

THE THEOLOGICAL FOUNDATIONS OF EQUITY'S CONSCIENCE AND THE CONSTRUCTIVE TRUST

This article aims to explore the scholastic theological origins of the concept of “conscience” and explain how that concept came to be “legalised” and incorporated within the system of equity. In doing so, it will also argue that conscience is the keystone – or organising concept – of equitable jurisprudence as a whole, without which, equity can neither be understood nor rationalised. In order to prove the point, this article will examine the institution (and in some jurisdictions, remedy) of the constructive trust and explore how the concepts of conscience and unconscionability can help extricate ourselves from the quagmire of conflicting views and judgments which characterise this area of law.

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I. Introduction

1 This article is divided into two intertwined parts which, broadly speaking, correspond with its two interlinked claims. The first is a descriptive legal history analysis of equity, and in particular its concept of “conscience”, which argues that this concept and equity more broadly remains rooted in scholastic theology (and objective morality), notwithstanding their longstanding “legalisation”. In doing so, this article will demonstrate that debates about the subjectivity or objectivity of conscience miss the point because the issue is not an either-or equation. Instead, through its extensive engagement with the problem of a malformed conscience, and a more granular analysis of the idea of a conscience itself, scholastic theology teaches us that conscience is both subjective and objective whilst avoiding the logical extremes of either. This article will also note how attempts to secularise conscience and relativise equity’s morality have undermined its ontological

1 A version of this article was presented at the 5th Annual Theology and Jurisprudence Symposium hosted at Queensland University of Technology. The author thanks the organisers and attendees of that event for their helpful comments. The author also thanks the anonymous peer reviewer for their invaluable comments and the editorial team at the Singapore Academy of Law Journal for their hard work. All opinions expressed and errors made are the author’s alone. *Non nobis domine.*

justifications, and transformed it into a destabilising force within equity more broadly. The second part builds on the first to explain how and why conscience, as properly understood via scholastic theology, is the keystone or “organising concept” around which the rest of equity has been built. However, this article will not do this in the abstract; rather, it will do so in the context of the constructive trust. This is because, as will be shown below, the constructive trust is the example par excellence of conscience and moral reasoning playing a determinative role in equitable doctrine. In demonstrating this, this article will also note that whatever shortcomings conscience may have as a concept, no alternative viable general framework for the constructive trust has yet been produced. Ultimately then, the constructive trust helps to show why, notwithstanding its shortcomings, and in particular the challenges it faces in ever more pluralistic and heterogenous societies, the concept of conscience is and always will be the “organising” or “unifying” concept of equity.

II. Equity, conscience and unconscionability

2 As with most concepts in equity that of conscience is controversial – as will be seen below, it has its fair share of critics. However, before discussing those critiques, some of its long history must be considered and before doing so, what is meant by “conscience” must first be considered. Thus, this section will be split into two parts: the first will consider the theological origins of conscience and the second will discuss how that concept was “legalised” or translated into legal terms.

A. *Theological origins of conscience*

3 What is meant by “conscience”? In general terms, most readers probably intuitively agree with the dictionary definition of “conscience”, meaning “the part of you that judges how moral your own actions are and makes you feel guilty about bad things that you have done or things you feel responsible for”.² Other popular dictionary definitions are broadly the same: “the sense or consciousness of the moral goodness or blameworthiness of one’s own conduct, intentions, or character together with a feeling of obligation to do right or be good”³ or “[t]he internal acknowledgement or recognition of the moral quality of one’s motives and actions; the sense of right and wrong as regards things for which one is responsible; the faculty or principle which judges the moral quality of

2 “Conscience” *Cambridge Dictionary* <<https://dictionary.cambridge.org/dictionary/english/conscience>> (accessed 5 May 2025).

3 “Conscience” *Merriam-Webster* <<https://www.merriam-webster.com/dictionary/conscience>> (accessed 5 May 2025).

one's actions or motives".⁴ However, where do all these definitions come from? What is their common foundation? It will be suggested that their foundation is based on scholastic theology as expounded, most famously, by Thomas Aquinas in the 13th century.

4 As is often the case with scholastic writings, Aquinas's discussion of conscience is complex, requiring significant re-reading, consideration of his entire body of work, and consideration of an almost infinite body of secondary work commenting on his work. Nevertheless, his conception of conscience may be summarised as "knowledge applied to an individual case", specifically "the ... application of knowledge to what we do"⁵ and thus, in the way in which it is used, conscience can be defined as the means by which one "judge[s] that something should be done or not done" or "judge[s] that something done is well done or ill done".⁶ Moreover, conscience in this sense is inherently subjective because "it applies knowledge to a particular act",⁷ *ie*, it is "not a judgment upon any speculative truth, any abstract doctrine, but bears immediately on conduct, on something to be done or not done"⁸ in a particular case. Thus, to establish whether A did or did not act in accordance with his conscience in doing or not doing B, the specific context of B must be considered – B's action cannot be considered in the abstract. In turn, this explains how A can wrongly believe that doing B is licit when it is in fact illicit and *vice versa*, *ie*, how A's conscience can be mistaken.

5 To understand how a conscience can be mistaken, how exactly conscience works and what sort of knowledge is applied by conscience, must first be explored. As explained by Cuddy, "through conscience the broad moral awareness of *synderesis* and the more specific ethical judgments of ... reason are applied to a particular action".⁹ At first glance, this leaves more questions than answers: What is *synderesis*? And what role does reason play? Put simply, *synderesis* refers to "both the power

4 "Conscience" *Oxford English Dictionary* <https://www.oed.com/dictionary/conscience_n> (accessed 5 May 2025).

5 Thomas Aquinas, *The Summa Theologiae of St Thomas Aquinas* vol I (Burns, Oates & Washbourne, 2nd Ed, 1920) at I q 79, a 13.

6 Thomas Aquinas, *The Summa Theologiae of St Thomas Aquinas* vol I (Burns, Oates & Washbourne, 2nd Ed, 1920) at I q 79, a 13.

7 Cajetan Cuddy O P, "St Thomas Aquinas on Conscience" in *Christianity and the Laws of Conscience: An Introduction* (Helen M Alvare & Jeffrey B Hammond eds) (Cambridge University Press, 2021) at pp 112 and 121.

8 John Henry Newman, *A Letter Addressed to His Grace the Duke of Norfolk: On Occasion of Mr Gladstone's Recent Expostulation* (Catholic Publication Society, 1875) at p 80.

9 Cajetan Cuddy O P, "St Thomas Aquinas on Conscience" in *Christianity and the Laws of Conscience: An Introduction* (Helen M Alvare & Jeffrey B Hammond eds) (Cambridge University Press, 2021) at p 120.

of knowing and the habitual awareness of the universal, first principles of morality that shape this power in relation to human action".¹⁰ Such first principles include "[t]he most foundational and universal principle of morality",¹¹ namely, that "good is to be done and pursued, and evil is to be avoided".¹² The need for such general universal knowledge emerged in:¹³

... commentaries upon St Jerome's interpretation of the biblical story of Cain [and Abel] ... Jerome held both that Cain throughout his evil deeds continued to have a conscience, that is, that he knew what he was doing was wrong, and yet that in some cases evildoers are able in time to obliterate their awareness that what they are doing is wrong. So commentators wanted a word for what it is that is indelible, that survives in even the wickedest human being, to distinguish it from that consciousness of good and evil which can be extinguished, 'synderesis' being used for the former, 'conscientia' for the latter. [emphasis in original]

Unlike conscience then, synderesis cannot err, although Aquinas does not deny that "the operation of synderesis in determining one's action may be hindered by either physical damage or the distracting force of some passion, which leads one to ignore what one in fact knows".¹⁴ How, then, can someone's conscience err?

6 In order to answer this, this article will consider how the process of moral judgment works according to Aquinas. As a preliminary point, it is important to note that scholastic reasoning is syllogistic, *ie*, one reasons from a major premise to a minor premise and then reaches a conclusion.¹⁵ Perhaps the most famous example is: "All men are mortal [major premise]; Socrates is a man [minor premise]; therefore, Socrates is mortal [conclusion]." Moral reasoning is no exception to this, with synderesis supplying the major premise, reason the minor and conscience

10 Cajetan Cuddy O P, "St Thomas Aquinas on Conscience" in *Christianity and the Laws of Conscience: An Introduction* (Helen M Alvare & Jeffrey B Hammond eds) (Cambridge University Press, 2021) at p 120.

11 Cajetan Cuddy O P, "St Thomas Aquinas on Conscience" in *Christianity and the Laws of Conscience: An Introduction* (Helen M Alvare & Jeffrey B Hammond eds) (Cambridge University Press, 2021) at p 120.

12 Thomas Aquinas, *The Summa Theologiae of St Thomas Aquinas* vols I & II (Burns, Oates & Washbourne, 2nd Ed, 1920) at q 94, a 2.

13 Alasdair MacIntyre, *Whose Justice? Which Rationality?* (University of Notre Dame Press, 1988) at p 184.

14 Alasdair MacIntyre, *Whose Justice? Which Rationality?* (University of Notre Dame Press, 1988) at p 185.

15 R E Houser, *Logic as a Liberal Art: An Introduction to Rhetoric & Reasoning* (The Catholic University of America Press, 2020) at pp 268–277.

representing the conclusion. The example given by Aquinas in *De Veritate* is as follows:¹⁶

If the judgment of synderesis expresses this statement: 'I must not do anything which is forbidden by the law of God', and if the knowledge of higher reason presents this minor premise: 'Sexual intercourse with this woman is forbidden by the law of God', the application of conscience will be made by concluding: 'I must abstain from this intercourse.'

However, what if the woman in question is the person's wife? Then, according to scholasticism, the conclusion to the moral syllogism would be false and "represents an error on the level of ... reasoning (i.e., God's law does not forbid sexual intercourse with one's wife)".¹⁷ That said, the error would not be at the level of synderesis, which correctly reflected universal moral truth; rather, it would be at the level of application of that universal moral truth to particulars. Thus, according to Aquinas, "any moral or practical judgment which is false, which mistakes the good for bad, will on sufficient examination turn out to be derivative, whether on the surface it initially appears so or not".¹⁸

7 At this stage a further question poses itself: What should be done when faced with an erroneous conscience? Or, in other words, is one obliged to follow an erroneous conscience? The answer according to Aquinas is "yes", because if your conscience tells you, for example, that blood transfusions (or some other form of modern medicine) are evil as a result of your conscience, and yet to choose to undergo one (thereby choosing to commit evil) you are inclining your will towards (what you perceive to be) evil,¹⁹ and that, in turn, makes your will itself evil. However, a false or malformed conscience does not bind in the same way that a correctly formed conscience does, given that:²⁰

A correct conscience binds absolutely because it binds without qualification and in every circumstance. For, if one's conscience tells him to avoid adultery, he cannot change that conscience without sin, since he would commit a serious sin in the very error of changing such a conscience. Moreover, as long as it remains, it cannot actually be set aside without sin. Thus, it binds absolutely

16 "Thomas Aquinas: Quaestiones Disputatae de Veritate" <<https://isidore.co/aquinas/english/QDdeVer.htm>> (accessed 5 May 2025).

17 Cajetan Cuddy O P, "St Thomas Aquinas on Conscience" in *Christianity and the Laws of Conscience: An Introduction* (Helen M Alvare & Jeffrey B Hammond eds) (Cambridge University Press, 2021) at p 124.

18 Alasdair MacIntyre, *Whose Justice? Which Rationality?* (University of Notre Dame Press, 1988) at p 185.

19 Thomas Aquinas, *The Summa Theologiae of St Thomas Aquinas* vols I & II (Burns, Oates & Washbourne, 2nd Ed, 1920) at I:II q 19, a 5.

20 "Thomas Aquinas: Quaestiones Disputatae de Veritate" <<https://isidore.co/aquinas/english/QDdeVer.htm>> (accessed 5 May 2025).

and in every event. But a false conscience binds only in a qualified way, since it binds conditionally. For one whose conscience tells him he must fornicate is not obliged in such a way that he cannot omit the fornication without sin except on condition that such a conscience remains. But this situation can be changed, and without sin. Hence, such a conscience does not oblige in every event. For something can happen, namely, a change of conscience, and, when this takes place, one is no longer bound.

