The Genetically Modified Constructive Trust

Graham Virgo*

In England the constructive trust is characterised as institutional, arising by operation of law at the time of a recognised triggering event. In Canada and Australia the remedial constructive trust is recognised through the exercise of judicial discretion to secure equity and justice. In fact, the categories of constructive trust are not as distinct as orthodoxy dictates. Motivated by the aim of seeking harmonisation where possible, this paper proposes a new model of constructive trust, the modified constructive trust, which embodies the institutional core but modified by reference to recognised principles.

* Professor of English Private Law, Faculty of Law, University of Cambrige

I. Introduction

This article is ultimately about legal cultures, particularly in Australia, Canada and England. Justice Finn[1] has said, specifically of the legal culture in England and Australia (but Canada could be included as well), that there are "differing casts of mind, distinctive methodologies and markedly different contexts". To some extent he is right. Certainly, since Australia and Canada abolished appeals to the Privy Council, the Australian and Canadian legal systems have inevitably become distinct from English law. There has, however, been an important recent riposte to Finn J's analysis of legal culture, as delivered by Lord Neuberger in the UK Supreme Court concerning the nature of the constructive trust, where he said:

> [a]s overseas countries secede from the jurisdiction of the Privy Council, it is inevitable that inconsistencies in the common law will develop between different jurisdictions. However, it seems to us highly desirable for all those jurisdictions to learn from each other, and at least to lean in favour of harmonising the development of the common law round the world.[2]

It is in that spirit of seeking to learn from each other, and even seeking some degree of harmonisation, that this paper will examine

1. Honourable Paul Finn, "Common Law Divergences" (2013) 37:2 Melbourne University Law Review 509 at 511.

2. *FHR European Ventures LLP v Cedar Capital Partners LLC*, [2014] UKSC 45 at para 45 [*FHR*].

the constructive trust, a trust that is prevalent in all three jurisdictions, which share a common legal tradition, common doctrines and common terminology, especially in that body of law known as equity. What we can learn from each other as regards the operation of the constructive trust will depend on the legal and judicial culture of each jurisdiction, particularly as to whether the dominant view is that the recognition of the trust should be rule-based, discretionary or something in between.

II. The Nature and Function of the Constructive Trust

It is important at the outset to identify the nature and function of the constructive trust. In all three jurisdictions it is a genuine trust, the creation of which does not depend on the intention of the parties. Property is held on trust by the constructive trustee for the beneficiaries, each of whom will have an equitable proprietary interest in the trust property. The creation of this equitable proprietary interest has three significant advantages for the beneficiary. First, if the constructive trustee becomes insolvent, the beneficiary will gain priority over the trustee's creditors as regards claims to the trust property. Secondly, if the value of any asset which is held on constructive trust has increased, the beneficiary will gain the benefit of that increase. Thirdly, the beneficiary of the trust can assert his or her equitable proprietary rights against innocent third parties who have received and retained the asset or its traceable substitute, as well as recipients who received but have not retained the asset or its traceable substitute, but who knew or should have known that the property had been held on trust.[3]

Whilst there is a broad consensus about the function of the constructive trust, the three jurisdictions have very different understandings of its nature. In England the constructive trust is, generally, analysed as an institution, such that it arises by operation of law on the occurrence of a

3. By means of a claim for knowing receipt. See *Bank of Credit and Commerce International (Overseas) Ltd v Akindele*, [2001] Ch 437 (CA (Civ)(Eng)); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, [2007] HCA 22; *Citadel General Assurance Co v Lloyds Bank Canada*, [1997] 3 SCR 805.

certain event where a constructive trust has previously been recognized.[4] In Australia[5] and Canada[6], however, it is the remedial constructive trust which is recognised. The essential difference between the institutional and remedial constructive trust was identified by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC* ("*Westdeutsche*"):

> [u]nder 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, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court.[7]

In other words, whereas an institutional constructive trust arises by operation of law from the date of the event which gives rise to it, the remedial constructive trust arises through the exercise of the judge's discretion, whenever it is considered to be just to recognise that the claimant has an equitable proprietary interest in property received by the defendant.[8] As a consequence, the court could require the transfer to the claimant of an asset, which otherwise belongs to the defendant and in which the claimant did not have a pre-existing legal or equitable right. The purpose of the remedial constructive trust is to enable the judge to create an equitable proprietary right which did not exist before the

---

4. See *e.g. Halifax Building Society v Thomas*, [1996] Ch 217 (CA (Civ) (Eng)) at 229, per Gibson LJ.
5. *Muschinski v Dodds* (1985), 160 CLR 583 (HCA) [*Muschinski*]; *Grimaldi v Chameleon Mining NL (No 2)*(2012), 200 FCR 296 (FCA (Austl)) at para 569, per Finn J [*Grimaldi*]. Also in New Zealand: *Powell v Thompson*, [1991] 1 NZLR 597 (HC).
6. *Pettkus v Becker* [1980] 2 SCR 834 [*Becker*]; *Soulos v Korkontzilas* [1997] 2 SCR 217 at para 34, per McLachlin J [*Soulos*]; *Kerr v Baranow*, 2011 SCC 10 at para 50, per Cromwell J [*Kerr*].
7. [1996] AC 669 (HL) at 714 [*Westdeutsche*].
8. *Ibid,* per Lord Browne-Wilkinson; *Soulos*, *supra* note 6 at para 34, per McLachlin J.

