THE CONSTRUCTIVE TRUST IN SINGAPORE

Five Persistent Puzzles

This paper investigates some persistent difficulties surrounding the constructive trust. The five persistent puzzles relating to the constructive trust that are considered in this paper are: the terminology puzzle, the institutional and remedial puzzle, the explanatory puzzle, the bankruptcy puzzle and the Torrens puzzle. It is the author's thesis that these five enduring puzzles must be addressed and ultimately unravelled in order to ensure the coherent development of the law in this area.

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I. Introduction

1 The constructive trust is one of the most difficult areas of equity jurisprudence. Yet the constructive trust is a form of relief frequently requested by litigants. It is easy to see why many plaintiffs seek a declaration of constructive trust in their statement of claim; such a declaration would grant a plaintiff a proprietary remedy with all its attendant benefits. In other words, a plaintiff who succeeds in a claim of constructive trust would have priority over the rest of the defendant's creditors in circumstances where the defendant is insolvent. Furthermore, any increase in value of the property concerned would accrue to the plaintiff by reason of the constructive trust.[1] Despite the popularity of constructive trust claims, the law in this area is far from clear. The terminology used in this context is often confused. Also, it is very difficult to discern general principles because a declaration of a constructive trust may arise in a myriad of circumstances. This problem is complicated by the fact that some judges have said that the law in this area has been deliberately left vague in order to deal with new situations.[2] Such vagueness has proved to be a bane to judges, lawyers, law teachers and law students alike. It is hard to disagree with

* The author is grateful to Prof Kevin Gray for his comments. The usual caveats apply.

1 See *eg Foskett v McKeown* [2001] AC 102.

2 *Carl-Zeiss Stiftung v Herbert Smith (No 2)* [1969] 2 Ch 276 at 300.

Lord Millett's extra-judicial sentiments that "[t]he unsatisfactory and confused state into which the law in this area has fallen is little short of a disgrace. There has been a failure to analyse the principles on which liability is based, compounded by a weakness of factual analysis …".[3]

2 In this paper, I attempt to unpack some of the difficulties that have afflicted the law of constructive trust. The five persistent puzzles relating to the constructive trust that I consider in this paper are: the terminology puzzle, the institutional and remedial puzzle, the explanatory puzzle, the bankruptcy puzzle and the Torrens puzzle. It is important that these puzzles be unpacked in order to develop the law in this area coherently. Two caveats need to be stated from the outset of this paper. First, I have no doubt that there are many more unresolved difficulties inherent in the constructive trust which are not covered here. However, due to space constraints it is impossible for this paper to consider more than the five persistent puzzles identified. Second, it should be pointed out that some of these five puzzles could individually merit an entire paper or even a monograph. As such, the purpose of this paper is not to offer definitive solutions to all issues related to each puzzle. Where appropriate, I have attempted to clear away some of the confusion and suggested how the law should develop. Some of the issues raised in the five puzzles are so complex and wide ranging (*eg* the bankruptcy and explanatory puzzles) that I am able only to scratch the surface of them by presenting an outline of the main arguments in these areas. The aim of this paper is merely to signpost the principal issues contained in these puzzles. It is hoped that this will form a framework for future consideration by the courts.

II. The terminology puzzle

3 A persistent difficulty in constructive trust analysis is the confusion over terminology. There is a tendency to conflate the constructive trust in a proprietary sense with a duty to account as a constructive trustee.[4] This is most unfortunate because the confusion prevents clarity in the analysis. Traditionally, the term "constructive trust" has been used in two ways. First, the courts may declare that the defendant holds the property in question on trust for the plaintiff. In this instance, the relief given to the plaintiff is proprietary. Second, the term "constructive trust" may also be used to mean relief granted to the claimant against a defendant which is personal in nature, *eg* where the defendant is "liable to account as a constructive trustee" to the claimant.

3 P J Millett, "Equity – The Road Ahead" (1995) 9 TLI 35 at 38.

4 A lament made by P J Millett, "Equity – The Road Ahead" (1995) 9 TLI 35; L D Smith, "Constructive Trusts and Constructive Trustees" (1999) 58 CLJ 294; P J Millett, "Restitution and Constructive Trusts" (1998) 114 LQR 399.

Examples occur in the case of a defendant who: (a) intermeddles and voluntarily assumes the mantle of trusteeship (*trustee de son tort*); (b) dishonestly assists in a breach of trust or fiduciary duty; or (c) knowingly receives property that is impressed with a trust or fiduciary duty. The superimposition of the term "constructive trust" in these situations is simply a shorthand denoting a personal liability to account in equity.[5] Professor Lionel Smith perceptively points out that the use of this formula perpetuates the pretence that beneficiaries can sue only their trustees.[6] Used in this second sense, the constructive trust is non-proprietary in nature and signifies simply a duty to account.

4 The use of the term "constructive trust" in the non-proprietary sense is unhelpful and has been deprecated by Lord Millett in *Dubai Aluminium Co Ltd v Salaam*.[7] Lord Millett observed:

> In this second class of case the expressions 'constructive trust' and 'constructive trustee' create a trap. As [Jules Sher QC, sitting as a deputy judge of the Chancery Division,] recently observed in *Coulthard v Disco Mix Club Ltd* [[1999] 2 All ER 457 at 479,] [2000] 1 WLR 707 [at] 731 this 'type of […] trust is merely the creation by the court … to meet the wrongdoing alleged: there is no real trust and usually no chance of a proprietary remedy'. The expressions are 'nothing more than a formula for equitable relief': *Selangor United Rubber Estates Ltd v Cradock (No 3)* [[1968] 2 All ER 1073 at 1097,] [1968] 1 WLR 1555 [at] 1582 per Ungoed-Thomas J. I think that we should now discard the words 'accountable as constructive trustee' in this context and substitute the words 'accountable in equity'.

5 Unfortunately, the conflation of both of these senses of constructive trust is found in Singaporean jurisprudence. In *Comboni Vincenzo v Shankar's Emporium (Pte) Ltd*,[8] there seems to be an intermingling of the elements of the constructive trust in a proprietary sense and the action based on knowing receipt. This decision will be explored below.[9] It is surmised that this intermingling of concepts in *Comboni* stems from a lack of terminological clarity. Hence it is suggested that we heed Lord Millett's advice in *Dubai Aluminium* and abandon reference to the constructive trust when referring to an equitable duty to account. The ambit of this paper is to explore the "constructive trust" when it is used in a proprietary sense and not in circumstances where there is an equitable duty to account.

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5 See *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 at 408–410.

6 L D Smith, "Constructive Trusts and Constructive Trustees" (1999) 58 CLJ 294 at 300–301.

7 [2003] 2 AC 366 at [142].

8 [2007] 2 SLR 1020.

9 See paras 18–22.

III. The institutional and remedial puzzle

6 Another perennial difficulty with the constructive trust is the perceived dichotomy between institutional constructive trusts and remedial constructive trusts. It is often said that the English conception of the constructive trust is that of an institution whereas the American view of the constructive trust is that it is a remedy.

A. The origins of the institutional and remedial constructive trust dichotomy

7 What exactly does this dichotomy mean? Unfortunately, the difference between the institutional and remedial forms of constructive trust is not sufficiently clarified either in the case law or in the textbooks. It is therefore necessary to unpack the supposed distinction between these two models of constructive trust. The origin of the dichotomy has often been attributed to Dean Roscoe Pound's article in the *Harvard Law Review*.[10] Pound wrote:

> An express trust is a substantive institution. Constructive trust, on the other hand, is purely a remedial institution. As the chancellor acts *in personam*, one of the most effective remedial expedients at his command was to treat a defendant as if he were a trustee and put pressure upon his person to compel him to act accordingly.

8 On closer reading, Pound was writing purely about US law and was not engaged in a comparative analysis of English and US law. Furthermore, Pound did not purport to make a distinction between an institutional and a remedial constructive trust. In fact, Dean Pound thought both the express and the constructive trust were institutions. It was probably Prof Ronald Maudsley, a distinguished English equity scholar writing in 1959 in the *Law Quarterly Review*, who first pointed to a dichotomy between the institutional and the remedial constructive trust. Maudsley asserted:[11]

> Modern American legal thought thinks more of a constructive trust as a remedy, but admits that occasionally it can be an institution. English law has always thought of a constructive trust as an institution, a type of trust.

