CONSTRUCTIVE TRUSTS

Deciphering and Distinguishing "Institutional" and "Remedial"

This article attempts to decipher and distinguish institutional constructive trusts and remedial constructive trusts. It argues that the remedial constructive trust is workable as a principled application of unconscionability as a doctrine. The institutional constructive trust, on the other hand, looks to something more than unconscionability. There must be circumstances pointing to a relationship that provided for impairment of title or that there was a common intention to share which impairs title. Unconscionability would then stem from the fact that the defendant is disavowing the prior relationship or agreement, and instead wishes to insist on his strict legal rights. It argues that it is not acceptable to conflate the two concepts together to introduce some form of remedial discretion.

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I. Introduction

1 It is important to examine and unpack the term "remedial", so as to accurately discern the nature of the discussion. It is of no use to baldly assert that English trust law recognises, or does not recognise, a remedial constructive trust, if one does not even begin to define what "remedial" means. Definitional difficulties are not without a practical aspect; in the latest case from the House of Lords,[1] Lord Scott, in the context of proprietary estoppel, held that there are situations where a "remedial constructive trust" would operate.[2] His Lordship appears to have reclassified the common intention constructive trust into a remedial constructive trust, when the remedial constructive trust was

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1 The "Appellate Committee of the House of Lords", as they were then known; the institution is now called the "Supreme Court of the United Kingdom"; see the Constitutional Reform Act 2005 (c 4) (UK) Pt 3.

2 *Thorner v Major* [2009] 1 WLR 776 at [14] and [20].

held to have been "recognised at least since *Gissing v Gissing*".[3] Academic comment has questioned the usage of the term "remedial" in this context; it has been variously described as the "application of principles relating to common intention constructive trusts",[4] and as "unnecessarily invit[ing] fresh controversy".[5]

2 From the outset, it is asserted that the term "remedial" in this context refers to the granting of a constructive trust remedy by the court for remedial purposes *per se*, there being no other reason why it should exist. With all due respect, this is in sharp contrast to the approach taken by Professor Tang Hang Wu, which is examined, and distinguished, below.[6]

3 The term "remedial", in one sense, simply refers to that of a remedy. Tang uses this definition as a lynchpin to show why English trust law recognises a remedial constructive trust. Tang asserts that "[a]ll forms of constructive trust are in a sense remedial".[7] This stemmed from the opinion that the historical basis for the distinction was a false premise. Tang traced the origins of the current dichotomy to Roscoe Pound's article:[8]

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

4 Tang asserts that Pound was "writing purely about US law and was not engaged in a comparative analysis of English and US law. Furthermore, Pound did not purport to make a distinction between an

3 *Thorner v Major* [2009] 1 WLR 776 at [14] and [20].

4 Ben McFarlane & Andrew Robertson, "Apocalypse Averted: Proprietary Estoppel in the House of Lords" (2009) 125 LQR 535 at 539.

5 Brian Sloan, "Estop Me if You Think You've Heard It" (2009) 68 CLJ 518 at 520: "Moreover, Lord Scott unnecessarily invited fresh controversy in *Thorner* by appearing to analyse testamentary promise cases in terms of the remedial constructive trust. This was in spite of previous pronouncements by the senior judiciary that the remedial version is not a current feature of English Law"; see too Kevin Gray & Susan F Gray, *Elements of Land Law* (Oxford: Oxford University Press, 5th Ed, 2008) at para 7.83: "His Lordship also does not clearly explain what he means by 'remedial constructive trusts' given that the idea that constructive trusts can be remedial rather than institutional has been a much vexed one that previous English courts have frowned upon."

6 Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAcLJ 136 at 149–150, para 25.

7 Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAcLJ 136 at 149, para 25.

8 Roscoe Pound, "The Progress of the Law – Equity" (1919–20) 33 Harv L Rev 420 at 420–421, cited in Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAcLJ 136 at 139, para 7.

institutional and remedial constructive trust".[9] He later traces the purported mistaken interpretation to Ronald Maudsley's article:[10]

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

5 Having established that there never was a dichotomy to begin with, and that both "the express and the constructive trust were institutions",[11] Tang then argues that "the terminology of 'institutional constructive trust' should be abandoned in Singapore",[12] because it "conceals the real question" as to "what is the appropriate methodology for dealing with the future development of the law".[13] The term "institution" merely reflects recognition of certain established categories where a constructive trust would be imposed,[14] and may even mean that the law "will *never* develop new categories of the constructive trust" [emphasis in original].[15] Thus, it is better to abandon such old labels and focus on "defensible reasons", rather than "dogmatic assertion[s]" in delimiting the content of the constructive trust.[16]

6 It is useful to consider next the Australian High Court case of *Muschinski v Dodds*, given that Tang also cites this case in support of there being no basis for having such a dichotomy.[17] The passage that Tang relies upon was by Deane J:[18]

> Where an equity court would retrospectively impose a constructive trust by way of equitable remedy, its availability as such a remedy provides the basis for, and governs the content of, its existence inter

9 Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAcLJ 136 at 139, para 8.

10 Ronald H Maudsley, "Proprietary Remedies for the Recovery of Money" (1959) 75 LQR 234 at 237, cited in Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAcLJ 136 at 139, para 8.

11 Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAcLJ 136 at 139, para 8.

12 Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAcLJ 136 at 140, para 11.

13 Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAcLJ 136 at 148, para 24.

14 In this regard, Tang also regards an institution as merely being so because "there are many established precedents supporting this proposition"; see Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAcLJ 136 at 150, para 25.

15 Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAcLJ 136 at 149, para 25.

16 Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAcLJ 136 at 149, para 25.

17 Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAcLJ 136 at 140, para 10.

