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LAWS 489

The Discretionary Remedial Constructive Trust

"[A] debate as cogent as a discussion of the merits of English versus American unicorns."¹

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Abstract: Those who seek settled property rights in Equity will find little comfort in this paper. With legal realism in mind the author asks what are the courts of Equity doing to property when recognising an institutional constructive trust? The author concludes that there is little distinction between a remedial and an institutional constructive trust; they are the same remedial equitable mechanisms for transferring property from A to B in equity. That is, an ICT, like the RCT is awarded/imposed/recognised by the courts based on the underlying concepts of fairness and justice (or the equitable term of art; 'unconscionability'). The ICT is seen as legitimate because it hides behind the mask of language of 'institution'. Finally if jurisdictions continue to recognise and impose the ICT, then there is no logic in rejecting the RCT as an any less legitimate tool in the Equities armory.

* Submitted in 2014 by Mr Jacob Joseph Meagher in part fulfillment of the research requirements of the Bachelor of Laws (Hons) at Victoria University of Wellington.

¹ William Swadling "The Fiction of the Constructive Trust" (2011) 64 Current Legal Problems 399 at 432.

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Introduction

- [1] The Remedial Constructive Trusts' (RCT) battle for recognition is a never ending war in Chancery between those who advocate for rules which are clear, principled and predictable "and those who support the view that equity is concerned to be flexible and fair, so that outcomes in individual cases can be seen to be just."² The RCT's *raison d'etre* is juridical discretion principled on unconscionability, fairness and justice allowing expropriation of rights *in rem* from A to B. Such a trust of discretion might not be institutionalised. Lord Neuberger, writing extra-judicially, has placed the onus on those who speak favorably of the RCT to prove its legitimacy.³ I admit the deficiency in my paper in that I do not identify a single unifying principle justifying the intervention of equity.⁴ Yet an attempt to identify a general form would be unwise; for that would advocate equity to be as rigid as the Common Law, and then what would be the point?⁵
- [2] To advance the debate on the RCT and the fiction distinguishing the remedial (*RCT*) and institutional (*ICT*) constructive trusts, I argue that both trusts are discretionary proprietary remedies. Clear points of law do not need to be steeped in complex language by the courts and academics to give them legitimacy or mask the juridical reality, the oft cited nomenclature of the "institution" or "arising by operation of law" statements.⁶ Both ICT and RCT, when recognised-awarded-imposed, (in this instance these have the same meaning) are made on the basis of "fairness and justice" or using in vogue phrase: "the equitable term of art of unconscionability."⁷ There is nothing unprincipled about such an exercise.

² David Neuberger "The Remedial Constructive Trust - Fact or Fiction" (paper presented to the Banking Services and Finance Law Association Conference, Queenstown, 10 August 2014) at [39].

³ At [42].

⁴ Stephen Trew "Remedial Constructive Trusts; revisits and redefines equitable remedies" [1999] NZLJ 175 at 177.

⁵ See Craig Rotherham "Property and Justice" <www.academia.edu> at 1. The author cites LA Selby-Bigge and PH Nidditch (eds) *David Hume: A Treatise of Human Nature* (2nd ed, Oxford, Clarendon Press, 1978) at 491: "The origin of justice explains that of property." I quote this as a retort to the oft cited saying "but equity is part of the law of property" to which one who follows the British philosopher Hume could reply "But does the origin of justice not explain that of property" and at 491: "Tis very preposterous, therefore, to imagine, that we can have any idea of property, without fully comprehending the nature of justice."

⁶ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] UKHL 12, [1996] 2 AC 669 at 714–715.

⁷ This is a phrase I take responsibility for coining, and I hope it betrays my suspicion for the legal realism underlying the word "unconscionability". For when Judges in Chancery discover "unconscionability" I suggest this is subjective immorality, the opposite of fairness and justice, based on normative personal views informed from years at the bar and bench.

I The Remedial Beast Exists

[3] In the 2009 House of Lords decision in *Thorner v Major* (a unanimous judgment), Lord Scott of Foscote would have imposed a RCT and held that in that instance he would exercise his inherent discretionary powers and impose the trust as a remedial proprietary remedy.⁸ Lord Scott's judgment has been questioned by Lord Neuberger, who sat on the appeal, where he asserted, extra-judicially, that Lord Scott misunderstood the meaning of the RCT.⁹ It is unlikely that Lord Scott confused the ICT and RCT. In the NZ Supreme Court case of *Regal Castings Ltd v Lightbody*¹⁰ Tipping J took the fortuitous opportunity¹¹ to uphold his dicta in *Fortex* where he held that the RCT was recognised "cautiously and provisionally".¹² In *Regal Castings* he disagreed with the ICT route adopted by his colleagues,¹³ Tipping J found the ICT route "artificial" and gave the Official Assignee a "straightforward course of directly imposing a remedial constructive trust on the trustees of the family trust".¹⁴ Now, post 2008, the RCT has been imposed in NZ and can be pleaded,¹⁵ as it can in Australia, although on different grounds.¹⁶ Still, in the UK and NZ the RCT is not liked by scholars.¹⁷

The Primary arguments against the RCT

- [4] There are three primary arguments against the RCT. All stem from its central feature that it is both a proprietary and discretionary remedy. This leads juridical conservatives¹⁸ to the primary argument against the trust; that the RCT and its imposition is uncertain,¹⁹ and in a legal system such as ours "[r]eliability and certainty are primary considerations of any system of property rights, and the unprovoked alteration of those rights is to be avoided where possible."²⁰
- [5] The secondary argument on "discretionary nature" rests primarily on the negative effects on third parties – usually creditors in insolvency situations – due to the unpredictability of its imposition. This is a vast overstatement of the prejudicial effect

⁸ *Thorner v Major & Ors* [2009] UKHL 18 at [14].

⁹ Neuberger, above n 2, at [20].

¹⁰ *Regal Castings Limited v Lightbody* [2008] NZSC 87.

¹¹ Perhaps his last opportunity to discuss *Fortex* due to his impending retirement in 2012.

¹² *Fortex Group Ltd (In Receivership and Liquidation) v MacIntosh* [1998] 3 NZLR 171 (CA) at 172–173.

¹³ Blanchard and Wilson JJ at [78] expressed no disagreement with Tipping J's imposition of a RCT.

¹⁴ *Regal Castings Limited v Lightbody*, above n 10, at [162].

¹⁵ *Commonwealth Reserves I v Chodar* [2001] 2 NZLR 374 (HC); *Fortex Group Ltd (In Receivership and Liquidation) v MacIntosh*, above n 12; Juliet Chevalier-Watts and Sue Tappenden *Equity, Trusts and Succession* (Thompson Reuters, Wellington, 2013); and Andrew S Butler and Tim Clarke (eds) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington 2009) at 351.

¹⁶ *Muschinski v Dodds* [1985] 62 ALR 429 (HCA), among many other cases. The RCT is now the most common CT in Australia.

¹⁷ Butler and Clarke, above n 17, at 350.

¹⁸ I use the term "conservative" not to criticise, but to identify those in the legal profession/judiciary who value certainty of property rights above all other rights. A contrast can be drawn between the Equity bar in Canada/Australia and the UK, the latter being far more conservative and the former arguably more liberal.

¹⁹ Neuberger, above n 2, at [6].

²⁰ *Commonwealth Reserves I v Chodar*, above n 15, at [47].

of the imposition of a RCT²¹ and, in my view, illogical. I will later discuss that the advantage of the RCT, inherent in its discretionary design, is the protection of third parties; Grantham and Rickett identify this as their third criterion of the RCT²² and indeed Tipping J identified in *Fortex* that a RCT would not be imposed if the equities militated against innocent third parties.²³ Yet the argument against RCTs is that they arise at the time of the court order, or are entirely at the discretion of the court whether or not to order their creation, as they are a remedy. Therefore the plaintiff will automatically gain priority over the rights of third party creditors thus upsetting *pari passu*.²⁴ This is a misunderstanding of the reality of a RCT as a creation of the court. The trust, evidenced by a court order, results in the plaintiff not automatically gaining priority over the rights of third parties; this is for the judge to decide by balancing the equities.²⁵ This contrasts with the ICT which generally upsets *pari passu* by affecting third parties.²⁶

- [6] The third argument against the RCT, which I term "the inherent concern of the judiciary" and the judicial concern, of unveiling their discretionary equitable powers with regards to property rights, is a common thread through this paper. This concern is overcome by recognising that both the ICT and RCT are both inherently remedial and indeed are of the same ilk. This is key to the argument, that if the judiciary evidences little concern when recognising the ICT then it should logically have no concern for imposing RCTs, as both are essentially the same mechanisms. Nevertheless the judiciary is wary of altering settled property rights by way of a trust for any reason other than on settled institutional principles. The judiciary tend to regularly use a trust as a remedy but craft their actions in the word "institution" or describe the RCT in unflattering language.²⁷
- [7] Other jurisdictions, namely Canada,²⁸ Singapore²⁹ and Australia³⁰ are more than happy to alter property rights,³¹ and in contrast to the UK,³² recognise that they have been

²¹ Paul D Friedman and Catherine Newman "Remedial Constructive Trusts Where to Next? Part II" (2000) 6(8) *Trusts & Trustees* 6 at 7.

²² Ross B Grantham and Charles EF Rickett *Enrichment and Restitution in New Zealand* (Hart Publishing, Oxford, 2000) at 416.

²³ *Fortex Group Ltd (In Receivership and Liquidation) v MacIntosh*, above n 12, at 176.

²⁴ Roy Goode *Principles of Corporate Insolvency Law* (4th ed, Sweet & Maxwell, London, 2011) at 246; see "Impact of the Pari Passu Principle" and "The Proof, Valuation and Ranking of Claims in Winding Up".

