rawluk* followed the US in upholding the Scott view of the prior existence of the trust. The majority maintained this

115 [1990] 1 SCR 70, 103. McLachlin J notes that the *dictum* was relied upon by the Ontario Court of Appeal in this case. Justice Cory also referred to it: ibid 92.

116 *Ingram v Ingram* [1941] VLR 95, 102 (O'Bryan J); *Thwaites v Ryan* [1984] VR 65, 92 where, in *obiter*, Fullagar J said of the *Gissing* line of cases that this was a type of express trust and will be found only where the common intention to share beneficial ownership existed at the time of acquisition of the property. This view was disapproved in *Butler v Craine* [1986] VR 274.

117 (1987) 10 NSWLR 283, 290. The Privy Council said there was no reason in principle why the doctrine should be limited to an intention formed at the time of acquisition of the property. See also *Sorochan v Sorochan* [1986] 2 SCR 38, 50 where Dickson CJ said that a contribution to the preservation, maintenance or improvement of property, rather than to its acquisition, may suffice to establish the requisite causal link between the claimant's deprivation and the trust property. In *Grant v Edwards* [1986] Ch 638, 651-2 Mustill LJ said that equitable interests were not necessarily fixed at the time of acquisition provided that they were referable to a bargain, promise or tacit common intention between the parties. His view was quoted with seeming approval by Gleeson CJ in *Green v Green* (1989) 17 NSWLR 343.

118 Patricia Ferguson, 'Constructive Trusts — A Note of Caution' (1993) 109 *Law Quarterly Review* 114, 121.

119 *Re Sharpe* [1980] 1 WLR 219, 225 (Brown-Wilkinson J).

120 David Paciocco, 'The Remedial Constructive Trust: A Principled Basis for Priority Over Creditors' (1989) 68 *Canadian Bar Review* 315, 319, fn 21.

position in the face of minority criticism that the Scott view insufficently recognised the trust's remedial character.

The criticism finds support among academic commentators. Waters endorses Palmer's view that it is a contradiction in terms to say that the constructive trust is a remedy but the interest exists before a court order.[121] Sherwin notes that the approach is misleading because it confuses the ground for imposition of the trust with the consequences of the remedy if granted.[122] The Supreme Court's adherence to this institutional feature of an otherwise remedial trust gives rise, says Waters, to a 'jurisprudential muddle'.[123] The constructive trust doctrine propounded by Deane J in *Muschinski* is affected by a similar difficulty — judicial discretion with respect to the trust's operative date is a remedial feature which is held in tension with the institutional doctrine of the trust's prior existence.

WHY HAS THE SCOTT POSITION PREVAILED?

That the Scott position has prevailed in Australia, Canada, the US and England, despite its internal contradictions and the distinguished status of its critics, suggests that its persistence owes more to judicial policy than to logic. The reasons for judicial adherence to the doctrine of the trust's prior existence can be gleaned from various themes in the judges' reasoning. Foremost among them is that judges are anxious to disavow any overtly redistributive function for the trust remedy. In deference to liberal economic notions of freedom of property, courts prefer to portray their role as declaring and enforcing pre-existing property rights which arise by operation of equitable principle.[124] A secondary reason is that courts wish to protect the claimant's property rights in the interval between the wrongful conduct and the administration of the remedy.

Denial of the Redistributive Function of the Trust

Courts resort to circular reasoning to deny their role in creating new property rights. An example of this can be found in the following statement by Mason CJ, Wilson and Deane JJ in *Baumgartner*:

> the foundation for the imposition of a constructive trust in situations of the kind mentioned is that a refusal to recognize the existence of the equitable interest amounts to unconscionable conduct and that the trust is imposed as a remedy to circumvent that unconscionable conduct.[125]

The proposition advanced there appears to be that the court imposes a constructive trust because of the unconscionable refusal of the legal owner to recognise an equitable interest which *ex hypothesi* already exists. The trust is not

[121] Waters, above n 11, 357 citing George Palmer, *The Law of Restitution* (1st published 1978, Supplement 1982) vol 1, 6.
[122] Sherwin, above n 18, 311.
[123] Waters, above n 11, 367.
[124] *Bryson v Bryant* (1992) 29 NSWLR 188, 195 (Kirby P); Rotherham, above n 17, 88.
[125] (1987) 164 CLR 137, 147.

coeval with the equitable interest but serves to remedy the unconscionable denial of its existence.

This analysis prompts two questions. First, what is the genesis of the equitable interest, if not the imposition of the constructive trust? Secondly, is unconscionable conduct relevant only to the administration of the remedy, and not to the creation of the antecedent equitable interest? If so, the equitable interest proceeds directly from the anterior circumstances such as the pooling of resources for the purpose of the relationship. Yet such a conclusion is contrary to the Court's insistence that mere unfairness (in the distribution of property rights) is an insufficient ground for the imposition of a constructive trust.[126] If the remedy is to be regarded as a matter separate from the underlying equitable interest, as the quoted passage suggests, then the remedy should *prima facie* be available whenever the proprietary interest is threatened, whether by unconscionable or merely inadvertent conduct. If this interpretation is correct, then the requirement of unconscionability is redundant.