8 Moreover, conscience does not allow one “to be his own master in all things, and to profess [and do] what he pleases, asking no one’s leave, and accounting priest, or preacher, speaker or writer, unutterably impertinent, who dares to say a word against his [beliefs and actions]”.²¹ This is because one is under an obligation to correctly form, or educate, one’s conscience “by means of education, social intercourse, experience, and literature”²² so that one’s “natural conscience” accurately reflects “those truths about the One Living God, which have been familiar to it from childhood”.²³ It follows too from what Newman says above about listening to corrections from others, that the process of formation involves “deferring to people of informed judgement”²⁴ so that forming “conscience ... is a communal affair, not merely the outcome of an isolated faculty of mind”.²⁵ Thus, an erroneous conscience does not necessarily impose an obligation on others to refrain from acting in order to allow an individual to act according to their malformed conscience. For example, if a parent believes that they should reject all medical treatment for their child in favour of merely praying,²⁶ this does not impose any obligation on the State to refrain from insisting that the child receive medical treatment notwithstanding the parent’s views, nor does it convert the parent’s refusal into a virtuous act.²⁷

21 John Henry Newman, *A Letter Addressed to His Grace the Duke of Norfolk: On Occasion of Mr Gladstone’s Recent Expostulation* (Catholic Publication Society, 1875) at p 75.

22 John Henry Newman, *An Essay in Aid of a Grammar of Assent* (Burns, Oates & Co, 1874) at p 116.

23 John Henry Newman, *An Essay in Aid of a Grammar of Assent* (Burns, Oates & Co, 1874) at p 116.

24 Frederick D Aquino, “An Educated Conscience: Perception and Reason in Newman’s Account of Conscience” (2016) 49(2) *Studies in the Literary Imagination* 63 at 69.

25 Frederick D Aquino, “An Educated Conscience: Perception and Reason in Newman’s Account of Conscience” (2016) 49(2) *Studies in the Literary Imagination* 63 at 69.

26 Andrew Messenger, “Elizabeth Struhs Trial Verdict: Members of Queensland Religious Sect Guilty of Killing of Eight-Year-Old” *The Guardian* (29 January 2025) <<https://www.theguardian.com/australia-news/2025/jan/29/elizabeth-struhs-trial-verdict-members-of-queensland-religious-sect-guilty-of-killing-of-8-year-old>> (accessed 5 May 2025).

27 Thus, for example, the State can insist that children receive blood transfusions notwithstanding the parent’s objections to this on the basis of their faith as Jehovah’s Witnesses. Such cases are unfortunately relatively common: for an example, see *An* (cont’d on the next page)

9 Aquinas therefore notes that:²⁸

If ... reason or conscience err with an error that is voluntary, either directly, or through negligence, so that one errs about what one ought to know; then such an error of reason or conscience does not excuse the will, that abides by that erring reason or conscience, from being evil.

Thus, Aquinas states that if one believes that one is commanded by conscience to commit adultery with another man's wife, conscience does not excuse from moral responsibility as the "error arises from ignorance of the Divine Law, which he is bound to know".²⁹ Ignorance, or mistake, is not then always a defence because: "[s]ometimes we are to blame for our misinformed state"³⁰ and an erroneous conscience:³¹

... excuses from sin ... when the error itself is not a sin ... as when the error is due to ignorance of some fact. But, if it is ignorance of a law, the conclusion is wrong because the ignorance itself is a sin. For before a civil judge, also, one who thus appeals to ignorance of a law which he should know is not excused.

This then is the objective element of conscience, there are things one is bound to know, and if he does not know them, he is bound to discover them, so that if he does not, he is not excused from the consequences of his actions. Scholasticism does not, therefore, have any time for the concept of "plausible deniability" if one refrains from inquiries out of fear about what one might find out, one is nevertheless still morally culpable.³²

10 One final subtle but important point to make is that on this view, conscience is inherently theological and cannot be secularised. As noted by Newman, "Conscience is not a long-sighted selfishness, nor a desire

NHS Trust v Child B [2014] EWHC 3486 (Fam). However, if the child is close to the age of majority, the issue is more complex and the court may permit doctors to refrain from blood transfusions against the child's own views: see *University Hospital Plymouth NHS Trust v JKL* [2024] EWHC 1034 (Fam). On a scholastic view, refusal to consent to such treatment would be of limited relevance given the duty to preserve one's own life: see eg, "Commentary on 2 Thessalonians: Chapter 3 Lecture 2" at para 76 <<https://aquinas.cc/la/en/~2Thess>> (accessed 5 May 2025). See in the context of suicide, Thomas Aquinas, *The Summa Theologiae of St Thomas Aquinas* vol II (Burns, Oates & Washbourne, 2nd Ed, 1920) at II:II q 64, a 5.

28 Thomas Aquinas, *The Summa Theologiae of St Thomas Aquinas* vols I II (Burns, Oates & Washbourne, 2nd Ed, 1920) at II:II q 19, a 6.

29 Thomas Aquinas, *The Summa Theologiae of St Thomas Aquinas* vols I II (Burns, Oates & Washbourne, 2nd Ed, 1920) at I:II q 19, a 6.

30 Cajetan Cuddy O P, "St Thomas Aquinas on Conscience" in *Christianity and the Laws of Conscience: An Introduction* (Helen M Alvare & Jeffrey B Hammond eds) (Cambridge University Press, 2021) at p 129.

31 "Thomas Aquinas: Quaestiones Disputatae de Veritate" <<https://isidore.co/aquinas/english/QDdeVer.htm>> (accessed 5 May 2025) at q 17, a 4.

32 Neither, for that matter, does the law: see the discussion as regards dishonest assistance in *Royal Brunei Airlines Sdn Bhd v Tan* (1995) 2 AC 378 at 389.

to be consistent with oneself, but it is a messenger from him, who in nature and grace, speaks to us behind a veil, and teaches and rules us by his representatives.”³³ In other words, conscience has the power to bind all as asserted by Aquinas and others, precisely because it represents the voice of God within minds and hearts or, as Newman poetically puts it, “Conscience is the aboriginal Vicar of Christ.”³⁴ Thus, Aquinas notes that:³⁵

Although that which a false conscience dictates is out of harmony with the law of God, the one who is mistaken considers it the law of God. Therefore, taking the thing in itself, if he departs from this, he departs from the law of God, although it would be accidental that he does not depart from the law of God.

This traditional understanding of conscience is, as noted by Alasdair MacIntyre:³⁶

... at variance with some Modern Thomistic writers on natural law who hold that it is possible to construct a genuinely Thomistic account of natural law and of our knowledge of it ‘without needing to advert to the question of God’s existence or nature or will’ as John Finnis, for example, has argued.

That view is difficult to reconcile with the traditional understanding of conscience which, as noted by Newman, rejects the idea that conscience is “in one way or another a creation of man”³⁷ and thus holds that it cannot be justified by “utility, nor expedience, nor the happiness of the greatest number, not State convenience, nor fitness, order, and the *pulchrum* [nor for that matter ‘human flourishing’].”³⁸ In any event, this article need not enter any further into this intramural debate given that Finnis’s “new natural law”³⁹ was developed in the late 20th century, whereas equity’s

33 John Henry Newman, *A Letter Addressed to His Grace the Duke of Norfolk: On Occasion of Mr Gladstone’s Recent Expostulation* (Catholic Publication Society, 1875) at p 73.

34 John Henry Newman, *A Letter Addressed to His Grace the Duke of Norfolk: On Occasion of Mr Gladstone’s Recent Expostulation* (Catholic Publication Society, 1875) at p 73.

35 “Thomas Aquinas: Quaestiones Disputatae de Veritate” <<https://isidore.co/aquinas/english/QDdeVer.htm>> (accessed 5 May 2025) at q 17, a 4.

36 Alasdair MacIntyre, *Whose Justice? Which Rationality?* (University of Notre Dame Press, 1988) at p 188. See also the criticism in Tan Seow Hon, “Justification in Finnis’ Natural Law Theory” [2000] *Sing JLS* 590.

37 John Henry Newman, *A Letter Addressed to His Grace the Duke of Norfolk: On Occasion of Mr Gladstone’s Recent Expostulation* (Catholic Publication Society, 1875) at p 72.

38 John Henry Newman, *A Letter Addressed to His Grace the Duke of Norfolk: On Occasion of Mr Gladstone’s Recent Expostulation* (Catholic Publication Society, 1875) at p 73.

39 For a comprehensive overview, see Robert P George & John Keown, *Reason, Morality, and Law: The Philosophy of John Finnis* (Oxford University Press, 2013);
(cont’d on the next page)

concept of conscience was formed centuries earlier on traditional scholastic lines, and remarkably continues in much the same vein today.

B. *Legalisation of conscience*

11 This section aims to discuss how the concept of conscience, which, as seen above, is a theological one, came to be incorporated into the law (or legalised) through equity. Initially, the concept of conscience was incorporated due to the work of the Chancery, which was a body staffed by the Chancellor that dealt with petitions by aggrieved litigants to the King, who were unable to obtain justice elsewhere. In addressing such petitions, the Chancellor began to devise new writs and grant new remedies which were not available in the ordinary common law courts.⁴⁰ Crucially, as the Chancellor tended until the mid-16th century or so to be a cleric of some sort,⁴¹ and thus extensively schooled in both scholastic theology and canon law, it was inevitable that in deciding such petitions they applied the law through the lens of such training. Moreover, this was not accidental; the Chancery existed to provide justice in extraordinary cases, *ie*, in cases in which the strict law, as applied by the King's courts, could not resolve the injustice at hand. How then could justice be dispensed if applying the strict law led to injustice? Or, in other words, what rule or guide could the Chancellor apply when deciding whether to grant the relief requested in a particular petition before him?

12 The answer, of course, is conscience. As seen above, conscience was considered a crucial guide for determining the correctness of one's actions and those of others and, so long as it was well-formed, was largely free from error. William Holdsworth therefore notes that "the ecclesiastical chancellors ... based the equity which they administered upon reason and conscience" given that, for them, "conscience must decide how and when the injustice caused by the generality of rules of law is to be cured". Moreover, as noted above, they believed that conscience amounted to "the executive agent in the work of applying to individual cases the dictates of the law of God and of reason upon which [they]

see also his magnum opus: John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd Ed, 2011).

40 Frederic William Maitland, A H Chaytor & W J Whittaker, *Equity and the Forms of Action* (Cambridge University Press, 1910) at pp 3–7.

41 John H Baker, *The Oxford History of the Laws of England* vol VI (Oxford University Press, 2004) at pp 171–191; Frederic William Maitland, A H Chaytor & W J Whittaker, *Equity and the Forms of Action* (Cambridge University Press, 1910) at pp 1–11; Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at pp 13–41.

considered equity to depend".⁴² Thus, the Chancery itself became known as a (even "the") "Court of Conscience"⁴³ and the Chancellors were exhorted by their King to decide the cases before them according to "equity and good conscience".⁴⁴ Conscience is also mentioned in a number of early petitions, thus in one 15th century petition the defendant was accused of acting "against law, right and good conscience",⁴⁵ whilst in another the petitioner similarly accused the defendant of having "taken alle the hole profitz contrarie to lawe, conscience, and the wille of the said William the fadyr".⁴⁶ In yet another case, the petitioner asked as follows:⁴⁷

... your most gracious Lordship, in honour of God and on account of righteousness, to grant writs to cause the said Walter and Reginald to come before you in the King's Chancery, which is the Court of Conscience, there to answer thereto as reason and conscience demand, otherwise the said supplicant is and will be without remedy, which God forfend.

13 In theory, the conscience in question was not the subjective conscience of the Chancellor,⁴⁸ but the objective conscience of the right-holder (or defendant) as formed by right reason, divine law or reason (to

42 W S Holdsworth, "The Early History of Equity" (1915) 13(4) *Michigan Law Review* 293 at 295.

43 Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at p 13. See also P Tucker, "The Early History of the Court of Chancery: A Comparative Study" (2000) 115(463) *The English Historical Review* 791 and W S Holdsworth, "The Early History of Equity" (1915) 13(4) *Michigan Law Review* 293.

44 William Paley Baildon, *Select Cases in Chancery AD 1364 to 1471* (Quaritch, 1896) at p xxx.

45 William Paley Baildon, *Select Cases in Chancery AD 1364 to 1471* (Quaritch, 1896) at p 119.

46 William Paley Baildon, *Select Cases in Chancery AD 1364 to 1471* (Quaritch, 1896) at p 130.

47 William Paley Baildon, *Select Cases in Chancery AD 1364 to 1471* (Quaritch, 1896) at p 121. Many similar petitions and cases are discussed in Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at pp 13–40.