²⁵ Friedman and Newman, above n 21, at 7.

²⁶ Alastair Hudson *Equity and Trusts* (7th ed, Routledge, Abingdon, Oxon (UK), 2013) at ch 12.1; recognising that the property, always in equity, belong to the beneficiaries. This does not make the situation any more palatable for the creditor who relies on the legal "paper" title.

²⁷ Neuberger, above n 2, at [6]. Lord Neuberger describes the RCT as displaying "equity at its flexible flabby worst".

²⁸ *Soulos v Korkontzilas* [1997] 2 SCR 217.

²⁹ *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 (Court of Appeal); The Singapore Court of Appeal recognised that it could have imposed a RCT, and that the ICT, at least in Singapore was inherently remedial.

³⁰ *Muschinski v Dodds*, above n 16.

³¹ Donovan Waters "The constructive trust: two theses – England and Wales, and Canada" (September 2010) *STEP Journal* <www.step.org>.

doing so by means of the ICT all along and take no issue with this fact: the trust for them is a remedy. Australia has reached this point by accepting that there is little distinction between an RCT and an ICT – both are underlyingly remedial.³³ Canada has reached the point by another road, the legal realism of Lord Denning in *Hussey v Palmer*³⁴ where he stated that equity is an exposition of fairness and justice and he imposed a trust over property based on that discretionary criterion.³⁵

- [8] The broader underlying concern is that of altering the social contract by affecting change to settled property rights based on judicial discretion of "fairness and justice".³⁶ Only principles of law, or statute, according to English law, can change settled property rights.³⁷ The ICT is considered to arise by "operation of law"³⁸ and thus is acceptable. This argument is based on a wholly false premise, that the ICT is not in fact remedial, which I turn to next. Nourse LJ outlines the conservative English view:³⁹

... we must recognise that the [RCT] gives the court a discretion to vary proprietary rights. You cannot grant a proprietary right to A, who has not had one beforehand, without taking some proprietary right away from B. No English court has ever had the power to do that

- [9] In terms of policy there exist two schools of thought with regards to the RCT, and both have merits. The first theory is that judicial discretion controls the existence of the RCT. The second theory holds that the trust's existence is automatic on equitable principles, "unconscionability", yet its vindication in a proprietary right (usually against third parties) is discretionary.⁴⁰ The latter view is supported by Grantham and Rickett.⁴¹
- [10] Jessica Palmer suggests that the operation of the RCT is unclear, criticising its apparent reliance on vague abstractions.⁴² Yet even with such a conservative viewpoint Palmer recognises the inherent remedial link between the ICT and the RCT hypothesising that a reason for the "irrational" existence of the RCT could be that at one time "institutional" trusts may have been considered "remedial" before becoming hardened and

³² The UK has, in the past, rejected attempts from Lord Denning in the Court of Appeal to give the judiciary more freedom to alter property rights in equity per *Lloyds Bank v Rosset* [1990] UKHL 14, [1991] 1 AC 107.

³³ *Muschinski v Dodds*, above n 16, at 451 per Deane J. See also Waters, above n 31.

³⁴ *Hussey v Palmer* [1972] 3 All ER 744 (CA). The jurisprudence of Lord Denning will be discussed in later paragraphs.

³⁵ Donovan Waters in Stephen Goldstein (ed) *Equity and Contemporary Legal Developments* (1992) 457 at 463 as cited in AJ Oakley "Restitution and Constructive Trusts" in WR Cornish, Richard Nolan, J O'Sullivan and G Virgo (eds) *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (Hart Publishing, Oxford, 2000) 212, at 220

³⁶ *Muschinski v Dodds*, above n 16, at [9] per Deane J where he identified that while "the constructive trust remains predominantly remedial ... [it] does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice".

³⁷ *In re Polly Peck International plc (No 2)* [1998] 3 All ER 812 (CA) at 829–30 per Mummery LJ.

³⁸ *Westdeutsche Landesbank Girozentrale v Islington LBC*, above n 6, at 714–715.

³⁹ *In re Polly Peck International plc (No 2)*, above n 37, at 829–30.

⁴⁰ S Gardner "The Element of Discretion" in PBH Birks (ed) *Frontiers of Liability* (Oxford University Press, Oxford, 1994) vol 2 186 at 191

⁴¹ See part II of this paper.

⁴² Jessica Palmer "Constructive Trusts" in Andrew S Butler and Tim Clarke (eds) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington 2009) 335, at 350.

"institutional".⁴³ However, Palmer considers that the basis of those 'pre-hardened' trusts was not, contra the current RCT, "unfettered discretion."⁴⁴ With respect, the basis of the current RCT is not "unfettered discretion" and this does not resolve the RCT debate.

Institutional as a contra-distinction to Remedial?

- [11] Over time equity has varied and awarded property rights, I suggest "proprietary remedies",⁴⁵ from A to B in factual situations. These are known as the institutional constructive trusts, where UK and NZ law recognises four situations which have hardened resulting in a quasi-automatic response from the courts.⁴⁶ This does not mean that there is no recognition of underlying unconscionability in the institution, just that it is clearly apparent, or that the operation of the "institution" is not remedial. It does not follow that merely because four types of trusts are institutions and therefore "arise" that there cannot be instances of other trusts which are remedial and do not arise institutionally but with judicial discretion. In contrast, that a RCT is firstly discretionary does not mean that in time there will not be a string of "institutional" (in the hardened automatic sense) RCT cases. That does not belie the fact that those cases are still remedial or discretionary, such is our system of precedent.
- [12] I do not suggest that we dispose of the distinction between the ICT and the RCT, as there are categories of constructive trusts which have now become "institutional" in the above sense. This would ignore the benefits of precedent. I argue that doctrinally the ICT does not oppose the RCT. Both are remedial, and both act as remedial mechanisms.
- [13] The commentary highlights that in the courts and academia conservative attitudes' are changing, recognising that judges can change settled property rights and the social contract has not been torn asunder. The main contention is that the RCT expressly states that property rights are being altered on the basis of "fairness and justice" or unconscionability which been harder to accept. Unconscionability is the trusts' underlying principle,⁴⁷ and in equity we are not so timorous to deny this as part of a legitimate proprietary response.⁴⁸

⁴³ At 351.

⁴⁴ At 351.

⁴⁵ The distinction being that a "right" implies that the property in question belonged to the person in equity beforehand, and a "remedy" implies some form of equitable compensation.

⁴⁶ I outline the four ICT situations in the next section.

⁴⁷ *Commonwealth Reserves I v Chodar*, above n 15, at [42].

⁴⁸ Craig Rotherham *Proprietary Remedies in Context* (Hart Publishing, Oxford, 2002) at 49. Rotherham advances a "normative approach to legal justification, to transcend unquestioned assumptions inherited from another age, and to accept responsibility for defining the meaning of property." That is to say that there has been a tendency to justify proprietary responses after the event meaning doctrine is not logically sound between different cases.

II Timorous souls v bold spirits

"On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed."⁴⁹

The rational behind the distinction and the principle objections

- [14] In the UK (and NZ) the courts recognise four types of constructive trusts, known commonly as ICTs.⁵⁰ The court recognises a trust as pre-existing where: advantages have been obtained by fiduciaries in breach of their duty of loyalty;⁵¹ strangers have intermeddled with trust property;⁵² advantages have been obtained by fraudulent or unconscionable conduct;⁵³ and, common intention constructive trusts / trusts based on contributions to property (commonly in relation to homes).⁵⁴ These "categories" fluctuate to the extent that some trusts are usually left at the fringes: four is not an immutable number.⁵⁵
- [15] These groupings should not be viewed as definitional, the murkiness in the doctrine could be understood by the lack of comprehensive/unifying definition⁵⁶ of the "constructive trust", or more likely an attempt to create a comprehensive definition of an area of trusts law where no discrete taxonomy exists. Justifications have been given, as in *Carl Zeiss v Herbert Smith* but they are timorous and defy logic.⁵⁷

Its boundaries have been left perhaps deliberately vague, so as not to restrict the court by technicalities in deciding what the justice of a particular case may demand.

- [16] If the above is a valid rationale for the varied definition of the ICT, how can such a trust, with its (so called) settled categories, be termed "institutional"? Edmond Davies LJ understood the form of trust to be of the court's own making or imposition, yet justified by referring to "justice" and various "demands". Is this definition more likely to be given now to a RCT, not an ICT? Some ten years later in what is now the perennial statement from the House of Lords, an ICT arises by "*operation of law*"⁵⁸ and, its categories have hardened into easily identifiable *institutions*. This is a legal fiction of the first order. I note that *Carl Zeiss* occurred pre *Hussey v Palmer*, so it would be incorrect to suggest that the idea of remedialism in the UK constructive trust doctrine

⁴⁹ *Candler v Crane, Christmas and Co* [1951] 2 KB 164 at 178 per Denning LJ dissenting.

⁵⁰ Paul D Friedman and Catherine Newman "Remedial Constructive Trusts Where to Next? Part I" (2000) 6(7) *Trusts & Trustees* 20 at 20–21.

⁵¹ *Boardman v Phipps* [1966] UKHL 2, [1967] 2 AC 46. See also *Keech v Sandford* [1726] 25 ER 223 (Ch).

⁵² Hudson, above n 26, at 575 sometimes known as a "trustee de son tort". See also *Mara v Browne* [1896] 1 Ch 199.

⁵³ *Attorney General of Hong Kong v Reid* [1993] UKPC 36.

⁵⁴ *Lloyds Bank Plc v Rosset*, above n 32. See also *Lankow v Rose* [1995] 1 NZLR 277 (CA).