9 On reflection, this supposed difference between institutional and remedial constructive trusts is a false distinction. With all respect to Maudsley, the error stems from a misreading of Pound's work. Pound

10 R Pound, "The Progress of the Law – Equity" (1919–20) 33 Harv L Rev 420 at 420–421.

11 R H Maudsley, "Proprietary Remedies for the Recovery of Money" (1959) 75 LQR 234 at 237. See also D Waters, *The Constructive Trust: The Case for a New Approach in English Law* (Athlone Press, 1964) at pp 9–19.

evidently thought that both express and constructive trusts were institutions, albeit that the latter was a remedial institution. Also, the word "institution", as used in this context, is unduly confusing. Craig Rotherham believes that the word institution here means merely a matter of established practice.[12] If this is the correct understanding of the word "institution", then it does not seem very advantageous to describe a constructive trust as being remedial or institutional. Professor Peter Birks likewise admitted to being "floored" by the choice of the term "institution" to describe the constructive trust. In his view, laws can be viewed as institutions because they set up "an intelligible structure for achieving certain ends". However, this meaning of institutions does not take us very far, nor does it necessarily add to our comprehension of the constructive trust. Birks thought the term most inappropriate and, in this context, unusable.[13]

10 In any case, the dichotomy between an institutional and a remedial constructive trust is unhelpful because it is inaccurate. *All* forms of constructive trust are in a sense remedial. As Deane J explained in *Muschinski v Dodds*:[14]

> Where an equity court would retrospectively impose a constructive trust by way of equitable remedy, its availability as such a remedy provides the basis for, and governs the content of, its existence *inter partes* independently of any formal order declaring it or enforcing it. In this more limited sense, the constructive trust is also properly seen as both 'remedy' and 'institution'. Indeed, for the student of equity, there can be no true dichotomy between the two notions …

11 Therefore I would argue that the terminology of "institutional constructive trust" should be abandoned in Singapore. However, this appears to be a move that may be undertaken only by the Singapore Court of Appeal. This is because the highest courts in England and Singapore have continued to refer to the dichotomy between an institutional constructive trust and a remedial constructive trust in relatively recent decisions.

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12 C Rotherham, *Proprietary Remedies in Context* (Hart, 2002) at p 12.

13 P Birks, "Can Sense Be Made of the Remedial Constructive Trust?" (paper delivered at the University of Western Australia Law School on 22 September 1999). *Cf* L Smith, "Philosophical Foundations of Proprietary Remedies" in *Philosophical Foundations of the Law of Unjust Enrichment* (R Chambers *et al* eds) (Oxford, 2009) at p 281 for a defence of the constructive trust based on historical institutional practices and an understanding of the law of obligations.

14 (1985) 160 CLR 583 at 614.

B. The Singapore cases on the remedial constructive trust

12 The House of Lords' decision in *Westdeutsche Landesbank Girozentrale v Islington LBC*[15] is the most significant case on the remedial constructive trust in recent times.[16] *Westdeutsche* has been cited a number of times in Singapore and it is therefore profitable to examine this decision in detail. In this case, the claimant bank entered into an interest rate swap contract with the defendant who was a local authority. Unfortunately, the contract was *ultra vires* the defendant: local authorities in England were not empowered to enter into such contracts. In this swap contract, the claimant had paid a tranche of money to the defendant. Since the contract was *ultra vires*, the claimant brought an action against the defendant for restitution of the money paid plus compound interest. One of the grounds put forward in support of the claim for compound interest was the assertion that a resulting trust had arisen in favour of the claimant pursuant to the *ultra vires* contract. This assertion was rejected. What is crucial to the discussion at hand is that although Lord Browne-Wilkinson said that a resulting trust was inappropriate on the facts of this case, he hinted that the remedial constructive trust may provide a more satisfactory doctrinal vehicle for developing the law. On the difference between an institutional and a remedial constructive trust, Lord Browne-Wilkinson explained:

> Under an institutional constructive trust the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such trust having arisen (including the potentially unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion. A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court.

13 His Lordship pointed out that the remedial constructive trust may be tailored to the circumstances of the case, allowing the court to take into account third party rights and all appropriate defences. Lord Browne-Wilkinson said, moreover, that whether English law should follow the US and Canada in adopting the remedial constructive

15 [1996] AC 669 (noted H Tjio, "Swaps: Compound Interest and Equitable Proprietary Interest" [1996] Sing JLS 608). See also T Etherton, "Constructive Trusts: A New Model for Equity and Unjust Enrichment" (2008) 67 CLJ 256 at 266–270.

16 See also *Thorner v Major* [2009] 1 WLR 776 at [14] and [20]–[21], where Lord Scott preferred to characterise the facts as justifying a remedial constructive trust rather than a remedy pursuant to proprietary estoppel.

trust was not directly in issue in the instant case and was a matter which remained to be explored in future.

14 Lord Browne-Wilkinson's hint that the remedial constructive trust might be a matter of further development has not been taken up in subsequent cases in England. This is due, in large measure, to the strong sentiments expressed against the remedial constructive trust in *Re Polly Peck International Plc (No 2)*.[17] This case involved an application to commence legal action against Polly Peck International Plc ("Polly Peck"), which was an insolvent company under an administration order. Polly Peck's administrators objected to the claim because they contended that the draft statement of claim did not disclose a seriously arguable case under English law. One of the principal claims in that draft statement of claim was that the applicants were entitled to a remedial constructive trust over the proceeds of sale of shares held by the subsidiaries of Polly Peck. This claim was given short shrift by the Court of Appeal. Mummery LJ said: "[t]he insolvency road is blocked off to remedial constructive trusts, at least when judge driven in a vehicle of discretion." Nourse LJ was similarly emphatic and said that it was not seriously arguable that a remedial constructive trust would be imposed. His Lordship added that, even if Polly Peck had been solvent, an Act of Parliament would have been needed to authorise the variation of proprietary rights. *Polly Peck* has been followed in a number of English cases.[18]

15 In contrast to *Polly Peck*, the Singapore courts have not been overtly hostile to the concept of the remedial constructive trust. After *Westdeutsche*, the first case that considered the remedial constructive trust was *Public Prosecutor v Intra Group (Holdings) Co Inc*.[19] Mr Chotirmall was instructed by the managing director of a Panama company, Intra Group (Holdings) Co Inc ("Intra") to purchase a residential property in Tanjong Rhu Road for S$245,000 in 1979. Intra

17 [1998] 3 All ER 812 (noted P Birks, "The End of the Remedial Constructive Trust" (1998) 12 TLI 202).

18 See *OJSC Oil Company Yugraneft v Roman Arkadievich Abramovich* [2008] EWHC 2613 (Comm); *Sinclair Investment Holdings SA v Versailles Trade Finance Limited* [2007] EWHC 915; *Ultraframe (UK) Ltd v Gary Fielding* [2005] EWHC 1638; *Freeman v HM Commissioners of Customs and Excise* [2005] BCC 506; *Cobbold v Bakewell Management Ltd* [2003] EWHC 2289; *Compagnie Commerciale Andre SA v Artibell Shipping Company Limited* 2001 SC 653 OH. *Cf London Allied Holdings Limited v Anthony Lee* [2007] EWHC 2061, where Etherton J thought that although English courts would be slow to follow the US and Canadian model of the constructive trust, there is the possibility of developing a form of discretionary constructive trust based on proprietary estoppel principles.

19 [1999] 1 SLR 803 (discussed in M Hwang, A Chan & K Low, "Developments in the Law of Equity" in *Developments in Singapore Law Between 1996–2000* (K Tan ed) (Singapore Academy of Law and National University of Singapore, 2001) at pp 450–452).

gave Mr Chotirmall the purchase price and money to renovate the property. The agreement was that Mr Chotirmall would hold the property on trust for Intra. However, this trust arrangement contravened the Residential Property Act: foreign persons (including companies) are not entitled to purchase certain types of residential property in Singapore unless they have obtained approval from the Comptroller of Residential Property. Mr Chotirmall, a permanent resident in Singapore, had obtained the necessary approval from the Comptroller of Residential Property to buy the property in his own name. Nevertheless, Mr Chotirmall and Intra did not disclose the trust relationship to the Comptroller of Residential Property. The Residential Property Act specifically prohibits the creation of trusts in respect of residential property in favour of any foreign person. Without the consent of Intra, Mr Chotirmall sold the property in 1994 for S$11m. Intra lodged a police report against Mr Chotirmall and Mr Chotirmall was charged with contravening the Residential Property Act. The Commercial Affairs Department took action to locate and seize the proceeds of the sale. Counsel for Intra argued that even though no express trust could arise with respect to the property, Intra was the beneficiary of a constructive trust of the proceeds of the sale. Yong Pung How CJ rejected this argument, saying that if the Residential Property Act does not permit Intra's claim "to bite on the property, neither can it bite on the proceeds. A proprietary claim premised on a constructive trust cannot … 'lay dormant': it either exists or it does not".[20] Yong CJ noted Lord Browne-Wilkinson's comments in *Westdeutsche* on the possibility of developing the remedial constructive trust. The Chief Justice said he did not propose to consider the applicability of the doctrine of remedial constructive trust in the present case. Thus, in contrast to the hostile attitude of the English Court of Appeal in *Re Polly Peck*, the development of the remedial constructive trust remains a possibility in Singaporean jurisprudence.

16 The first Singapore case to grapple with the remedial constructive trust in any meaningful way was *Ching Mun Fong v Liu Cho Chit.*[21] In this case, the plaintiff, Madam Ching, sued the defendant, Mr Liu, on behalf of her late husband, Mr Tan. The plaintiff prayed for a declaration of remedial constructive trust over the assets of the defendant. The allegation was that Mr Tan had agreed to buy land from Mr and Mrs Liu at a price of "$3.8m net of tax". Toward this end, Mr Tan paid Mr Liu US$642,451.04 as part of the purchase price in 1981. It turned out that neither Mr nor Mrs Liu had any interest in the

20 [1999] 1 SLR 803 at [26].