18 *Muschinski v Dodds* (1985) 160 CLR 583 at 614.

> partes independently of any formal order declaring it or enforcing it. In this more limited sense, the constructive trust is also properly seen as both 'remedy' and 'institution'. Indeed, for the student of equity, there can be no true dichotomy between the two notions.

7 However, that is not the end of the matter. Deane J's speech as a whole actually provided two ways of understanding the term "remedial". The above passage was his Honour's conclusion as to the debate on the dichotomy.[19] Earlier, his Honour held:[20]

> In a broad sense, the constructive trust is both an institution and a remedy of the law of equity. As a remedy, it can only properly be understood in the context of the history and the persisting distinctness of the principles of equity that enlighten and control the common law. The use or trust of equity, like equity itself, was essentially remedial in its origins … There is, however, a more limited sense in which there is some superficial plausibility in the notions of 'institution' and 'remedy' as competing characterizations of the constructive trust. If 'institution' is understood as connoting a relationship which arises and exists under the law independently of any order of a court and 'remedy' is defined as referring to the actual establishment of a relationship by such an order, the catchwords of 'institution' and 'remedy' do serve the function of highlighting a conceptual problem that persists about the true nature of a constructive trust.

8 Thus, there appear to be two ways in which "remedial" can be understood. "Remedial" can either mean "remedy", and in that sense both Deane J and Tang agree that there is no real dichotomy because the constructive trust is essentially a remedial measure *per se*; or it can mean a remedy given to vindicate a pre-existing relationship established at law.

9 Professor Peter Birks attempted to unpack the term "remedial" even more thoroughly. He discerned five different meanings of the word "remedy" and "remedial constructive trust".[21] Birks defined the term "remedial" to mean "an action or actionability", "a right born of a wrong", "a right born of grievance or injustice", "a right born of the order or judgment of a court", or "a right born of a court's discretionary

19 *Muschinski v Dodds* (1985) 160 CLR 583 at 614; "Even in this more limited sense, however, any perceived dichotomy between the two notions tends to prove ephemeral upon closer examination."

20 *Muschinski v Dodds* (1985) 160 CLR 583 at 613.

21 Peter Birks, "Can Sense Be Made of the Remedial Constructive Trust?" (paper delivered at the University of Western Australia Law School on 22 September 1999).

order".[22] It is useful to attempt to analyse Birks' approach, for Tang also relied upon Birks' approach to show the limitations of this dichotomy.

10 For present purposes, it is useful to examine the fourth and fifth meanings of the word "remedial", for Birks was quick to dismiss the first three meanings as being either "so imprecise that it cannot be used as an instrument of analysis",[23] or that the latter two meanings were already sufficiently precise without the word "remedial"; "nothing could be achieved by insisting on the adjective 'remedial' as justified by these two meanings of that word".[24]

11 As for the fourth meaning, Birks described it as "the pronouncement of the court made on a non-discretionary basis … the role of the declaration is not properly speaking creative. If it finds for the plaintiff, it recognises and confirms the effect of the happening of earlier facts".[25] He cites Roy Goode's opinion that there are cases where the "court's declaration is creative *ex nunc*, not simply confirmatory *ex tunc*".[26] This would happen in cases where the defendant owes the asset in question, but the plaintiff "has a personal right to have it transferred to him: a *ius in personam ad rem adequirendam*".[27] Birks concedes that this might indeed be the case, but a "remedy" in that sense, and hence a "remedial constructive trust" of that definition, would never occur, because "[t]he premise is a personal right to have a *res* transferred", and equity, having always regarded as done that which ought to be done, would have turned "the promissory into a trustee at once".[28] Thus, when the court's role is to recognise the trust when the maxim operates, and that it is "almost impossible to envisage facts on which an English court would exclude the operation of the maxim", the

22 Peter Birks, "Can Sense Be Made of the Remedial Constructive Trust?" (paper delivered at the University of Western Australia Law School on 22 September 1999) at para 7.

23 Peter Birks, "Can Sense Be Made of the Remedial Constructive Trust?" (paper delivered at the University of Western Australia Law School on 22 September 1999) at para 18.

24 Peter Birks, "Can Sense Be Made of the Remedial Constructive Trust?" (paper delivered at the University of Western Australia Law School on 22 September 1999) at para 19.

25 Peter Birks, "Can Sense Be Made of the Remedial Constructive Trust?" (paper delivered at the University of Western Australia Law School on 22 September 1999) at para 20.

26 Peter Birks, "Can Sense Be Made of the Remedial Constructive Trust?" (paper delivered at the University of Western Australia Law School on 22 September 1999) at para 20.

27 Peter Birks, "Can Sense Be Made of the Remedial Constructive Trust?" (paper delivered at the University of Western Australia Law School on 22 September 1999) at para 20.

28 Peter Birks, "Can Sense Be Made of the Remedial Constructive Trust?" (paper delivered at the University of Western Australia Law School on 22 September 1999) at para 20.

conclusion would be that this would only be a theoretical exercise with little practical effect.

12 With that in mind, Birks expounded upon the fifth meaning, which proved to be the most interesting one:[29]

> '[R]emedy' in the sense of judgment is finally divorced from 'right – and from the maxim … – by the court's assertion of a strong discretion. If a trust is created by the court in the exercise of a strong discretion, that trust certainly deserves the name 'remedial' – that is, 'judgment-created'.