⁵⁵ For example constructive trusts in relation to specifically enforceable contracts, or *Re Rose* type CT's, or CTs known by case names such as *Walsh v Lonsdale*, *Rocheffoucault v Boustead*.

⁵⁶ Chevalier-Watts and Tappenden, above n 15, at 91.

⁵⁷ *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 271.

⁵⁸ *Westdeutsche Landesbank Girozentrale v Islington LBC*, above n 6, at 714–715.

started with Lord Denning's *new model*,⁵⁹ indeed the seed was recognised much earlier. Hudson, in a leading UK text *Equity and Trusts*,⁶⁰ uses Edmond Davies LJ's statement in support of the "essential truth that the constructive trust is not a certain or rigid doctrine. Rather, its edges are blurred and the full scope of its core principles is difficult to define."⁶¹ Hudson is not of the view, unlike many in the UK, and unlike the court in the leading case of *Westdeutsche Landesbank*,⁶² that the ICT settled in to four categories and is thus "institutional".

- [17] The main advantage of the constructive trust is that it gives the plaintiff a proprietary remedy – a trump card in the insolvency process. A disadvantage is that it is difficult to identify the circumstances to justify the recognition of the ICT.⁶³ From the restitutionary standpoint Grantham and Rickett identify that overall, while emanating the same function, "equitable remedies differ from common law ones in that they are discretionary."⁶⁴ They argue that the remedy in equity, i.e. the transfer of property from the holder of the legal title to the person with the beneficial interest "does not follow as a right from the plaintiff's substantiation of the cause of action" because the recognition or existence of the trust, constructive or otherwise, "is dependent upon the favorable exercise by the court of its [equitable] discretion."⁶⁵ They recognise that it is clear that the courts regard themselves as acting upon "fixed rules and settled principles", that is, the four types of constructive trust couched in the language "institutional", but that these settled principles are not evidenced. In *Patel v Ali* Goulding J, demystifying and providing some rare legal realism held that "in the end I am satisfied that it is within the court's ... [equitable] discretion to accede to the defendants' prayer if satisfied that it is just to do so."⁶⁶
- [18] What role in practice are the courts of equity, in recognising the ICT or imposing the RCT, performing? The question is not rhetorical; the courts are altering property rights. I use the analysis of Grantham and Rickett, restitutionary theorists, as a lens (call restitution a jurisprudential theory if you will)⁶⁷ with which to uncover the failings in

⁵⁹ Some scholars have suggested that Denning LJ's personal "Christian naturalism" explains his approach in *Hussey v Palmer*: see Andrew Phang "The Natural Law Foundations of Lord Denning's thought and Work" (1999) 14 Denning LJ 159. However, this overlooks that the Court of Chancery has always had Christian Naturalism in its historical foundation – stemming from the Lord Chancellor as an ecclesiastical figure.

⁶⁰ Hudson, above n 26.

⁶¹ At 552.

⁶² *Westdeutsche Landesbank*, above n 6.

⁶³ See generally Ross Grantham "Doctrinal Bases for the Recognition of Proprietary Rights" (1996) 16 Oxford Journal of Legal Studies 561.

⁶⁴ Grantham and Rickett, above n 22, at 400. See also *Lamare v Dixon* (1873) LR 6 HL 414 at 423; and *Patel v Ali* [1984] 2 WLR 960 (Ch) at 965. See generally Walter Ashburner *Principles of Equity* (Butterworths, London, 1902) at 23; George Williams Keeton and LA Sheridan *Equity* (Rose, London, 1969) at 484–485; Michael Tilbury *Civil Remedies* (Butterworths, Sydney, 1990) vol 1 at 287 and following; ICF Spry *The Principles of Equitable Remedies* (5th ed, LBC, Sydney, 1997) at 4; and P Loughlan "No Right to the Remedy?: An Analysis of Judicial Discretion in the Imposition of Equitable Remedies" (1989) 17 MULR 132.

⁶⁵ Grantham and Rickett, above n 22, at 400.

⁶⁶ *Patel v Ali*, above n 64, at 965 as cited in Grantham and Rickett, above n 22, at 400.

⁶⁷ John Lowry "Structure and Justification in Private Law: Essays for Peter Birks [Book Review]" (2009) 20 King's Law Journal 185; Richard A Posner *The Problems of Jurisprudence* (Harvard University Press, Cambridge (Mass), 1993); Peter Birks "Adjudication and interpretation in the common law: a century of

the constructive trust doctrine and to support the thesis that, if one accepts the failings in the ICT doctrine but continues to recognise it as a useful equitable remedy, then one should accept the RCT as a purer and legitimate equitable remedy.

- [19] Grantham and Rickett argue that all proprietary remedies in equity ultimately depend on the court's discretion,⁶⁸ even if the courts themselves refuse to recognise or actively disavow this factor, as with the ICT which is said to "arise by operation of law".⁶⁹ I use their recognition of the fundamental discretionary nature of all equitable proprietary remedies to argue that the RCT and the ICT have no distinction, because recognition of the former as legitimate leaves no choice but to also recognise the latter. Even Sir Peter Millett, an RCT detractor, and opposed to the trust as a form of remedy, observed that in practice of the UK jurisdiction:⁷⁰

While we still insist on the institutional character of the constructive trust, however, we [the judiciary] undoubtedly use it as a remedial instrument... Thus the expression "constructive trust" may either be used in an institutional sense, when it is used in contradistinction to other kinds of trust, or in a remedial sense, when it is used in contradistinction to other proprietary remedies...

- [20] The "principle distinctions" between the institutional and the remedial constructive trusts are not in fact based on principle. The main academic criticisms against the RCT are easily overcome and Lord Denning's dicta in *Hussey v Palmer*, while lacking in substance, he identified the "core" of the trust in equity – a mechanism or remedy to effect "fairness and justice" – an equitable term of art which the judiciary and academics describe as "unconscionability". Thus, distilled to its core, the trust is a proprietary remedy in equity imposed to do justice *inter parties*.
- [21] The "unconscionability" only comes to the fore once the institutional character of the trust has been recognised or, as Lord Neuberger describes: "fairness and reasonableness ... merely fills the gap, where there is one, as to how the beneficial interest under that institutional trust are to be assigned."⁷¹ While he admits that this is an "exaggerated" argument against the RCT,⁷² even he is willing to concede that apart from its problems "It's a pretty good concept".⁷³ It is hard to reconcile his tacit recognition that even in an ICT situation "fairness and reasonableness", which are normative discretionary concepts, have some role in assigning the beneficial interest (which is the most important question) with his dicta in *Sinclair Investments*:⁷⁴

change" (1994) 14 Legal Studies 156; and Peter Linzer "Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts" [2001] Wis L Rev 695.

⁶⁸ Grantham and Rickett, above n 22: the authors are clearly promoting the positive jurisprudential viewpoint of the law of restitution

⁶⁹ *Westdeutsche Landesbank Girozentrale v Islington LBC*, above n 6, at 714–715.

⁷⁰ Sir Peter Millett "Restitution and Constructive Trusts" (1998) 114 LQR 399 at 402.

⁷¹ Neuberger, above n 2, at [19].

⁷² At [42].

⁷³ At [6].

⁷⁴ *Sinclair Investments (UK) Ltd v Versailles Group plc* [2011] EWCA Civ 347, [2012] Ch 453 at [37] per Neuberger LJ. Lord Neuberger later overruled his own judgment in *FHR European Ventures LLP v Cedar Capital Partner LLC* [2014] UKSC 45, although on a different issue.

Whether a proprietary interest exists or not is a matter of property law, and is not a matter of discretion...it follows that the courts of England ... do not recognise a remedial constructive trust as opposed to an institutional constructive trust.

If the assignment of the beneficial interest in the ICT, once the trust is recognised, can be based on "fairness and reasonableness", then it is illogical that the UK courts do not recognise a RCT when the assignment of the property right in equity is the key question. In RCT and ICT the courts do so to varying extents on a discretionary basis. The secondary argument that the RCT offends against the fundamental principle of certainty of law and property rights⁷⁵ falls by the wayside if his Lordship has *pro tanto* recognised that, in contentious ICT situations, discretion is a "gap filler". The ICT, at its fringes, is no more principled and certain than an RCT.

[22] This is seen most clearly with the simple express trust. When a beneficiary asks for his *Saunders v Vautier* rights,⁷⁶ that is, to call in his beneficial interest, the court uses its recognition of the (pre-existing) trust as a remedial mechanism to transfer the property to him. There is no discretion. The court essentially acts in the same way for the ICT and the RCT except that it construes the situation (hence the "*constructive*" in the trusts name), using discretion. The court recognises the trust using equitable discretion. And it is the construction itself where the exercise of discretion is apparent. Ultimately, whether the trust originated before the hearing (as in the case of an ICT) is not particularly relevant: what is relevant is whether or not the court recognises the trust and it does so, I argue, based on its equitable discretion. If the reader is uncomfortable with this truism one might be better to describe it as an equitable judicial discretion to discern fact. As with all judicial discretion, several factors influence this – the factual matrix and conduct of the parties – but in the end the plaintiff is applying to the court of equity: it is fairness and justice and a critical judicial eye which will ultimately construe the trust, or not. Both institutional and remedial constructive trusts as inherently *remedial* in that they are in practice equitable mechanisms for effecting a remedy for transferring property from party A to party B based on the judge's discretion of recognising the trust. With the ICT "the court declares as a matter of history the existence of equitable rights"⁷⁷ and this is essentially a forensic measure, however, with this "institutional" exercise the court still retains residual discretion with regards to ICT's whether or not to declare the trust based on the facts it forensically examines.⁷⁸ The logical point is normally overlooked and this is key to the relationship between the RCT and the ICT.

