

COMMENTARY ON LORD NEUBERGER'S
"THE REMEDIAL CONSTRUCTIVE TRUST – FACT OR FICTION"
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Lord Neuberger's paper deals with its subject in admirable style. It is certainly learned. But it is also dashing. This is no surprise. The hand which wrote the paper can also be seen in the joint judgment of seven members of the Supreme Court of the United Kingdom in *FHR European Ventures LLP v Cedar Capital Partners LLC*.¹ In that case the Supreme Court favoured the view of the lamented Lord Templeman in *Attorney General for Hong Kong v Reid*² over its rivals.

The judgment in the *FHR European Ventures* case is notable for three things at least. First, it dealt in a deft and scholarly way with a topic which has been controversial, sometimes bitterly controversial, for at least 150 years: whether a fiduciary who has taken a bribe is liable to the principal only as an equitable debtor or can be liable to restore the bribe or its proceeds in specie under a constructive trust. Secondly, the judgment was written in a style – brisk, brief and brilliant – quite beyond the powers of most Australian judges. Thirdly, despite the importance

¹ [2014] UKSC 45.

² [1994] 1 AC 324.

and complexity of the issue and despite the fact that it was argued over three days, judgment was delivered less than four weeks after the close of argument. These are achievements which ought to make most Australian judges hang their heads in shame, though there have been exceptions to these strictures. One was the now retired Mr Justice Malcolm McLelland, to whom I will refer later.

A barrister's life has many pains, and a judge's life has some pleasures. But one of the advantages of being a barrister is that all one need do is think up an available argument. The barrister need not believe it to be valid. And indeed the barrister does not even have to reach a conclusion as to its validity or invalidity as long as it has some reasonable basis. The painful task of determining validity or invalidity is for the judge. Lord Neuberger describes himself as "intentionally shooting a line". Let me adopt the same tactic, but in the opposite direction.

Lord Neuberger, through his participation in the *FHR* case, recognised that in Australia and New Zealand there is a "remedial constructive trust", as the judgment states in a slightly chilly fashion.³ The first draft of this paper, which he kindly sent me 10 days ago, described the English and Canadian positions, but it does not deal with the Australian and New Zealand positions. This is not an occasion for displaying the usual Antipodean chip on our shoulders and complaining

³ [2014] UKSC 45 at [45].

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that we are merely the remote outposts of a far flung and powerful Empire – outposts which were once valued but which the world in general and the former Imperial power in particular has long forgotten. Lord Neuberger has simply adopted a courteous and tactful way of leaving space for the commentator to say something fresh, if he is able to. Part of this space remains even after Lord Neuberger’s treatment of the local scene to some degree this morning.

It is no easy task to follow Lord Neuberger, but it may be best to begin shouldering the burden by reflecting on the wide variety of relationships and circumstances which have been called “constructive trusts”. Here it is only possible to give some examples. For many of them the usage is controversial. For example, a person who is liable to pay equitable compensation or account for profits because of having knowingly assisted a fiduciary in a dishonest and fraudulent design is sometimes called a constructive trustee – but inaptly, if that person has none of the principal’s property over which any constructive trust can operate.⁴ One type of “constructive trust” is that supposedly existing between vendor and purchaser under a contract for sale of land of which specific performance may be decreed.⁵ Another is the trust of the purchase money held by a mortgagee who has exercised a power of

⁴ See *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 at [141].

⁵ See P G Turner, “Understanding the Constructive Trust Between Vendor and Purchaser” (2012) 128 LQR 582.

sale.⁶ Another refers to various types of tracing. Another arises where the defendant holds property as a result of a transaction which is voidable by reason of undue influence or other equitable fraud.⁷ A further category comprises testamentary or inter vivos secret trusts.⁸ Another concerns mutual wills.⁹ Constructive trusts have been used as a remedy against those who abuse, or procure others to abuse, confidential information. Constructive trusts have been imposed on criminals in respect of the proceeds of their crimes.¹⁰ More standard instances include benefits obtained by a fiduciary in circumstances where there was a significant possibility of conflict between the fiduciary's interest and duty, or where the benefit was obtained by use of the fiduciary position. They also include the remedies available against defendants in breach of the rule in *Barnes v Addy*¹¹ either because they received trust property in breach of trust or because they knowingly assisted a fiduciary in a dishonest and fraudulent design. Then constructive trusts have been recognised, before statute largely took over the field at least in Australia, to split the assets of couples after

⁶ *Charles v Jones* (1887) 35 Ch D 544 at 549-550.

⁷ *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143 at 153.

⁸ *Ottaway v Norman* [1972] Ch 698.

⁹ *Birmingham v Renfrew* (1937) 57 CLR 666 at 682-683.

¹⁰ *Black v S Freedman & Co* (1910) 12 CLR 105 at 110; *Rasmanis v Jurewitsch* (1969) 70 SR (NSW) 407.