21 [2001] 3 SLR 10 (discussed in M Hwang, A Chan & K Low, "Developments in the Law of Equity" in *Developments in Singapore Law Between 1996–2000* (K Tan ed) (Singapore Academy of Law and National University of Singapore, 2001) at pp 451–455).

land. The plaintiff's claim in the present case was characterised as a claim for money had and received on the ground that the money was paid pursuant to: (a) a mistaken assumption that Mr and Mrs Liu had an interest in the land; and/or (b) a consideration that had totally failed. The defendant attempted to strike out the claim on the basis that it was time-barred. In order to take advantage of a more favourable limitation period,[22] the plaintiff argued that the court should declare a constructive trust over the sum of US$642,451.04 paid to Mr Liu. L P Thean JA refused to entertain the plea of remedial constructive trust. The following principles seem to emerge from the judgment.

> (a) "[A] remedial constructive trust is a restitutionary remedy which the court, in appropriate circumstances, gives by way of equitable relief."[23]
>
> (b) "[T]he payee's conscience must have been affected, while the moneys in question still remain with him."[24]
>
> (c) Where "the payee learns of the mistake only after the moneys have got mixed with other funds or dissipated, no constructive trust in respect of these moneys can arise. This is because there would no longer be an identifiable fund for the trust to bite."[25]

17 On the facts, the money which was paid had not been intended to be kept distinct as an identifiable fund. Furthermore, the money had already been spent or mixed with Mr Liu's other funds. The Court of Appeal therefore held that no remedial constructive trust could be declared on the facts of this case. *Ching Mun Fong* is a significant ruling because it does not reject outright the concept of the remedial constructive trust. Rather, L P Thean JA attempted to lay down some guiding principles as to when a declaration of remedial constructive is inappropriate, namely, when the funds were spent or mixed by the defendant.

18 The difficult case of *Comboni Vincenzo v Shankar's Emporium (Pte) Ltd*[26] ("*Comboni*") is also relevant to this discussion of the remedial constructive trust. Mr Comboni, the first plaintiff, received an unsolicited email from Mr Nsugbe claiming that Mr Nsugbe's murdered father had left US$20m with a security firm in South Africa and that he was looking for assistance in investing the money. Mr Comboni, a retired banker, licensed financial trustee and an Italian solicitor, offered his professional services to Mr Nsugbe. Mr Comboni was also a

22 Section 22 of the Limitation Act (Cap 163, 1996 Rev Ed).
23 [2001] 3 SLR 10 at [36].
24 [2001] 3 SLR 10 at [36].
25 [2001] 3 SLR 10 at [36].
26 [2007] 2 SLR 1020.

director of the second plaintiff, GB & Associates Inc ("GB"). As a result of a meeting between Mr Comboni and Mr Nsugbe, GB signed an investment management agreement with Mr Nsugbe. Before money was transferred to GB for investment purposes, Mr Comboni was instructed to make (and did make) three payments to a Singapore company, Shankar's Emporium (Pte) Ltd ("Shankar") as the cost of cover for an insurance bond to insure the money to be remitted to GB. It later transpired that Mr Comboni had been the victim of a massive and elaborate fraud. Shankar claimed that it was not privy to the fraud and had no knowledge of any wrongdoing. Shankar's version of the events was that Shankar traded with a Nigerian company called Liko. Liko was indebted to Shankar and would frequently instruct third parties to pay Shankar. Shankar alleged that once payment was made by third parties like GB, Shankar would extend further credit and release bills of lading to Liko.

19 In *Comboni*, Kan Ting Chiu J thought that although there were doubts as to whether the remedial constructive trust was part of English law, the remedial constructive trust was certainly part of the law of Singapore.[27] The learned judge said that in the context of a remedial constructive trust the vital issues were "what does it mean for a recipient's conscience to be affected, and second whether the defendant's conscience was in fact affected in this case". Kan J then went on to discuss the claim based on knowing receipt and the level of knowledge required to establish knowing receipt. On the facts, Kan J found the defendant's conscience not to be affected by the fraudulent scheme. Although the defendant was aware of the possibility of fraud, the defendant did not have actual or wilful knowledge of the fraud. As such, there was *prima facie* no liability. However, Kan J found that there was liability in respect of a sum of US$103,043.39, which was still in the defendant's hands at the date of trial. Kan J reasoned that, at the end of the trial, the defendant must have known that these remittances were tainted by fraud. Applying Lord Browne-Wilkinson's judgment in *Westdeutsche Landesbank Girozentrale v Islington LBC*,[28] Kan J held that the recipient's knowledge of the fraud at the end of the trial was unconscionable. Hence, the defendant became a constructive trustee of the sum of US$103,043.39.

20 With respect, Kan J's analysis in *Comboni* seems to be a conflation of two very distinct kinds of claim relating respectively to liability for knowing receipt and the imposition of a remedial constructive trust.[29] The prerequisite of liability for knowing receipt is

27 [2007] 2 SLR 1020 at [52].
28 [1996] AC 669 at 705.
29 See T M Yeo, "Restitution" (2007) 8 SAL Ann Rev at 377–381, paras 20.44–20.56.

receipt of trust property[30] or property impressed with a fiduciary duty.[31] Without the satisfaction of this essential requirement, there can be no liability for knowing receipt. It is erroneous to link this inquiry to the remedial constructive trust. The remedial constructive trust is a very different creature. It is a form of a *proprietary* remedy. A claimant will usually argue for a remedial constructive trust when the recipient is insolvent in order to gain priority over the rest of the recipient's creditors. Here, however, there was no need for a remedial constructive trust to be asserted as it did not appear that Shankar was in financial difficulty. A personal claim in unjust enrichment based on mistake would have sufficed. The conflation of knowing receipt and remedial constructive trust was unnecessary. On the facts, it is very difficult to justify the defendant's liability for knowing receipt as there was no trust property or property impressed with a fiduciary obligation.

21 Kan J's finding in *Comboni* that the defendant was liable in respect of US$103,043.39 is undoubtedly correct. However, the manner in which Kan J reached this conclusion is controversial. Ultimately, this case should have been analysed on the principle of unjust enrichment.[32] The framework of analysis should have been as follows: (a) Was there an enrichment? (b) Was the enrichment at the plaintiff's expense? (c) Was there a recognised ground of restitution? and (d) Were there any defences?[33] Questions (a) and (b) are relatively uncontroversial in this context. Similarly, inquiry (c) is also satisfied because mistake is a recognised "unjust factor" in Singapore.[34] The main issue in this case would be whether the defendant had changed its position[35] in good faith on the receipt of the moneys when it credited the sums of money to several Nigerian parties. In respect of the US$103,043.39, there was clearly no change of position as the alleged change of position (loss suffered as a result of US freezing order proceedings) was too tenuous to be linked to the receipt of the moneys. With respect, *Comboni* is a case where concepts of knowing receipt, unconscionability and the remedial constructive trust were unnecessarily conflated. This decision represents

30 See *Caltong (Australia) Pty Ltd v Tong Tien See Construction Pte Ltd* [2002] 3 SLR 241.

31 *CMS Dolphin Ltd v Simonet* [2001] BCLC 704.

32 On the law of unjust enrichment applying in Singapore, see *eg Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd (No 2)* [2002] 3 SLR 488.

33 See *eg Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd (No 2)* [2002] 3 SLR 488; *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] AC 221 at 227.

34 *MCST No 473 v De Beers Jewellery Pte Ltd* [2002] 2 SLR 1.

35 On change of position, see *Lipkin Gorman v Karpnale* [1991] 2 AC 548; *Seagate Technology Pte Ltd v Goh Han Kim* [1995] 1 SLR 17 (noted T M Yeo, "Restitution, Change of Position and Compensation" [1995] Sing JLS 209). See also J Palmer, "Chasing the Will-o'the-Wisp? Making Sense of Bad Faith and Wrongdoers in Change of Position" [2005] 13 RLR 53; H W Tang, "The Role of Negligence and Non-Financial Detriment in the Law of Unjust Enrichment" [2006] RLR 55.

a missed opportunity to develop Singapore's law of unjust enrichment and especially the change of position defence.

22 Before leaving the Singapore cases on the remedial constructive trust, it is also worth mentioning the case of *Re Pinkroccade Educational Services Pte Ltd*.[36] Although not couched in terms of remedial constructive trust, this case adopted Lord Browne-Wilkinson's rationalisation of *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*[37] in *Westdeutsche Landesbank Girozentrale v Islington LBC*.[38] The claim arose in the context of the winding up of Pinkroccade Educational Services Pte Ltd ("Pinkroccade"). The claimant, PT HM Sampoerna TBK ("Sampoerna"), an Indonesian company, had engaged an Australian company, Pink Elephant International Pte Ltd ("Pink Elephant"), to conduct various courses for its staff in Indonesia. For this service Pink Elephant rendered an invoice for AUD$135,608 to Sampoerna's Singapore office. Sampoerna instructed its bank to make a payment of AUD$112,472 on the invoice. Unfortunately, the instruction incorrectly cited the bank account of Pinkroccade (then known as PDA Pink Elephant Pte Ltd). The payment was made on 30 January 2002 and Sampoerna realised its mistake on 8 February 2002. Pinkroccade was insolvent by January and was already preparing to go into voluntary winding up. The liquidators were formally appointed on 18 March 2002 when the special resolution to wind up the company was passed, but even by early March the company was effectively inoperative and the liquidators had already begun to prepare for Pinkroccade's liquidation. What is relevant in the present case is that when the (as yet unappointed) liquidators were informed of the mistake by Sampoerna, they held themselves out as being in a position to deal with the matter.