[23] To deny the RCT is to deny that the ICT is in fact used as a remedy to transfer property from A to B.⁷⁹ In my latter analysis of the four factors of the RCT as posited by Grantham and Rickett, it is clear that factor number two – the improper enrichment of the defendant (the legal title holder) in its correct language and form as identified by Lord Denning in *Hussey v Palmer* – "fairness and justice" is the true core of the trust,

⁷⁵ Neuberger, above n 2, at [28].

⁷⁶ *Saunders v Vautier* (1841) 4 Beav 115, 49 ER 282 (Ch).

⁷⁷ Trew, above n 4, at 175.

⁷⁸ At 175.

⁷⁹ On any practical viewing of the ICT, this is inevitably what happens to the property in question – the court ensures it moves, legally from the hands of party A to party B.

any trust, even the express trust. Although I fully recognise "fairness and justice" (unconscionability) alone are not enough to justify a proprietary response in equity, they are the important factor in the courts exercising its discretion to impose a discretionary remedial constructive trust over property.

Bold Sprits – The conceptualisation of Fairness and Justice in the Constructive Trust

- [24] During the reign of Lord Denning MR arose the short lived period of his "new model" constructive trust.⁸⁰ In *Hussey v Palmer* a mother lived together with her daughter at her daughter's house. The mother paid for an extension to be built and after a disagreement the mother decamped. The mother claimed that she had a proprietary interest in the house by way of resulting trust. The Court of Appeal held instead that a constructive trust was created in her favor as it would be unconscionable for the money (or the proceeds – the extension) to be retained without a proprietary right arising. Lord Denning controversially stated:⁸¹

Although the plaintiff alleged that there was a resulting trust, I should have thought that the trust in this case, if there was one, was more in the nature of a constructive trust: *but this is more a matter of words than anything else*. The two run together. By whatever name it is described, *it is a trust imposed by law whenever justice and good conscience require it*. It is a liberal process, founded upon large principles of equity, to be applied in cases where the legal owner cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or the benefit of it or a share in it. The trust may arise at the outset when the property is acquired, or later on, as the circumstances may require. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.

- [25] Scholars outline that "The underlying and indeed often expressed objectives of the judges in the cases in which what became known as 'new model' constructive trusts were imposed was to prevent results which would otherwise have been inequitable."⁸² Professor Oakley noted in the 1978 edition of his *Constructive Trusts* book that what later became known as the "new model" "[might] be symptomatic of a general change of attitude towards the constructive trust." Presumably, one founded on "justice and good conscience,"⁸³ however that might be defined. This did not come to fruition in the UK and in NZ.

⁸⁰ *Hussey v Palmer*, above n 34, at 43.

⁸¹ At 1289–1291 (emphasis added).

⁸² AJ Oakley *Constructive Trusts* (3rd ed, Sweet & Maxwell, 1997) at 22.

⁸³ AJ Oakley *Constructive Trusts* (1st ed, Sweet & Maxwell, London, 1978) at 24.

*III The four (give or take) ICT categories?*⁸⁴

- [26] The term "institution" is mystifying. The settled categories of constructive trusts ignore the inherent "ambiguity in its use." The granting of a proprietary remedy is the most powerful remedy that equity can give. The term "constructive" "offers little or no insight into its real nature, how it differs from other trusts [for example express], or what factors call the trust into existence."⁸⁵ The ICT is a class of trust which is set in contrast to the true "express trust": that is, "*I hold this property on trust for you*", as opposed to the court construing that the trustee holds property on trust.
- [27] That these situations are discernable is debatable. However the UK and NZ courts generally recognise an existing ICT when either of the following situations are identifiable:⁸⁶
- i. *A tracing claim*: Equity directly vindicates pre-existing property rights. The legal titleholder has property and tracing has identified it as belonging in equity to a beneficiary. The defendant cannot retain a property right against the plaintiffs'/beneficiaries' equitable ownership. The constructive trust is used as a mechanism "by which equity gives effect to and recognises the plaintiffs' ownership of the asset."⁸⁷
 - ii. *A trustee de son tort*: Lord Browne-Wilkinson outlined the liability of a third party in breach of trust or fiduciary duty.⁸⁸ However, Millett LJ outlined the inappropriateness of classifying a third party breach of trust as "liable to account as contrastive trustee" in *Paragon Finance plc v D Thakerar & Co (a firm)*.⁸⁹ In his opinion, such a person was not in fact a trustee as he was never in the position of a trustee. There was no trust and "usually no possibility of a proprietary remedy; [the trust is] 'nothing more than a formula for equitable relief'."⁹⁰ But yet we consider such a person and such a class of trusts an ICT.⁹¹
 - iii. *Lack of formality*: this is the "easy to spot" traditional and early constructive trust and the trust which the court construes to fix the ineffectual express trust.⁹² There will be an intention to create an express trust but due to a lack of

⁸⁴ Grantham and Rickett, above n 22, at 407.

⁸⁵ At 406.

⁸⁶ I will preempt criticism by noting that this essay was not written with the aim of outlining the types of ICT and the following categories are extremely broad. The categories overlook, at a glance: the relationship between trustee de son tort and personal liability to account (dishonest assistance and knowing receipt), *Walsh v Lonsdale* and *Rochefoucault v Boustead* type CTs among many others. The many types of "Constructive Trusts" and whether the four broad categories are correct is outside the scope of this paper.

⁸⁷ At 406; See also *Boscawen v Bajwa* [1996] 1 WLR 328 (CA) at 334–335; and *Kuwait Oil Tanker Co SAK v Al Bader* HC, 17 December 1998 at 63.

⁸⁸ *Westdeutsche Landesbank Girozentrale v Islington LBC*, above n 6, at 707.

⁸⁹ *Paragon Finance plc v D Thakerar & Co (a firm)* [1991] 1 ALL ER 400 (CA) at 408–409.

⁹⁰ Grantham and Rickett, above n 22, at 407.

⁹¹ Hudson, above n 27, at 552.

⁹² Grantham and Rickett, above n 22, at 408. Grantham and Rickett cite Lionel Smith "Constructive Trusts and Constructive Trustees" [1999] CLJ 294 at 297–298, identifying that "[a]ll the early and traditional constructive trusts cases are of this type."

formality or absence of trust property, "the parties' intention was legally non-cognisable or ineffective."⁹³ The court for reasons of equity, fairness and justice, construes the situation into a legitimate trust.

- iv. *Breach of fiduciary duty: the Attorney-General for Hong Kong v Reid* type trust. Where an employee receives a bribe he is bound to hold it on trust for his employer. This cannot be an express trust for obvious reasons "as the money would not have been received at the time of his fiduciary undertaking."⁹⁴ Through the constructive trust, equity gives effect to the fiduciary intentions of the parties.⁹⁵ This case has not been without criticism. The main point is that "the court recognises the plaintiff's equitable ownership of the particular asset and it is effecting a trust which is held to have come into existence at some earlier time."⁹⁶

[28] Grantham and Rickett identify that the common theme of the above categories is that:⁹⁷

The [ICT] thus arises initially as a response to the intention of the parties. The court's declaration that the assets are held for the plaintiff is then a recognition of the plaintiff's pre-existing equitable property rights ... The trust arises because of the parties' intentions, and thus it dates from a point in time well before the trial at which the court acknowledges the existence of that trust. At the time of trial, therefore, the property rights are already, as a matter of doctrine, in existence, and all the court is required to do is to give effect to those rights by ending the defendant's inference with them.

In contrast to their definition, I identify another common theme. The ICT is an equitable mechanism for affecting a transfer of property from A to B which the court deems legitimately warranted by equity. They suggest that due to the intention of the parties and the plaintiffs' "pre-existing equitable property rights", both key factors for discerning an ICT in the past, the court recognises the trust at the hearing (but arising at some past date). Conversely, I argue that these are factors for the court to construe and discern in a discretionary way.

[29] The court hears evidence on the plaintiffs' pre-existing equitable property rights: equitable property rights differ from legal ones as equity takes into account factors contained in the maxims, for example conscience and unconscionability (dare I suggest "fairness and justice"). The court hears evidence on the intentions of the parties and then gives effect to those intentions using mechanism of the constructive trust and by deeming the intentions of the parties in relation to the property to fit within one of the

⁹³ At 408.

⁹⁴ At 409.

⁹⁵ *Attorney General of Hong Kong v Reid*, above n 53; Although Sir Peter Millett in "Restitution and Constructive Trusts" (1998) 114 LQR 399 at 403-4., stated that "the paradigm example of the fiduciary is the express trustee, not the constructive trustee: and while all fiduciaries are subject to fiduciary obligations, they are not all subject to the same fiduciary obligations" thus indicating that there are different levels of fiduciary obligations and types of fiduciaries; see *Chirnside v Fay* [2006] NZSC 68., where the New Zealand Supreme Court (Elias CJ dissenting) allowed for allowances to be awarded to a defaulting fiduciary.

⁹⁶ Grantham and Rickett, above n 22, at 409.

⁹⁷ At 410.

four institutional categories.⁹⁸ An alternative view of the declaration is in fact that the ICT, the construing of the facts to create a trust, is the mechanism for the court to "do equity" and give legitimacy to its award of a proprietary remedy, when traditionally only an express trust would justify such an award. That some ICTs have existed in the law reports for many years does not beguile this point.