13 Birks observed that this was the meaning of the term "remedial" as described in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, where Lord Browne-Wilkinson held:[30]

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

14 The kind of trust that appears here would be where "the existence of the claimant's equitable interest, its quantum, and its inception would all be tailored to suit the facts of the case. These matters would all be discretionary."[31] In this regard, Birks drew a distinction between "discretionary in creation" and "discretionary in operation", with the result that this "sense five remedial trust" is discretionary in the former sense.[32]

15 It flows from the preceding analysis that the term "remedial" does not merely reflect the meaning that Tang attributes to it.

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29 Peter Birks, "Can Sense Be Made of the Remedial Constructive Trust?" (paper delivered at the University of Western Australia Law School on 22 September 1999) at para 22.

30 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 714.

31 Peter Birks, "Can Sense Be Made of the Remedial Constructive Trust?" (paper delivered at the University of Western Australia Law School on 22 September 1999) at para 22.

32 Peter Birks, "Can Sense Be Made of the Remedial Constructive Trust?" (paper delivered at the University of Western Australia Law School on 22 September 1999) at para 22.

16 There is, in a sense, something more distinctively "substantive" about the dichotomy, as opposed to a mere misuse of labels. It directly correlates to the distinct theories behind it. As David Wright puts it, the remedial theory does not draw a "distinction … between the nature of a constructive trust and the circumstances out of which it arose", while the institutional theory approaches it from a substantive perspective by inquiring as to the "existence of a triggering situation to activate the constructive trust".[33] The term "remedial constructive trust" can best be understood from a perspective whereby the constructive trust arose due to its remedial nature *per se*. It does not arise out of any other reason, institution or relationship.

17 Thus analysed, the essential distinction is whether there is a pre-existing relationship either to take imperfect title,[34] or an agreement that the title holder does not retain the whole of his title because of an agreement to share.[35] Where there is no such notion of an imperfect title, a constructive trust that nevertheless arises would be one that is remedial in nature, because there is no pre-existing category for the trust to latch itself on. The dichotomy would thus make sense, if it is understood this way.

II. Coherence within the institutional constructive trust

18 It stems from the above analysis that one must now look to defining the institutional constructive trust. It is more useful to define the concept, rather than the term "institutional", for the term

33 David Wright, *The Remedial Constructive Trust* (Australia: Butterworths, 1998) at paras 1.3 and 1.7. Wright cited the Canadian case of *Atlas Cabinet and Furniture Ltd v National Trust Co Ltd* (1990) 68 DLR (4th) 161 at 169, where Lambert JA held that: "In a substantive constructive trust, the acts of the parties in relation to some property are such that those acts are later declared by a court to have given rise to a substantive constructive trust and to have done so at the time when the acts of the parties brought the trust into being. The difference between a substantive constructive trust and a resulting trust may, in cases where the property reverts to the settlor, be no more than a matter of terminological preference. In a remedial constructive trust, on the other hand, the acts of the parties are such that a wrong is done by one of them to another so that, while no substantive trust relationship is then and there brought into being by those acts, nonetheless a remedy is required in relation to property and the court grants that remedy in the form of a declaration which, when the order is made, creates a constructive trust by one of the parties in favour of another party".

34 An example of this is *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324, where the fiduciary who received the bribe was deemed to have received it on behalf of his principal, and hence the proceeds of the bribe constituted the property of the constructive trust, liable to be traced into any asset. The fiduciary was deemed to have never taken the title as a whole; he merely took title on trust for his principal.

35 As with the case of the common intention constructive trust; see generally *Stack v Dowden* [2007] 2 AC 432.

"institution" merely tells "categories of situation where it is appropriate to declare a constructive trust".[36]

19 Assuming, as one must do, for present purposes that the term "institutional" is still appropriate in this area, one must now examine whether the institutional constructive trust is really "institutional" in nature, in that it responds to a given situation by looking to an established category to see if a constructive trust can be imposed, or whether it operates as a general doctrine. The latter question is important, because if the "institutional" constructive trust is shown to not rely on any notion of "institutions", it would then be important to examine the limits of the general doctrine to see whether the underlying rationale, basis and concerns of the "remedial" constructive trust can be accommodated within this general doctrine.

20 It is suggested that the constructive trust doctrine is one that looks to categories, but, and this is an important point, that such categories have a common underlying basis for imposing a constructive trust. Thus, while the focus remains on establishing the appropriate category for a given factual scenario, the existence of a common underlying basis allows for new categories to be added.

III. A theory of categories

21 Professors Pearce and Stevens have opined that "English law has tended to take the view that constructive trusts arise in a range of relatively well circumscribed conditions in which the trustee's conduct is considered unconscionable".[37] This is in broad agreement with Snell, where it concluded:[38]

> For the present … constructive trusts fall for the most part in well-established categories, and it is only occasionally and in unusual circumstances that it would be necessary to take refuge in such a broad and fundamental principle [*ie*, of unconscionability].

22 Pearce and Stevens argue that the categories approach would be preferable to general statements defining imprecisely what a constructive trust is. This is because:[39]

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36 Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAcLJ 136 at 149, para 24.

37 Robert Pearce & John Stevens, *The Law of Trusts and Equitable Obligations* (Oxford: Oxford University Press, 4th Ed, 2006) at p 270.

38 Baker & Langan, *Snell's Equity* (London: Sweet & Maxwell, 29th Ed, 1990) at p 197.

39 Robert Pearce & John Stevens, *The Law of Trusts and Equitable Obligations* (Oxford: Oxford University Press, 4th Ed, 2006) at p 270.

> The concept of 'justice and good conscience' is too broad to be of direct practical value. Analysis of the precise conduct justifying the imposition of a constructive trust can only realistically be attempted in the context of the common circumstances where constructive trusts have been found to arise.