23 Undoubtedly, Sampoerna had a valid claim to recover the money as the funds were paid under a mistake. However, such a personal claim would have left Sampoerna in the position of an unsecured creditor and therefore unlikely to be able to recover the full sum. The case therefore focused on whether Sampoerna could somehow step outside the statutory scheme of distribution. This Sampoerna sought to do in two ways: first, by arguing that the *Ex parte James*[39] principle applied; and second, by claiming that a constructive trust had arisen on the facts of the case. It is the second argument that is relevant to this paper. Sampoerna's argument on the constructive trust proceeded in two stages. First, Sampoerna attempted to rely on the holding of *Chase Manhattan* itself, *viz* a mistaken payer retains an

36 [2002] 4 SLR 867 (noted by T E Chan, "Revisiting Ex Parte James" [2003] Sing JLS 557).
37 [1981] Ch 105.
38 [1996] AC 669.
39 (1874) LR 9 Ch App 609. See also *Re PCChip Computer Manufacturer (S) Pte Ltd* [2001] 3 SLR 296, which applied this decision.

equitable interest in the moneys so paid, arguing that this principle had been applied in Singapore by Goh Joon Seng J in *Standard Chartered Bank v Sin Chong Hua Electric & Trading Pte Ltd*.[40] Lee Seiu Kin JC (as he then was) rejected this argument. The judge took the view that Goh J had not relied on *Chase Manhattan* for the holding that a mistaken payer retained an equitable interest in the moneys so paid, but rather for the proposition that such an interest allowed the plaintiff in *Standard Chartered Bank v Sin Chong Hua Electric & Trading Pte Ltd* to trace the money. Lee JC preferred the view of Lord Browne-Wilkinson in *Westdeutsche Landesbank* to the effect that mere receipt of a mistaken payment, without knowledge of the mistake, was incapable of triggering the declaration of a constructive trust. On the facts, the defendant had knowledge that the moneys were paid by mistake before the winding-up resolution was passed. Furthermore, the moneys were in an identifiable fund in a separate account which was not mixed with the other funds of the company. This last factor was given special significance by Lee JC. Finally, Lee JC also pointed out that this was a situation where there was no commercial or contractual relationship between Sampoerna and Pinkroccade; it was simply a case of a mistaken payment to a third party. Thus, Lee JC declared that Pinkroccade held the moneys on a constructive trust for the benefit of Sampoerna prior to winding up.

C. Reflections on the remedial constructive trust

24 Ultimately, the debate as to whether the constructive trust is institutional or remedial in nature conceals the real question at hand: what is the appropriate methodology for dealing with the future development of the law in this area?[41] In other words, is it legitimate to admit new categories of case where a constructive trust may be declared and, if so, how are these new categories determined? This issue opens up difficult doctrinal issues and philosophical problems of accommodating public policy in judicial law making. The latter is especially difficult as the declaration of a constructive trust has important implications when the defendant is insolvent. These tricky problems are not new questions, nor are they unique to the law of constructive trusts. For example, tort law has struggled for many years to articulate the proper approach in developing novel categories of duty of care and in determining how public policy should be taken into account in this endeavour.[42] While

40 [1995] 3 SLR 863.

41 See generally D Wright, *The Remedial Constructive Trust* (Butterworths, 1998), who attempts to rationalise the appropriate factors to consider in choosing the remedy.

42 For a recent tort decision in Singapore considering this issue, see *Spandeck Engineering (S) Pte Ltd v Defence Science and Technology Agency* [2007] 4 SLR 100 (noted L Joseph, "Establishing a Duty of Care: Singapore's Single, Two-stage Test – *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*" (2008) 20 SAcLJ 251; K Amirthalingam, "Lord Atkin and the Philosopher's Stone: The Search for a Universal Test for Duty" [2007] Sing JLS 350.

this debate has taken place robustly in tort law, a similar debate has not been fully ventilated in the law of constructive trust. Unfortunately, discussion of the development of new applications of the constructive trust has been stunted by the assertion that English law recognises only an institutional constructive trust and not a remedial constructive trust. The former represents a conservative point of view in developing the law in this area, *ie* a constructive trust will be declared only if there are precedents to support the declaration of such a trust; otherwise, it is illegitimate to declare a constructive trust because to do so is to adopt a remedial view of the constructive trust which is foreign to English law. A strict adherence to the supposed rule that the law recognises only the institutional constructive trust means that the law may *never* admit new categories of situation where it is appropriate to declare a constructive trust.

25 This traditional approach to constructive trust jurisprudence, in referring to the dichotomy between the institutional and the remedial constructive trust, is highly unsatisfactory on many levels. First, as argued above, the terms "institutional" and "remedial" constructive trust obscure the essential question that we are facing, namely, how does the law evolve and admit new categories of situation where the declaration of a constructive trust is appropriate. It is by no means clear how reference to the dichotomy between the institutional and remedial constructive trust assists in this inquiry. In fact, I would argue that the continued reference to this supposed dichotomy is damaging to constructive trust jurisprudence because it conceals the real question. Second, the dogmatic assertion that the law recognises only institutional constructive trusts and not remedial constructive trusts is tantamount to no more than a bald pronouncement that the law will *never* develop new categories of the constructive trust. While there may be defensible reasons for taking this position, it is better to articulate the basis for this conservative stance rather than simply to make a dogmatic assertion that no new categories are permitted. It is also doubtful whether such a conservative approach to the development of the law of constructive trust is sustainable. There is no reason to suppose that the law is so perfect that it should be "frozen" in time in terms of specific pre-existing categories; the law must be able to grow to meet changing social circumstances. It is surely impossible for judges and jurists to pronounce that no expansion of the law is ever allowed. Furthermore, there is a logical fallacy to this approach. If this restrictive approach had been taken from the very beginning, the law of constructive trust would never have developed. Finally, as argued above, the terms "institutional" and "remedial" are unhelpful and, ultimately, inaccurate terms to describe the constructive trust. *All* forms of the constructive trust are, in a sense, remedial in nature. A very stark illustration of this fact is the

constructive trust which may be declared where an equity has arisen in a proprietary estoppel claim.[43] A constructive trust in this category is no doubt an institutional constructive trust because there are many established precedents supporting this proposition.[44] However, the law on whether to declare a constructive trust in the context of proprietary estoppel is remedial and discretionary. Judges have said, in deciding on the award of remedies, that they would order the minimum equity to do justice between the parties,[45] look at the context of the relationship to determine whether the case is a "bargain" or "non-bargain case",[46] the certainty of the representation,[47] the proportionality between the remedy and detriment,[48] whether the equity has been spent,[49] the need for a clean break, and so on.[50] Thus, even within the so-called institutional constructive trust, we are able to discern a very strong remedial flavour to the declaration of a constructive trust.

26 What then is the proper approach to developing new categories of constructive trust in Singapore? It is suggested that general guidance may be obtained from V K Rajah JA's decision in *Lau Siew Kim v Yeo Guan Chye Terence*.[51] Although this is a decision on resulting trust and the presumption of advancement, there are valuable observations on the general principles of equity that may be pertinent to the issue at hand. Several themes on the future development of equity emerge from this important decision. First, the theoretical basis of the existence of equity is to function as a "body of principles which has evolved progressively to mitigate the severity sometimes occasioned by the rigid application of the rules of the common law". Invoking Aristotle, the learned judge saw

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43 See *eg Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR 292. On the remedy granted when an equity had arisen, see generally S Gardner, "The Remedial Discretion in Proprietary Estoppel – Again" (2006) 122 LQR 492; A Robertson, "The Reliance Basis of Proprietary Estoppel Remedies" [2008] Conv 295; R Walker, "Which Side 'Ought to Win'? – Discretion and Certainty in Property Law" [2008] Sing JLS 229; K Gray & S F Gray, *Elements of Land Law* (Oxford, 5th Ed, 2009) at pp 1240–1258.

44 See *eg* cases discussed in K Gray & S F Gray, *Elements of Land Law* (Oxford, 5th Ed, 2009) at pp 1253–1254. *Cf Thorner v Major* [2009] 1 WLR 776 at [14] and [20]–[21].

45 *Crabb v Arun DC* [1976] Ch 179 at 198. Applied in Singapore in *LS Investment Pte Ltd v Majlis Ugama Islam Singapura* [1998] 3 SLR 754; *Ong Beng Chong v Jayaram Victoria* [2009] SGHC 66.

46 *Jennings v Rice* [2003] 1 P & CR 100.

47 *Jennings v Rice* [2003] 1 P & CR 100. Applied in *Singapore in Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR 292.

48 *Jennings v Rice* [2003] 1 P & CR 100. Applied in Singapore in *Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR 292. See also *Yeoman's Row Management Ltd v Cobbe* [2008]1 WLR 1752 (noted by B McFarlane & A Robertson, "The Death of Proprietary Estoppel" [2008] LMCLQ 449).