IV The ICT is a fictional trust

[30] "It is trite law," some may say, that ICT's arise on "the event" and not on the judicial assessment of the event. But the courts always must assess the event, read and hear submissions on the event and there may even be cross-examinations on the trust creating events. This would be to ignore the realities of evidential issues, coupled with the complication that the court is assessing beneficial title, which is always invisible. If it were axiomatic that the ICT arises on the "event" and the court merely recognised this, as this legal fiction suggests, then perhaps litigants should stop going to court and those who are sure of their beneficial title should just physically take it. What would the courts have said if the Attorney-General for Hong Kong had his agents occupy Mr Reids' houses because the titles belonged in equity to the people of Hong Kong as opposed to arguing all the way to the Privy Council?⁹⁹ The same could be said of very recent UK SC case of *FHR European Venture LLP v Cedar Capital Partners*.¹⁰⁰ Is the answer "but I have the yet to be recognised equitable title" a defense to the torts of trespass or conversion, especially if that trust is constructive? The trite response that ICTs arise on "happenings of events" fail to recognise that the pages of equity texts are littered with various "events" being argued to the highest courts in the lands.

[31] I argue that a common theme of the four ICT categories, is not, while it can appear the condition precedent for the ICT occurring, conduct in the past and the court of equity merely recognising the trust at a later date, but actually that the ICT is an equitable mechanism for effecting a transfer of property from A to B which the court deems legitimately warranted by equity. Such a mechanism, the ICT, is thus a remedy. The RCT is also a remedy, effecting the same outcome and they are of little distinction. The only distinction being in name/language, with the courts recognising at the outset of the RCT that they are using a trust as a remedy, whereas with the ICT this is done in a much more subtle way.

An Erstwhile Existence?

[32] A RCT will exist regardless of what the court names the trust, or how the court describes its actions/order "where a trust over assets is imposed by a court as a remedial response to the plaintiff's otherwise personal claim."¹⁰¹ It is a use of equity's ability to award proprietary based remedies for a personal situation of unconscionability or "unfairness" – "injustice" relating to property. To quote Tipping J in *Fortex v Macintosh*,

⁹⁸ Swadling, above n 1.

⁹⁹ *Attorney General of Hong Kong v Reid*, above n 53.

¹⁰⁰ *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, 3 WLR 535. The UKSC overruled *Sinclair Investments v Versailles Trade* in favour of *Attorney General for Hong Kong v Reid*.

¹⁰¹ Grantham and Rickett, above n 22, at 412.

a RCT is "one which is imposed by the Court as a remedy in circumstances where, before the order of the Court, no trust of any kind existed",¹⁰² those circumstances being personal inter parties. If one can think of a borderline ICT case,¹⁰³ then perhaps regardless of the court's classification of said trust as an ICT, it may in fact be an RCT. A tomato is still fruit, even though it does not appear in the fruit bowl. The RCT's existence depends on the courts order, with the court able to impose the RCT so long as at the time of the order there are "assets ... in respect of which the Court considers it appropriate to impress a trust in favor of the plaintiffs."¹⁰⁴ In the Australian High Court cases of *Muschinski v Dodds*¹⁰⁵ and *Baumgartner v Baumgartner*¹⁰⁶ it was held that the RCT could be imposed by the court "despite the common intention of the parties" and that "the [remedial] constructive trust serves as a remedy which equity imposes regardless of actual or presumed intention."¹⁰⁷ In Australia the "RCT is the most common form of constructive trust" as the Australian CT is characterised as remedial.¹⁰⁸ The overall Australian approach is in two stages emphasising the discretionary nature of the proprietary remedy. The approach essentially mirrors the four stage test suggested by Grantham and Rickett below.¹⁰⁹

The strong remedial distinction

- [33] Grantham and Rickett argue that where a RCT is sought as a response to a situation, "it is nothing other than a plea for the court [of equity] to exercise its strong remedial discretion" and that therefore on a doctrinal basis "there is no connection with trusts at all."¹¹⁰ Such a radical view need not be entirely accepted but is incidentally supported by the analysis of Professor Swaddling. However the authors go further by quoting and ostensibly agreeing with Professor Langbein's historical view that in a RCT situation, in effect "the chancellor says to a defendant who is not a trustee, '[b]ecause the outcome can be made convenient, I'm going to treat you as though you were a trustee, even though we all know you are not'."¹¹¹ I have no qualms in concluding that the constructive trust is merely a remedial mechanism hidden in opaqueness.
- [34] The authors conclude that implicit in the RCT is the variation of property rights which have already been established by settled legal rules. The court uses its discretion at the time of the trial:¹¹²

... to carve out of the general assets of a defendant some form of proprietary interest in favor of the plaintiff, and then order that those assets be delivered to the plaintiff. This, therefore, amounts to a non-statutory discretion to vary property rights. It should be

¹⁰² *Fortex Group Ltd (In Receivership and Liquidation) v MacIntosh*, above n 12, at 173.

¹⁰³ I have always been suspicious of *Attorney-General for Hong Kong v Reid*, however, I suggest this ICT as but one example and adding any more cases to this note would give cause for another paper.

¹⁰⁴ At 175.

¹⁰⁵ *Muschinski v Dodds*, above n 16.

¹⁰⁶ *Baumgartner v Baumgartner* (1987) 164 CLR 137.

¹⁰⁷ *Bathurst City Council* (1998) 195 CLR 566 at 584.

¹⁰⁸ PW Young, Clyde E Croft and Megan Smith *On Equity* (Thomson Reuters, NSW, 2009) at 442

¹⁰⁹ David M Wright "The Australian Constructive trust" (2010) STEP Journal <www.step.org>.

¹¹⁰ Grantham and Rickett, above n 22, at 412.

¹¹¹ John H Langbein "The Later History of Restitution" in WR Cornish, Richard Nolan, Janet O'Sullivan and Graham Virgo (eds) *Restitution Past, Present and Future* (Hart Publishing, Oxford, 1998) 57 at 58.

¹¹² Grantham and Rickett, above n 22, at 413.

clear by now that calling this response a "remedial constructive trust", whilst perhaps providing a degree of comfort, avoids transparency. In its most immediate sense, the event to which the trust is the response is merely the court's decision.

- [35] This, I argue, is one of the main underlying arguments against the RCT, and I have quoted the authors because they, amongst others, best identify it: that the "event to which the trust is the response is merely the court's decision." That decision, which Grantham and Rickett do not go on to discuss, will normatively be based on some form of "fairness and justice" or the phraseology which is more in vogue – unconscionability – there is little practical distinction between these phrases. I nevertheless suggest that does not make the court's decision and thus "the event" (the unconscionability) to which the trust (as a remedy) is the response to, any less legitimate than the ICT, as Grantham and Rickett argue and that is where we depart.
- [36] Looking to the ICT, the four or so categories are not as settled and clear as one would think by their "institutional" namesake – the word "institutional" giving them legitimacy. When it is appropriate for the court to recognise or impose a proprietary remedy? There is a lack of practical distinction between the ICT and the RCT, confusion reigns as to the nature and the function of the former which has led to a misstep in the doctrinal analysis of the availability of proprietary remedies in equity.¹¹³ Two questions follow: *first*, if a RCT is available, what cause of action or factors is it a response to? *Secondly*, is the response appropriate and legitimate enough to raise a proprietary remedy?

V A Legitimate RCT?

- [37] Grantham and Rickett argued in 2000 that the analyses for the imposition of a RCT were largely unsatisfactory.¹¹⁴ Their argument is that commentators and judges either ignore the second question, appropriateness and legitimacy of a proprietary remedy, or "invoke opaque but historically proven terminology" which leads to the inevitable – a descent into naked arbitrary decision making.¹¹⁵
- [38] It is vital for the legitimacy of the doctrine of the RCT that one first addresses the appropriateness of the proprietary nature of the remedy and secondly that any answer to this question is informed by rational and transparent principles and not cries to history.
- [39] In remedying the imperfection the authors identify potential definitional factors further legitimising the imposition of a discretionary RCT:¹¹⁶
1. There will be a wider factual matrix "beyond those matters which are directly relevant to the cause of action" which will be used by the plaintiff (beneficiary) to justify the imposition. This could be described as the justice or fairness or unconscionability of the factual matrix.

¹¹³ At 415.

¹¹⁴ At 414 they reference the critique by D Paciocco "The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors" (1989) 68 Can Bar Rev 315.

¹¹⁵ At 415.

¹¹⁶ At 415.

2. Using the language of restitution, the defendant will be "improperly enriched at the expense of the plaintiff", or, I suggest to put the phrase in the negative, the defendant will not be able to satisfy the court on equitable maxims/principles that he should keep the property. His hands will not be clean. Think moral turpitude – unconscionability – injustice – unfairness in equitable terms.

[40] Yet as Grantham and Rickett identify, these two factors alone justify no more than a remedy in personam, a personal monetary remedy that is normally useless in the insolvency process.¹¹⁷ To get a proprietary response, something more is required. A property remedy can not merely flow whenever the defendant is insolvent.¹¹⁸ Two other factors are justified:

3. Consideration of third parties:¹¹⁹

Such is the nature of a proprietary remedy that it must inevitably impact on the rights of third parties, particularly the defendant's secured creditors. In imposing a [RCT] the court is bluntly varying the existing property rights of the defendant's creditors, thereby effectively expropriating their rights away from them in favor of the plaintiff. The state of the conscience of those third parties with an interest in the defendant's assets must, therefore, be a significant factor in the decision to impose a constructive trust and, in effect, disentitle them.