23 This does not necessarily mean that the categories are closed, contrary to what Tang postulates. While Tang writes that "[a] strict adherence to the supposed rule that the law recognises only the institutional constructive trust means that the law may *never* admit new categories of situation where it is appropriate to declare a constructive trust" [emphasis in original],[40] it must be kept in mind that there is judicial pronouncement that "the boundaries of constructive trust may have been left deliberately vague, so as not to restrict the court by technicalities in deciding what the justice of a particular case may demand".[41]

24 A question then arises: would it still be a coherent theory of categories, if the list of categories is not closed? It is submitted that an open list would not prove fatal to the categories approach. The efficacy of the categories approach lies in whether the recognised categories are coherent; coherence would fall to be measured by a common baseline standard. There should be no objections – in theory at least – to adding new categories if such categories are able to fit into pre-existing categories coherently.

25 At this juncture, we examine the two categories that provide a contrast: the common intention constructive trust and a constructive trust imposed by way of a fiduciary duty. These two categories seem to respond differently in imposing a constructive trust; if sense is to be made of the institutional constructive trust, one must be able to discern a rational explanation for imposing a constructive trust in these markedly distinct scenarios.

26 It is useful to first consider the constructive trust imposed by way of a fiduciary duty, for this is the classic case of the imposition of a constructive trust. The *locus classicus* in this area would be the case of *Attorney-General for Hong Kong v Reid*,[42] where Reid, being a servant of the Crown in Hong Kong, was found guilty of accepting bribes in the course of discharging his duty to the Crown. The issue in the present case was whether properties bought in New Zealand with the proceeds of the bribes could be recovered by the administration in Hong Kong.

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40 Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAcLJ 136 at 149, para 24.

41 Philip Pettit, *Equity and the Law of Trusts* (Oxford: Oxford University Press, 10th Ed, 2005) at p 64.

42 [1994] 1 AC 324.

The obvious difficulty in the case was that, while Reid was in a fiduciary position *vis-à-vis* the administration in Hong Kong, bribes that were received in connection with his official position were not really moneys that were held on trust for the principal, because these moneys were not conceivably part of the duty owed to the principal. Lord Templeman, in holding that the administration was entitled to recover the New Zealand properties, opined:[43]

> When a bribe is offered and accepted in money or in kind, the money or property constituting the bribe belongs in law to the recipient. Money paid to the false fiduciary belongs to him. 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. The provider of a bribe cannot recover it because he committed a criminal offence when he paid the bribe. The false fiduciary who received the bribe in breach of duty must pay and account for the bribe to the person to whom that duty was owed … if the bribe consists of property which increases in value or if a cash bribe is invested advantageously, the false fiduciary will receive a benefit from his breach of duty unless he is accountable not only for the original amount or value of the bribe but also for the increased value of the property representing the bribe. As soon as the bribe was received it should have been paid or transferred instanter to the person who suffered from the breach of duty. Equity considers as done that which ought to have been done. As 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.

27 What is important to note is that the legal analysis underpinning the imposition of a constructive trust was that the false fiduciary who receives the bribe receives it on behalf of his principal, and hence the proceeds of the bribe constitute the property of the constructive trust, liable to be traced into any asset. In this sense, this is a unique case in that Reid never agreed to take the bribes on trust for the Hong Kong administration, but it was held that he was a "false fiduciary" who ought to have "paid or transferred instanter to the person who suffered from the breach of duty" the bribes that were taken. The principle to be extracted is that one "institution" within the institutional constructive trust comes from a prior relationship that results in a defendant taking imperfect title. Thus, the constructive trust is imposed with a prior relationship in mind, and not as a remedy *per se*.

28 The common intention constructive trust is a relatively recent development. It was introduced judicially in *Gissing v Gissing* by Lord

43 *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 at 331.

Diplock, who considered the resulting trust approach as laid down in *Pettitt v Pettitt*[44]:[45]

> A resulting, implied or constructive trust – and it is unnecessary for present purposes to distinguish between these three classes of trust – is created by a transaction between the trustee and the *cestui que trust* in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the *cestui que trust* a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the *cestui que trust* to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.

29 Strictly speaking, the common intention constructive trust does not adhere to this formulation;[46] this sub-species of constructive trust differs in that it is probably more accurate to speak of the need to discern "whether there is a common intention that [the party not invested with the legal interest] is to have an interest".[47] In contrast with the above category of constructive trust, there is no fiduciary relationship to speak of. The basis here upon which the constructive trust operates is via the common intention. However, this still adheres to the idea of a pre-existing relationship impairing the defendant's title. Professors Hayton and Marshall's view is perhaps instructive; while constructive trusts are imposed to reflect the intentions of the parties, it can go against the intention of the property owner in that it is "imposed against the *current* wishes of the property owner, and that it responds to his 'wrongdoing' in denying the claimant's beneficial interest" [emphasis in original].[48]

30 Thus analysed, there seems to be no difficulty in both categories of constructive trust in operating coherently within the given definition of an institutional constructive trust.

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44 *Pettitt v Pettitt* [1970] AC 777.

45 *Gissing v Gissing* [1971] AC 886 at 905.

46 See *Allen v Snyder* [1977] 2 NSWLR 685 at 693, *per* Glass JA: "[W]hen it is called a constructive trust, it should not be forgotten that the courts are giving effect to an arrangement based upon the actual intentions of the parties, not a rearrangement in accordance with considerations of justice, independent of their intentions and founded upon their respective behaviour in relation to the matrimonial home."

47 Tan Sook Yee, Tang Hang Wu & Kelvin F K Low, *Tan Sook Yee's Principles of Singapore Land Law* (Singapore: LexisNexis, 3rd Ed, 2009) at para 7.5.6.