48 That said, as a judge is as bound by their conscience as any other, there will always be some role for judicial conscience on this view, even if the conscience in question should be a well-formed one and thus, effectively, an objective one. However, the most obvious example of this, *ie*, the problem of what a judge must do when faced with unjust laws, is outside the scope of this article given the rivers of ink which have been spilt on the subject. Thus, for present purposes it suffices to say that according to the scholastic view, a judge must walk a fine line between ruling according to equity where the strict law would produce injustice, not usurping the lawmaker's role, and avoiding the enforcement of intrinsically evil laws: see Thomas Aquinas, *The Summa Theologiae of St Thomas Aquinas* vols I & II (Burns, Oates & Washbourne, 2nd Ed, 1920) at I:II q 60, a 4–5 and q 96, a 4; For commentary see J Budziszewski, *Commentary on Thomas Aquinas's Treatise on Law* (Cambridge University Press, 2014) at pp 192–198 and J Budziszewski, *Commentary on Thomas Aquinas's Virtue Ethics* (Cambridge University Press, 2017) at pp 214–241.

name but a few). Thus, the petitions discussed above refer to the defendant as having acted contrary to conscience in the abstract, *ie*, as an objective external concept, so that equity should not depend, as was famously criticised, on the length of the Chancellor's foot. Nevertheless, from a relatively early stage complaints were made of excessive subjectivity, thus there were 16th century complaints that under Cardinal Wolsey's chancellorship "[t]he certainty of the land law ... had been destroyed by uncertainty, since title had come to depend on the whim (arbitrement) of the judge in conscience"⁴⁹ and elsewhere an Italian diplomat noted that "his will was law, *Hoc volo, sic jubeo*".⁵⁰ On the other hand, his successor, Thomas More, took a more objective view and noted in a response to Martin Luther that:⁵¹

If you take away laws and leave everything free to the judges ... they will rule as their own nature leads and order whatever pleases them, in which case the people will in no wise be more free but worse off and in a condition of slavery, since instead of settled and certain laws they will have to submit to uncertain whims changing from day to day.

Although Henry VIII's subsequent break with Rome and the rise of Protestant Christianity would have important effects on equity's conscience,⁵² it is important to note that equity had already imported the scholastic conscience several decades before.

14 In large part, the final importation of conscience into law was due to Christopher St German's 1518 work *Doctor and Student*, also known as *Dialogues between a Doctor of Divinity and a Student in the Laws of England Containing the Grounds of Those Laws Together with Questions and Cases Concerning the Equity Thereof*. The book is generally accepted to have been highly influential and thus has been called "the central text in the reconceptualization of conscience *vis-à-vis* equity and law".⁵³ In this work St German sets out an understanding of conscience which is largely in keeping with what has been discussed above, thus he notes that

49 John H Baker, *The Oxford History of the Laws of England* vol VI (Oxford University Press, 2004) at p 176.

50 John H Baker, *The Oxford History of the Laws of England* vol VI (Oxford University Press, 2004) at p 175.

51 John H Baker, *The Oxford History of the Laws of England* vol VI (Oxford University Press, 2004) at p 177.

52 As to which, see Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at pp 107–219.

53 Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at p 44.

“Synderesis ministereth a universal principle that never errs, that is to say that an unlawful thing is not to be done.”⁵⁴ On the other hand.⁵⁵

Conscience may ... err ... because conscience is formed of a certain particular proposition or question grounded particularly upon universal rules ordained for such things as are to be done. And because a particular proposition is not known of himself. As are universal principles of things to be done, but must appear and be searched by belief or by a diligent search of reason, therefore in that search and in the conscience that should be formed thereupon may happen to be error, and thereupon it is said that there is error in conscience.

15 In terms of specific errors of conscience, St German lists several factors, again broadly in line with what was discussed above, including “ignorance ... that is when a man knoweth not what he ought to do and what he ought not to do ... negligence; as when a man is negligent to search his own conscience, or having searched his conscience, he is still ignorant as to how he should act and nevertheless neglects to enquire the truth of another”;⁵⁶ self-will “as when a man follows his own wit, and will not conform himself to other, nor follow the good common ways of men”;⁵⁷ surrender to passions “whereby he makes his conscience to follow his desire, and so he causes her to go out of her right course”⁵⁸ and so on.

16 In general, and in line with modern-day equity, St German holds that equity ought generally to follow law, albeit he discusses not just human law but also the law of reason and the law of God.⁵⁹ However, as he often discusses human law, it is plain that according to him “positive human law, either concurrently with or independently of the other laws, will often be the ground and guide of conscience”.⁶⁰ Thus, he notes that “English lawyers hold that where there is any law duly had and ordained for the disposition of things real, personal or mixed, which law is not contrary to the law of God or of reason, that then that law is binding upon

54 T F T Plucknett & J L Barton, *Christopher St German's Doctor and Student* vol 91 (Selden Society, 1974) at p 91.

55 T F T Plucknett & J L Barton, *Christopher St German's Doctor and Student* vol 91 (Selden Society, 1974) at p 91.

56 T F T Plucknett & J L Barton, *Christopher St German's Doctor and Student* vol 91 (Selden Society, 1974) at pp 91–93.

57 T F T Plucknett & J L Barton, *Christopher St German's Doctor and Student* vol 91 (Selden Society, 1974) at p 93.

58 T F T Plucknett & J L Barton, *Christopher St German's Doctor and Student* vol 91 (Selden Society, 1974) at p 93.

59 Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at p 56.

60 Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at p 57.

all who are subject to it, in the tribunal of conscience.”⁶¹ As an example, he discusses the question of whether an older son born before their parents’ marriage, or the younger son born after their parents’ marriage, should inherit and notes:⁶²

Synderesis ministereth the major thus. Righteousness is to be done to every man: upon which the law of England ministereth the minor thus: the inheritance belongeth to the son born after espousal and not to the son born before espousal, then conscience maketh the conclusion and sayeth therefore the inheritance is (in conscience) to be given to the son born after espousal.

This, of course, is entirely in line with the maxim of equity that “Equity follows the law”⁶³ and both earlier,⁶⁴ as well as later, scholastic works which held that human law would generally bind in conscience (although unjust laws would not so bind⁶⁵).

17 Nevertheless, according to St German, there were cases in which equity would not follow human law, because human law possessed a gap that equity had to fill for the sake of justice. For example:⁶⁶

The law can also ordain that contracts shall not be made without certain witnesses, and that if any contract is made otherwise, that it shall be of no effect; then if anyone should sell his land without witnesses against the form of the statute and even receive the purchase money, there would remain for him in conscience no other duty than to return the purchase money to the purchaser.

61 T F T Plucknett & J L Barton, *Christopher St German’s Doctor and Student* vol 91 (Selden Society, 1974) at p 129.

62 T F T Plucknett & J L Barton, *Christopher St German’s Doctor and Student* vol 91 (Selden Society, 1974) at p 129.

63 “Maxims of Equity” *Oxford Reference* <<https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100141673>> (accessed 5 May 2025).

64 Thomas Aquinas, *The Summa Theologiae of St Thomas Aquinas* vols I & II (Burns, Oates & Washbourne, 2nd Ed, 1920) at I:II q 96, a 4; Francisco Suarez & Thomas Pink, *Selections from Three Works* (Liberty Fund, 2014) at pp 142–151 and pp 461–475.

65 Indeed, strictly speaking, such acts were not considered law at all: see Thomas Aquinas, *The Summa Theologiae of St Thomas Aquinas* vols I & II (Burns, Oates & Washbourne, 2nd Ed, 1920) at I:II q 96, a 4 and Francisco Suarez & Thomas Pink, *Selections from Three Works* (Liberty Fund, 2014) at pp 119–120 and pp 479–480. That said, unless an unjust law positively mandated evil, it might bind in conscience in order to scandal or greater disturbance than the injustice of the law: see the sources discussed in Lucas Clover Alcolea, “Common Good Constitutionalism, Natural Law, and American History and Tradition” (2024) 17(1) *St Thomas Journal of Law and Public Policy* 327 at 342–345.

66 T F T Plucknett & J L Barton, *Christopher St German’s Doctor and Student* vol 91 (Selden Society, 1974) at p 135.

Similarly:⁶⁷

... if a man sell his land by a sufficient and lawful contract though there lacketh livery of seisin or such other solemnities of the law yet the contract holds in conscience and the seller is bound in conscience to perform the contract ... and as I have often heard there is a remedy in such case in the king's chancery.

Equity then was essentially supplemental, “enforc[ing] conscience in cases that the common law fails to address”⁶⁸ and thus St German himself noted that equity was an “exception of the law of God, or of the law of reason, from the general rules of the law of man: when they by reason of their generality would in any particular case [go] against the law of god or the law of reason”.⁶⁹ This formulation was not novel but rather built on Aquinas's statement that:⁷⁰

... laws that are rightly established, fail in some cases, when if they were observed they would be contrary to the natural right. Wherefore in such cases judgment should be delivered, not according to the letter of the law, but according to equity which the lawgiver has in view ...

which in turn explicitly built on earlier classical statements by Aristotle.⁷¹ Surprisingly, it appears relatively little immediately changed as regards conscience following Henry VIII's break with Rome and the rise of protestant Christianity. Thus, Klinck has noted that later works “dr[ew] heavily and uncritically on *Doctor and Student*”⁷² and “*Doctor and Student* was re-published often in the seventeenth century”⁷³ whilst later Chancery pleadings “would ... ordinarily contain expressions claiming that the defendant has acted ‘contrarie to all right, equitie, and good conscience’ and/or asking for an order that will ‘stand with right, equitie, and good conscience.’”⁷⁴

67 T F T Plucknett & J L Barton, *Christopher St German's Doctor and Student* vol 91 (Selden Society, 1974) at p 137.

68 Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at p 64.

69 T F T Plucknett & J L Barton, *Christopher St German's Doctor and Student* vol 91 (Selden Society, 1974) at p 97.

70 Thomas Aquinas, *The Summa Theologiae of St Thomas Aquinas* vol II (Burns, Oates & Washbourne, 2nd Ed, 1920) at II:II q 120, a 1.

71 W D Ross, “Nicomachean Ethics” in *The Complete Works of Aristotle* vol II (Princeton University Press, 2014) at 1137 b11-25.

72 Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at p 74.

73 Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at p 74.

74 Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at p 79.

18 However, inevitably, the break between Rome and England, as well as the latter's embrace of Protestantism, did eventually lead to significant changes when it came to the Chancery, and thus to equity and its concept of conscience. The first significant change is arguably that the rejection of a single universal church in favour of innumerable Protestant churches meant that there was an "increasing destabilization of conscience as a result of religious controversy and [a] realization that the idea of a uniform, objective conscience was difficult to sustain".⁷⁵ Instead, and broadly in line with Protestant views as regards *sola scriptura* conscience was associated "more and more with the private, the internal, the spiritual – in other words, with the individual – in a more radical sense than it had been before" and this tendency "compromised the cogency of conscience as a juristic principle".⁷⁶ That said, this view is not universally held; thus Richard Hedlund has argued that whilst "Theologically, the Protestant vision of conscience is different from the Catholic vision ... that did not carry over into equity."⁷⁷

19 It is certainly true, as will be discussed below, that the scholastic conception of conscience has, in some senses, persisted within equity even until the modern day, however it is also undeniable that theological conceptions of conscience have become significantly "diluted"⁷⁸ and, in many respects, the term is now defined not by virtue of its inherent characteristics, but rather "extensionally";⁷⁹ *ie*, "all the particular instances to which it refers, or was made to refer".⁸⁰ Thus, "what the conscience of equity became was simply the sum of all the individual cases which the Chancellor decided".⁸¹ The second significant, and related, change is that, following the break with Rome, "later Chancellors were increasingly trained lawyers and judges".⁸² Consequently, these Chancellors began to

75 Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at p 222.

76 Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at p 217.

77 *The Legal Legacy of the Reformation: Catholic and Protestant Approaches to Law* (John Duddington ed) (Routledge, 2024) at p 223.

78 Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at p 271.

79 Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at p 273.

80 Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at p 274.

81 Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at p 274.

82 *The Legal Legacy of the Reformation: Catholic and Protestant Approaches to Law* (John Duddington ed) (Routledge, 2024) at p 222.

“formalise”, or secularise, equity and its concept of conscience.⁸³ In this vein, Maitland notes that:⁸⁴

In the second half of the sixteenth century the jurisprudence of the court is becoming settled. The day for ecclesiastical Chancellors is passing away. Wolsey is the last of the great ecclesiastical Chancellors, though in Charles I's day we have one more divine in the person of Dr Williams.