[41] This is essentially what Lord Browne-Wilkinson identified as one of the benefits of the RCT. Since it is discretionary, a judge could refuse to order its imposition because it would unfairly impact on innocent third parties. Tipping J put this in the alternative by refusing to impose a RCT in *Fortex* because nothing negative affected the conscience of the third party creditors, namely they had done nothing which in the eyes of equity meant that they should be deprived of their property rights and therefore a RCT in favor of the plaintiff was inappropriate.¹²⁰

4. Common intention or understanding or legitimate expectation: This limb stems from cases dealing with relationship property and breakdowns of *de facto* marriages. Such cases suggest that the "presence of some common intention, understanding or legitimate expectation that the plaintiff would have in the property is also crucially relevant."¹²¹ Although the word "legitimate" might be crossing doctrines a little, Cooke P's dicta in *Gillies v Keogh* emphasised that the "reasonable expectations in light of the conduct of the parties are at the heart of the matter."¹²² A moment for pause is required: these expectations will never amount to the type of expectations of the caliber enough to constitute an ICT. They will "fall short" or be "too nebulous to ground an

¹¹⁷ At 415.

¹¹⁸ At 416.

¹¹⁹ At 416.

¹²⁰ *Fortex Group Ltd (In Receivership and Liquidation) v MacIntosh*, above n 12, at 176.

¹²¹ At 416.

¹²² *Gillies v Keogh* [1989] 2 NZLR 327 (CA) at 331 as cited in *Fortex Group Ltd (In Receivership and Liquidation) v MacIntosh*, above n 12.

institutional constructive trust".¹²³ The expectation and the court's belief in its legitimacy is a factor which supports the imposition of a proprietary remedy – it is "a factor which equity may take into account in the exercise of its discretion".¹²⁴ One must reasonably expect to be beneficially entitled to the property in order to justify a court awarding a proprietary remedy. The reasonableness of that expectation is for the court to decide. This does not conflict with the dicta in the Australian High Court¹²⁵ where the court held that it could impose the trust "regardless of the common intentions of the parties". The conflict can be resolved because it will always be the legitimate intention of at least one of the parties that the property should be beneficially entitled to one of them. Expectations are always for the court to *construe*.

Grantham and Rickett's four limbs pro tanto

- [42] A distinction arises, a plaintiff may be able to make a case where he is entitled to a remedy based on the first two factors. However the court must consider factors three and four when deciding to impose that remedy in a proprietary way: hence the discretion inherent in the imposition of the RCT. It is likely factor two, where much of the discussion and the discretion is inherent, the "unconscionability" of the situation, so to speak. Yet it is factors three and four which may give the courts some form of legitimacy if they so choose to award the trust over the property – the principle behind the expropriation of the property from A to B.¹²⁶
- [43] This is not to say that overall a court could not choose to ignore or discount factors three or four. Similarly, as with regards to ICT it "...is thus merely a consequence, or recognition, of the property rights so created ... [that] the rights have already arisen; and the trust is deemed in order to give them transparency"¹²⁷ as the trust is considered existing before the legal interest is transferred to the creditor. The former two factors may be so strong that a court might feel justified in outweighing the latter. The court may also predate its order, to a time before the legal right passed to the creditor, as in practice the remedial mechanism of the ICT works.¹²⁸ But again, this creates problems of legitimacy.
- [44] Some may still think that the only satisfactory RCT will be one where the property in question is not in the insolvency mix, although that is unlikely to eventuate, as a personal remedy will then be sufficient. A plaintiff pleads for a trust because it exempts the property (in his eyes his property) from the regime. In *Fortex* the Court of Appeal appeared to conclude that the NZ insolvency regime did not prevent it from creating a new property right effectively during insolvency, although, perhaps due to factor three,

¹²³ Grantham and Rickett, above n 22, at 417.

¹²⁴ At 417.

¹²⁵ *Bathurst City Council* (1998) 195 CLR 566 at 584.

¹²⁶ For an example of an RCT imposed along the lines of the Grantham and Rickett's suggestions please see the appendices.

¹²⁷ Grantham and Rickett, above n 22, at 414.

¹²⁸ With regards to the ICT, the court traditionally recognises the "trust" in favor of the beneficiary arising before the common law title has transferred to the third party creditor. And thus the equitable title (which trumps common law) has always remained with the beneficiary; the creditor never had good title.

the court chose not to do so.¹²⁹ The mechanics of the operation of this trust leave much to be explored in future RCT cases.

- [45] Many definitions of the constructive trust "simply reflect the orthodoxy that the "constructive trust" is a genuine trust"¹³⁰ and one is reminded of the "arise by operation of law" adage.¹³¹ This definition is not helpful. I turn to Professor Swadling who submits that the essential element of the express trust, the *true trust*, is missing from constructive trusts, which in its most basic form is the "idea of one person holding rights for another or for a purpose."¹³² It is missing axiomatically because the court has to construe that purpose, hence the nomenclature "*constructive*" trust. Swadling explains that this underlies Pound's comment¹³³ that "An express trust is a substantive institution. Constructive trust, on the other hand, is purely remedial institution ... [There is not] the substance of a trust."¹³⁴ I focus on this part of Swadling's thesis; the use of fictitious language in trusts law and his chariot cry "Why not call a spade a spade".¹³⁵

VI The Preponderance of Language: legitimate remedial mechanism due to the illegitimate linguistic distinction

- [46] The orthodox position in UK Law is that the constructive trust is as much a trust as an express trust with the only difference being that it is "construed by the court". Swadling argues that this is false, representative of the constructive trust as a legal fiction and not like the express trust. The only true trust in English law is the express trust.¹³⁶ One can identify that the constructive trust is a mask of "language" – a portmanteau – for two types of court orders; (i) that the defendant pay a sum of money to the claimant; and (ii) that the defendant convey a convey a particular right to the claimant. These orders are similar to my "CT as a mechanism". Only then, Swadling argues, once the "fictitious nature of the 'trust' is realised can any coherent analysis of the incidence of such orders be made."¹³⁷ A secondary incidence of his argument is, as Grantham and Rickett identify, that the ICT is inherently remedial and thus there is no distinction between the ICT and RCT. However, logic dictates that if a jurisdiction, such as the UK, still accepts the legitimacy of the ICT, in spite of Swadling's "hard to swallow" argument,¹³⁸ then there is no logical reason to reject the RCT as an any less functional remedial mechanism.

The constructive trust as two "dressed" court orders

¹²⁹ *Fortex Group Ltd (In Receivership and Liquidation) v MacIntosh*, above n 12, at 178.

¹³⁰ Swadling, above n 1, at 9.

¹³¹ *Westdeutsche Landesbank Girozentrale v Islington LBC*, above n 6, at 714–715.

¹³² Swadling, above n 1, at 9.

¹³³ Roscoe Pound "The Progress of law – Equity" (1920) 33 Harv L Rev 420 at 421.

¹³⁴ Pound, above n 133, at 421 as cited in Swadling, above n 1, at 13.

¹³⁵ Swadling, above n 1, at 14.

¹³⁶ At 2.

¹³⁷ At 1.

¹³⁸ At 35.

- [47] The "court order" analysis is a broader substantiation that the constructive trust is a judiciously exercised mechanism to legitimise the transfer of property by way of trust from A to B. Therefore, if this is in fact what a ICT is doing and is being used by the courts to do, then the RCT is in effect the same mechanism, the transfer of property from A to B, based on equitable principles but with the key distinction that no linguistic "dressing" is required. Such chicanery beguiles wanting simplicity in the law of constructive trusts.
- [48] The RCT is a discretionary proprietary remedy based on fairness and justice and unconscionability: this has led to its rejection as unprincipled.¹³⁹ The ICT hides behind its veil of an "institution" when yet it too is a proprietary remedy applied in a discretionary way and has no distinction from the RCT.¹⁴⁰ Distinction and legitimacy is created by calling the ICT "institutional" and pointing to events creating equitable title: yet it is truly discretionary for the court to recognise it. The only distinction *pro tanto* between an ICT and an RCT is that the RCT admits its remedial and discretionary nature and therefore is labeled unprincipled, whereas the ICT pretends to be principled and hides behind the language of "institution" or, as Swadling describes, the "fiction" of the constructive trust. If courts are prepared to accept the ICT, they should recognise that they are accepting a remedial beast and accept the RCT, for the two are the same. The so called "four categories" of ICTs are underpinned by fairness and justice and unconscionability as Lord Denning identified.

Through the fiction the fog clears

- [49] In *Dubai Aluminum Co Ltd v Salaam* Millett LJ described the language of constructive trusts as "a trap",¹⁴¹ and it is a trap which has lead the courts to view the ICT not as a trust but in truth a proprietary order in equity to pay money or to convey particular rights.¹⁴² Thus Swadling concludes it is this fiction which has lead to the illogical rejection of the RCT, for the RCT has been recognised as a discretionary equitable proprietary remedy, with courts rejecting its legitimacy because it is not a true trust (an ICT or express) as the foundation of the RCT is remedial. Equity has for a long time been awarding proprietary remedies based on the underlying principle of "fairness and justice" – if one regards that as discretion then so be it. The divide between RCT and ICT is untenable as "The truth is that all constructive 'trusts' are remedial, for they are nothing more than court orders; there can therefore be no such thing as an 'institutional' constructive trust."¹⁴³

VII Conclusion

- [50] That the drawing of this false distinction has not led to any wrongly decided case is of little comfort in so far as it has lead to "interminable confusion in the literature."¹⁴⁴ I am

¹³⁹ Gareth H Jones and William Rodolph Cornish *Restitution* (Hart Publishing, London, 1998) at 220. See also Sir Peter Millet "Equity - The Road Ahead" (1995-6) 1, Vol 6, King's College Law Journal, at 1.

¹⁴⁰ *Muschinski v Dodds*, above n 16, at 451.

¹⁴¹ *Dubai Aluminum Co Ltd v Salaam* [2003] 2 AC 366 at [142].