48 David Hayton & Charles Marshall, *Hayton & Marshall Commentary and Cases on The Law of Trusts and Equitable Remedies* (London: Sweet & Maxwell, 12th Ed, 2005) at p 350, commenting on *Lornho plc v Fayed (No 2)* [1992] 1 WLR 1.

IV. A general doctrine of conscience for the constructive trust

31 It flows from this that the various categories exhibit a commonality – the constructive trust is imposed whenever title is found to be impaired, either from an agreement or from a defined relationship, from the outset. If the general doctrine of constructive trust is found to be as such, then there can be no objection to reclassifying the constructive trust as having a general approach, for it is certain that every category of constructive trust known to English law, and perhaps Singapore law, would include some form of impaired title as a basis for denying the title holder when he asserts fully his legal rights.

32 What is discussed here is really whether there is a general doctrine of conscience that is available as a basis for granting the imposition of a constructive trust. In this area, it seems that unconscionability is the core principle from which a constructive trust can be imposed. After all, the constructive trust is "the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee".[49]

33 How does one then measure conscience? It is suggested that conscience is to be measured with reference to past events and current events; the constructive trust hence arises "by operation of law whenever the circumstances are such that it would be unconscionable for the owner of his property … to assert his own beneficial interest in the property and deny the beneficial interest of another".[50]

34 This statement must be examined in light of the above two factual scenarios presented. At the general level, a constructive trust would be imposed to create "equitable proprietary interests in favour of identifiable beneficiaries … despite the lack of any express or implied intention … or where an intention to create a trust is ineffective because it is not expressed in compliance with the appropriate statutory formalities".[51] There is a distinction to be made within that statement; it would seem that a constructive trust can be imposed despite the absence of an intention to hold the property on trust (as was the case above with *Attorney-General for Hong Kong v Reid*),[52] and also where parties were held by the court to have intended to have created a trust over the

49 *Beatty v Guggenheim Exploration Co* (1919) 225 NY 380 at 386, *per* Cardozo J, cited in *Binions v Evans* [1972] Ch 359 at 368, *per* Lord Denning MR.

50 See generally, *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400; see also P Millett, "Restitution and Constructive Trusts" (1998) 114 LQR 399 at 400.

51 Robert Pearce & John Stevens, *The Law of Trusts and Equitable Obligations* (Oxford: Oxford University Press, 4th Ed, 2006) at p 270.

52 [1994] 1 AC 324.

disputed property. It is undeniable that, functionally speaking, both classifications are accurate; constructive trusts are imposed in situations like the *Attorney-General for Hong Kong v Reid* case, as well as to reflect a common intention that exists between the parties.

35 The former characteristic might be somewhat startling. Professors Gray and Gray suggest that this characteristic, in "its more dramatic manifestations … resembles a decree of confiscation, awarding to B, in whole or part, a proprietary interest in an asset which A had previously thought belonged entirely to himself both at law and in equity".[53] It might seem that this would lend force to the argument that the imposition of a constructive trust is really more remedial than declaratory in nature, if not for the fact that courts have no flexibility to vary the order in light of potential effects of the constructive trust on third parties and creditors, on account of the institutional restrictions and requirements under English law.[54]

36 As for the latter characteristic, it is seen by Pearce and Stevens as being especially significant in the context of ownership of land, because it allows a person to "obtain a share of the beneficial ownership where no formal declaration of trust has been made in their favour".[55] This would be effected when the "repudiation of a promised beneficial entitlement crosses the threshold of unconscionable behaviour",[56] and in response to that "equity is … prepared to impose a special form of trust liability on the errant estate owner, thereby safeguarding the bargained interest notwithstanding its informality of origin".[57] Thus:[58]

> [W]here there has been no written declaration or agreement, nor any direct provision by the plaintiff of part of the purchase price so as to give rise to a resulting trust in her favour, she must establish a common intention between her and the defendant, acted upon by her, that she should have a beneficial interest in the property. If she can do that, equity will not allow the defendant to deny that interest and will construct a trust to give effect to it.

37 It may be that, with the emphasis on inequity, unconscionability and the remedial function of the constructive trust, one would be

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53 Kevin Gray & Susan F Gray, *Elements of Land Law* (Oxford: Oxford University Press, 5th Ed, 2008) at para 7.3.2.

54 Robert Pearce & John Stevens, *The Law of Trusts and Equitable Obligations* (Oxford: Oxford University Press, 4th Ed, 2006) at p 271.

55 Robert Pearce & John Stevens, *The Law of Trusts and Equitable Obligations* (Oxford: Oxford University Press, 4th Ed, 2006) at p 271.

56 Kevin Gray & Susan F Gray, *Elements of Land Law* (Oxford: Oxford University Press, 5th Ed, 2008) at para 7.3.2.

57 Kevin Gray & Susan F Gray, *Elements of Land Law* (Oxford: Oxford University Press, 5th Ed, 2008) at para 7.3.2.

58 *Grant v Edwards* [1986] Ch 638 at 647A, *per* Nourse LJ.

compelled to assume that a constructive trust would be imposed whenever the circumstances were such that it was inequitable not to do so. However, the traditional conception of a constructive trust did not seek to go so far. It merely declares that the "court's intervention merely reflects a pre-existing conclusion of equity that the estate owner's conscience is so bound".[59] Thus, judicial pronouncement on this issue largely follows the thinking that "the function of the court is merely to declare that such a trust has arisen in the past".[60]

38 In both instances, one can see that a proprietary right in favour of an aggrieved party has been created within the interest held by another. For the former, it is that despite a lack of intention to hold the property on trust, equity has deemed that the one party should hold such property on trust for the aggrieved party by virtue of the special relationship between them. In the latter case, it is simply equity giving effect to the state of affairs that was agreed between both parties. This understanding of constructive trust allows the creation of informal proprietary rights from a defined proprietary interest. There is hence no trust created in the abstract, or what is described as "the value transferred";[61] instead, the trust will "only arise where there is defined trust property".[62] Hence, when a company which dealt in gold and other precious metals represented to their customers that there was a separate and sufficient stock of each type of bullion to meet their demands, but having never segregated the gold bullion, such customers are unable to claim a constructive trust on the gold bullion upon the company's insolvency, on account that there was no fixed and identified bulk in existence from which a title could be created by a deemed appropriation, and that there was no fiduciary relationship which imposed a trust on property received.[63]

V. A composite theory of the institutional constructive trust

39 Thus, the institutional constructive trust is not one of closed categories. Neither is it one that operates via a general doctrine alone.