¹¹ (1874) LR 9 Ch App 244 at 251-252.

cohabitation has ceased. Lord Denning MR propounded what he called “a constructive trust of a new model” based on fairness and justice.¹² Lord Denning MR said:¹³ “It is a trust imposed by law wherever justice and good conscience require it. It is a liberal process, founded on large principles of equity It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution”. If that doctrine still exists, it is an example of a remedial constructive trust in England. It is, admittedly, open to many of the anathemas Lord Neuberger has hurled against the remedial constructive trust. It was inconsistent with earlier House of Lords authority.¹⁴ It also seems inconsistent with later House of Lords and Supreme Court authority,¹⁵ which, like the earlier authority, depends on an inference of common intention to be drawn from conversations or conduct. And it seems to treat injustice as a cause of action in itself. That is, while in the case of other constructive trusts it is necessary to establish an independent ground for equitable intervention before working out which amongst an array of remedies should be granted, and, in the case of institutional constructive trusts, must be granted, Lord Denning seems to omit the first step. In Australia constructive trusts have been found where parties to a joint endeavour which fails without attributable blame are enabled to recover

¹² *Eves v Eves* [1975] 1 WLR 1338 at 1341.

¹³ *Hussey v Palmer* [1972] 1 WLR 1286 at 1289-1290.

¹⁴ *Pettit v Pettit* [1970] AC 777; *Gissing v Gissing* [1971] AC 886.

¹⁵ *Lloyds Bank plc v Rosset* [1991] 1 AC 107 at 132-133; *Stack v Dowden* [2007] 2 AC 432; *Jones v Kernott* [2012] 1 AC 776.

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contributions made by one party which it was not intended that the other party should enjoy.¹⁶ These doctrines are none too clear in their application either, though they appear to operate much more narrowly than Lord Denning's approach.

It is possible to refine these categories.

Nearly 50 years ago in *Selangor United Rubber Estates Ltd v Cradock (No 3)*¹⁷ Ungood-Thomas J divided constructive trustees into two categories. Into the first fell:

"Those who, though not appointed trustees, take on themselves to act as such and to possess and administer trust property for the beneficiaries, such as trustees de son tort. Distinguishing features for present purposes are (a) they do not claim to act in their own right but for the beneficiaries, and (b) their assumption to act is not of itself a ground of liability (save in the sense of course of liability to account and for any failure in the duty so assumed), and so their status as trustees precedes the occurrence which may be the subject of claim against them."

He contrasted this category with a second:

"Those whom a court of equity will treat as trustees by reason of their action, of which complaint is made. Distinguishing features are (a) that such trustees claim to act in their own right and not for

¹⁶ *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137.

¹⁷ [1968] 1 WLR 1555 at 1579. See also *Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400 at 408-409.

beneficiaries, and (b) no trusteeship arises before, but only by reason of, the action complained of.”

Lord Sumption recently described Ungood-Thomas J’s statement as “clear and entirely orthodox”.¹⁸ Lord Millett, too, has approved it.¹⁹ Lord Sumption himself put the first category thus:²⁰

“The first comprises persons who have lawfully assumed fiduciary obligations in relation to trust property, but without a formal appointment. They may be trustees de son tort, who without having been properly appointed, assume to act in the administration of the trusts as if they had been; or trustees under trusts implied from the common intention to be inferred from the conduct of the parties, but never formally created as such.”

The first sentence raises a question, or perhaps only a quibble. Can a person who acts as trustee even though there has not been a valid appointment as trustee be described as having “lawfully assumed fiduciary obligations”? That person is called a “trustee de son tort” for a reason. However morally innocent one may be, it is wrong to act as a trustee without having been validly appointed to do so. But apart from trustees de son tort, the “first category” would include the vendor/purchaser constructive trust, the mortgagee constructive trust,

¹⁸ *Williams v Central Bank of Nigeria* [2014] 2 WLR 355 at [10].

¹⁹ *Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400 at 408-409.

²⁰ *Williams v Central Bank of Nigeria* [2014] 2 WLR 355 at [9].

secret trusts, constructive trusts arising under mutual wills, and constructive trusts arising after the collapse of a joint venture.

Lord Millett describes this first category as containing institutional constructive trusts. He described each item in the second category as a remedial formula. He saw the distinction between the first and second categories as the distinction between “a trust and a catch-phrase”.²¹ Ungood-Thomas J described this second category as “nothing more than a formula for equitable relief”. A question arises – is this in truth a division of constructive trusts into institutional (the first category) and remedial (the second category)?