20 The harbinger of such change, and the man generally accepted to be the father of modern equity, was Lord Nottingham.⁸⁵ Thus, it has been stated that the “whole tendency of Lord Nottingham's work was towards a scientific arrangement of equity; he was the father of systematic equity”.⁸⁶ The point can be supported with reference to his judgment in the *Earl of Feversham's Case*⁸⁷ where he explained that:

... equity itself would cease to be justice if the rules and measures of it were not certain and known. For if conscience be not dispensed by the rules of science, it were better for the subject that there were no Chancery at all than that men's estates should depend upon the pleasure of a Court which took upon itself to be purely arbitrary.

This does not mean that he did not refer to conscience – it is evident that he did and elsewhere he often discussed the concept⁸⁸ – but it is clear that in doing so he was truly translating, or attempting to translate, conscience into objective legal, as opposed to theological, terms. This translation can be seen in *Cook v Fountain*,⁸⁹ where he stated that:

If after all this a man will still suppose that there was a secret trust, security or agreement between the parties to repurchase this rent, which no bill charges, no proof can make out, and the defendant denies upon oath, then it must be such a trust, security or agreement as is only between a man and his confessor. With such a conscience which is only *naturalis et interna* this Court hath nothing to do; the conscience by which I am to proceed is merely *civilis et politica*, and tied to certain measures; and it is infinitely better for the public that a trust, security

83 Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at pp 219–273.

84 Frederic William Maitland, A H Chaytor & W J Whittaker, *Equity and the Forms of Action* (Cambridge University Press, 1910) at p 9.

85 Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at p 225.

86 D E C Yale, *Lord Nottingham's Chancery Cases* vol 73 (1954) at p xlv <<https://heinonline.org/HOL/P?h=hein.selden/seldseng0073&i=1>> (accessed 5 May 2025).

87 D E C Yale, *Lord Nottingham's Chancery Cases* vol 79 (1961) at p 639 <<https://heinonline.org/HOL/P?h=hein.selden/seldseng0073&i=1>> (accessed 5 May 2025).

88 Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at pp 226–227.

89 D E C Yale, *Lord Nottingham's Chancery Cases* vol 73 (1954) at p 371 <<https://heinonline.org/HOL/P?h=hein.selden/seldseng0073&i=1>> (accessed 5 May 2025).

or agreement, which is wholly secret, should miscarry than that men should lose their estates by the mere fancy and imagination of a chancellor.

21 We can detect in this traces of the modern secular view of equity as enforcing “community standards”⁹⁰ or “customary morality”,⁹¹ as opposed to a conscience which was ontologically tied to God and his dictates as expressed in natural law or divine law. Although Lord Nottingham’s view was not unchallenged,⁹² including in the *Earl of Feversham’s Case*,⁹³ it is clear that over time his systematic view of equity, and legalised or systematised conscience, came to be generally accepted. Thus, the late great Lord Eldon, who also “undertook the systematization and streamlining of [equitable] principles in order to give them an internal coherence and greater certainty”,⁹⁴ famously noted that:⁹⁵

The doctrines of this Court ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this Court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done any thing to justify the reproach that the equity of this Court varies like the Chancellor’s foot.

22 Some decades later, and it must be said somewhat idiosyncratically, Sir George Jessel even went as far as saying: “This Court is not, as I have often said, a Court of conscience, but a Court of Law.”⁹⁶ Nevertheless, the perennial issue of subjectivity and novelty *versus* objectivity and precedent in equity has never truly gone away. For example, few can neither forget the creativity of the late Lord Denning, nor his statement that “[e]quity is not past the age of child bearing”,⁹⁷ to which Bagnall J adroitly responded, “[but] its progeny must be legitimate – by precedent out of principle”⁹⁸ Subsequently, much of Lord Denning’s creativity in the context of land law was undone with the Court of Appeal noting

90 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* [2024] HCA 27; *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18.

91 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* [2024] HCA 27.

92 Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) at pp 227–230.

93 D E C Yale, *Lord Nottingham’s Chancery Cases* vol 79 (1961) at pp 646–649 <<https://heinonline.org/HOL/P?h=hein.selden/seldseng0073&i=1>> (accessed 5 May 2025).

94 Fiona R Burns, “The Court of Chancery in the 19th Century: A Paradox of Decline and Expansion” (2001) 21 *University of Queensland Law Journal* 198 at 202.

95 *Gee v Pritchard* (1818) 36 ER 670 at 674.

96 *In Re National Funds Assurance Co (No 2)* (1878) 10 Ch D 118 at 128.

97 *Eves v Eves* [1975] 1 WLR 1338 at 1341.

98 *Cowcher v Cowcher* [1972] 1 WLR 425 at 430.

that a specific rule devised by Denning was “*per incuriam* in the sense that it was made without reference to authorities which, if they would not have compelled, would surely have persuaded the court to adopt a different *ratio*”.⁹⁹

23 More recently, the equity jurisprudence of the Supreme Court of Canada has evinced an extreme creativity,¹⁰⁰ remoulding concepts such as the constructive trust and much of fiduciary law to achieve “fairness”¹⁰¹ as well as “supplement[ing] tort law and provid[ing] a basis for the creation of new forms of civil wrong”.¹⁰² In contrast, English equity remains firmly in the post-Denning phase, thus it has consistently rejected the idea of the remedial constructive trust¹⁰³ on the basis that:¹⁰⁴

... we must recognise that the remedial constructive trust 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, except with the authority of Parliament.

Australian equity would appear to be somewhere in between the two, rejecting the remedial constructive trust as developed in Canada and Canadian influences generally,¹⁰⁵ on the basis that:¹⁰⁶

Under the law of this country – as I venture to think, under the present law of England ... proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion ... subjective views about which party ‘ought to win’ ... and the ‘formless void of individual moral opinion’.

99 *Ashburn Anstalt v Arnold* [1989] Ch 1 at 22. However, the courts did sometimes get to similar results via less creative means as was the case in *Ashburn Anstalt v Arnold*. See also *Stack v Dowden* [2007] 2 AC 432.

100 For a magisterial overview up to the year 2000, see Donovan W M Waters, “The Reception of Equity in the Supreme Court of Canada (1875-2000)” (2001) 80(1-2) *Canadian Bar Review* 620.

101 See, eg, *Rawluk v Rawluk* [1990] 1 SCR 70. See also the discussion by Beverley McLachlin CJ in Cheryl Saunders & A F Mason, *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) at pp 118–137.

102 *Breen v Williams* (1996) 186 CLR 71 at [40].

103 *Re Polly Peck International plc (No 2)* [1998] 3 All ER 812; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669; *FHR European Ventures LLP v Mankarious* [2014] 3 WLR 535; *Bailey v Angove’s PTY Limited* [2016] 1 WLR 3179.

104 *Re Polly Peck International plc (No 2)* [1998] 3 All ER 812 at 831, *per Nourse LJ*.

105 See generally *Breen v Williams* (1996) 186 CLR 71.

106 *Muschinski v Dodds* (1985) 160 CLR 583 at [9].

On the other hand, the High Court accepted in both *Muschinski v Dodds*¹⁰⁷ and *Baumgartner v Baumgartner*¹⁰⁸ that the constructive trust could be “imposed as a remedy to circumvent ... unconscionable conduct”,¹⁰⁹ although this is construed much more tightly than in Canada.¹¹⁰ In Singapore, it remains unclear whether the remedial constructive trust is recognised with conflicting opinions expressed by the courts¹¹¹ and academic practitioners,¹¹² although all seem to address the concept of conscience in some way.

24 The end result is that although equity’s conscience may well have been legalised, it has not necessarily been stabilised, with different conceptions present in different jurisdictions – indeed, even within the same jurisdiction at different times as seen in pre- and post-Denning England – and for that matter, even the very same judge or court may use the term in different and conflicting ways at one and the same time.¹¹³ An additional and more general problem is that the legalisation, or secularisation, of conscience means that it is difficult to explain exactly why someone should follow their conscience, and why when individuals fail to do so, or fail to act according to the strictures of the equity’s objective conscience, the courts can grant remedies to ensure that what should have happened if they had acted according to a well-formed conscience in fact happens. Instead, it is often merely taken for a given that one must act according to one’s conscience and that if one fails to do so, or one’s conscience is malformed, the courts may correct it. On the theological view discussed above, the justification for doing so is that conscience represents the internalised voice of God and dictates of natural law, but once this is removed, particularly if one also removes

107 (1985) 160 CLR 583.

108 (1987) 164 CLR 137.

109 *Baumgartner v Baumgartner* (1987) 164 CLR 137 at [30]; *Muschinski v Dodds* (1985) 160 CLR 583 at 616–624.

110 See generally Liew Ying Khai, “Constructive Trusts and Discretion in Australia: Taking Stock” (2020) 44(3) *Melbourne University Law Review* 963.

111 *Zaiton bte Adom v Nafsiah bte Wagiman* [2023] 3 SLR 533; *National Bank of Oman SAOG Dubai Branch v Bikash Dhamala* [2021] 3 SLR 943; *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801.

112 Tey Tsun Hang, “Constructive Trusts – Deciphering and Distinguishing ‘Institutional’ and ‘Remedial’” (2011) 23 SAclJ 250; Allison Wu, “Remedying the Remedial Constructive Trust” (2021) 2021 *Singapore Comparative Law Review* 199; Yip Man, “Singapore: Remedialism and Remedial Constructive Trust” (2014) 20(4) *Trusts & Trustees* 373; David Chan & Daryl Fong, “The Imposition of a Remedial Constructive Trust Compromises an Insolvent Estate” [2019] SAL Prac 32.

113 See generally Dennis R Klinck, “The Unexamined ‘Conscience’ of Contemporary Canadian Equity” (2001) 46 *McGill Law Journal* 571.

even a secularised form of natural law,¹¹⁴ the ontological justification for being bound by conscience disappears.

25 The result is that the secularised equity of conscience merely represents “community standards” which “develop and change over time” so that “standards from earlier times” may not always be appropriate as they may be “rougher and, in other respects, more fastidious”, whilst “[d]ifferent standards of ... morality apply in other lands”.¹¹⁵ Thus, conscience becomes further destabilised (although some may see this as a positive, as it also means that it is more flexible) as a result of losing both its timelessness and its universality. The justification for following such a customary, or community, morality also changes from a requirement to follow the dictates of God to a requirement to obey the “rules of the game” if one wants to participate in a society or community. However, in “pluralistic and multicultural societ[ies]”¹¹⁶ it may be difficult both to “identify the relatively permanent values of the whole community, beyond perhaps a narrow core”¹¹⁷ and to justify requiring communities who do not hold such values to abide by them. It may be that such a narrow core, such as rules against fraud, protecting the weak from oppression by the strong, theft, *etc.*, can be both identified and its enforcement by the courts justified; but it is difficult to argue against the view that the more heterogenous a society gets, the harder this becomes. Despite this, conscience and traditional conceptions of equity continue to be “regularly invoked in the contemporary discourse of equity”¹¹⁸ so that conscience, for better or for worse, remains the “organising”¹¹⁹ or “unifying”¹²⁰ concept of equity. This perhaps reflects the reality that,

114 The most famous example of such a secularised natural law is John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd Ed, 2011).

115 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* [2024] HCA 27 at [104]. In the commercial context the relevant standards would thus presumably be derived from “accepted commercial practice”, so that as that practice changed so too did the standards, with the scope of unconscionability widening or narrowing in tandem: see *George Raymond Zage III v Ho Chi Kwong* [2010] 2 SLR 589 at [32].

116 John Doyle, “Implications of Judicial Law-Makin” in Cheryl Saunders & A F Mason, *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) at p 96.

117 John Doyle, “Implications of Judicial Law-Makin” in Cheryl Saunders & A F Mason, *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) at p 96.

118 Dennis R Klinck, “The Unexamined ‘Conscience’ of Contemporary Canadian Equity” (2001) 46 *McGill Law Journal* 571 at 610.

119 Alastair Hudson, “Conscience as the Organising Concept of Equity” (2016) 2(1) *Canadian Journal of Comparative and Contemporary Law* 261.

120 Mark Pawlowski, “Unconscionability as a Unifying Concept in Equity” (2012) 16(1) *The Denning Law Journal* 79.

for better or for worse, “equity relies directly on basic morality”¹²¹ even if only in “a constrained fashion”¹²² so that in applying and developing equitable doctrines a judge must necessarily (and properly) “engag[e] in moral reasoning”.¹²³ The discussion below will examine the most obvious example of conscience (and indirectly, moral reasoning) continuing to play an important role in equity, namely the constructive trust.