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59 Kevin Gray & Susan F Gray, *Elements of Land Law* (Oxford: Oxford University Press, 5th Ed, 2008) at para 7.3.1

60 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 714G, *per* Lord Browne-Wilkinson.

61 Peter Birks, "Restitution and Resulting Trusts" in *Equity and Contemporary Legal Developments* (Stephen Goldstein ed) (Jerusalem: Hebrew University of Jerusalem (Sacher Institute), 1992) at pp 335–373.

62 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 709.

63 *Re Goldcorp Exchange Ltd* [1995] 1 AC 74.

40 It is suggested that the institutional constructive trust can be viewed this way. It is a doctrine that has an eye on unconscionable conduct, as all equitable doctrines are wont to do. However, unconscionable conduct *per se* is not enough to impose a constructive trust. There must be a pre-existing relationship that brings the factual scenario within the substantive institution of the constructive trust. After all, as has been shown, while *Attorney-General for Hong Kong v Reid*[64] was a clear case that would strike the conscience of the court if Reid was allowed to retain the New Zealand properties, the legal analysis underpinning the imposition of a constructive trust was that the false fiduciary who receives the bribe receives it on behalf of his principal, and hence the proceeds of the bribe constitute the property of the constructive trust, liable to be traced into any asset. Thus, while conscience undoubtedly played a major role in overruling the decision in *Lister v Stubbs*,[65] the reasoning relied upon was still institutional in nature.

41 As to the question of categories, it is suggested that there was never a closed list of categories. Tang's discomfort with the categories approach stems from the opinion that this is supposedly a closed list of categories:[66]

> [T]he dogmatic assertion that the law recognises only institutional constructive trusts and not remedial constructive trusts is tantamount to no more than a bald pronouncement that the law will *never* develop new categories of the constructive trust. While there may be defensible reasons for taking this position, it is better to articulate the basis for this conservative stance rather than simply to make a dogmatic assertion that no new categories are permitted. It is also doubtful whether such a conservative approach to the development of the law of constructive trust is sustainable. There is no reason to suppose that the law is so perfect that it should be 'frozen' in time in terms of specific pre-existing categories; the law must be able to grow to meet changing social circumstances. It is surely impossible for judges and jurists to pronounce that no expansion of the law is ever allowed. Furthermore, there is a logical fallacy to this approach. If this restrictive approach had been taken from the very beginning, the law of constructive trust would never have developed. [emphasis in original]

42 This author agrees with the above statement insofar as it is assumed that the categories approach is a closed one. However, what can be distilled is a general doctrine in another sense, one that undergirds such discrete categories and ensures a coherent theory of the

64 [1994] 1 AC 324,

65 (1890) 45 Ch D 1.

66 Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAcLJ 136 at 149, para 25.

constructive trust. It has already been suggested that the fiduciary cases and the common intention cases are manifestations of an intention to take the transferred assets on trust.

43 It does not matter whether at the relevant point in time the legal title holder evinces no intention to hold such title on constructive trust for the beneficiary. Rather, the constructive trust is imposed because it is unconscionable for the legal title holder to go against the previous intention to hold impaired title, and is thus "imposed against the *current* wishes of the property owner, and that it responds to his 'wrongdoing' in denying the claimant's beneficial interest" [emphasis in original].[67]

44 Thus, the theory of an institutional constructive trust is in reality a composite one; the categories (or institutions) to which it responds are mere manifestations of a general doctrine that keeps it coherent. It is still institutional in a sense because it is through these categories that the constructive trust is given effect. It would indeed be surprising if a court decides to elevate this rule into one of first application, instead of relying on established categories, given the law's, and equity's, preference for reasoning "by precedent out of principle".[68] Such categories would provide the precedent for the imposition of a constructive trust, and hence can never be made redundant.

VI. Keep to the dichotomy

45 In considering whether it is still useful to keep to this dichotomy, one must also examine the approach taken in various jurisdictions. The explanations for preferring a particular approach in a jurisdiction would be examined to see whether one interest should trump the other.

46 Towards this end, it is clear that Tang's objections to the dichotomy, insofar as they are premised on the redundancy of the dichotomy, and the potential inflexibility to adapt to new situations, must be rejected, for it has been shown above that there is actually a meaningful distinction – positively speaking – between these two concepts, and that the institutional constructive trust does not contain a closed list of categories. This author suggests that there are indeed good reasons for keeping to the dichotomy.[69]

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67 David Hayton & Charles Marshall, *Hayton & Marshall Commentary and Cases on The Law of Trusts and Equitable Remedies* (London: Sweet & Maxwell, 12th Ed, 2005) at p 350, commenting on *Lornho plc v Fayed (No 2)* [1992] 1 WLR 1.

68 *Cowcher v Cowcher* [1972] 1 WLR 425 at 430, *per* Bagnall J.