There are many things I agree with in Lord Neuberger’s paper. Indeed it is hard to see how anyone could disagree with some of them. Take paragraph 6, where he sets out criticisms of the “remedial constructive trust”. One is that it is “flexible” and “flabby”. Who could favour flabbiness against taut muscularity rippling over inflexible bones, or at least a pleasing and elegant slimness? Who could favour what is “unprincipled, incoherent and impractical”? After all, a central ideal for the law is that it be a coherent body of principles which have utility in practical operation. Who can favour the unpredictable over the predictable? Hayek stressed that at its heart the rule of law requires government power, including judicial power, to be exercised in

²¹ *Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400 at 413.

accordance with clear, coherent and comprehensible standards capable of being complied with, stipulated in advance and enforced in courts. Who can lightly accept interference with property rights by recourse to discretionary factors, not strict rules? Who can admire courts which commit the worst sin – usurpation of the role of the legislature?

Some of these clarion calls, however, ring out a little less certainly when one notes that many of the ideas involved in attacking the remedial constructive trust stem from, or at least were shared by, Lord Millett and the late Professor Birks.

Lord Millett thought the remedial constructive trust unnecessary. In 1995 he said: “it is a counsel of despair which too readily concedes the impossibility of propounding a general rationale for the availability of proprietary remedies”.²² On the same occasion Lord Millett also said: “We need to be more ready to categorise wrongdoers as fiduciaries and to extend the situations in which proprietary remedies are made available on *established principles*.” (emphasis added)

Peter Birks said: “The remedial constructive trust is a judicial discretion to vary property rights and, as such, an object of suspicion”.²³

²² “Equity – The Road Ahead” (1995) 6 KCLJ 1 at 19.

²³ *The Frontiers of Liability*, Vol 2, p 24.

So speak the stern high priests guarding the temple of strict property rights and adherence to established principle. But these high priests, it must be remembered, are also famous in other ways.

Lord Millett is the same Lord Justice Millett who is famous for his judgment in *Bristol & West Building Society v Mothew*.²⁴ In that case his Lordship narrowed the categories of wrongdoer into which fiduciaries may fall very sharply by excluding from the field of fiduciary duty duties of skill and care. Indeed he saw the damages recoverable for breach of these equitable duties as not being equitable damages, but common law damages. These were ideas which would have been seen as quite novel before his day. They are ideas closely related to another novel idea: that fiduciary duties are only negative, not positive – only proscriptive, not prescriptive. His Lordship thereby propounded a general rationale rendering proprietary remedies much less widely available. The brilliance of his prose and his supreme self-confidence have seduced many judges, and many more academic lawyers, into total acceptance – at least until Lord Walker of Gestingthorpe evinced clear signs of firm rebellion against the *Mothew* doctrine, though not by name, in *Pitt v Holt*.²⁵

²⁴ [1998] Ch 1.

²⁵ [2013] 2 AC 108.

Lord Millett has often criticised the conservatism of the mid-20th century. He called equity “fossilised” between 1951 and 1980,²⁶ but spoke in contrast with admiration of Lord Denning as “undoubtedly one of the most innovative and daring judges we have ever had”.²⁷ He called for “a unified restitutionary system, neither common law nor equitable”.²⁸ In 1995, he hailed the impending advent of the “great landmark cases in the law of restitution”.²⁹

Lord Millett and Professor Birks certainly tried to arrive at a general rationale for the availability of proprietary remedies. They did so by recourse to a taxonomy alien to the history of English law. They purported to derive it from Roman jurists who flourished under the military dictatorships of increasingly incompetent Roman Emperors. Those dictatorships were marked by a degree of brutality and tyranny and a contempt for the rule of law never known in England even in its darkest ages. The consequent rise of the modern law of restitution has been revolutionary, has generated much uncertainty, and has caused profound damage to received legal conceptions.

²⁶ “Equity – The Road Ahead” (1995) 6 KCLJ 1 at 1.

²⁷ “Equity – The Road Ahead” (1995) 6 KCLJ 1 at 1.

²⁸ “Equity – The Road Ahead” (1995) 6 KCLJ 1 at 10.

²⁹ “Equity – The Road Ahead” (1995) 6 KCLJ 1 at 12.

There is another clarion call which rings out uncertainly – the claim that the remedial constructive trust will usurp the legislature’s role because it is impermissible for the judiciary to alter property rights without statutory warrant. In paragraph 21, Lord Neuberger contends that “the discretionary remedial constructive trust offends against the fundamental principle that property rights are a matter of strict law not discretion”. He quotes Nourse LJ:³⁰ “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.” In this thesis there is both force and unreality. On the one hand, no doubt it is true that property rights compete against each other. On the other hand, a significant part of equity history has been the recognition – the creation – of new property rights in collision with existing ones. The Middle Ages saw the rise of the use or trust against the owner of property. The 17th century saw the establishment of the equity of redemption against mortgagees. The 19th century saw the recognition of covenants restrictive of the use of land capable of running with the land. The 19th and 20th centuries have seen the rise of rights to confidential information which some have seen as proprietary. Of course there have been candidates for recognition as property rights who have failed. In its day one of the most striking of these was Lord Denning MR’s deserted wife’s equity, until it was slain by the merciless hands of Lord Wilberforce in

³⁰ *Re Polly Peck Ltd (No 2)* [1998] 3 All ER 812 at 831.