III. Conscience and the constructive trust

26 As readers familiar with the area will no doubt be aware, the constructive trust is something of a quagmire and is often considered “one of the most difficult areas of equity jurisprudence”.¹²⁴ In large part this is because of the perennial, and often heated, controversy between proponents and opponents of the (purely) remedial constructive trust.¹²⁵ However, that debate is itself only a result of the fact that attempting to adequately describe and explain the constructive trust is a little like trying to pin a jellyfish to the wall. This follows from the fact that “a constructive trust may arise in a myriad of circumstances”,¹²⁶ including, *inter alia*:

- (a) breach of the fiduciary duty of loyalty;¹²⁷
- (b) where property is conveyed subject to an agreement to hold it on trust which the defendant then repudiates;¹²⁸
- (c) under specifically enforceable contracts;¹²⁹

121 Henry E Smith, “Equity as Meta-Law” (2021) 130 *Yale Law Journal* 1050 at 1123.

122 Henry E Smith, “Equity as Meta-Law” (2021) 130 *Yale Law Journal* 1050 at 1077.

123 Chris Maxwell & Matthew Harding, “Private Law, Conscience and Moral Reasoning: The Role of the Judge” (2022) 46(1) *Melbourne University Law Review* 123 at 141.

124 Tang Hang Wu, “The Constructive Trust in Singapore” (2010) 22 SAclJ 136 at 136.

125 As to which, see *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; *Muschinski v Dodds* (1985) 160 CLR 583; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 714–715; *Bailey v Angove’s PTY Limited* [2016] 1 WLR 3179; Lord Neuberger, “The Remedial Constructive Trust – Fact or Fiction”, speech at the Banking Services and Finance Law Association Conference (10 August 2014); and Liew Ying Khai, “Reanalysing Institutional and Remedial Constructive Trusts” (2016) 75(3) *The Cambridge Law Journal* 528.

126 Tang Hang Wu, “The Constructive Trust in Singapore” (2010) 22 SAclJ 136 at 136.

127 The classical cases here are *Boardman v Phipps* [1966] 2 AC 46 and *Attorney-General for Hong Kong v Reid* [1993] 3 WLR 1143.

128 *Rochefoucauld v Boustead* [1897] 1 Ch 196 at 207; *Bannister v Bannister* [1948] 2 All ER 133. Logically, secret trusts would also come under this head: see *De Bruyne v De Bruyne* [2010] EWCA 519 at [51].

129 For a useful recent restatement of the law on this point, see *Frenkel v La Micro Group (UK) Ltd* [2025] 2 WLR 1.

- (d) in certain rare situations as regards licences over land;¹³⁰
- (e) as regards property which was intended to be, but was not at law, jointly owned;¹³¹
- (f) where an individual is guilty of either dishonest assistance or knowing receipt;¹³²
- (g) as against a thief;¹³³
- (h) on the basis of a successful proprietary estoppel claim;¹³⁴ and
- (i) as an exercise of judicial discretion to reverse unjust enrichment.¹³⁵

Prima facie, it seems difficult to “discern [any] general principles”¹³⁶ that could encompass all these varied scenarios, with the result that some judges have simply abandoned the endeavour and argued that vagueness, rather than clarity, is to be desired in this area of law. Thus, Edmund Davies LJ famously noted that “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.”¹³⁷ More poetically, Cardozo J explained that “[a] constructive trust is the formula through which the conscience of equity finds expression”¹³⁸ and as a result, “A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the

130 *Lyus v Prowsa Developments Ltd* [1982] WLR 1044; *Ashburn Anstalt v Arnold* [1989] Ch 1; For a more recent application of these principles in Singapore see *Ho Kon Kim v Lim Gek Kim Betsy* [2001] 3 SLR(R) 220.

131 See generally Lynton Tucker, Nicholas Le Poidevin & James Brightwell, *Lewin on Trusts* (Sweet & Maxwell, 20th Ed, 2020) at paras 10-062–10-089. In Australia, this is addressed by the “joint endeavour constructive trust”: see *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137; and Liew Ying Khai, “The ‘Joint Endeavour Constructive Trust’ Doctrine in Australia – Deconstructing Unconscionability” (2021) 42(1) *Adelaide Law Review* 73.

132 *Barnes v Addy* (1874) 9 LR 244.

133 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 716, *per* Lord Browne-Wilkinson. The classic case is *Black v S Freedman & Company* [1910] 12 CLR 105.

134 *Giumelli v Giumelli* [1999] HCA 10; *Thorner v Major* [2009] 1 WLR 776; *Kramer v Stone* [2024] HCA 48.

135 Although this is generally a Canadian idiosyncrasy, see *Pettkus v Becker* [1980] 2 SCR 834; *Rawluk v Rawluk* [1990] 1 SCR 70; *Peter v Beblow* [1993] 1 SCR 980; and *Moore v Sweet* [2018] 3 SCR 303.

136 Tang Hang Wu, “The Constructive Trust in Singapore” (2010) 22 SAclJ 136 at 136.

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

138 *Beatty v Guggenheim Exploration Co* (1919) 122 NE 378 at 386.

measure of relief.”¹³⁹ Others, however, have bemoaned the “persistent puzzles” and “difficulties that have afflicted the law of constructive trust” and insisted that these must “be unpacked in order to develop the law in this area coherently”.¹⁴⁰ This approach can be supported with reference to the traditional English view that as “[p]roperty rights are fixed and ascertainable rights”,¹⁴¹ their existence must depend “on settled principles, even in equity”¹⁴² and in consequence, as the constructive trust necessarily involves proprietary rights, it too should be governed by “settled principles” rather than unbridled judicial discretion.¹⁴³

27 This article suggests that the solution to these controversies lies in a recognition that “[t]he most important principle underpinning the constructive trust ... is that of unconscionability”,¹⁴⁴ so that a constructive trust is merely the means by which the law enforces “the conscience of the legal owner [which] requires him to carry out the purposes ... which the law imposes on him by reason of his unconscionable conduct”.¹⁴⁵ Of course, in many situations, the unconscionable conduct in question will lie in a “denial of the beneficial interest of another”¹⁴⁶ as, for example, where a trustee refuses to recognise the equitable title of a beneficiary because of a failure by the settlor to comply with formality requirements imposed by law,¹⁴⁷ or a refusal to recognise the equitable title of another where there was a common intention or joint endeavour to share ownership of particular property.¹⁴⁸ To prove the point the discussion below will outline how the concept of conscience forms the guiding thread which weaves its

139 *Beatty v Guggenheim Exploration Co* (1919) 122 NE 378 at 388.

140 Tang Hang Wu, “The Constructive Trust in Singapore” (2010) 22 SAclJ 136 at 137.

141 *Bailey v Angove’s PTY Limited* [2016] 1 WLR 3179 at [28].

142 *Bailey v Angove’s PTY Limited* [2016] 1 WLR 3179 at [28].

143 This in turn explains English law’s rejection of the purely remedial constructive trust, see *Bailey v Angove’s PTY Limited* [2016] 1 WLR 3179 at [27]. In Australia, the High Court was careful to emphasise that even the remedial constructive trust cannot depend on “idiosyncratic notions of fairness and justice” but rather “is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction”: *Muschinski v Dodds* (1985) 160 CLR 583 at [8].

144 Graham Virgo, “The Genetically Modified Constructive Trust” (2016) 2(2) *Canadian Journal of Comparative and Contemporary Law* 579 at 593.

145 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 705, *per* Lord Browne-Wilkinson.

146 Lynton Tucker, Nicholas Le Poidevin & James Brightwell, *Lewin on Trusts* (Sweet & Maxwell, 20th Ed, 2020) at para 8-010.

147 *Rochefoucauld v Boustead* [1897] 1 Ch 196.

148 See generally Lynton Tucker, Nicholas Le Poidevin & James Brightwell, *Lewin on Trusts* (Sweet & Maxwell, 20th Ed, 2020) at paras 10-062–10-089. See in Australia *Muschinski v Dodds* (1985) 160 CLR 583 and Liew Ying Khai, “The ‘Joint Endeavour Constructive Trust’ Doctrine in Australia – Deconstructing Unconscionability” (2021) 42(1) *Adelaide Law Review* 73.

way through the complex thicket of jurisprudence in this area and which, ultimately, justifies the existence of the constructive trust itself.

28 The seminal judgment in this regard, which it has been said “reminded us that ‘conscience’ is, and always has been, at the heart of trusts law ... as well as at the heart of equity”,¹⁴⁹ is that of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*.¹⁵⁰ In that case, his Lordship noted that as “[e]quity operates on the conscience of the owner of the legal interest”¹⁵¹ and “since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected”,¹⁵² a person “cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience”.¹⁵³ This focus on conscience is, however, not new – thus, Lord Cairns in *Cunningham v Foot*¹⁵⁴ interpreted a statutory provision on express trusts noting that “I understand the Legislature to mean a trust which arises upon the construction of the written instrument, not upon any inference of law imposing a trust upon the conscience; a trust arising upon the words of the instrument itself.”¹⁵⁵ Similarly, 15 years later in the case of *Soar v Ashwell*,¹⁵⁶ Bowen LJ explained that:¹⁵⁷

A constructive trust is one which arises when a stranger to a trust already constituted is held by the Court to be bound in good faith and in conscience by the trust in consequence of his conduct and behaviour. Such conduct and behaviour the Court construes as involving him in the duties and responsibilities of a trustee, although but for such conduct and behaviour he would be a stranger to the trust.

29 This focus on conscience can be found almost universally throughout the many seemingly unrelated situations in which a constructive trust can be applied. Thus, as regards so-called “secret trusts” the House of Lords has held that:¹⁵⁸

149 Alastair Hudson, “Conscience as the Organising Concept of Equity” (2016) 2(1) *Canadian Journal of Comparative and Contemporary Law* 261.

150 [1996] AC 669.

151 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 705.

152 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 705.

153 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 705.

154 (1878) 3 App Cas 974.

155 *Cunningham v Foot* (1878) 3 App Cas 974 at 984.

156 [1893] 2 QB 390.

157 *Soar v Ashwell* [1893] 2 QB 390 at 396.

158 *Blackwell v Blackwell* [1929] AC 318 at 335.

For the prevention of fraud equity fastens on the conscience of the legatee a trust, a trust, that is, which otherwise would be inoperative; in other words it makes him do what the will in itself has nothing to do with; it lets him take what the will gives him and then makes him apply it, as the Court of conscience directs, and it does so in order to give effect to wishes of the testator, which would not otherwise be effectual.

In the rare cases in which a court will permit a licence over land to be enforced against a third-party purchaser via a constructive trust, the Court of Appeal has similarly stated that “The court will not impose a constructive trust unless it is satisfied that the conscience of the estate owner is affected.”¹⁵⁹ In the case of third-party personal liability for what is now known as knowing receipt, *ie*, where a third party receives trust property which they know is trust property (but not if they do so only after the beneficiary’s proprietary right has been destroyed due to a transfer to equity’s darling or by some other means¹⁶⁰), it has been stated that ‘In considering whether a constructive trust has arisen in a case of the knowing receipt of trust property, the basic question is whether the conscience of the recipient is sufficiently affected to justify the imposition of such a trust.’¹⁶¹

30 Again, where a fiduciary breaches their duty of loyalty, *eg*, by receiving a bribe, “The legal estate in freehold property conveyed to the false fiduciary by way of bribe vests in him. Equity, however, which acts *in personam*, insists that it is unconscionable for a fiduciary to obtain and retain a benefit in breach of duty.”¹⁶² Thus, “[a]s soon as the bribe was received, whether in cash or in kind, the false fiduciary held the bribe on a constructive trust for the person injured.”¹⁶³ Equally, where a person

159 *Ashburn Anstalt v Arnold* [1989] Ch 1 at 25.

160 See generally *Byers v Saudi National Bank* [2024] AC 1191.

161 *In re Montagu’s Settlement Trusts* [1987] Ch 264 at 285. In Australia, see *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [267]–[268]. On the other hand, it would appear that conscience plays a limited role as regards knowing or dishonest assistance: see *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at 392; However, Lord Sumption has argued that dishonest assistance is, like knowing receipt, based on unconscionability, see *Williams v Central Bank of Nigeria* [2014] 2 WLR 355 at 373; There is also Singaporean authority to this effect see *George Raymond Zage III v Ho Chi Kwong* [2010] 2 SLR 589. In Canada it is also accepted that liability for knowing assistance depends on the third party’s conscience being affected, see *Air Canada v M & L Travel Ltd* [1993] 3 SCR 787. See most recently *Christine DeJong Medicine Professional Corp v DBDC Spadina Ltd* [2019] SCC 1 and *DBDC Spadina Ltd v Walton* [2018] ONCA 60 at [237] (dissenting opinion of van Rensburg JA upheld by the Supreme Court of Canada).