¹⁴² Swadling, above n 1, at 26.

¹⁴³ At 34.

¹⁴⁴ Swadling, above n 1, at 34.

grateful that is recognised. Swadling finds little merit in the RCT versus ICT debate. While I do not necessarily agree, I can certainly understand the vast literature and commentary which would have lead him to this glorious summation;

*"It is, however, a debate as cogent as a discussion of the merits of English versus American unicorns."*¹⁴⁵

- [51] Cogency aside Swadling is not alone to opine the fallacy of language used in trusts law. Professor Virgo's analysis is that the UK ICT has remedial aspects since there are elements of judicial discretion at play, but that the UK ICT will never be a "full blown" RCT- primarily because judges, when recognising the ICT, "do not purport to exercise any discretion when determining whether a constructive trust should be recognised."¹⁴⁶ Perhaps, on my analysis, if a judge were to purport, like Lord Denning in *Hussey v Palmer*,¹⁴⁷ to be exercising discretion when recognising unconscionability, as opposed to using the stock phrase "unconscionable conduct" as an equitable term of art, then the UK ICT will begin to take on much more of a remedial flavor.
- [52] Leading constructive trusts scholars have described the UK ICT as more or less "apparently certain" and I think it logical to read fictionality into that apparent certainty as discussed above.¹⁴⁸ Virgo asks the English Chancery bar "Do we really want to leave the *apparent* certainty of the institutional constructive trust and go down the more flexible road?"¹⁴⁹ That road, as I have argued, is one of recognition of the inherent remedialism of the ICT, the mechanics of the remedy, and the RCT as a legitimate trust due to ICT and RCT having no distinction as a matter of principle. Departing from the certain road might be asking too much from the conservatives, even though I argue there is little underlying distinction bar settled categories between ICT and RCT. The UK *et al* should at least recognise that another road does legitimately exist, as has the rest of the Commonwealth.¹⁵⁰ The latter road may at times be better and paving it would not destroy the foundation of property rights. Such a road would recognise that this proprietary remedy has elements of judicial discretion based on equitable principles. The answer is implicit in that Virgo's question is rhetorical: there are those who will always return to the stock response of Sir Peter Millett:¹⁵¹

[such RCT's are] ... a counsel of despair which too readily concedes the impossibility of propounding a general rationale for the availability of proprietary remedies.

¹⁴⁵ At 34.

¹⁴⁶ Graham Virgo "Review: The Remedial Constructive Trust By David Wright" (1999) 58 CLJ 645, at 646.

¹⁴⁷ *Hussey v Palmer*, above n 34.

¹⁴⁸ David Wright *The Remedial Constructive Trust* (Butterworths, Sydney, 1998) at ch 9.16.

¹⁴⁹ Virgo, above n 146, at 646.

¹⁵⁰ New Zealand in *Fortex Group Ltd (In Receivership and Liquidation) v MacIntosh* [1998] 3 NZLR 171 (CA),; see also *Regal Castings Limited v Lightbody* [2008] NZSC 87., Australia in *Muschinski v Dodds* [1985] 62 ALR 429 (HCA)., Canada in *Soulos v Korkontzilas* [1997] 2 SCR 217., Singapore in *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 (Court of Appeal).

¹⁵¹ Jones and Cornish, above n 139, at 220. See also Millet, above n 139.

[53] Such opines are not constructive and only serve to polarise debate.¹⁵² Grantham and Rickett, theorists which undoubtedly uses the constructive trust as a remedy, clearly evidence their inherent remedial view of both the ICT and the RCT, and provide four limbs for awarding the later discretionary RCT. Yet Professor Birks said of the RCT that it was "ugly, repugnant alike to legal certainty, the sanctity of property and the rule of law."¹⁵³ I have noticed that those who criticise the RCT for its definitional normative language, hypocritically use language of worse ilk far more freely to criticise it. We must move on from this use of linguistic legal fictions in the language of constructive trusts. Both institutional and remedial CTs are inherently remedial, of the same "ilk" and rest on the inherent equitable foundation of judicial discretion and are a practical mechanism to transfer property in the court of equity. In this discourse progressive souls, even bold souls are not needed, only rational ones. Perhaps these bold souls might cry "yes it is true the courts of equity do alter property rights based on fairness and justice and they do so with discretion" – but he might shout it in the library ever so softly for such a view might still be accused of belonging to a heretic.

¹⁵² At 415.

¹⁵³ P Birks *Property and Unjust Enrichment: Categorical Truths* [1997] NZ L Rev 623 at 641.

VIII Appendices and Empirical Observations

A) A Valid Remedy applied with Circumspect

In the following passage I set out a contrived set of facts adopted from *Leggett v Kensington*¹⁵⁴ and argue for a legitimate imposition of an RCT along the lines of the judgment of Gault J in that case.

[54] The remedy is a property right and in Australia, "Ordinarily relief by way of [remedial] constructive trust is imposed only if some other remedy is not suitable"¹⁵⁵ so to in Canada where "in the vast majority of cases a [remedial] constructive trust will not be the appropriate remedy."¹⁵⁶ The RCT in both countries where the remedy has taken hold is one awarded discerningly. In those jurisdictions the courtrooms are not Tribal-Councils and do not dish out "palm tree justice"¹⁵⁷ as is the ostensible fear. The arguments against the RCT are not founded as practically they have not materialised due to the very factor which makes the RCT an admirable tool in equities armory:¹⁵⁸ the trust rests on discretion, which judges are well schooled and more than capable of imposing, and our appeal systems are more than apt to temper. Judges use discretion when sentencing and remove the right of liberty, a higher order right than property: why some hold rights in rem to a higher standard I am uncertain.¹⁵⁹

[55] The counter argument for RCT being imposed only in circumspect is that such language should trigger a "warning light" for it indicates that a judge "may be ... about to cheat"¹⁶⁰ because she finds the legal reasoning behind recognising an ICT too difficult on the facts or because the ICT does not exist and she wishes to do justice and cannot with the institutional tools at hand. Should the law, especially equity, not provide remedies on the top shelf available in special circumstances where settled institutional principles do not seem to fit, or should the law have to be so bent and twisted that the logic of the ICT meaningless?

An example of a valid RCT imposition?

[56] The Plaintiff, who is ill informed in the ways of investing and is taken in by a company offering to sell to him and store gold bullion, the respondent is a Receiver appointed by a Bank who holds a "General Security Agreement"/"Present and After Acquired Property Clause" over all the property and assets of the bullion store. The plaintiff was deliberately misled by the bullion store by way of certificates of insurance and title that the store held enough bullion to cover his account and that said bullion belonged to him and was separate from all other clients. His "Bullion Certificate" used the phrase "*the bullion is yours and is non-allocated*".

¹⁵⁴ *Leggett v Kensington* (1993) 1 NZLR 257 (CA).

¹⁵⁵ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 230 CLR 89 at [200].

¹⁵⁶ *LAC Minerals Ltd v International Corona Resources Ltd* [1989] 61 DLR 14 at 51.

¹⁵⁷ *Bryson v Bryant* (1992) 29 NSWLR 188 at 196 per Kirby P, not to be confused with his brother Michael Kirby of the High Court of Australia Bench.

¹⁵⁸ Neuberger, above n 2, at [6].

¹⁵⁹ If the highwayman gave me a choice between "your money or your life" the latter I would choose.

¹⁶⁰ At [31].

[57] It was held : "That the understanding of non-allocated purchasers was deliberately fostered can hardly be open to doubt" and an internal company memo was furnished which stated that:

The growth of the bullion market must lie in the education of the mass public and the consequent switching from traditional forms of investment to bullion....so the last fear they want in their minds is that their precious non-allocated metal does not actually exist.

The memo continued "[o]f course, it is a different story for the businessman or the frequent purchaser, they understand how it works and accept it".

[58] The Bank subsequently exercised its power of receivership over the bullion store when its loan fell due and claimed under its GSA all assets of the business. The plaintiff went to the premises to collect *his* gold to find that not only was there not enough bullion to cover his account but that it existed in one pile mixed with others and that the bank claimed that it had priority as secured creditor.

[59] Council for the plaintiff would have a formidable task proving an ICT:¹⁶¹ for the claimants are at arm's length with the company as purchasers and thus no fiduciary relationship exists militating against an ICT,¹⁶² and there existed no contractual requirement for the bullion to be set aside. There was no "separate property" for the trust to bite at due to the intermingling to bullion in one big pile.

[60] This may be one of the situations where a RCT should be imposed due to the overarching consideration that "it would be unconscionable for the party into whose hands the property came to retain it against the claimant."¹⁶³ A RCT may be imposed in absence of a fiduciary duty. But what of the Bank in whose hands the gold now sits? Justice Gault in *Liggett v Kensington* held that where "the company's conduct ... [is] seen overall as inequitable and unconscionable justifying relief [the RCT is] subject to consideration of the competing claim of the secured creditor."¹⁶⁴

Turning to the competing claim of the bank, it would be difficult to impose an RCT where the third party had obtained fair value without notice, as the proprietary remedy in favor of the plaintiff would act in prejudice to the secured creditor.¹⁶⁵ This is one of the main arguments against the RCT in general. However instead of stopping, as most do, at this step, why not simply seek evidence on what "notice" the secured creditor had? Or if the creditor had none, why not do what the law does best in such situations,

¹⁶¹ *Liggett v Kensington (in re Goldcorp Exchange)* (1993) 1 NZLR 257 (CA) at 279 per Gault J.