National Provincial Bank v Ainsworth.³¹ Many of the new property rights which have become recognised arose over lengthy periods from a series of decisions which may have been seen at the time to be isolated responses to particular unusual hardships but which were gradually perceived to rest on coherent and enduring principles. Similarly, the reach of the injunction has widened in the last 200 years, as requirements once thought of as going to the court's jurisdiction or power to grant an injunction tended to become seen rather as factors relevant to the exercise of discretion. But any negative injunction, for example, can injure not only the defendant, but others. As Lord Sumption recently said in *Coventry v Lawrence*:³²

“Most uses of land said to be objectionable cannot be restrained by injunction simply as between the owner of land and his neighbour. If the use of a site for (say) motocross is restrained by injunction, that prevents the activity as between the defendant and the whole world. Yet it may be a use which is in the interest of very many other people who derive enjoyment or economic benefits from it.”

In view of those historical developments, it does not seem sound to oppose the development of constructive trusts, whether institutional or remedial, *merely* on the ground that as new constructive trusts are recognised, existing proprietary rights may shrink.

³¹ [1965] AC 1175.

³² [2014] 2 All ER 622 at [157].

Some of the clarion calls also ring out uncertainly when the question is asked: “What is the difference between an institutional constructive trust and a remedial constructive trust?” Lord Neuberger certainly demonstrates that on the whole English judges do not think that a remedial constructive trust can exist. Indeed one can add to Lord Neuberger’s list of judges who deny the existence of the remedial constructive trust in English law.³³ But what do they mean when they contrast the existence of the institutional constructive trust and the non-existence of the remedial constructive trust? Lord Neuberger in paragraph 7 defines an institutional constructive trust as one which “arises automatically as a matter of law when a benefit, whether it is property[,] some other asset or simply money, is acquired in certain defined circumstances”. In paragraph 10 he defines a remedial constructive trust as one which “only comes into existence once a court is satisfied that (i) a plaintiff has a claim for equitable compensation (or even possibly common law damages) from a defendant, which does not give rise to an institutional constructive trust or other proprietary interest, and (ii) the court in its discretion, having considered all the circumstances, considers that justice would be done by imposing a trust in favour of the plaintiff.” This distinction is similar to one drawn by Lord Millett. Lord Millett contrasted the supposed certainty of institutional constructive trusts with remedial constructive trusts which were “granted

³³*Re Sharpe* [1980] 1 WLR 219 at 225; *Halifax Building Society v Thomas* [1996] Ch 217 at 229. Cf *Fostex Group Ltd v MacIntosh* [1998] 3 NZLR 171; *Powell v Thompson* [1991] 1 NZLR 579 at 615; *Equiticorp Industries Group Ltd v Hawkins* [1991] 3 NZLR 700.

whenever the justice of the case so requires, with the result that rights of property may depend upon the exercise by the court of a general discretion and cannot be known in advance”.³⁴

The need for the institutional constructive trust to arise “automatically as a matter of law” is thus placed in contrast with the discretionary character ascribed to remedial constructive trusts. Lord Neuberger’s words – “arise”, “automatically”, “law” – suggest that there is considerable precision in the identification of institutional constructive trusts. But is there? Lord Millett in 1998, in a passage quoted by Lord Neuberger in paragraph 8, said that an institutional constructive trust arises “whenever the circumstances are such that it would be unconscionable for the owner of the legal title to assert his own beneficial interest and deny the beneficial interest of another”.³⁵ A search for the unconscionable is not discretionary in some senses of that word but it is in others. It calls for a close examination of the particular circumstances, turning on matters of impression, characterisation and judgment. The outcome of inquiries of this kind is often not easy to predict, let alone with precision. In his paper, Lord Neuberger rightly criticises the vagueness of tests which state that a remedial constructive trust will be imposed when it is “not unjust in all the circumstances”. A similar criticism can lie against a test for the

³⁴ “Equity – The Road Ahead” (1995) 6 KCLJ 1 at 18.

³⁵ “Restitution and Constructive Trusts” (1998) 114 LQR 399 at 400 (footnote omitted). This was repeated in *Paragon Finance plc v DB Thakerar & Co (a Firm)* [1999] 1 All ER 400 at 409.

institutional constructive trust which rests, like Lord Millett's, on unconscionable conduct. For words like "unjust" or "unconscionable" only represent the outcome of analysis. They do not themselves constitute analysis.

Let us turn to the position of constructive trusts in Australia. Whether one calls them remedial or not, they have the following characteristics.