162 *Attorney-General for Hong Kong v Reid* [1993] 3 WLR 1143 at 1146; see most recently *Rukhadze v Recovery Partners GP Ltd* [2025] 2 WLR 529.

163 *Attorney-General for Hong Kong v Reid* [1993] 3 WLR 1143 at 1146. This approach was not followed in England until *FHR European Ventures LLP v Mankarious* [2014] 3 WLR 535. For the more nuanced Australian approach, see J C Campbell, “When and Why a Bribe Is Held on a Constructive Trust: The Method of Reasoning towards an Equitable Remedy” (2015) 39 *Australian Bar Review* 320.

acquires property under terms which require them to hold it on trust “equity will hold the transferee of property to the terms upon which it was acquired by imposing a constructive trust to that effect”¹⁶⁴ because “equity will regard it as against conscience for the owner of the property to deny the terms upon which he received it”.¹⁶⁵ Similarly:¹⁶⁶

In common intention constructive trusts the equity arises because it would be unconscionable for the owner of the property to be allowed to deny the co-habitee the interest which it was agreed or understood that he or she would have and in reliance on which the co-habitee acted to his or her detriment.

The trust through which a thief holds stolen property for the true owner¹⁶⁷ has likewise, in England, been explained on the basis of a constructive trust,¹⁶⁸ which was elsewhere explained as being “imposed on him [*ie*, the holder of the legal estate] by reason of his unconscionable conduct”.¹⁶⁹ In the context of proprietary estoppel, it has been stated that:¹⁷⁰

Knowledge of acts in reliance on the representation (or assumed state of affairs) is a necessary element for a proprietary estoppel by acquiescence (since it is the knowledge and standing by that engages the conscience of the party sought to be estopped) but it is not a necessary element where the representor’s conscience has been sufficiently engaged through the encouragement made by the representation in the first place.

164 *De Bruyne v De Bruyne* [2010] EWCA 519 at [51].

165 *De Bruyne v De Bruyne* [2010] EWCA 519 at [51].

166 *De Bruyne v De Bruyne* [2010] EWCA 519 at [50]. See also *Hudson v Hathway* [2023] 2 WLR 1227. This would also appear to be the case as regards the Australian joint endeavour constructive trust: see *Muschinski v Dodds* [1985] 160 CLR 583 at 616–624 and *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 147–150 and 156–157. For an argument that unconscionability is unnecessary and unhelpful in this context, see Liew Ying Khai, “The ‘Joint Endeavour Constructive Trust’ Doctrine in Australia – Deconstructing Unconscionability” (2021) 42(1) *Adelaide Law Review* 73.

167 There has been some controversy about this: see Susan Barkehall Thomas, “Thieves as Trustees: The Enduring Legacy of *Black v S Freedman & Co Ltd*” (2009) 3 *Journal of Equity* 52 and John Tarrant, “Thieves as Trustees: In Defence of the ‘Theft Principle’” (2009) 3 *Journal of Equity* 170.

168 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 716. In Australia it is not definitively settled whether it is a constructive or a resulting trust: see generally *Sze Tu v Lowe* [2014] NSWCA 462.

169 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 705.

170 *Kramer v Stone* [2023] NSWCA 270 at 128. The decision of the New South Wales Court of Appeal was upheld on further appeal to the High Court of Australia: see *Kramer v Stone* [2024] HCA 48.

Lastly, the vendor–purchaser constructive trust has also been explained as arising “on the basis that it would be unconscionable for the vendor to refuse to perform his contractual obligation to transfer the land”.¹⁷¹

31 The end result, it is submitted, is that, as was stated by McLachlin J in *Soulos v Korkontzilas*¹⁷² (“*Soulous*”), “a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past.”¹⁷³ Although the term “unconscionability” does not appear often, and indeed sometimes at all, in case law from the Supreme Court of Canada on the point, in effect what good conscience requires is that one does not act unconscionably, *ie*, contrary to one’s conscience. Thus, McLachlin J’s view is entirely compatible with the more classically framed statement by Virgo that the constructive trust “should preferably be treated as a response to unconscionability”.¹⁷⁴

A. *Objections to the conscience-based constructive trust approach*

32 The obvious problem with, and perennial criticism of, the conscience-based approach is that it is “indeterminate”, so that “‘unconscionability’ is conceived of differently by individual judges, and applied with different results on the facts”,¹⁷⁵ with the result that “It is impossible to escape the reality that unconscionability remains an inherently nebulous notion with perceived connotations of morality, fairness and justice.”¹⁷⁶ In addition, it is argued that this indeterminacy destabilises property rights, in particular as regards “the imposition of the remedial constructive trusts [which] equip[s] judges with a free-wheeling discretion to create proprietary rights”,¹⁷⁷ and more generally the concept “introduces considerable uncertainty as to the circumstances

171 Mark Pawlowski & James Brown, “Sale of Land and Personal Property – The Purchaser as Beneficial Owner?” (2020) 34(2) *Trust Law International* 63 at 64. See *contra* Graham Virgo, *Principles of Equity and Trusts* (Oxford University Press, 2020) at pp 290–291.

172 [1997] 2 SCR 217.

173 *Soulos v Korkontzilas* [1997] 2 SCR 217 at [35].

174 Graham Virgo, “The Genetically Modified Constructive Trust” (2016) 2(2) *Canadian Journal of Comparative and Contemporary Law* 579 at 589.

175 Rohan Havelock, “Conscience and Unconscionability in Modern Equity” (2015) 9(1) *Journal of Equity* 1 at 20. See also Peter Birks, “Equity in the Modern Law: An Exercise in Taxonomy” (1996) 26(1) *University of Western Australia Law Review* 1.

176 Rohan Havelock, “Conscience and Unconscionability in Modern Equity” (2015) 9(1) *Journal of Equity* 1 at 20.

177 Rohan Havelock, “Conscience and Unconscionability in Modern Equity” (2015) 9(1) *Journal of Equity* 1 at 26.

in which property rights will be recognised as subsisting¹⁷⁸. At the very least, critics note that if “conscience” is to be the touchstone for imposing or recognising a constructive trust, “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”.¹⁷⁹ Thus, Lord Briggs recently criticised the view that the relevant state of mind for a successful claim in knowing receipt was “knowledge ... such as to make it unconscionable for [the recipient] to retain the benefit of the receipt”,¹⁸⁰ on the grounds that “so flexible a test of the requirement for knowledge wrongly elevates unconscionability from an equitable objective into an unruly and unpredictable test for liability”.¹⁸¹

33 As seen above, these criticisms are not new; they merely represent specific applications of more general criticisms which have been made of equity almost since its inception. Thus, we must answer two questions. Firstly, is it really true that the conscience-based approach leads to insurmountable issues of indeterminacy and subjectivity? Secondly, is there any alternative, and preferably compelling, explanation for the constructive trust? Each question will be addressed in turn below.

(1) *Issues of indeterminacy and subjectivity*

34 To the first question, this article makes the classical response, namely that even if “Good conscience ... has the disadvantage of being very general ... any concept capable of embracing the diverse circumstances in which a constructive trust may be imposed must, of necessity, be general”.¹⁸² Moreover, properly understood, the concept of conscience is not, as discussed above, subjective (either by reference to the defendant or the court)¹⁸³ but rather objective, the standard against which a person is judged is therefore the standard that a person with a well-formed conscience should possess. Thus, the concept of conscience is not “an optional scale, with higher or lower values according to the moral

178 Rohan Havelock, “Conscience and Unconscionability in Modern Equity” (2015) 9(1) *Journal of Equity* 1 at 26.

179 Tang Hang Wu, “The Constructive Trust in Singapore” (2010) 22 SAclJ 136 at 157.

180 *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2000] 3 WLR 1423 at 1439, per Nourse LJ.

181 *Byers v Saudi National Bank* [2024] AC 1191 at [82].

182 *Soulos v Korkontzilas* [1997] 2 SCR 217 at 236.

183 However, for a recent argument that the subjective conscience of judges does and should play a role in judicial decision making, see Chris Maxwell & Matthew Harding, “Private Law, Conscience and Moral Reasoning: The Role of the Judge” (2022) 46(1) *Melbourne University Law Review* 123 at 138–149.

standards of each individual”;¹⁸⁴ instead, it is “normative”¹⁸⁵ and as with the concept of honesty in *Royal Brunei Airlines Sdn Bhd v Tan*¹⁸⁶ (“*Royal Brunei*”), “[i]n most situations there is little difficulty in identifying how [a person in good conscience] would behave”¹⁸⁷ given the “high degree of community consensus”¹⁸⁸ concerning the moral norms which the courts (and, on occasion, legislatures) enforce through the concept of conscience.¹⁸⁹ Thus, pocketing bribes, refusing to follow agreements by which property should be held on trust, refusing to perform specifically performable contracts, knowingly receiving misappropriated trust assets, knowingly or dishonestly assisting in a breach of trust, stealing property, *etc.*, are not close-cut cases; they are obviously wrong and we suspect that most – if not all of us – would accept this. The fact that some would not believe that, for example, theft is wrong is irrelevant because “The court is not asking the defendant what they personally claim to think is right or wrong. Instead, the court is asking what that person’s conscience, formed by inter-action with that society, ought to have prompted them to do.”¹⁹⁰

35 In consequence, as noted by Gleeson CJ in terms almost identical to those used by theologians and early equity jurists, “The conscience of the appellant, which equity will seek to relieve, is a properly formed and instructed conscience. The real task is to decide what a properly formed and instructed conscience has to say about”¹⁹¹ whatever is at issue in the case at hand. This conscience is also clearly a reflection of an objective

184 Discussing the concept of honesty *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at 389.

185 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* [2024] HCA 27.

186 [1995] 2 AC 378. It might be thought odd to use Brunei as an example here, as the Judicial Committee of the Privy Council elsewhere rejected the use of the term “unconscionable conduct” in this context; however, it has been argued, correctly, that the judgment nevertheless provides a good example of “the objective conscience at work”: see Alastair Hudson, “Conscience as the Organising Concept of Equity” (2016) 2(1) *Canadian Journal of Comparative and Contemporary Law* 261 at 279–281.

187 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at 389.

188 Chris Maxwell & Matthew Harding, “Private Law, Conscience and Moral Reasoning: The Role of the Judge” (2022) 46(1) *Melbourne University Law Review* 123 at 144.

189 Chris Maxwell & Matthew Harding, “Private Law, Conscience and Moral Reasoning: The Role of the Judge” (2022) 46(1) *Melbourne University Law Review* 123 at 144. That said, and as noted earlier, it is not clear that such consensus will continue to exist in the future as societies become more pluralistic and moral norms develop or deviate between different communities (as well as society as a whole).

190 Alastair Hudson, “Conscience as the Organising Concept of Equity” (2016) 2(1) *Canadian Journal of Comparative and Contemporary Law* 261 at 279.

191 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [45].

“communal moral standard”;¹⁹² thus, for example, when justifying the view that fiduciaries held bribes on constructive trust for their principal, the Privy Council noted in *Attorney-General for Hong Kong v Reid* that:¹⁹³

Bribery is an evil practice which threatens the foundation of any civilised society. In particular bribery of policemen and prosecutors brings the administration of justice into disrepute ... The amount of loss or damage resulting from the acceptance of a bribe may or may not be quantifiable. In the present case the amount of harm caused in the administration of justice in Hong Kong by the first respondent in return for bribes cannot be quantified.

36 The House of Lords said much the same in *Attorney-General v Blake*,¹⁹⁴ where it noted that:¹⁹⁵

The victim of a criminal act will be entitled to a restitutionary remedy where the benefit gained by the criminal, for example the royalties of a book, is the product of the wrongful act and the benefit has been gained at what is broadly to be described as the victim's expense. It would be morally obnoxious that, where a profit has been obtained as a result of criminally inflicting harm, it is the criminal rather than the victim who should enjoy the profits.