69 Whether the remedial constructive trust ought to be imported into Singapore law is, however, a question best left to another day, for it would necessitate discussion

(*cont'd on the next page*)

47 The current Australian position is typified by *Muschinski v Dodds*[70] and *Baumgartner v Baumgartner*.[71] Deane J in *Muschinski v Dodds* held that "for the student of equity there can be no true dichotomy between the two notions".[72] This was later endorsed in *Baumgartner v Baumgartner*,[73] where the majority judgment[74] approved of Deane J's speech in *Muschinski v Dodds*:[75]

> [T]he constructive trust serves as a remedy which equity imposes regardless of actual or presumed agreement or intention 'to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle' … In rejecting the notion that a constructive trust will be imposed in accordance with idiosyncratic notions of what is just and fair his Honour acknowledged that general notions of fairness and justice are relevant to the traditional concept of unconscionable conduct, this being a concept which underlies fundamental equitable concepts and doctrines, including the constructive trust.

48 On the facts of the case, "the appellant's assertion that the property was his alone constituted unconscionable conduct [which] … justified the imposition of a constructive trust".[76] This was because:[77]

> In this situation the appellant's assertion, after the relationship had failed, that the … property, which was financed in part through the pooled funds, is his sole property, is his property beneficially to the exclusion of any interest at all on the part of the respondent, amounts to unconscionable conduct which attracts the intervention of equity and the imposition of a constructive trust at the suit of the respondent.

49 As Wright puts it, this judgment can stand for the proposition that:[78]

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into proprietary estoppel and restitution, the latter of which is not covered in this article.

70 *Muschinski v Dodds* (1985) 160 CLR 583 at 614.

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

72 *Muschinski v Dodds* (1985) 160 CLR 583 at 614.

73 *Baumgartner v Baumgartner* (1987) 164 CLR 137 was a case that concerned a couple in a *de facto* relationship for four years, who purchased a house in the sole name of the male partner. The purchase price was paid for from a combination of proceeds from the male partner's previous property and from a loan in the male partner's name only. This loan, and further living expenses, were paid from a fund mixture that was contributed to in the proportions of 55% by the male partner and 45% by the female partner.

74 By Mason CJ, Wilson and Deane JJ.

75 *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 149.

76 David Wright, *The Remedial Constructive Trust* (Australia: Butterworths, 1998) at para 2.50.

77 *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 149.

78 David Wright, *The Remedial Constructive Trust* (Australia: Butterworths, 1998) at para 2.53.

> … abandons entirely the triggering situations requirement, and replaces it with liability based upon unconscionability. Another way of approaching this reading is to say that there are now two categories of constructive trusts, one which requires a triggering situation to become operative and one based upon broad notions of unconscionability. *Muschinski v Dodds* and *Baumgartner v Baumgartner* emphasise the importance of the concept of unconscionability to the use of the constructive trust as a remedy. Unconscionability is another way of saying 'contrary to justice and good conscience'. In *Baumgartner* the unconscionable action was the male partner's denial of the female partner's equitable interest. Having established this, the High Court said that a constructive trust could be imposed as a remedy to circumvent unconscionable conduct.

50 In this regard, it is suggested that the Australian cases evince an approach to treat the imposition of a constructive trust as based upon the desire to "circumvent unconscionable conduct". This being the root of the inquiry, it becomes unnecessary – and even superfluous – to inquire into the existence of the "triggering situation", or category, or institution. In this regard, the categories approach must be taken to have been made functionally redundant by this approach.

51 The English position, on the other hand, is best represented by the Court of Appeal decision in *Re Polly Peck International plc (No 2)*.[79] Prior to *Re Polly Peck International plc (No 2)*, Lord Browne-Wilkinson opined in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*:[80]

> [T]he remedial constructive trust, if introduced into English law, may provide a more satisfactory road forward. The court by way of remedy might impose a constructive trust on a defendant who knowingly retains property of which the plaintiff has been unjustly deprived. Since the remedy can be tailored to the circumstances of the particular case, innocent third parties would not be prejudiced and restitutionary defences, such as change of position, are capable of being given effect.

52 However, subsequent decisions by the English Court of Appeal were decidedly less enthusiastic. In *Re Polly Peck International plc (No 2)*, Mummery LJ held that, in the context of insolvency proceedings, "the position is that there is no prospect of the court in this case granting a remedial constructive trust to the applicants in respect of the proceeds of sale of the shares held by PPI in its subsidiaries … [developments in the law] cannot be legitimately moved by judicial decision down a road

79 *Re Polly Peck International plc (No 2)*, [1998] 3 All ER 812.

80 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 716; note that this was strictly *obiter dicta*, which explains why subsequent Court of Appeal decisions have cast doubts on the viability of the remedial constructive trust in English law.

signed 'No Entry' by Parliament. The insolvency road is blocked off to remedial constructive trusts, at least when judge driven in a vehicle of discretion".[81] Nourse LJ agreed with this approach, stating that it would be permitting a "variation of proprietary rights", for which an Act of Parliament is needed to permit it.[82]

53 One other case needs to be mentioned. Lord Denning has previously proposed a model called the "new model constructive trust", when his Lordship held that "things have altered now. Equity is not past the age of child bearing. One of her latest progeny is a constructive trust of a new model".[83] On the facts of *Eves v Eves*, the "constructive trust of a new model" was imposed because of considerations of "fairness" and "inequity".[84] This "unrestrained unconscionability" approach[85] was criticised by Deane J in *Muschinski v Dodds*, who held that the constructive trust cannot be used as "a medium for the indulgence of idiosyncratic notions of fairness and justice". And that "there is no place in the law of [Australia] for the notion of 'a constructive trust of a new model' which, '[b]y whatever name it is described, … is … imposed by law whenever justice and good conscience' (in the sense of 'fairness' or what 'was fair') require it".[86] This new model constructive trust, representing an overly strong form of a remedial constructive trust, has thus never been followed in any jurisdiction.