Taken at face value, the High Court's explanation for the decision in *Baumgartner* is incoherent and internally inconsistent. The existence of Mrs Baumgartner's equitable interest must logically have been dependent upon the imposition of a constructive trust. The ground for the imposition of the trust must have been her husband's refusal to recognise, not her equitable interest, but her just claim to a reallocation of the property to which she had contributed. This is the formulation advanced by Deane J in *Muschinski* when he identified the unconscionability in Mr Dodds' conduct as:

> seeking, in the circumstances, to assert and retain the benefit of a full one-half interest in the property without making any allowance for the fact that Mrs Muschinski has contributed approximately ten-elevenths of the cost of its purchase and actual improvement.[127]

In Anglo-Australian law, there is no coherent distinction between the grounds for the trust remedy and the genesis of the equitable interest. What the High Court was seeking to do in *Baumgartner* was to rationalise the redistributive effect of the constructive trust by resort to legal fictions and circular reasoning. First, it gave a retrospective operation to an equitable interest that was itself a product of the imposition of the trust. It then justified the imposition of the trust as a remedy to enforce the pre-dated equitable interest.

In this analysis the Court was drawing upon well-established modes of equitable discourse. Other equitable proprietary doctrines also rely on circular reasoning, thus equity conjures up a proprietary interest out of contracts by anticipating the retrospective grant of a remedy. The consistency of principle applied in administration of the remedy is said to justify an assumption that the equitable

[126] Courts insist that the constructive trust must not be imposed simply to remedy unfairness in the distribution of property, but only in accordance with equitable principle: *Allen v Snyder* [1977] 2 NSWLR 685, 693-5 (Glass JA), 697 (Samuels JA), 705 (Mahoney JA); *Baumgartner* (1987) 164 CLR 137, 148 (Mason CJ, Wilson and Deane JJ), 152 (Toohey J); *Muschinski* (1985) 160 CLR 583, 615-16 (Deane J), 594 (Gibbs CJ); *Re Goldcorp Exchange Ltd* [1995] 1 AC 74, 99 (Mustill LJ).

[127] *Muschinski* (1985) 160 CLR 583, 622. Justice Mason gave a similar formulation: ibid 599.

interest already exists prior to judicial determination.[128] This explanation is maintained even when the grounds for the remedy are ephemeral, for example where the availability of specific performance is affected by events occurring between entry into a contract and trial.[129] In reality, judicial recognition of an equitable interest under a specifically enforceable contract or constructive trust cannot be anticipated with confidence since the existence of grounds (and the absence of disentitling factors) is determined in retrospect on the whole history up to the date of trial.

The circularity in this argument has been noted by Meagher, Gummow and Lehane[130] who took Windeyer J's judgment in *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd*[131] as their authority. They observed that:

> because equity restrained by injunction interference with a particular subject matter, that subject matter was a form of property, followed by the assertion that equity intervened in such cases because it protected established property interests.[132]

These examples of equitable reasoning illustrate what some property lawyers have long known — that property is largely illusory, a 'conceptual mirage',[133] often 'defined tautologously in terms of legal consequence'.[134] Julius Stone maintains that this circular reasoning is not a sterile process but part of the lifecycle of an emerging doctrine. He agrees with Neave and Weinberg that the use of ill-defined notions like 'equity' and 'constructive trust' 'serves as a holding operation pending delimitation of the range of protections for the (still undelimited) class of situations of which the instant case is an example'.[135]

The formal explanation of the constructive trust is a formula for denial of the court's role in creating new property rights.[136] It conceals the choices made by judges in selecting from a family of proprietary and restitutionary remedies, and the considerations, such as concerns for third parties, which influence their choices.[137] As Margaret Stone points out, the task is approached by seeking in the instant facts the defining elements of the constructive trust, then pronouncing the

128 Margaret Stone, above n 7, 74.

129 See, eg, *McMahon v Ambrose* [1987] VR 817. This was a case where a contact for assignment of lease became incapable of specific performance upon forfeiture of the lease prior to the commencement of proceedings. The issue was whether the plaintiff had an equitable interest prior to the forfeiture: Joycey Tooher, 'Case Note: *McMahon v Ambrose*' (1990) 16 *Monash University Law Review* 122.

130 R Meagher, W Gummow and J Lehane, *Equitable Doctrines and Remedies* (3rd ed, 1992) 103-4.

131 (1968) 122 CLR 25, 34.

132 Meagher, Gummow and Lehane, above n 130.

133 Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252, 305.

134 Ibid 301; Meagher, Gummow and Lehane, above n 130.

135 Julius Stone, 'From Principles to Principles' (1981) 97 *Law Quarterly Review* 224, 252; Marcia Neave and Mark Weinberg, 'The Nature and Function of Equities (Part I)' (1978) 6 *University of Tasmania Law Review* 24.