49 *Chiam Heng Luan v Chiam Heng Hsien* [2007] 4 SLR 305.

50 *Gillett v Holt* [2001] Ch 210.

51 [2008] 2 SLR 108 (noted K Low, "Apparent Gifts: Re-examining the Equitable Presumptions" (2008) 124 LQR 369).

this branch of jurisprudence as a "rectification of law where the law falls short by reason of its universality". Second, there is a desire to develop equity in a principled and certain manner and avoiding "palm tree" justice, where the law is dispensed on the basis of an individual judge's subjective view of fairness. Finally, care must be taken so as not to calcify equity so that it is incapable of developing in a way which mitigates the rigours of the common law. These twin policy concerns (of maintaining flexibility and being principled) present an inherent tension in equity. In balancing these competing policies, V K Rajah JA said "courts should be principled and pragmatic when resolving the tension of applying an unguided and untrammelled discretion as an antidote to the blind acceptance of inflexible hard and fast rules". Reiterating Bagnall J's iconic statement in *Cowcher v Cowcher*[52] that "[t]his does not mean that equity is past childbearing; simply that its progeny must be legitimate – by precedent out of principle", Rajah JA identified four primary perspectives as guidance for the court in the future development of equitable principles. The learned judge said that when a court is presented with a legal dispute, it must pay regard to: (a) precedent; (b) principle; (c) policy; and (d) pragmatism. Rajah JA succinctly said that "[p]rincipled pragmatism should be the key to the court's approach in the application of equitable principles". It is suggested that all these themes are relevant to discussion of the future development of the constructive trust.

27 Identifying the basic themes relevant to how the law of constructive trust should evolve is just the starting point of a difficult inquiry. In this paper, I do not claim to be able to offer a solution of all the issues related to the constructive trust. Rather, the purpose of this paper is to provide a framework for the development of the law and highlight the unresolved problems which have hitherto been obscured by the dogmatic assertion that English law recognises only the institutional constructive trust and not the remedial constructive trust. Diving down to the particulars, there are many doctrinal and policy concerns which remain unsettled. The doctrinal difficulties include: (a) the confusion between the elements of a remedial constructive trust and knowing receipt;[53] and (b) the level and the timing of the knowledge that is required to affect the conscience of the recipient in a case of a mistaken payment. Issue (a) is relatively easy to sort out. As argued above, the constructive trust, at least used in a proprietary sense, ought to be disentangled from the action of knowing receipt. As to the second issue, the prescription of the relevant level of knowledge on the recipient's part in the context of a mistaken payment is slightly more difficult. What forms of knowledge apart from actual knowledge should compel the courts to declare a constructive trust? Also, what is the

52 [1972] 1 WLR 425 at 430.

53 *Comboni Vincenzo v Shankar's Emporium (Pte) Ltd* [2007] 2 SLR 1020.

relevant time to assess the level of knowledge? On a more general and philosophical level, the questions that need to be addressed are as follows. What is the justification for the declaration of a constructive trust in certain cases? Should public policy factors be taken in developing the law of constructive trust? If so, what is the relevance in this inquiry of the insolvency of the recipient? Are third parties' interests (*eg* rights of unsecured creditors) relevant in deciding whether to declare a constructive trust? Apart from mistaken payments, should a constructive trust be declared in other situations where the transferor's intent can be said to be vitiated? How do we deal with the criticism that in declaring a constructive trust, the courts are engaging in an exercise which is essentially an illegitimate redistribution of property rights between private parties? The Singapore Court of Appeal will have to deal with these difficult doctrinal and policy inquiries at some point in time if they wish to develop the law of constructive trust coherently.

IV. The explanatory puzzle

28 Quite apart from imprecise terminology and being bogged down in the unhelpful institutional and remedial debate, constructive trust jurisprudence has also not benefitted from a sound theoretical foundation. The constructive trust seems to arise in a wide array of seemingly unconnected categories. A non-exhaustive list includes situations where there is:

(a) a binding contract for the disposition of an interest in land;[54]

(b) a breach of trust;[55]

(c) a transfer of property subject to a condition;[56]

54 *Lysaght v Edwards* (1876) 2 Ch D 499. Applied in Singapore in *Cheng-Wong Mei Ling Theresa v Oei Hong Leong* [2006] 2 SLR 637.

55 *Keech v Sandford* (1726) Sel Cas T King 61.

56 *Binions v Evans* [1972] Ch 359; *Lyus v Prowsa Developments* [1982] 1 WLR 1044. These cases have been applied in Singapore in *Ho Kon Kim v Lim Gek Kim Betsy* [2001] 4 SLR 340. See also *Leong Sze Hian v Teo Ai Choo* [1984–1985] SLR 345. However, the courts in *Leong Sze Hian* chose to rationalise the trust as an express trust. For secondary literature on this issue, see S Bright, "The Third Party's Conscience in Land Law" [2000] Conv 398, B McFarlane, "Constructive Trusts Arising on a Receipt of Property *Sub Conditione*" (2004) 120 LQR 667.

(d) an acquisition of property due to the fraudulent[57] or unconscionable[58] conduct of the defendant;

(e) a breach of fiduciary duty;[59]

(f) a common intention to share property, which common intention has been relied on to the detriment of the plaintiff;[60]

(g) a mistaken payment in circumstances where the defendant has knowledge of the mistake and the moneys are still identifiable in a segregated fund;[61]

(h) an equity has arisen pursuant to a proprietary estoppel claim;[62]

(i) a traceable equitable proprietary interest vesting in the plaintiff;[63]

(j) a *Pallant v Morgan* equity;[64] and

(k) a breach of confidence.[65]

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57 *Rochefoucauld v Boustead* [1897] 1 Ch 196. See N Hopkins, "How Should We Respond to Unconscionability? Unpacking the Relationship between Conscience and the Constructive Trust" in *Contemporary Perspectives on Property* (M Dixon & G Griffiths eds) (Oxford, 2007) at p 3.

58 *Chase Manhattan Bank v Israel-British Bank* [1981] Ch 105, as rationalised by *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 715. See also *Standard Chartered Bank v Sin Chong Hua Electric & Trading Pte Ltd* [1995] 3 SLR 863 (noted A Loke, "Reclaiming Moneys Paid under Fraud in Documentary Credits" [1996] Sing JLS 251). It would seem here that a constructive trust was declared over the traceable proceeds of the mistaken payment.

59 *Boardman v Phipps* [1967] 2 AC 46 at 117 (*per* Lord Guest). On fiduciary agents and bribes see *Sumitomo Bank Ltd v Kartika Ratna Thahir* [1993] 1 SLR 735 (noted H Tjio, "Rethinking the Personal and Proprietary Distinction" [1993] Sing JLS 198). *Cf* D Crilley, "A Case of Proprietary Overkill" [1994] RLR 57.

60 Considered in *Tan Thiam Loke v Woon Swee Kheng Christina* [1992] 1 SLR 232 but held not to be applicable on the facts of the case. For a recent restatement of the law in the House of Lords, see *Stack v Dowden* [2007] 2 AC 432.

61 *Chase Manhattan Bank v Israel-British Bank* [1981] Ch 105, as rationalised by *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 715. Applied in Singapore in *Re Pinkroccade Educational Services Pte Ltd* [2002] 4 SLR 867.

62 See for example *Re Basham* [1986] 1 WLR 1498; *Gillett v Holt* [2001] Ch 210.

63 *Foskett v McKeown* [2001] AC 102 (noted H W Tang, "*Foskett v McKeown* – Hard Nosed Property Rights or Unjust Enrichment" (2001) 25 MULR 295). See also *Hongkong and Shanghai Banking Corp Ltd v United Overseas Bank Ltd* [1992] 2 SLR 495.

64 [1953] Ch 43. Considered in *Ong Heng Chuan v Ong Boon Chuan* [2003] 2 SLR 469 but held not to be applicable on the facts of the case.

65 *LAC Minerals v International Corona Resources* (1989) 61 DLR (4th) 14. *Cf* H W Tang "Confidence and the Constructive Trust" (2003) 23 LS 135. See also D Sheehan, "Information, Tracing Remedies and the Remedial Constructive Trust" [2005] RLR 82; G Wei, "Breach of Confidence, Downstream Losses, Gains and Remedies" [2005] Sing JLS 20; M Conaglen, "Thinking about Proprietary Remedies for Breach of Confidence" [2008] IPQ 82–109.

29 A quick perusal of the categories above suggests that these categories appear to be no more than a rag-bag of unrelated situations. The challenge for the jurist is to explore whether there are any underlying similarities between these categories. Otherwise, it would be very difficult to develop the law in this area in a coherent manner. In this section, I consider the various explanations for the existence of the constructive trust.

A. The sceptical thesis

30 The first school of thought is the "sceptical thesis"[66] advanced by Tony Oakley.[67] Oakley is unapologetic about the lack of rationale in this area of the law. He points out that the constructive trust "arises quite independently of the intention of any parties. Exactly which trusts fall within this definition cannot be stated with the same precision."[68] In support of this argument, Oakley cites Edmund Davies LJ in *Carl-Zeiss Stiftung v Herbert Smith (No 2)*,[69] who said:

> English law provides no clear and all-embracing definition of a constructive trust. 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.