First, they are only to be employed as a last resort. In international law a litigant seeking international remedies must first exhaust local remedies. In equity a litigant seeking an injunction in the auxiliary jurisdiction must first demonstrate that it is necessary to grant the injunction on the ground that the common law remedy of damages is inadequate. Equity will not appoint a receiver if the grant of an injunction is adequate.³⁶ Similarly, a plaintiff seeking a remedial constructive trust may have to exclude the possibility that there is some other effective remedy which is non-proprietary – ie which does not attach to specific assets.³⁷ Thus in that sense, in Australia constructive trusts are

³⁶ *National Australia Bank v Bond* [1991] 1 VR 386 at 549-551.

³⁷ *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 379; *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491 at 508; *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at [40]-[43]; *Giumelli v Giumelli* (1999) 196 CLR 101 at [10] and [49]-[50]; *Katingal Pty Ltd v Amor* (1999) 162 ALR 287; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [200]; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [126].

discretionary. It does not necessarily follow from the fact that a remedy is used only as an exceptional last resort that it does not or should not exist.

Secondly, from the discretionary character of Australian constructive trusts flow particular outcomes as to timing. Lord Browne-Wilkinson has said:³⁸ “Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which gave rise to it: the function of the court is merely to declare that such a trust has arisen in the past”. Sometimes this is true of remedial constructive trusts in Australia, but not always. Thus in *Black v Freedman*,³⁹ O’Connor J – a revered member of the original High Court – said: “where money has been stolen it is trust money in the hands of the thief and he cannot divest it of that character”. And where one joint tenant murdered another, the former’s interest arising by way of survivorship was held in trust for the estate of the victim.⁴⁰ In neither case did the court suggest that the trust character only arose when the court’s order was made. In *Muschinski v Dodds*,⁴¹ Deane J said (Mason J concurring) that “there does not need to have been a curial declaration or order before equity will recognise the prior existence of a constructive trust”. But Deane J then said: “Where competing common law or

³⁸ *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 714.

³⁹ (1910) 12 CLR 105 at 110.

⁴⁰ *Rasmanis v Jurewitsch* (1969) 70 SR (NSW) 407.

⁴¹ (1985) 160 CLR 583 at 615.

equitable claims are or may be involved a declaration of constructive trust by way of remedy can properly be so framed that the consequences of its imposition are operative only from the date of judgment or formal court order or from some other specified date.”

Thirdly, the form of any constructive trust or other equitable remedy ordered can vary. In Australia, *Boardman v Phipps*⁴² is regarded as a correct decision, despite the forceful dissents, in all respects, including the remedies granted by Wilberforce J. Those remedies included a constructive trust over 5/18 of the shares acquired by Boardman and Tom Phipps and an order for an account of profits derived from the transaction. On the conventional English analysis, which denies the possibility of a remedial constructive trust, the constructive trust must be regarded as an institutional constructive trust, not a remedial constructive trust, though because the relief does not seem to have been controversial the matter was unargued and not dealt with in the reasons for judgment. In the Supreme Court of Canada, there has been debate, with the majority favouring and the minority opposing a constructive trust on the facts of *Lac Minerals Ltd v International Corona Resources Ltd*.⁴³

⁴² [1967] 2 AC 46.

⁴³ [1989] 2 SC R 574.

In Australia the cases exhibit diversity in the relief granted. There are certainly instances in Australian law additional to those referred to above of what appear to be institutional constructive trusts. Thus *Furs Ltd v Tomkies*⁴⁴ concerned a managing director who procured the sale of part of his employer's business to a new company for £4000 and £1000 worth of shares in that new company. The company asked for a declaration that the shares belonged to it and an order that they be transferred to it – orders amounting to a constructive trust. The company also asked for an order that the defendant pay over the £4000. The High Court of Australia (Rich, Dixon and Evatt JJ) made those orders. They said:⁴⁵ “An undisclosed profit which a director so derives from the execution of his fiduciary duties belongs in equity to the company”. Similar apparent rigidity appears in *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd*⁴⁶ where it was said that “any property acquired, or profit made, by [the defendant] in breach of [the rule in *Keech v Sandford*] is held by him in trust for his cestui que trust.” These cases seem to treat the imposition of a constructive trust as being automatic. They were favourably referred to by Mason J in the *Hospital Products* case.⁴⁷ But, as will be seen, that judgment also favours less rigid remedial approaches. One earlier example of that lack of rigidity is

⁴⁴ (1936) 54 CLR 583.

⁴⁵ (1936) 54 CLR 583 at 592.

⁴⁶ (1958) 100 CLR 342 at 350.

⁴⁷ (1984) 156 CLR 41 at 107-110.