Similarly, as regards third-party liability for “assist[ing] with knowledge in a dishonest and fraudulent design on the part of the trustees”,¹⁹⁶ *ie*, dishonest assistance, it has been held that “conduct which is morally reprehensible can properly be said to be dishonest and fraudulent”.¹⁹⁷ In the context of constructive trusts imposed as a response to unjust enrichment, it has also been stated that a court should take into account “the parties’ reasonable expectations and moral and policy-based arguments about whether particular enrichments are unjust”.¹⁹⁸ Although, for obvious reasons, reference to the Christian theological basis of these objective moral standards is rare in contemporary equity jurisprudence, a notable exception can be found in the concurring judgment of Steward J

192 Richard Hedlund, “The Theological Foundations of Equity’s Conscience” (2015) 4(1) *Oxford Journal of Law and Religion* 119 at 139.

193 [1993] 3 WLR 1143 at 330–331.

194 [2001] 1 AC 268.

195 *Attorney-General v Blake* [2001] 1 AC 268 at 274.

196 *Barnes v Addy* (1874) 9 LR 244 at 252.

197 *Baden v Société Générale pour Favoriser le Développement du Commerce et de l’Industrie en France SA* [1993] 1 WLR 509 at 574. This was on the basis of the earlier case of *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1591.

198 *Freeland v Farrell* [2022] BCCA 99 at [75]. See also *Moore v Sweet* [2018] 3 SCR 303. Both cases are the result of general principles regarding unjust enrichment which were laid down by the Supreme Court of Canada in *Kerr v Baranow* [2011] 1 SCR 269.

in *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission*.¹⁹⁹ In that case, his Honour noted that:²⁰⁰

The historical foundation of equity and its concern with standards of conscience is ‘ecclesiastical natural law’ or perhaps more accurately just ‘ecclesiastical law’. In that respect, judges often refer to the ‘ecclesiastical’ or even the ‘religious’ foundations of equity, without any more elaboration, and may do so in fear of using that one word which more accurately characterises the origins of equity, the doctrine of unconscionable conduct, and the society from which these laws historically emerged: Christianity.

37 At this stage it might be argued (correctly), that the issue is not just whether or not X has acted unconscionably by breaching objective moral standards (which are themselves arguably based on Christian theological teachings),²⁰¹ but whether or not a constructive trust, as opposed to some other legal institution or remedy, should be granted or recognised by the court in the instant case. On this view, a finding of unconscionability does not necessarily lead to the recognition or imposition of a constructive trust, instead, some other requirement(s) must be met, or it must be accepted that conscience, as applied via a constructive trust, “equip[s] judges with a free-wheeling discretion to create proprietary rights”.²⁰² What then are those requirements? It is suggested that the primary requirement is, reflecting equity’s nature as a supplemental system of justice, that a constructive trust will only be recognised or imposed if it is necessary to protect the plaintiff’s rights.²⁰³ *Prima facie*, this looks like

199 [2024] HCA 27.

200 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* [2024] HCA 27 at [297].

201 The question of if, whether and how, this should change given modern-day pluralism has already been briefly discussed above and cannot be discussed further given the constraints of space.

202 Rohan Havelock, “Conscience and Unconscionability in Modern Equity” (2015) 9(1) *Journal of Equity* 1 at 25.

203 An important role has also been granted to considering the effect granting such rights would have on third parties: see *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; *Soulos v Korkontzilas* (1997) 2 SCR 217; and Liew Ying Khai, “Constructive Trusts and Discretion in Australia: Taking Stock” (2020) 44(3) *Melbourne University Law Review* 963. This is problematic because it is generally accepted that questions of fairness are irrelevant in the context of property rights. Thus, for example, if X represents the substitute asset of misappropriated trust funds, it is irrelevant that allowing the beneficiary to trace into X would be unfair, or unjust, or unreasonable to the current third-party holder of those assets because it is a case of “hard-nose property rights”: see *Foskett v McKeown* [2001] 1 AC 102 at 109. Perhaps surprisingly, this approach has also been adopted in Australia, see eg, *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [698]–[700].

a tautology but what is meant is that “a constructive trust ought not to be imposed if there are other orders capable of doing full justice”.²⁰⁴

38 In general, this will mean those cases where “the plaintiff [has] a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties”.²⁰⁵ Thus, for example, the constructive trust which arises as regards a breach of a fiduciary’s duty of loyalty ensures the fiduciary’s loyalty by ensuring that any diverted profits are restituted to the trust fund.²⁰⁶ From an English point of view this approach may seem heretical, because it seems to amount to the “discretionary remedialism” (this involves the unlinking of right and remedy so that a judge may award whatever remedy they feel appropriate, regardless of the nature of the right at issue²⁰⁷) which Peter Birks rightly lambasts,²⁰⁸ however even English law has arguably long recognised this principle in certain areas.²⁰⁹ Thus, the reason that a seller holds property under a specifically enforceable contract for sale on a constructive trust for the purchaser is because the uniqueness of the property in question²¹⁰ means that “damages for breach or interference would be an inadequate remedy”.²¹¹ Similarly, as noted above, the decision as to whether to recognise a constructive trust in response to a successful proprietary estoppel claim requires some exercise of judicial discretion in deciding that a constructive trust, as

204 *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [583]. See also generally G E Dal Pont, “The High Court’s Trust Tricentarian: Its Legacy From 1985–2015” (2015) 36 *Adelaide Law Review* 459 and Liew Ying Khai, “Constructive Trusts and Discretion in Australia: Taking Stock” (2020) 44(3) *Melbourne University Law Review* 963.

205 *Soulos v Korkontzilas* [1997] 2 SCR 217 at 241.

206 *Attorney-General for Hong Kong v Reid* [1993] 3 WLR 1143.

207 The most famous example of this view can be found in *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574 at 631–632, *per* Wilson J. This remedies-focused approach is endemic throughout Canadian law, thus the issue of retroactive *versus* prospective overruling is discussed from a remedial (and discretionary) basis in *Canada (Attorney General) v Hislop* [2007] 1 SCR 429. See more recently *Ontario (Attorney General) v G* [2020] 3 SCR 629. For a general overview see Kent Roach, “Principled Remedial Discretion Under the Charter” (2004) 25(2) *The Supreme Court Law Review* 101.

208 Peter Birks, “Three Kinds of Objection to Discretionary Remedialism” (2000) 29(1) *Western Australian Law Review* 1; Peter Birks, “Rights, Wrongs, and Remedies” (2000) 20(1) *Oxford Journal of Legal Studies* 1.

209 For example, the Privy Council noted as long ago as 1884 that “the Court must look at the circumstances in each case to decide in what way the equity can be satisfied”: *Plimmer v Wellington Corpn* (1884) 9 App Cas 699 at 714.

210 *Frenkel v La Micro Group (UK) Ltd* [2025] 2 WLR 1 at [24]–[26]. See also Robert Chambers, “The Vendor-Purchaser Constructive Trust” in James Edelman & Simone Degeling, *Equity in Commercial Law* (Lawbook Co, 2005) at pp 431–462.

211 *Frenkel v La Micro Group (UK) Ltd* [2025] 2 WLR 1 at [49].

opposed merely to the payment of compensation, is appropriate in the instant case.²¹²

39 Moreover, the ability to recognise or impose a constructive trust is further constrained by the common law method of “reasoned, incremental development of the law on a case-by-case basis”,²¹³ and this, in turn, means that judges are constrained by existing “principles about what equity ... recognise[s] as an unconscionable result”²¹⁴ so that, for example, “What makes it unconscionable to resile from a promise or agreement unenforceable at common law is detrimental reliance on that agreement or promise.”²¹⁵ Similarly, in the context of relationships “that provid[e] for impairment of title or [where] there was a common intention to share which impairs title”,²¹⁶ the requisite unconscionability “would ... stem from the fact that the defendant is disavowing the prior relationship or agreement, and instead wishes to insist on his strict legal rights”.²¹⁷ Equally, in the context of knowing receipt, the test for unconscionability does not need to be the “unruly and unpredictable”²¹⁸ test deplored by Lord Briggs, but rather one centred around whether “there are circumstances in a particular transaction that are so unusual, or so contrary to accepted commercial practice, that it would be unconscionable to allow a defendant to retain the benefit of receipt”.²¹⁹ In consequence, it is arguable that in many cases it is not for a judge to determine, in the abstract, what unconscionability is or whether a constructive trust should be recognised or imposed; rather, they merely need to apply already decided law to the factual matrix of the case before them. This is entirely in line with the need for equity to apply its own well-settled principles rather than arbitrary judicial caprice as noted by Lord Eldon²²⁰ and Thomas More.²²¹

212 See generally *Thorner v Major* [2009] 1 WLR 776. See also *Guest v Guest* [2022] 3 WLR 911. In the Australian context, see *Kramer v Stone* [2023] NSWCA 270 and *Kramer v Stone* [2024] HCA 48; and *Giumelli v Giumelli* [1999] HCA 10.

213 *Soulos v Korkontzilas* [1997] 2 SCR 217 at 237. See also, echoing this, *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 at [182].

214 *Hudson v Hathway* [2023] 2 WLR 1227 at [72].

215 *Hudson v Hathway* [2023] 2 WLR 1227 at [72].

216 Tey Tsun Hang, “Constructive Trusts – Deciphering and Distinguishing ‘Institutional’ and ‘Remedial’” (2011) 23 SAclJ 250 at 270.

217 Tey Tsun Hang, “Constructive Trusts – Deciphering and Distinguishing ‘Institutional’ and ‘Remedial’” (2011) 23 SAclJ 250 at 270.

218 *Byers v Saudi National Bank* [2024] AC 1191 at [82].

219 *George Raymond Zage III v Ho Chi Kwong* [2010] 2 SLR 589 at [32].

220 *Gee v Pritchard* (1818) 36 ER 670 at 674.

221 John H Baker, *The Oxford History of the Laws of England* vol VI (Oxford University Press, 2004) at p 177.

40 Lastly, on this view, a constructive trust should not be seen as creating proprietary rights *ex nihilo* and according to arbitrary judicial caprice; rather, it is merely a specific application of general equitable principles “which have, over time, enabled purely personal rights to harden into property rights”²²² in order to fulfil equity’s fundamental purpose of “impos[ing] carefully measured constraints upon unconscionable conduct otherwise permitted by the law”.²²³ Although this article need not go as far as Sarah Worthington in holding that equity has “effectively eliminated the divide between property and obligation, or between property rights and personal rights”,²²⁴ it is certainly true that equity has often reified purely personal rights in order to ensure the availability of an effective remedy for the protection of rights which could otherwise be breached with impunity.²²⁵ In this sense, equity can also be said to “subvert the law”,²²⁶ although this approach is not without its critics,²²⁷ or one could view equity as being a system of “meta-principles”²²⁸ which “smuggl[es] inside the process of legal analysis an overriding normative formula [that] then imparts a critical twist of direction to the major premise of the syllogism”,²²⁹ *ie*, changes the result from what it would otherwise be at law. Nevertheless, as subversive as equity can be, it by no

222 *Byers v Saudi National Bank* [2024] AC 1191 at [37].

223 *Byers v Saudi National Bank* [2024] AC 1191 at [37].

224 Sarah Worthington, “The Disappearing Divide between Property and Obligation” (2006) 42(3) *Texas International Law Journal* 917 at 917.

225 For example, in the context of licences over land, see Lucas Clover Alcolea, “Contractual Licences Over Land and the ‘Disappearing Divide between Property and Obligation’” (2024) 54(3) *Australian Bar Review* 319. This has also been argued to be the case as regards the beneficiary’s proprietary rights in the trust fund: see the judgment of Lord Briggs in *Byers v Saudi National Bank* [2024] AC 1191. See also *Grey v Inland Revenue Commissioners* [1958] Ch 690 at 707–708; *Sinclair v Brougham* [1914] AC 398 at 442; and Sir William Markby, *Elements of Law Considered with Reference to Principles of General Jurisprudence* (Clarendon Press, 1874) at pp 157–158. The process was famously outlined by Maitland, although he argued that the beneficiary’s rights merely looked like proprietary rights rather than actually being proprietary rights: see Frederic William Maitland, A H Chaytor & W J Whittaker, *Equity and the Forms of Action* (Cambridge University Press, 1910) at pp 111–123. For other examples see Sarah Worthington, “The Disappearing Divide between Property and Obligation” (2006) 42(3) *Texas International Law Journal* 917.

226 Mark Bennett & Adam Hofri-Winogradow, “The Use of Trusts to Subvert the Law: An Analysis and Critique” (2021) 41(3) *Oxford Journal of Legal Studies* 692.

227 David Frydrych, “Characteristic Uses of Trusts: A Response to Bennett and Hofri” (2024) 140 *Law Quarterly Review* 453.