31 Such a flexible philosophy towards the constructive trust is also consistent with the US jurisprudence on constructive trust. In an often quoted passage in *Beatty v Guggenheim Exploration Co*,[70] Justice Cardozo said: "A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of the relief."

32 Is the search for general principles in this area an unnecessary inquiry? I would suggest not. While I have sympathy for the argument that the law must not be stated in too rigid terms[71] so as to preclude the future development of the law, there is the corresponding danger of

66 This term is borrowed from G Elias, *Explaining Constructive Trusts* (Oxford, 1990) at p 2.

67 A J Oakley, *Constructive Trusts* (Sweet & Maxwell, 1997). See also A J Oakley, "Restitution and Constructive Trust: A Commentary" in *Restitution, Past Present and Future* (Hart, 1998) (W R Cornish *et al* eds) at p 219 and p 220 where he argues that the most accurate description of the law in England is "the constructive trust continues to be seen as an institutional obligation attaching to property in certain circumstances" (quoting D Waters).

68 A J Oakley, *Constructive Trusts* (Sweet & Maxwell, 1997) at p 1.

69 [1969] 2 Ch 276 at 300.

70 122 NE 378 at 381 (NY 1919). See also C Saiman, "Restitution and the Production of Legal Doctrine" (2008) 65 Wash & Lee L Rev 993 at 1017–1031 for a recent review of the US jurisprudence on the constructive trust.

71 *Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR 108.

being unprincipled when the law is left "deliberately vague". By refusing to state general principles, the law risks being accused of dispensing palm-tree justice between litigants. It is difficult to think of any other area of the law where the courts have refused to set out some general guidelines. Equity, ever mindful of the charge of being unprincipled, has long asserted that its rules are not dependent on the length of the Chancellor's foot. It is apposite to pay heed to Selden's articulation in the 17th century of the usual complaint of equity: that justice was being dispensed according to the each Chancellor's differing notion of conscience.[72] Therefore, I would argue that it is incumbent on judges and jurists to attempt to rationalise the principles which animate situations where a constructive trust may be declared.

33 It may very well be that I have rather unfairly constructed a straw man argument against the sceptical thesis. Perhaps the sceptical thesis merely rejects any overarching theories which attempt to explain the constructive trust. It may be that the sceptical thesis does not reject the fact that for pre-existing categories where a constructive trust may be declared, the doctrinal rules have to be tolerably clear with some room for development to take into account new situations. For example, when we look at the common intention constructive trust, the courts have, in effect, laid down specific doctrinal principles (*ie* common intention to share the property and detrimental reliance) which would lead to the declaration of a constructive trust.[73] However, I would argue that merely having clear doctrinal principles in specific categories is not enough; it is important that in rationalising the law in this area that we take the jurisprudential inquiry to a higher plane and ask the following questions. Why does the law respond by declaring a proprietary interest in this situation? Is it to honour the agreement between the parties? Or is it because there is a policy factor in protecting people in intimate relationships? All these questions should be explored in the myriad of the categories where a constructive trust has hitherto been declared. If we are able to rationalise the various pre-existing categories, this will provide a foundation to develop future categories of the constructive trust. Without such a rationalisation, future development risks being undertaken in an incoherent and haphazard manner. For this reason, I would argue that while the sceptical thesis might be an accurate description of the law at the moment, it is not a desirable approach to take with regard to the future development of the law.

72 John Selden, *Table Talk, newly edited for the Selden Society by Sir Frederick Pollock* (Quaritch (London), 1927).

73 See *Stack v Dowden* [2007] 2 AC 432.

B. The conscience school

34 Another often cited justification of the constructive trust is that it arises due to the unconscionable conduct of the defendant. In the well-known US decision of *Beatty v Guggenheim Exploration Co*,[74] Cardozo J used this statement to describe the constructive trust:[75]

> A constructive trust is the formula through which the conscience of equity finds expression. *When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.* [emphasis added]

35 A similar approach is also found in the English case law. For example, Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC*[76] said that a fundamental principle is that "equity operates on the conscience of the owner of the legal interest".

36 Absent guidelines, the objection to defining situations where constructive trust may be declared merely by reference to the unconscionable conduct of the defendant lies in the danger that this formula is too open-ended. It is incumbent on the courts to give some guidance as to how "unconscionable conduct" is identified. Unconscionable conduct must mean something more specific than a vague appeal to fairness. As La Forest J said in *LAC Minerals v International Corona Resources*:[77]

> I do not countenance the view that a proprietary remedy can be imposed whenever it is 'just' to do so, unless further guidance can be given as to what those situations may be. To allow such a result would be to leave the determination of proprietary rights to 'some mix of judicial discretion … and "the formless void of individual moral opinion"'.

37 The problem with unconscionable conduct as the basis of liability is that it is very difficult to define such conduct.[78] For example, it can be said that it is unconscionable for trustees to misuse trust property for personal gain. It can equally be said that it is

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74 122 NE 378 (NY 1919).

75 122 NE 378 (NY 1919) at 380–381. See also *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 147, where Mason CJ, and Wilson and Deane JJ, said that "the foundation for the imposition of a constructive trust … is that [the defendant's] refusal to recognise the existence of [the plaintiff's] equitable interest amounts to unconscionable conduct and … the trust is imposed as a remedy to circumvent that unconscionable conduct".

76 [1996] AC 669 at 705.

77 (1989) 61 DLR (4th) 14 at 51.

78 See *eg Royal Brunei Airlines v Tan* [1995] 2 AC 378 at 392 on the need to be clear as to what unconscionability means.

unconscionable for a person not to take proper care when driving, thereby negligently causing injury to a pedestrian. Suppose the errant driver becomes insolvent after the accident. Why is it that in the former situation, a proprietary remedy may be granted and not in the latter? The label "unconscionable conduct" without further elaboration does not clarify matters at all in this context. To give another example, liability in circumstances where proprietary estoppel may be asserted is also often described in terms of the defendant's unconscionable conduct. Yet, when we look at the particulars of a claim in proprietary estoppel, there is specific guidance in the case law to assess whether the defendant's conduct is unconscionable, *ie* the defendant must have made certain representations to the plaintiff on which the plaintiff relied to his or her detriment. Again, the criticism that the notion of unconscionable conduct is uncertain may well be totally misplaced. If Lord Browne-Wilkinson had in mind a technical meaning for the word "conscience" (as in the doctrine of proprietary estoppel), then the formulation of the constructive trust based on conscience may be salvaged.[79] As such, unconscionability can be viewed as merely a general "umbrella principle" which needs to be fleshed out.[80]

38 If the future development of the jurisprudence of the constructive trust is to be based on the unconscionable conduct of the defendant, then the ambit of what is unconscionable conduct has to be spelt out by the courts.[81] While courts may choose to keep the penumbral meaning of unconscionable conduct slightly vague in order to retain some degree of flexibility in dealing with new situations,[82] the core meaning of unconscionable conduct ought to be mapped out with sufficient clarity. Otherwise, it would be very difficult for judges to apply the law in a consistent manner or for lawyers to advise their clients effectively about their rights. It could be argued that the judges have already begun the process of stating the key elements of unconscionable conduct in this context. For example, in the case of the mistaken payment in the *Chase Manhattan* situation as rationalised by Lord Browne-Wilkinson in *Westdeutsche*, a constructive trust is said to be justified in this case because the recipient knew of the mistaken payment a matter of days after it was made. A further principle derived from the Singapore cases is that there must be a fund for the trust to

79 See W Swadling, "Property and Conscience" (1998) 12 TLI 228 for a thorough analysis of trusteeship arising without knowledge and wrongdoing of the defendant. See also R Chambers, *Resulting Trusts* (Oxford, 1997) at pp 203–210.

80 See A Phang, "Vitiating Factors in Contract Law – Some Key Concepts and Developments" (2005) 17 SAcLJ 148 (arguing consistently for a substantive "umbrella principle" of unconscionability in contract law).

81 See *eg* G Watt, "Unconscionability in Property Law: A Fairy-Tale Ending?" in *Contemporary Perspectives on Property* (M Dixon & G Griffiths eds) (Oxford, 2007) at p 117.

82 See *eg Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR 502.

"bite on".[83] In other words, the funds must be segregated before a constructive trust may be declared.

39 Nevertheless, there remains a lot of work to be done. Unconscionability can operate as the umbrella principle under which a constructive trust is declared only if the core meaning of unconscionable conduct is defined. This is a task which the courts will have to undertake in future cases. Also, it is hoped that the courts will develop constructive trust jurisprudence by exploring questions on a higher plane. In *Chase Manhattan*, for example, we should ask the following questions. Why is it unconscionable for the defendant to retain the money? Why is a proprietary response justified on the facts? Why is the knowledge of the defendant so important? Why is it so important for the funds to be segregated? A mere assertion of unconscionability does not provide the answers to these difficult questions. Without exploring these higher questions, we are left with a finite list of categories where the constructive trust may be declared. It would be very difficult to develop the law beyond these specific situations.