*Consul Development Pty Ltd v DPC Estates Pty Ltd*⁴⁸ in which Gibbs J said: “The question whether the *remedy* which the person to whom the duty is owed may obtain against the person who has violated a duty is proprietary or personal may sometimes be one of some difficulty. In some cases the fiduciary has been declared a trustee of the property which he has gained by his breach; in others he has been called upon to account for his profits and sometimes the distinction between the two *remedies* has not, it appears, been kept clearly in mind.” (emphasis added)

An extreme form of constructive trust was ordered in *Timber Engineering Co Pty Ltd v Anderson*.⁴⁹ Kearney J, a distinguished equity judge, held that Anderson and Toy, two employees of a business, had sole products in competition with that business in breach of fiduciary duty because their personal interests conflicted with that duty. The two employees conducted their competing business principally through a company called “Mallory Trading”. The company operating the injured business was called “TECO”. The judge held that the relief available was not limited to an account of the profits which the employees had made. It extended to a constructive trust over the successful business which the employees had set up as a result of their breaches. On what

⁴⁸ (1975) 132 CLR 373 at 395.

⁴⁹ [1980] 2 NSWLR 488.

grounds did Kearney J take this approach? There were two. He put the first thus:⁵⁰

“Every opportunity which Mallory Trading has received is directly traceable to resources and benefits provided by TECO, even to the extent of time and efforts expended by Anderson and Toy for which TECO was paying. Every advance made by Mallory Trading was also due to the advantages of the tangible and intangible resources and facilities provided from TECO. In truth, the business of Mallory Trading was carved out of the business of TECO, and thus ought to be treated as being ... held on trust for TECO.”

He also based the constructive trust on a second theory:⁵¹

“The substance and worth of Mallory Trading were rooted in fraud and were nourished and sustained in fraud of TECO. For Mallory Trading to maintain that it is beneficially entitled to the produce of such deceit, so as to deny TECO any benefit therein, would, in my opinion, constitute fraud calling for the imposition of a constructive trust in favour of TECO.”

Kearney J then dealt with an argument that only one remedy should be ordered – an account of profits limited to profits made on orders to Mallory Trading from customers who once were TECO customers. He referred to a discussion by Upjohn J in *Re Jarvis (dec'd)*.⁵² Counsel for the defendant submitted to Upjohn J that the remedy should be limited to the benefits actually flowing to the defendant executrix-trustee of a

⁵⁰ [1980] 2 NSWLR 488 at 496 (17).

⁵¹ [1980] 2 NSWLR 488 at 497 (17).

⁵² [1958] 1 WLR 815 at 820.

tobacconist business which she had run for her own benefit, not that of the beneficiaries. Counsel for the plaintiff submitted that it would be impossible to separate those benefits out, and the defendant should be made accountable for the whole business. Subject to a laches point, Upjohn J accepted the latter argument because the success of the tobacconist business depended much more on its origins in the business bequeathed than on the independent activity of the defendant.

Kearney J adopted that latter approach as well. He favoured granting a constructive trust over the defendant's business, and granting an equitable lien over the shares of companies which carried it on.

The reasoning of Upjohn J in *Re Jarvis* and Kearney J in the *Timber Engineering* case does not seem compatible with the notion of an institutional constructive trust arising automatically. Instead it rests on a close examination of the particular circumstances and on matters which are in some sense discretionary, or at least matters of judgment. In particular, Upjohn J's status as one of the leading English equity lawyers of the 20th century casts doubt on whether constructive trusts in England are in truth institutional only – or perhaps even at all. In the *Hospital Products* case, Mason J approved Upjohn J's reasoning. He said:⁵³

“In *In re Jarvis*, Upjohn J observed, correctly in my opinion, that it is not possible to say that one approach is universally to be preferred to the other, for each case depends on its own facts and the form of inquiry which ought to be directed must vary according

⁵³ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 110.

to the circumstances. In each case the form of inquiry to be directed is that which will reflect as accurately as possible the true measure of the profit or benefit obtained by the fiduciary in breach of his duty.”

The *Hospital Products* case illustrates how the remedy varies depending on the nature of the duty broken, the extent of the breach and the need to achieve justice and avoid injustice in the particular circumstances. It also illustrates how different minds can react to identical facts. The case concerned the misconduct of an American distributor who was appointed Australian distributor of an American company’s products. His surname, appropriately, was Blackman. The American principal claimed a declaration that the distributor’s assets were held on constructive trust. The trial judge, McLelland J, found that a fiduciary duty existed, but ordered only an account of profits made by the distributor in getting a head start in the Australian market in breach of duty.⁵⁴ The New South Wales Court of Appeal, who reacted very sharply to the distributor’s undoubtedly shameful perfidy, declared a constructive trust over the whole of the distributor’s assets. A majority of the High Court held that there was no fiduciary duty and left the principal to a claim for breach of contract. However, Mason J, though finding a fiduciary duty narrower than the Court of Appeal’s, like McLelland J, would have ordered only an account of profits. He did not consider it necessary to impose a constructive trust because that would extend far

⁵⁴ His judgment, incidentally, is a reminder that even in an age in which litigation is conducted in a bloated, ponderous and complex fashion, it is possible to dispose of it with admirable elegance, precision and succinctness.

beyond the profits made in breach of duty and would fail to make any allowance for the contribution in time, effort and finance made by the distributor.⁵⁵ Deane J, who unlike McLelland J and Mason J did not find any fiduciary duty, would nonetheless have ordered a constructive trust obliging the distributor to account for profits made in breach of contract. Since constructive trusts are normally conceived of as arising in the exclusive jurisdiction of equity, not the auxiliary, this was revolutionary thinking. It should be put aside for the present.