228 See in this vein Henry E Smith, “Equity as Meta-Law” (2021) 130 *Yale Law Journal* 1050.

229 Kevin Gray & Susan Francis Gray, “The Rhetoric of Reality” in Joshua Getzler & E H Burn, *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis UK, 2003) at p 237. See also Lucas Clover Alcolea, “The Numerus Clausus as a Meta-Principle of Trusts Law: Hiding in Plain Sight?” (2023) 37(4) *Trust Law International* 205.

means aims to supplant the common law, nor could it, as equity can only build upon, or gloss, the foundations laid by the common law (or statute). Thus, Maitland famously remarked that “It’s of no use for Equity to say that A is a trustee of Blackacre for B, unless there be some court that can say that A is the owner of Blackacre. Equity without common law would have been a castle in the air, an impossibility.”²³⁰ On this view, it follows that even as regards a remedial constructive trust, a court declaring one is not creating entirely new legal rights and relations where before there were none; instead, it is merely transforming pre-existing legal rights and relations.²³¹

(2) *Are there any alternative and compelling explanations for the constructive trust?*

41 As to the second question, it is rare that opponents of conscience formulate an alternative general framework, although they may do so as regards specific types of constructive trust.²³² Those few attempts which have been made have often either been abandoned or are plainly unsatisfactory. Thus, for example, the Supreme Court of Canada at one stage appeared to suggest that all constructive trusts arose as a response to unjust enrichment because “the principle of unjust enrichment lies at the heart of the constructive trust.”²³³ However, this approach was abandoned by the majority in *Soulos* because of the obvious “wrinkle” that whilst traditionally “fiduciaries, who acquire for their own benefit assets which they should acquire only for their principals, hold those assets on constructive trust”²³⁴ this could not be justified on an unjust enrichment basis where, as in *Soulos*, the acquired asset had depreciated in value.²³⁵ The Supreme Court of Canada was therefore left with two choices: it could either completely rewrite the law of constructive trusts to accommodate its doctrine or rewrite its doctrine to accommodate the

230 Frederic William Maitland, A H Chaytor & W J Whittaker, *Equity and the Forms of Action* (Cambridge University Press, 1910) at p 19.

231 Liew Ying Khai, “Constructive Trusts and Discretion in Australia: Taking Stock” (2020) 44(3) *Melbourne University Law Review* 963.

232 For example, see Liew Ying Khai, “The ‘Joint Endeavour Constructive Trust’ Doctrine in Australia – Deconstructing Unconscionability” (2021) 42(1) *Adelaide Law Review* 73.

233 *Pettkus v Becker* [1980] 2 SCR 834 at 847; *Peter v Beblow* [1993] 1 SCR 980 at 995–996; *Soulos v Korkontzilas* [1997] 2 SCR 217 at 257–250, *per* Sopinka and Iacobucci JJ (dissenting).

234 Robert Chambers, “Constructive Trusts in Canada Symposium on Restitution” (1999) 37(1) *Alberta Law Review* 173 at 175.

235 Robert Chambers, “Constructive Trusts in Canada Symposium on Restitution” (1999) 37(1) *Alberta Law Review* 173 at 174–175.

law. It chose the latter course, and this has generally been accepted as correct by Canadian legal commentators.²³⁶

42 An alternative approach to formulating a general theory free of conscience is that of Rohan Havelock who argues in favour of a “category-based”²³⁷ approach, whereby instead of referring to conscience one would merely say “Because of elements X, Y and Z – Equity will intervene because this case falls within an established category of the rules or principles of the Equity jurisdiction.”²³⁸ The problem, as noted above, is that it is notoriously difficult to establish what rule or principle, aside from conscience, unites all the disparate occasions in which constructive trusts have been imposed by equity. One could, of course, simply refer to all those disparate situations and say “a constructive trust will be imposed whenever one of these situations occurs” but this would effectively fossilise the constructive trust and make it “very difficult to develop the law beyond these specific situations.”²³⁹ Moreover, doing so would tell us nothing about why equity imposes a constructive trust in those situations in the first place, it would merely amount to saying “A constructive trust arises in these situations because a constructive trust has always arisen in those situations.” Evidently, this is not a particularly attractive way in which to either explain or develop the law surrounding constructive trusts.

43 In addition, it is not clear that removing conscience from some of the situations in which a constructive trust arises would make the law any more objective. For example, as regards constructive trusteeship, *ie*, personal liability for knowing receipt or knowing or dishonest assistance, it is notorious that the law has struggled, almost since its inception, to explain exactly what sort of knowledge or dishonesty is required in order to obtain a remedy.²⁴⁰ This is a particularly apt example

236 Leonard I Rotman, “Deconstructing the Constructive Trust” [1999] *Alberta Law Review* 133; Robert Chambers, “Constructive Trusts in Canada Symposium on Restitution” (1999) 37(1) *Alberta Law Review* 173.

237 Rohan Havelock, “Conscience and Unconscionability in Modern Equity” (2015) 9(1) *Journal of Equity* 1 at 28.

238 Rohan Havelock, “Conscience and Unconscionability in Modern Equity” (2015) 9(1) *Journal of Equity* 1 at 28. See, to similar effect, Peter Birks, “Equity in the Modern Law: An Exercise in Taxonomy” (1996) 26(1) *University of Western Australia Law Review* 1.

239 Tang Hang Wu, “The Constructive Trust in Singapore” (2010) 22 SAclJ 136 at 158.

240 The following is a selection of important cases where the problem has been noted, most of which contradict each other: *Baden v Société Générale pour Favoriser le Développement du Commerce et de l’Industrie en France SA* [1993] 1 WLR 509; *Agip (Africa) Ltd v Jackson* [1990] Ch 265; *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2000] 3 WLR 1423; *Twinsectra Ltd v Yardley* [2002] 2 AC 164; *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378; *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; *Grimaldi v Chameleon* (cont’d on the next page)

because, as Havelock himself is aware,²⁴¹ in *Royal Brunei* the Judicial Committee of the Privy Council (“JCPC”) warned against unconscionable conduct being the basis of liability for dishonest assistance as it either meant dishonesty, in which case it was superfluous, or if it meant something different “it is not clear what that something different is. Either way, therefore, the term is better avoided in this context.”²⁴² However, as shown by the continuing controversy about what exactly dishonesty means, as noted above, it is not clear that the JCPC’s attempt to replace “conscience” or “unconscionability” with “dishonesty” has made the law in this area any less indeterminate. The same issue of determining what X term means, and whether or not the plaintiff was X in the case at hand remains. Moreover, although Havelock himself would likely not see this as a problem, this approach does not allow for any room for judicial discretion, it posits that if situation A falls into category B then C must necessarily happen (whether or not the judge would consider C reasonable or appropriate). It cannot, therefore, explain the remedial constructive trust, nor any other situation in which there is some sort of discretion as regards the recognition, or imposition, of a constructive trust²⁴³ (including where a constructive trust is imposed as the result of successful proprietary estoppel claim²⁴⁴).

44 This article suggests that the end result is that there is no credible alternative to conscience as an explanatory framework for constructive trusts. This is not problematic because the indeterminacy objections which are generally made against the concept of conscience are, for the reasons discussed above, grossly overstated. The conscience which is applied in this context is an objective one based on well known, and accepted, communal moral standards. Moreover, the decision to recognise or impose a constructive trust in response to a breach of those

Mining NL (No 2) (2012) 200 FCR 296; *McLennan v Livaja* [2017] NZCA 446; *Scott v ANZ Bank New Zealand Ltd* [2020] 3 NZLR 145; *Crédit Agricole Corporation and Investment Bank v Papadimitriou* [2015] 1 WLR 4265 at [33], per Lord Sumption; and *Westpac Banking Corporation v Forum Finance Pty Limited* [2024] FCA 1176. See also Joachim Dietrich & Pauline Ridge, “The Receipt of What?: Questions Concerning Third Party Recipient Liability in Equity and Unjust Enrichment” (2007) 31 *Melbourne University Law Review* 47 and *Fault Lines in Equity* (Jamie Glister & Pauline Ridge eds) (Hart Publishing, 2012) at pp 119–141.

241 Rohan Havelock, “Conscience and Unconscionability in Modern Equity” (2015) 9(1) *Journal of Equity* 1 at 4.

242 *Royal Brunei Airlines Sdn Bhd v Tan* (1995) 2 AC 378 at 392.

243 For an outline of the general importance of discretion in Australia as regards the constructive trust see *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296. See also Liew Ying Khai, “Constructive Trusts and Discretion in Australia: Taking Stock” (2020) 44(3) *Melbourne University Law Review* 963.

244 *Kramer v Stone* [2023] NSWCA 270; *Kramer v Stone* [2024] HCA 48; *Giumelli v Giumelli* [1999] HCA 10; *Thorner v Major* [2009] 1 WLR 776.

standards is itself, likewise, based on objective criteria rooted in equity's nature and *raison d'être* as a supplemental form of justice, which corrects shortcomings in the common law. This is not to say that the concept of conscience is perfectly determinate, but that does not undermine the validity of conscience as a legal concept, because, at least, "partial indeterminacy 'is true of virtually all fundamental statements of law'"²⁴⁵ which, for the theologian, is merely the legal result of the fact that in this world "[w]e see now through a glass [darkly]"²⁴⁶ whilst in the next we will see God, and thereby justice, "face to face".²⁴⁷

IV. Conclusion

45 This article has outlined the concept of conscience in scholastic theology, as well as more recent theology based on scholastic theology such as the writings of Cardinal Newman, and has attempted to demonstrate that this theological concept was imported into equity jurisprudence in two primary ways. The first is a result of the theological training of ecclesiastical Chancellors up until the 16th century, and the second was as a result of seminal equity lawyers, such as St German and Thomas More, as well as in later years Lord Nottingham, who translated this theological concept into legal terms. Although the importance of conscience has waxed and waned over the years, reflecting the reality that "[t]here has only ever been one real argument about equity"²⁴⁸ namely, whether "equity [is] open-textured and just ... or [whether] it is an enemy of order in the law",²⁴⁹ the concept of conscience in equity has never gone away. As noted by Klinck, "Conscience' still has a privileged place in our legal culture. It is embedded in our inherited way of talking about equity."²⁵⁰ This article has argued that this is because conscience is the "organising concept of equity"²⁵¹ and in this context it has outlined

245 Conor Casey & Adrian Vermeule, "Myths of Common-Good Constitutionalism" *Ius & Iustitium* (9 September 2021) <<https://iustetiustitium.com/myths-of-common-good-constitutionalism/>> (accessed 5 May 2025).

246 *The Holy Bible, Douey-Rheims Version* (John Murphy Company, 1899) 1 Corinthians 13:12.

247 *The Holy Bible, Douey-Rheims Version* (John Murphy Company, 1899) 1 Corinthians 13:12.

248 Alastair Hudson, "Conscience as the Organising Concept of Equity" (2016) 2(1) *Canadian Journal of Comparative and Contemporary Law* 261 at 262.

249 Alastair Hudson, "Conscience as the Organising Concept of Equity" (2016) 2(1) *Canadian Journal of Comparative and Contemporary Law* 261 at 262–263. Alternatively, as was noted to the author, one could talk of a "tug of war" between the need for legal certainty and the need for justice in the individual case.

250 Dennis R Klinck, "The Unexamined 'Conscience' of Contemporary Canadian Equity" (2001) 46 *McGill Law Journal* 571 at 613.

251 Alastair Hudson, "Conscience as the Organising Concept of Equity" (2016) 2(1) *Canadian Journal of Comparative and Contemporary Law* 261.

how the concept of conscience is the only general explanatory framework that convincingly explains the institution or remedy of the constructive trust which is best understood as “a response to unconscionability”.²⁵²

46 In doing so, this article has addressed the primary objection to the concept of conscience – its alleged indeterminacy – by noting that this objection is greatly overstated, as conscience is an objective as opposed to a subjective concept, and arguing that as some degree of indeterminacy is a common feature of all legal concepts, conscience (both generally and in the context of the constructive trust) is no worse off in this respect than any other legal concept. Moreover, as explained above, there is simply no convincing alternative explanatory framework for the constructive trust, so that unless one either abandons the concept or abandons the endeavour of attempting to make sense of the law, there is no alternative but to embrace the role of conscience in this context. Lastly, it has been argued that the objective moral standards upon which conscience is based arise from scholastic theological teachings, even if that point is generally (but as seen, not always) omitted or glossed over today.

252 Graham Virgo, “The Genetically Modified Constructive Trust” (2016) 2(2) *Canadian Journal of Comparative and Contemporary Law* 579 at 589.