C. The unjust enrichment thesis

40 Another competing explanation of the constructive trust is the unjust enrichment thesis. According to Donovan Waters,[84] the constructive trust has only one aim: it reverses the unjust enrichment of a defendant. This thesis need not hold us for too long. It does not seem able to explain all the established categories of situation where a constructive trust may be declared unless we take a very expansive view of the unjust enrichment principle. Many situations where a constructive trust has been declared involve cases where the defendant has committed a wrong (*eg* a breach of fiduciary duty or fraud). If we accept that there is a distinction between wrongs and unjust enrichment claims,[85] then Waters' thesis does not have sufficient explanatory force to justify the declaration of a constructive trust in response to wrongs committed by the defendant. Of course, we could include the category of wrongs as a species of unjust enrichment in our effort to justify Waters' thesis. On reflection, it is suggested that this strategy is not desirable because it takes the focus away from the primary reason why a constructive trust is declared, *ie* the wrongfulness of the defendant's conduct.[86] It is far better to bring this factor into focus and then embark

83 *Public Prosecutor v Intra Group (Holdings) Co Inc* [1999] 1 SLR 803 at [26]; *Ching Mun Fong v Liu Cho Chit* [2001] 3 SLR 10.

84 D W M Waters, *The Constructive Trust* (Athlone Press, 1964).

85 Much valuable work was done on this issue by Peter Birks. See *eg* P Birks "The Law of Unjust Enrichment: A Millennial Resolution" [1999] Sing JLS 318.

86 R Chambers, "Constructive Trusts in Canada" (1999) 37 Alberta L Rev 173 at 177–178.

on the difficult inquiry as to why certain wrongful conduct triggers a proprietary response in law. Nevertheless, it is important to note that to reject Waters' narrow thesis that the *sole* aim of the constructive trust is to reverse a defendant's unjust enrichment is not necessarily to deny the proposition that in certain circumstances a constructive trust may well arise in response to the defendant's unjust enrichment. This latter proposition will be investigated below.

D. The Elias thesis

41 In his excellent book Dr Gbolahan Elias suggests that the aims of the constructive trust are three-fold. He argues:[87]

> The three aims are to ensure that (1) one who has chosen to dispose of his options in favour of another person should abide by the choice; (2) one who has made a pecuniary gain through another person's loss gives up the gain to the other person; and (3) one who has caused loss to another repairs the loss. These three aims will henceforth be called 'the perfection aim', 'the restitution aim', and 'the reparation aim' respectively – 'the three aims' collectively.

42 Elias's insight is an important one because it moves away from mono-causal theories of the constructive trust (*eg* unjust enrichment or unconscionable conduct) to a multi-causal theory. As a descriptive theory of the constructive trust, Elias's thesis seems to "fit" very well with the case law. The perfection aim is able to explain a number of situations where the constructive trust arises. For example, the perfectionary impulse may explain the constructive trust where: (a) there is a specifically enforceable contract to sell a unique subject matter;[88] (b) the purchaser of land expressly agrees to take subject to the interest of a third party;[89] (c) there is a common intention constructive trust;[90] and (d) an equity can be raised against the defendant by reason of proprietary estoppel.[91] The second aim of the constructive trust according to Elias's multi-causal thesis is that the constructive trust responds to the law's restitutionary impulse. A person who has made gains through another person's loss must give back such gains. It could be argued that the basis for a declaration of constructive trust in respect

87 G Elias, *Explaining Constructive Trusts* (Oxford, 1990) at p 4.

88 See *eg Lysaght v Edwards* (1876) 2 Ch D 499 (contract for sale of land). See also *Oughtred v IRC* [1960] AC 206 and *Neville v Wilson* [1996] 3 All ER 171 (contract for sale of shares in a private company).

89 *Lyus v Prowsa Developments* [1982] 1 WLR 1044; *Bahr v Nicolay (No 2)* (1988) 78 AJLR 1; *Ashburn Anstalt v Arnold* [1989] Ch 1; *Ho Kon Kim v Lim Gek Kim Betsy* [2001] 4 SLR 340.

90 The leading case in this area is *Stack v Dowden* [2007] 2 AC 432.

91 See for example *Inwards v Baker* [1965] 2 QB 29; *Hussey v Palmer* [1972] 3 All ER 744; *Re Basham* [1986] 1 WLR 1498; *Matharu v Matharu* (1994) 68 P & CR 93; *Gillett v Holt* [2001] Ch 210.

of a mistaken payment in the *Chase Manhattan* situation is essentially to reverse the unjust enrichment of the defendant. Finally, it is argued that the third aim of the constructive trust is to make reparation.[92] This could explain circumstances where a constructive trust is declared in response to wrongs such as a breach of fiduciary duty, fraud, unconscionable conduct and, possibly, a breach of confidence.

E. Reflections on explanations for the constructive trust

43 Eminent judges and scholars have struggled for many years to explain the constructive trust. In this short paper I do not pretend to offer any definitive conclusion as to which theory should be adopted in this area. Instead, the aim of the paper is merely to provide a framework or an agenda for discussion of the future development of the law. The tentative conclusion reached here is that, among all the theories explored above, both the sceptical and the unjust enrichment theses should be rejected. With regard to the sceptical thesis, the approach leaves too much discretionary space to individual judges in deciding whether to declare a constructive trust. Such an approach runs the risk of being unprincipled and does not offer any guidance for the future development of the law. The unjust enrichment theory is also rejected as the *sole* normative explanation of the myriad situations in which a constructive trust may be declared. As a theory, it does not provide a good "fit" *vis-à-vis* the case law. We are thus left with only two serious contenders – unconscionable conduct and Elias's multi-causal theory. The argument that a constructive trust is declared because of the unconscionable conduct of the defendant is certainly plausible: the reference to unconscionable conduct is certainly consistent with the language used by the courts. Nevertheless, it is the present author's view that much work remains to be done in defining the scope of what is unconscionable conduct. Furthermore, on a general level, it is hoped that the courts will explore why certain forms of unconscionable conduct trigger a proprietary response in law. Elias's multi-causal thesis, *ie* that the law of constructive trust is triggered by certain impulses, which are essentially about perfection, restitution and reparation, is also a promising rationale for the constructive trust. The multi-causality of the events which invite declarations of constructive trust is an important insight. There is reason to suspect that mono-causal theories of the constructive trust are under-inclusive in explaining the constructive trust. Elias's theory provides us with a starting point and a useful organising framework for analysis of the constructive trust. Even so, difficult questions remain, namely, why do certain perfectionary

92 See generally W Y Wong, "Restitution for Wrongs" [1998] Sing JLS 299.

aims, unjust enrichment claims[93] and wrongs[94] trigger a proprietary response in law?

V. The bankruptcy puzzle

44 One of the most contentious issues related to the constructive trust is the fact that the constructive trust claimant has priority over the general body of the defendant's creditors in the defendant's insolvency. At the risk of over-simplification, various justifications for this priority can be summarised as follows:

> (a) The property in question does not belong beneficially to the defendant and it is therefore unobjectionable to declare a constructive trust.
>
> (b) The plaintiff did not accept the risk of the defendant's insolvency.
>
> (c) If a constructive trust is not declared, the property would represent a "windfall" to the defendant's creditors. In other words, the defendant's creditors would be unjustly enriched at the expense of the plaintiff.

45 Thus, if judges are inclined to develop new categories of constructive trust in the context of the defendant's insolvency, they should be mindful of the following factors. (a) The court must scrutinise the relevant insolvency provisions in order to determine whether the court is subverting the statutory scheme of distribution by declaring a constructive trust. (b) The defendant's creditors must stand to be unjustly enriched at the expense of the plaintiff. (c) The plaintiff must also establish that he or she has not accepted the risk of the defendant's insolvency. (d) The defendant must be shown to have retained the enrichment in the form of a specific asset.

46 This is another very difficult area that remains under-investigated in the case law. Scholars are deeply divided on whether it is legitimate to declare a constructive trust in situations where the defendant is insolvent. On one view, there is no good reason why priority should be given to the plaintiff in the event of the defendant's insolvency.[95] If this approach is adopted, then the courts should be slow

93 For an excellent recent exploration of this area, see B Häcker, "Proprietary Restitution after Impaired Consent Transfers: A Generalised Power Model" (2009) 68 CLJ 324.

94 See *Soulos v Korkontzilas* [1997] 146 DLR (4th) 214 for a Canadian approach to this question. See also W Y Wong, "Restitution for Wrongs" [1998] Sing JLS 299; R Chambers, "Constructive Trusts in Canada" (1999) 37 Alberta L Rev 173 at 175–181.

95 W Swadling, "Policy Arguments for Proprietary Restitution" (2008) 28 LS 506.

to develop new categories of constructive trust. On the other hand, there is a view that there are indeed persuasive reasons why some classes of claimant (*eg* unjust enrichment claimants) should sometimes be given priority in cases of insolvency.[96] If this position is taken, then there is room for new categories of constructive trust to develop especially in the field of unjust enrichment. Again, it is beyond the scope of this essay to offer definitive views on this issue. The purpose of this section is to signpost this very important issue if new categories of constructive trust are to be developed.