It has been seen that at least one English case, *Re Jarvis*, supports flexibility in deciding whether or not to impose a constructive trust, and what sort of constructive trust. It thus points against the view that in England the institutional constructive trust arises strictly in every case. It has also been seen that Mason J's judgment in the *Hospital Products* case, which, though dissenting, is much admired, and has had much influence inside and outside Australia, approved *Re Jarvis*. *Re Jarvis* indeed is a case which on other points (just allowances and laches) is much approved.

Another English authority which recognises the power to grant a constructive trust of a remedial character, but only after examining various factors which point in different directions, is *Ocular Sciences Ltd v Aspect Vision Care Ltd*. It concerned abuse of confidential information. There Laddie J said:⁵⁶

⁵⁵ (1984) 156 CLR 41 at 114.

⁵⁶ [1997] RPC 289 at 414-415.

“In determining whether to grant a proprietary remedy, the court should consider whether it is the appropriate remedy in the circumstances of the case. In considering this, the court must bear in mind the possible effects of imposing a constructive trust. Not only will the plaintiff obtain priority over general creditors, he may recover profits made by the defendant, limitation periods may be different and the plaintiff may be able to obtain compound interest.”

He then discussed the detailed analysis in the *Lac Minerals* case. He continued:⁵⁷

“What the plaintiffs are asking for is the imposition of a constructive trust over a part of the defendants’ business and assets. Unlike *Lac Minerals*, there is no question here of the defendants having diverted their business or assets, or any part of them, from the plaintiffs. Furthermore even if it is said that part of the defendants’ business and assets have been contaminated by breaches of confidence, that contamination is small and technically inconsequential. In my view it would be quite wrong to impose a constructive trust over such a minor fraction. It was not clear to me how a constructive trust imposed on such a fraction would work. Who would decide what repairs or modifications should be carried out to equipment, who should pay for them, who should decide what to do with obsolete equipment and if AVCL was to be floated on the stock exchange, who would decide at what price and on what terms? I can see attractions in a suitable case of imposing a constructive trust over a complete discrete item of property but imposing such a trust over a part only raises additional problems.”

Another inquiry relevant to the distinction between institutional and remedial constructive trusts is whether it is open to a court to refuse to

⁵⁷ [1997] RPC 289 at 416.

declare a constructive trust on grounds like laches, unclean hands, hardship, a failure to satisfy the maxim that those who seek equity must do equity, or unconscionable conduct. If so, the constructive trust is more likely to be a remedy than an institution. A claim to enforce a beneficial interest under an express trust is not usually seen as defeasible for these reasons. It seems likelier that a claim for a constructive trust is not defeasible on those grounds. Laches defeated the claimant in *In re Jarvis*.⁵⁸ In *Chan v Zacharia*,⁵⁹ Deane J said it may still be arguable in the High Court of Australia that “the liability to account for a personal benefit of gain obtained ... by reason of fiduciary position ... will not arise in circumstances where it would be unconscionable to assert it”. Admittedly it is not clear whether he was saying the liability to account will not arise at all in those circumstances, or that, though it may arise prima facie, those circumstances afford grounds for refusing the remedy.

Another pointer against any rigid distinction between institutional constructive trusts (permissible) and remedial constructive trusts (impermissible) is the difficulty of distinguishing between them. That is illustrated by the rich modern case of *Boardman v Phipps*.⁶⁰ Seven judges supported the view that a constructive trust over the relevant

⁵⁸ [1958] 1 WLR 915. See also *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 at 335 (assuming that a constructive trust over a bribe can be defeated by delay).

⁵⁹ (1984) 154 CLR 178 at 204-205.

⁶⁰ [1967] 2 AC 46.

shares should be declared. But their reasons for concluding that the defendants had committed the breaches of equitable duty which led to that remedy varied.⁶¹ Lord Denning MR and Lord Cohen thought that the constructive trust was triggered automatically on the basis that Boardman was a fiduciary who had acquired a gain. Four others (Lord Hodson, Lord Guest, Pearson LJ and Russell LJ) thought that the information from which Boardman perceived the opportunity to improve the position of the relevant company by acquiring the shares personally and improving its administration was to be seen as trust property. On those two approaches, the constructive trust would fall within Ungood-Thomas J's second category. Wilberforce J, on the other hand, treated each of Boardman and Tom Phipps as an agent *de son tort* or a trustee *de son tort*. If so, they fell into Ungood-Thomas J's first category, and are to be viewed as constructive trustees under an institutional constructive trust.