exercise of the judge's discretion.[9]

In *FHR European Ventures LLP v Cedar Capital Partners LLC*[10] ("*FHR*") the Supreme Court rejected the remedial constructive trust in English law. In *FHR*, the claimants had purchased the share capital of a company which owned the lease of the Monte Carlo Grand Hotel. Cedar Capital Partners LLC acted as the claimants' agent in negotiating the purchase of the shares and, as an agent, owed fiduciary duties to the claimants. The defendant had earlier entered into an agreement with the vendor of the hotel by virtue of which the vendor would pay it €10 million following the successful sale of the shares, but the defendant failed to disclose this payment to the claimants in breach of fiduciary duty. It was held that the agent held the secret commission on constructive trust for the claimants, and this trust arose automatically because the payment had been received by the defendant in breach of fiduciary duty, and not through the exercise of judicial discretion.[11]

Although the Supreme Court cited the judgment of Lord Browne-Wilkinson in *Westdeutsche*[12] in support of its decision to reject the remedial constructive trust in England, and it is certainly true that he did not formally recognise the remedial constructive trust in English law, he was not adverse to the recognition of such a trust and considered that there may be circumstances where it might be beneficial to recognise it, because it would enable proprietary relief to be tailored to the particular circumstances of the case, but he did not consider that it was appropriate to recognise it at that point in time. Despite that, the remedial constructive trust appears to be extinct in England.

III. Institutional Versus Remedial Constructive Trust

The rejection of the remedial constructive trust in England, and its acceptance in Australia and Canada, may well reflect different legal cultures as to the function of the law and the role of the judge, particularly

9. *Polly Peck International v The Marangos Hotel Company Ltd*, [1998] 3 All ER 812 (CA (Civ)) at 830, per Nourse LJ [*Polly Peck*].
10. *FHR*, *supra* note 2 at para 47, per Lord Neuberger.
11. See further Part III.B.3, below.
12. *Westdeutsche*, *supra* note 7 at 716.

the legitimacy of judicial discretion. The English appear to be suspicious of the judge being given the opportunity to exercise their discretion: judges are not to be trusted. So, for example, Lord Camden in *Doe v Kersey* said:

> [t]he discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper, and passion. In the best it is oftentimes caprice; in the worst it is every vice, folly, and passion, to which human nature is liable.[13]

This has not always been the consistent view, however, particularly in equity. For example, 500 years ago Sir Thomas More in *Utopia* wrote:

> [t]he law and Judges should avoid arcane interpretations and debates about law but should instead judge the overall equity or justice of a situation and decide accordingly.[14]

This was equated with the exercise of the judge's conscience, which was considered to be fundamental to the equitable jurisdiction. But it is the approach of Lord Camden which appears to underpin the rejection of the remedial constructive trust in England. Lord Neuberger, who delivered the single judgment in *FHR* which rejected the remedial constructive trust, subsequently expressed his concerns about its recognition extra-judicially,[15] and sought to provide detailed justification for its rejection, which was lacking in his judgment in *FHR*. He considered that "the notion of a remedial constructive trust displays equity at its flexible flabby worst". He considered it to be "unprincipled, incoherent and impractical". He was opposed to its recognition in England for the following reasons:

i. it would render the law unpredictable;
ii. it would be an affront to the common law view of property rights and interests;
iii. it would involve the courts usurping the role of the legislature: the creation

13. Lord Camden, cited in Edward Wynne, *Eunomus, or, Dialogues Concerning the Law and Constitution of England: with an Essay on Dialogue*, 5d, (London: S Sweet and R Millikin, 1822) at 91.
14. Sir Thomas More, *Utopia Book 1* (Leuven: More, 1516) at 45.
15. David Neuberger, "The Remedial Constructive Trust: Fact or Fiction" (delivered at the Banking Services and Finance Law Association Conference New Zealand, 10 August 2014) [unpublished] at para 6.