¹⁶² *Westdeutsche Landesbank Girozentrale v Islington LBC*, above n 6, at 997. Lord Browne-Wilkinson, revising *Chase Manhattan* [1981] Ch 105, held that "further, I cannot understand how the recipient's 'conscience' can be affected at a time when he is not aware of any mistake" as an example of the orthodox contention that in ICT situations some form of fiduciary relationship is usually required or construed. See also *Re Diplock* [1951] AC 251, which held that equitable tracing requires some form of fiduciary relationship.

¹⁶³ *Liggett v Kensington*, above n 161, at 281 per Gault J.

¹⁶⁴ At 282 per Gault J.

¹⁶⁵ At 283 per Gault J.

attempt to impute notice when it would be reasonable to do so? The whole foundation of the *constructive* trust, is the court *construing* facts: hence the distinction between the *express* trust where facts and deeds of trust are expressly stated. In *Liggett v Kensington* the bank had knowledge of Goldcorp's business model, while it did not express any concern as to the business model Gault J construed that it should have, knowing that Goldcorp was intent on attracting novice investors.¹⁶⁶ He thus would have imposed a RCT over the gold belonging in equity to Mr Leggett, he would not have imposed a RCT over the gold belonging to the professional investors as Goldcorps conduct in relation to that class was not unconscionable because they knew the meaning of "unallocated" and the risks it entailed.¹⁶⁷

- [61] In *Re Goldcorp*, The Privy Council rejected the Court of Appeal's recognition of an ICT¹⁶⁸ and Lord Mustill rejected Gault J's RCT argument because he found the conduct of Goldcorp merely "wrongful in the sense of being a breach of contract, [and] it did not involve any injurious dealing with the subject-matter of the alleged trust."¹⁶⁹ The case was one of breach of contract giving rise to a personal remedy.
- [62] Yet I ask anew, for the novice investors: if an ICT would not work in a Goldcorp situation, and neither would the Common Law rout, why not use the powerful remedy of the RCT?¹⁷⁰

¹⁶⁶ *Liggett v Kensington*, above n 161, at 283 per Gault J.

¹⁶⁷ At 283 per Gault J.

¹⁶⁸ *Re Goldcorp Exchange Ltd (in receivership) (Kensington v Liggett)* [1994] 3 NZLR 385 (PC).

¹⁶⁹ At [18] per Lord Mustill.

¹⁷⁰ Roderick Peter Thomas *Rethinking the Constructive Trust* (University of Auckland, Auckland, 1995) at 66.

B) Lord Denning and natural justice in Equity

There is a clear link between jurisprudential naturalism and the jurisprudence of Lord Denning, especially with regards to his equity judgments.

- [63] Denning LJ's dicta is steeped in natural law jurisprudence,¹⁷¹ not surprising considering his reliance on "fairness and justice". He provided "scope for a breath or two of fresh air" in to an area of company law "of a risk adverse disposition".¹⁷² He is remembered for his steadfast belief in that immutable fact that "Law is only the application, however imperfectly, of truth and justice in our everyday affairs."¹⁷³ Many disagree with him on this point, but it is a hard pill to swallow to say that "truth and justice" should have no bearing on actions in equity, when the later maxims hold the concept at their core.

C) Swadling's Categories of Constructive Trust

I further explore the legitimacy behind Professor Swadling's two delineated categories of constructive trust.

A constructive trust as a court order: (i) order to pay money

- [64] Take as an example a defendant who dishonestly assists a trustee to commit a breach of trust and the beneficiary who seek an award to make good their loss. For equity to reach through to non-trustee defendants a "magic formula was incanted: the defendants were said to be 'liable to account as if they were trustees'."¹⁷⁴ The court does not say that the defendant is a trustee, there is no fiction, but he is liable to account as "*if he were a trustee*". Swadling highlights this clear line of thinking in the judgment of Ungood-Thomas J in *Selangor United Rubber Estates v Craddock (No 3)*: "[The language of constructive trusts] is nothing more than a formula for equitable relief. The court of equity says that the defendant shall be liable in equity, as though he were a trustee."¹⁷⁵ However we now hear of third parties being described as "a constructive trustee" appearing that there is a trust but one "constructed" by the court, as opposed to the constructive trust being used as a formula for equitable relief.¹⁷⁶ Or, as I argue, the ICT being used by the court as a mechanism, a remedy for relief.
- [65] This was the case in *Re Montagu's Settlement Trust* where Megarry V-C described the defendant as liable to account as a "constructive trustee"¹⁷⁷ giving the impression that the defendant was indeed a trustee of a constructive trust, a trust construed by the court. Not as in fact, as he should have said, the defendant was liable to account "as if" the defendant were a trustee.¹⁷⁸ With the constructive trust being as Ungood-Thomas J said, and Swadling argues merely a formula for equitable relief.

¹⁷¹ Phang, above n 59.

¹⁷² Len Sealy "Commercial Law and Company law" (1999) 14 Denning LJ 13, at 24.

¹⁷³ Lord Denning "Why I Believe in God" (talk given on the BBC, 14 December 1943).

¹⁷⁴ Swadling, above n 1, at 14.

¹⁷⁵ *Selangor United Rubber Estates v Craddock (No 3)* [1968] 1 WLR 1555 (Ch) at 1582 as cited in Swadling, above n 1, at 14.

¹⁷⁶ At 15.

¹⁷⁷ *Re Montagu's Settlement Trust* [1987] Ch 246.

¹⁷⁸ Swadling, above n 1, at 15.

- [66] Therefore, if what is known as the classic ICT can be viewed, quite logically, as merely a formula for equitable relief over property belonging in equity to another, then those who accept that the ICT is inherently remedial¹⁷⁹ are on the correct side of the divide. The point being that ICT is inherently remedial, and therefore there is no logical distinction between an ICT and a RCT. The latter should bask in the lime light of the recognition of its remedialism.

In support of the second argument: (ii) orders to convey particular rights

- [67] Swadling asks, "What accounts for the use of language of constructive trusts in cases of orders to convey particular rights?"¹⁸⁰ Those rights normally being constructive trusts over land, the answer he puts forward is the Court of Chanceries power to invoke the *Saunders v Vautier* Jurisdiction:¹⁸¹

...Brynyate said that the constructive trust was..."a remedial device by which a person can recover property to the present or future benefit of which he is equitable entitled. It is only by a fiction called a trust. The Court does not suppose that the constructive trustee has actually been holding or managing property for the *cestui que use*, but by a fiction it deems that he has been so doing, in order that the *cestui que use* may recover the property from him."

Thus the reason for the fiction becomes more apparent. Millett LJ in *Paragon Finance v Thakarer* recognised the fiction in the language when he held that in pay money constructive trustee cases such trusts "were not in reality trusts at all, but merely a remedial mechanism by which equity gave relief".¹⁸²

The historical origins in support of Swadlings Contention

- [68] Indeed by 1985 the tide of judicial opinion changed with the High Court of Australia ruling in *Muschinski v Dodds*.¹⁸³ Deane J supported by Mason J was of the opinion that "there is really no distinction between 'institutional' and 'remedial' constructive trusts" for the purposes of Australian trusts law as both have strong remedial elements.¹⁸⁴ Justice Deane was clear that "The use or trust of equity, like equity itself, was essentially remedial in its origins"¹⁸⁵ and that overall the concept of the trust commenced life in medieval England as a remedy, introduced by equity to ameliorate the harshness of the common-law and it still bears traces of that *raison d'être*.¹⁸⁶ Justice Deane's thesis was that the constructive trust in Australia, whether remedial or institutional, had no remaining distinction if one ever did exist:¹⁸⁷ it was a remedy "which may be molded and adjusted to give effect to the application and interplay of equitable principles in the circumstances of the particular case."¹⁸⁸ As for the basis for imposing the remedy in Australia, Deane J held that "fairness" was simply a concept of

¹⁷⁹ *Muschinski v Dodds*, above n 16, at 451 per Deane J.

¹⁸⁰ Swadling, above n 1, at 15.

¹⁸¹ JW Brynyate *Limitations of Actions in Equity* (1932) at 57 as cited in Swadling, above n 1, at 15.

¹⁸² Millett LJ in *Paragon Finance v Thakarer*, above n 89, at 409 as cited in Swadling, above n 1, at 17.

¹⁸³ *Muschinski v Dodds*, above n 16.

¹⁸⁴ At 451 per Deane J.

¹⁸⁵ At [6] per Deane J.

¹⁸⁶ Waters, above n 31.

¹⁸⁷ *Muschinski v Dodds*, above n 16, at [8] per Deane J.

¹⁸⁸ At [8] per Deane J.

the "formless void of individual moral opinion"¹⁸⁹ and that a court could not mandate a constructive trust (either imposed or recognised) based on such subjectivity (fairness) *but* that fairness as a notion was not wholly subjective as it had a sister concept which courts of Chancery have been dealing with for centuries:¹⁹⁰

That is not to say that general notions of fairness and justice have become irrelevant to the content and application of equity. They remain relevant to the traditional equitable notion of *unconscionable conduct*¹⁹¹ which persists as an operative component of some fundamental rules or principles of modern equity.

Even though the High Court of Australia has seen through the fog, and recognised the illogic in the distinction, it has used a term of art to reject *Hussey v Palmer* "fairness and justice" and term instead the discretion on "unconscionability". Confusion still reigns in a forward thinking equitable jurisdictions.

¹⁸⁹ At [9] per Deane J but see *Carly v Farrelly* (1975) 1 NZLR 356 (HC) at 367; and *Avondale Printers & Stationers Ltd v Haggie* (1979) 2 NZLR 124 (HC) at 154.

¹⁹⁰ At [9] per Deane J.

¹⁹¹ I have previously outlined that I consider "fairness and justice" and "unconscionability" to be two sides of the same coin: see [11].

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