Among the many issues which Lord Neuberger's thoughtful paper has raised, there is one very significant issue which calls for comment. The paper questions whether there is any point in the remedial constructive trust. It might be said that there is no point in it when the defendant is solvent, and able to pay moneys by way of equitable compensation or an account profits. And if it is tailored to protect third party rights it does not give any advantage over money remedies.

⁶¹ See the valuable analysis of Andrew D Hicks, "Proprietary relief and the order in *Boardman v Phipps*" [1913] Conv 232.

However, one useful aspect of a constructive trust is to be found in its operation against defendants who, though solvent, are unwilling to pay. Proprietary orders against particular assets can be valuable against the Blackmans of this world. The immoral disposition which caused the defendant to commit an equitable wrong also tends to cause that defendant to conceal as many assets as possible in order to evade the conventional remedial consequences of that wrong.

Another useful aspect is illustrated by *Boardman v Phipps*. The plaintiff never attempted to enforce the constructive trust over the shares. They had halved in value since they were acquired. If they were to be recovered by the plaintiff, he would have had to account to Boardman and Phipps for the money spent in buying them. The purchase price was not in terms caught by Wilberforce J's just allowances order relating to work and skill. But Wilberforce J did specifically say "account must naturally be taken of the expenditure which was necessary to enable the profit to be realised"⁶² – namely, what the defendants have had to pay to get the shares. Boardman in fact retained all his shares. What was valuable about the shares was the dividends which had been declared on them in consequence of Boardman's efforts in improving the position of the company: the dividends received on the shares exceeded the decline in their value. Wilberforce J may have been concerned to ensure that all profits were captured by his account of profits order, and the creation of a continuing constructive trust was a useful and perhaps necessary way of avoiding

⁶² *Phipps v Boardman* [1964] 1 WLR 993 at 1018.

any restriction on the period for which profits were recoverable.⁶³ The account of profits order standing alone might run into the future, after the proceedings had ended, but equity dislikes orders in the nature of a mandatory injunction running for an unpredictable time into the future. The declaration of a constructive trust ensured that if he chose to, the plaintiff could avoid difficulties on the account of profits order by linking the account of profits to his continuing beneficial interest in the shares under the constructive trust.

There is a third advantage of constructive trusts even where the defendant is solvent. Monetary relief, whether it is equitable compensation or an account of profits, can be hard to calculate. In particular, it can be difficult to assess how far profits were the result of the defendant's wrong as distinct from other conduct of the defendant. Where the behaviour of the defendant attracts the maxim that equity is to be presumed against a wrongdoer, it is simpler to impose a constructive trust on the whole of the relevant assets of the relevant business, and it is not unjust even if this may exceed the actual profits.

It might take a very long time to conduct a sufficiently detailed analysis of the authorities to be sure of this, but it may be that the distinction between the institutional and the remedial constructive trust – between the English and the Australian position – has been exaggerated. Though most English judges seem to deny the remedial constructive trust, there are at least two cases supporting its existence.

⁶³ Andrew D Hicks, "Proprietary relief and the order in *Boardman v Phipps*" [2013] Conv 232 at 237-238.

Further, Ungood-Thomas J said in the *Selangor* case that cases in the second category of constructive trusteeship rested on “nothing more than a formula for equitable relief”. And in the *Central Bank of Nigeria* case, Lord Sumption called them “purely remedial”.⁶⁴ Does that hallowed usage render constructive trusts in the second category “remedial”, not “institutional”? If so, and if constructive trusts in England are never remedial, there can be no proprietary relief for cases in Ungood-Thomas J’s second category. That would be an extreme result. On the other hand, there are several Australian cases in which what appear to have been institutional constructive trusts have been imposed, though there are others where the order is in the nature of a remedial constructive trust. There is a certain logic and purity of principle in the contention which must underlie the English institutional constructive trust – that once a wrong has been committed to the plaintiff, any proprietary rights in the plaintiff that flow from that wrong should operate from the moment of the wrong. On the other hand, if remedial flexibility is sought, the price will sometimes be the creation of a non-retrospective constructive trust, ie a remedial constructive trust. It does not seem that the Australian solution has caused much harm. But it is difficult to generalise at this stage. The remedy of constructive trust is used only as an extreme emergency measure. It is therefore not commonly granted. Whether it has major disadvantages can only be ascertained over quite long periods which have not yet run their course.

⁶⁴ *Williams v Central Bank of Nigeria* [2014] 2 WLR 355 at [9].