54 The Singapore approach, on the other hand, seems to be more ambivalent with regard to the possibility of a remedial constructive trust. The Singapore Court of Appeal in *Chin Mun Fong v Lim Cho Chit*[87] rejected the application of the remedial constructive trust, but did not "reject outright the concept of the remedial constructive trust. Rather, L P Thean JA attempted to lay down some guiding principles as

81 *Re Polly Peck International plc (No 2)* [1998] 3 All ER 812 at 827.

82 *Re Polly Peck International plc (No 2)* [1998] 3 All ER 812 at 831.

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

84 *Eves v Eves* [1975] 1 WLR 1338 at 1342, *per* Lord Denning MR: "It seems to me that this conduct by Mr Eves amounted to a recognition by him that, in all fairness, she was entitled to a share in the house, equivalent in some way to a declaration of trust; not for a particular share, but for such share as was fair in view of all she had done and was doing for him and the children and would thereafter do. By so doing he gained her confidence. She trusted him. She did not make any financial contribution but she contributed in many other ways. She did much work in the house and garden. She looked after him and cared for the children. It is clear that her contribution was such that if she had been a wife she would have had a good claim to have a share in it on a divorce … In view of his conduct, it would, I think, be most inequitable for him to deny her any share in the house. The law will impute or impose a constructive trust by which he was to hold it in trust for them both."

85 David Wright, *The Remedial Constructive Trust* (Australia: Butterworths, 1998) at para 2.53.

86 *Muschinski v Dodds* (1985) 160 CLR 583 at 615.

87 *Chin Mun Fong v Lim Cho Chit* [2001] 1 SLR(R) 856.

to when a declaration of remedial constructive trust is inappropriate".[88] *Comboni Vincenzo v Shankar's Emporium (Pte) Ltd*[89] is another case in which the remedial constructive trust was considered. Kan Ting Chiu J held unequivocally that:[90]

> Although remedial constructive trusts are recognised in Canada and the United States of America, there are doubts whether remedial constructive trust is recognised in English law … the Court of Appeal (and the defendant) has remedial constructive trust as part of the law of Singapore without reservation.

55 This might appear to be contrary to the English approach, but Tang points out that:[91]

> Kan J's analysis in *Comboni* seems to be a conflation of two very distinct kinds of claim relating respectively to liability for knowing receipt and the imposition of a remedial constructive trust. The prerequisite of liability for knowing receipt is receipt of trust property or property impressed with a fiduciary duty. Without the satisfaction of this essential requirement, there can be no liability for knowing receipt. It is erroneous to link this inquiry to the remedial constructive trust. The remedial constructive trust is a very different creature. It is a form of a *proprietary* remedy. A claimant will usually argue for a remedial constructive trust when the recipient is insolvent in order to gain priority over the rest of the recipient's creditors. Here, however, there was no need for a remedial constructive trust to be asserted as it did not appear that Shankar was in financial difficulty. A personal claim in unjust enrichment based on mistake would have sufficed.

56 Hence, on this basis, it must remain doubtful whether the remedial constructive trust as understood in England and Wales, and Australia, is one that is accepted as part of the law in Singapore.

57 Normatively speaking, the idea of an institution connoting a pre-existing relationship is significant not merely because it represents "a matter of established practice",[92] but rather, as explained above, that such relationships were deemed to have created a trust from the outset. This strengthens the case for having the dichotomy. The essential difference between both conceptions of the constructive trust lies in whether the property rights of the defendant were properly impaired in the first place. The example of the debate between implied and imputed

88 Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAcLJ 136 at 144, para 17.

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

90 *Comboni Vincenzo v Shankar's Emporium (Pte) Ltd* [2007] 2 SLR(R) 1020 at [52].

91 Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAcLJ 136 at 145–146, para 20.

92 Tang Hang Wu, "The Constructive Trust in Singapore: Five Persistent Puzzles" (2010) 22 SAcLJ 136 at 140, para 9.

intentions in imposing the common intention constructive trust is especially relevant here. An argument that the demonstration of a common intention to share is enough to create a constructive trust because it shows that the parties intended to share from the outset can only be sustained if the inquiry as to intention undertaken by the courts is at most on an inferred basis. Imputed intentions cannot be relevant – or even workable – because a finding of intention based on imputation is merely the court's version of what it thinks is fair as between the parties.

58 The reason for the dichotomy is thus borne out as follows: the remedial constructive trust is workable as a principled application of unconscionability as a doctrine. The institutional constructive trust, on the other hand, looks to something more than unconscionability. There must be circumstances pointing to a relationship that provided for impairment of title or that there was a common intention to share which impairs title. Unconscionability would then stem from the fact that the defendant is disavowing the prior relationship or agreement, and instead wishes to insist on his strict legal rights.

59 Seen in this perspective, the *Re Polly Peck International plc (No 2)*[93] objection becomes more nuanced; it is not acceptable to conflate the two concepts together to introduce some form of remedial discretion, because one conception of the constructive trust has as its emphasis a general notion of conscience, while the other conception is more mindful of protecting accrued property rights. It is far more desirable to examine whether the policy of a particular jurisdiction would allow trust law to override a hitherto more robust protection of property rights.

60 Thus, for the reasons above, it is important to view the traditional distinction between institutional and remedial constructive trusts as being principled in nature, and necessary to achieve a coherent analysis.

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93 [1998] 3 All ER 812.