136 Rotherham suggests that another device used for the same end is the equitable doctrine of tracing which allows courts to create new property rights while apparently conforming to the English property paradigm that property rights are fixed, inalienable and are enforceable against all comers: Rotherham, above n 17, 87-8.

137 Margaret Stone, above n 7, 64-6.

interest to have already been created by operation of law. She decries this as the fallacy of 'reification' or 'misplaced concreteness', and contrasts it with an approach that she terms 'instrumentalism' which values concepts according to their explanatory usefulness.[138]

In Canada judicial opinion is retreating from the formal English view of the role of the constructive trust, in favour of an 'instrumentalist' approach in Stone's sense. The Canadian Supreme Court has expressly acknowledged that the constructive trust may be used to create new rights of property as well as to recognise and enforce existing ones, and has proceeded to identify the considerations that should guide courts in selecting between the trust and other available remedies.[139] Canada no longer needs a theory to serve the purpose of denial of the trust's redistributive function.

Preservation of the Claimant's Rights in the Interim

A second explanation for the persistence of the Scott position is that courts wish to preserve the claimant's property rights in the period prior to the judicial decree, and to divest the legal owner of any profits or increment in the property's value that accrued in the interim.[140] One way to achieve this is to treat the interest as operative retrospectively, an approach that courts justify by the maxim that 'equity deems as done that which ought to be done.'[141]

A criticism of this approach is that the courts use the retrospectivity doctrine to deny responsibility for the impacts on third parties who have in the interim transacted in ignorance of the beneficiary's claim. Those who have acquired a legal interest, or an equitable interest for value, in the subject matter of the claim may not be affected, but unsecured creditors of the constructive trustee will find the latter's estate retrospectively depleted. It is in this aspect that judicial policy underlying the Scott doctrine is most vulnerable. Courts are increasingly responsive to the criticism that they should take control of the effects on third parties and not shrug them off as doctrinally pre-determined. The retrospectivity doctrine has withstood criticisms of its logical deficiencies but may not survive the challenge to its policy foundations.

138 Ibid.

139 In *LAC Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, 676 La Forest J had postulated that the constructive trust remedy sometimes created a property interest (its remedial function) and sometimes recognised a pre-existing interest (its institutional function). He added that he thought the remedial role was more important. See also *Peter v Beblow* [1993] 1 SCR 980, 1023-4 (Cory J).

140 See, eg, *Dwyer v Kaljo* (1992) 27 NSWLR 728, 744 (Handley JA).

141 *Muschinski* (1985) 160 CLR 583, 614 (Deane J). Retrospective operation may serve as a deterrent to unconscionable dealing. In *Re Stephenson Nominees Pty Ltd v Official Receiver* (1987) 76 ALR 485, 503 Gummow J observed that the constructive trust may be imposed as a restitutionary remedy, and it may also be imposed as a cautionary or deterrent remedy.

CONCLUSION

The terms 'remedy' and 'institution' remain useful tools for analysing developments and making comparisons, provided that they are seen as opposing paradigms rather than as labels for the constructive trust conceptions dominant in particular countries. We can then analyse developments in constructive trust doctrine and make international comparisons in terms of which remedial and institutional features are present. The dichotomy also directs our attention to the conceptual tensions and contradictions that stem from an awkward juxtaposition of the features.

Recent Australian developments have all been in the direction of incorporating remedial features. First, in one of the constructive trust's major categories the requirement of a breach of antecedent fiduciary duty has been removed.[142] This makes it more difficult to maintain that, in declaring the existence of a trust, the court is merely recognising a pre-existing proprietary interest. Secondly, liability is being re-formulated in terms of a standard of conduct rather than as a collection of 'defining circumstances'. This is a precondition for dissociating the choice of the remedy from the principle determining liability, although that further step has not been taken explicitly. Thirdly, there is recognition of judicial discretion as to the extension of the remedy to new situations which answer the basic conduct standard,[143] and as to the terms of relief upon which the trust is administered within its established categories.[144]

What is still lacking is the recognition that, in appropriate cases, imposition of the trust can flow from a finding of unconscionability or breach of fiduciary duty without passing through intermediate doctrines, and an express acknowledgment that courts may satisfy the liability by administering a non-proprietary remedy. I have sought to show that the latter proposition is already understood and applied by the courts, although it has yet to be impounded into doctrine.

[142] *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41. This principle was affirmed by Deane J in *Muschinski* (1985) 160 CLR 583, 616.

[143] In *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 378-9 Gibbs CJ (with whom Wilson and Dawson JJ concurred) recognised that there was judicial scope for finding new categories of circumstances in which a constructive trust may be imposed, although he declined in the circumstances to impose one.

[144] *Muschinski* (1985) 160 CLR 583, 615 (Deane J); *Re Osborn* (1989) 91 ALR 135, 140 (Pincus J); *Australian National Industries Ltd v Greater Pacific Investments Pty Ltd (No 3)* (1992) 7 ASCR 176, 190 (Cole J).