VI. The Torrens puzzle

47 One of the unresolved issues unique to Singaporean and Australian jurisprudence is the question whether declarations of constructive trust over registered land are consistent with the Torrens scheme of title registration. It is axiomatic that the Torrens statute confers indefeasible title on the registered proprietor of land.[97] Indefeasibility of title may be defeated only in limited situations, *eg* where the registered proprietor was privy to fraud or forgery which led to the registration of title. The issue here is that there appears to be a clash between a declaration of a constructive trust and the principle of indefeasibility. Under Torrens jurisprudence a registered proprietor of land acquires paramount title to the land. However, a declaration of a constructive trust in favour of a third party who is not the registered proprietor seems to derogate from the principle of indefeasibility.

48 There are two prominent Singapore Court of Appeal decisions which have examined the constructive trust within the Torrens context. In the earlier of these cases, *Ho Kon Kim v Lim Gek Kim Betsy* ("*Betsy Lim*"),[98] L P Thean JA declared the defendant, a registered mortgagee, to be a constructive trustee for the plaintiff. In *Betsy Lim*, Madam Ho had an agreement with Betsy Lim that Madam Ho would sell her land to Betsy Lim. The agreement provided that Betsy would build three houses on the land and re-transfer one house to Madam Ho. Madam Ho transferred the land to Betsy. In breach of the agreement, Betsy mortgaged the house to RHB Bank ("RHB"). RHB registered their mortgage. Under the Land Titles Act,[99] a registered mortgagee has

96 For valuable work in this context, see D M Paciocco, "The Remedial Constructive Trust: A Principled Basis For Priorities Over Creditors" (1989) 68 Can Bar Rev 315; E L Sherwin, "Constructive Trusts in Bankruptcy" (1989) University of Illinois Law Review 297; C Rotherham, *Proprietary Remedies in Context* (Hart, 2002); H Dagan, *The Law and Ethics of Restitution* (Cambridge, 2004) at pp 297–328.

97 See generally Tan Sook Yee, H W Tang & K Low, *Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009), ch 14.

98 [2001] 4 SLR 340.

99 Cap 157, 1994 Ed.

indefeasibility of title. One of the issues in this case was whether the courts had the power to declare RHB to be a constructive trustee of the land for Madam Ho. L P Thean JA found the following facts to be material: (a) RHB had knowledge of the agreement between Betsy and Madam Ho; (b) RHB made an allowance in respect of Madam Ho's interest and discounted this interest in their evaluation of the property; and (c) in the agreement between RHB and Betsy, RHB acknowledged and committed themselves to honour Madam Ho's interest in the property. L P Thean JA therefore declared a constructive trust in favour of Madam Ho. This decision can be said to support the view that constructive trust claims may be accommodated within the Torrens land system. In contrast, the more recent decision of the Court of Appeal in *United Overseas Bank Ltd v Bebe bte Mohammad*[100] seems to deprecate this approach. Chan Sek Keong CJ said the "language of this subsection [s 46(2)(*c*) of the Land Titles Act][101] seems to apply only to express trusts and not constructive trusts". Although the Chief Justice did not overrule *Betsy Lim,* Chan CJ preferred to rationalise *Betsy Lim* as a case which could be understood as an instance of Torrens fraud. In other words, Madam Ho's interest prevailed over RHB because RHB's conduct could be characterised as fraudulent within Torrens jurisprudence.

49 Does a declaration of a constructive trust remain a possibility after *United Overseas Bank v Bebe*? I have argued elsewhere[102] that not all forms of constructive trust claim are inconsistent with indefeasibility of title. The key issue is to determine whether the claim detracts from the general principle of indefeasibility.[103] Constructive trust claims are tricky because they arise in a myriad of circumstances. It is my suggestion that not all forms of constructive trust undermine the principle of indefeasibility. For example, constructive trusts which are declared on the basis of wrongdoing by the defendant are not precluded by the Torrens statute. This is because indefeasibility of title was never meant

100 [2006] 4 SLR 884 at [81] (noted B Crown, "Back to Basics: Indefeasibility of Title under the Torrens System" [2007] Sing JLS 117).

101 Section 46(2)(*c*) of the Land Titles Act (Cap 157, 1994 Rev Ed) stipulates that an exception to indefeasibility arises where a person seeks to enforce against a proprietor who is a trustee the provisions of the trust.

102 H W Tang, "Beyond the Torrens Mirror: A Framework of the *In Personam* Exception to Indefeasibility" (2008) 32 MULR 672.

103 For different approaches, see B Crown, "Equity Trumps the Torrens System: *Ho Kon Kim v Lim Gek Kim Betsy*" [2002] Sing JLS 409; B Crown "A Hard Look at *Bahr v Nicolay*" in *Lives in the Law: Essays in Honour of Peter Ellinger, Koh Kheng Lian, Tan Sook Yee* (Dora Neo, Tang Hang Wu & Michael Hor eds) (Faculty of Law, National University of Singapore & Academy Publishing, Singapore Academy of Law, 2007) at p 191; Z Seow, "Rationalising the Singapore Torrens System" [2008] Sing JLS 165; K Low, "The Nature of Torrens Indefeasibility: Understanding the Limits of 'Personal Equities'" (2009) 33 MULR (forthcoming); K Low, "The Story of 'Personal Equities' in Singapore: Thus Far and Beyond" [2009] Sing JLS (forthcoming).

to protect the registered proprietor from his or her own wrongful conduct. Indefeasibility of title was devised to protect the registered proprietor from a prior title-based claim. On this analysis, constructive trusts which arise from situations such as commonly intended beneficial ownership or proprietary estoppel clearly do not detract from the principle of indefeasibility. Indefeasibility of title does not make the registered proprietor immune from claims stemming from such conduct as the formation of a common intention to share property with the plaintiff or the making representations to the plaintiff which the latter has relied on to his or her detriment. However, the Torrens statute properly precludes a constructive trust claim by a plaintiff who seeks to vindicate his or her equitable title against a registered proprietor who has paid value. This is because such a claim is essentially a title-based claim which detracts from the principle of indefeasibility of title.

50 The *Betsy Lim* case presents a slight challenge. There is an argument that here the declaration of a constructive trust detracted in substance from the principle of indefeasibility because the claim was based primarily on RHB's knowledge. After all, one of the most hallowed principles of Torrens jurisprudence is that mere knowledge of a prior claim does not defeat a registered proprietor's title. On the other hand, there is an argument that RHB's conduct went beyond registration of RHB's interest with mere knowledge of Madam Ho's interest. Apart from the constructive trust analysis, it may also be possible to attribute liability to RHB on the basis of: (a) an express trust;[104] (b) Torrens fraud;[105] (c) the tort of conspiracy;[106] and (d) the enforcement of a contractual provision for a third party.[107] On balance, it is suggested that the better analysis is that RHB's conduct involved more than mere knowledge of a prior registered interest and that RHB inevitably took subject to Madam Ho's claim. Whether a constructive trust analysis is the most appropriate doctrinal vehicle for making RHB liable to Madam Ho is beyond the scope of this paper. The main argument in this section is that *United Overseas Bank v Bebe* should not be taken to rule out constructive trust claims in the context of Torrens land. Rather, each constructive claim must be examined closely on its own facts to see whether, in substance, the claim undermines the principle of indefeasibility.

104 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 618–619 (*per* Mason CJ and Dawson J); *United Overseas Bank v Bebe* [2006] 4 SLR 884 at [72].

105 *United Overseas Bank v Bebe* [2006] 4 SLR 884 at [72].

106 S Bright, "The Third Party's Conscience in Land Law" [2000] Conv 398.

107 S Bright, "The Third Party's Conscience in Land Law" [2000] Conv 398.

VII. Conclusion

51 In this paper I have considered five persistent puzzles often associated with the constructive trust. With regard to the terminology puzzle, the suggestion is that we should not confuse a personal duty to account in equity with the declaration of a constructive trust in a proprietary sense. In fact, we should heed the call of many judges and scholars to abandon the unnecessary reference to the constructive trust in situations where the remedy sought against the defendant comprises a personal duty to account. Next, this paper suggests that the institutional and remedial puzzle masks a more fundamental question in trust jurisprudence, namely whether the courts should recognise new categories of situation where a declaration of constructive trust is justified? This question leads to the next issue. If new categories are possible, how then do we accommodate public policy and judicial discretion in their formulation? The assertion that the law recognises only the institutional constructive trust is no more than a shorthand for saying that the law does not acknowledge the existence of new situations where a constructive trust may be declared. Even so, the issue should be thoroughly ventilated and debated in the courts. The supposed dichotomy between institutional and remedial constructive trusts should be abandoned and we should focus on the real questions identified above. The conclusion reached with regard to the Torrens puzzle is that a constructive trust may be declared over Torrens land provided that the claim does not, in substance, detract from the principle of indefeasibility. Indefeasibility of title does not protect a registered proprietor from the consequences of personal wrongdoing. Finally, with regard to the bankruptcy and explanatory puzzles, I have merely sought to signpost the main issues at hand. The bankruptcy dimension is important because a declaration of constructive trust directly affects the defendant's creditors in the event of insolvency. There is, therefore, a need to justify the constructive trust claimant's priority over the defendant's creditors. The explanatory puzzle is also a significant inquiry. It is important to explore whether there are any general principles which link the various traditional situations where a constructive trust may be declared, since otherwise we would be left with simply a rag-bag of jurisprudential categories. These five persistent puzzles must be addressed and ultimately unravelled in order to ensure the coherent development of the law in the future.