> of new property rights being something which should be left to Parliament.[16] This reflects a particular concern about the use of the remedial constructive trust to undermine priorities on insolvency as identified by statute.[17]

The Court of Appeal in *Re Polly Peck International (No 2)*[18] *("Polly Peck")* had explicitly refused to recognise the remedial constructive trust for this reason. It was considered that the variation of property rights should be a matter for Parliament rather than for the discretion of the judiciary, especially where the creation of an equitable proprietary right by a judge would exclude assets from distribution to the unsecured creditors of the defendant.[19] In *Polly Peck*, the claimant had sought to recover money from an insolvent company and argued that it was held on a remedial constructive trust to enable the claimant to gain priority over the defendant's other creditors. The Court of Appeal refused to recognise such a trust, especially because the distribution of assets on insolvency was governed by the *Insolvency Act 1986*[20] and it was not for the courts to interfere with this statutory regime. As Lord Justice Mummery recognised: "[t]he insolvency road is blocked off to remedial constructive trusts, at least when judge-driven in a vehicle of discretion".[21] Lord Justice Nourse went further and said that, even had the defendant been solvent, he would not have recognised a remedial constructive trust because proprietary rights should be varied only by statute.[22]

But the real concern about the recognition of the remedial constructive trust is fundamentally that the law needs clear and predictable rules as to whether or not equitable proprietary rights have

16. But the Supreme Court in *FHR*, *supra* note 2, did create a new property right in the secret commission in circumstances where that right had not existed previously. See further Part III.B.3, below.
17. Neuberger, *supra* note 15 at para 6.
18. *Polly Peck*, *supra* note 9.
19. See also, *Cobbold v Bakewell Management Ltd*, [2003] EWHC 2289 (Ch) at para 17, per Rimer J; *Re Farepak Food and Gifts Ltd*, [2006] EWHC 3272 (Ch) at para 38, per Mann J; *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*, [2011] EWCA Civ 347 at para 37, per Lord Neuberger MR.
20. (UK), c 45.
21. *Polly Peck*, *supra* note 9 at 827.
22. *Polly Peck*, *supra* note 9 at 830.

been created, and the remedial constructive trust is antithetical to such clarity and predictability,[23] being perceived to involve unrestrained judicial discretion. Professor Peter Birks was especially strongly opposed to its recognition for that reason. He said:

> [t]he law of remedies is not exempt from the demands of certainty and predictability: nor is the law as a whole intellectually respectable if, even at the level of remedies, it takes refuge in an inscrutable case to case empiricism. Practising lawyers need to be able to advise their clients as to the likely results of litigation. The judges on whom these results depend need the insulation from personal criticism which only objectively ascertainable rules and principles can provide.[24]

He also described the remedial constructive trust as a remedy that is "ugly, repugnant alike to legal certainty, the sanctity of property and the rule of law".[25] Despite this, there have still been calls for the recognition of the remedial constructive trust in England. In *London Allied Holdings Ltd v Lee*,[26] Justice Etherton suggested that *Polly Peck* was concerned only with the recognition of the remedial constructive trust where the defendant was insolvent, and Lord Justice Mummery and Lord Justice Potter in *Polly Peck* did indeed focus on that particular context. Justice Etherton considered that the way was therefore clear for the recognition of such a trust where the defendant was solvent and suggested that the judiciary should have a discretion to fashion such a remedy, by analogy with the discretion to fashion the remedy in respect of proprietary estoppel. He concluded that:

> … there still seems scope for real debate about a model more suited to English jurisprudence, borrowing from proprietary estoppel: namely, a constructive trust by way of discretionary restitutionary relief, the right to which is a mere equity prior to judgment, but which will have priority over the intervening

---

23. Peter Millett, "Equity: The Road Ahead" (1995) 9:2 Trust Law International 35 at 42.
24. Peter Birks, "The Remedies for Abuse of Confidential Information" (1990) 4 Lloyd's Maritime and Commercial Law Quarterly 460 at 465.
25. Peter Birks, "Property and Unjust Enrichment: Categorical Truths" (1997) 1997:5 New Zealand Law Review 623 at 641. See also, Peter Millett, "Equity's Place in the Law of Commerce" (1990) 114:2 Law Quarterly Review 214.
26. [2007] EWHC 2061 (Ch).

> rights of third parties on established principles … [27]

This reflects the remedial constructive trust as it operates in Canada. But such a debate appears now to be terminated in England by the apparently clear decision of the Supreme Court in *FHR*.

But, if the real concern about the recognition of the remedial constructive trust is that it would undermine the certainty of the law by introducing unacceptable judicial discretion, it is necessary to be much more precise in our analysis of what discretion means for these purposes and what the real concern is. In an important and helpful analysis, HLA Hart[28] argued that discretion is fundamentally different from arbitrary choice: discretion by its nature is guided by rational principles, so that a decision which is not susceptible to principled justification is not an exercise of discretion at all but simply an arbitrary choice. Consequently, if the remedial constructive trust is to be defended, the determination of whether the trust should be recognised and how it should operate must be determined with reference to recognised principles, for otherwise the judicial decision will not involve the exercise of discretion, but will simply depend on the whim of the judge; it is such an arbitrary choice which should be considered to be contrary to the rule of law. If principles can be identified for the exercise of the judge's decision, that decision can be defended as involving the legitimate exercise of judicial discretion. The key question will then be what principles, or reasons of

---

27. *Ibid* at para 274. See also, *Thorner v Major,* [2009] UKHL 18 at para 20 (in which Lord Scott indicated that the remedial constructive trust should be used where the defendant has represented that the claimant would receive property in the future, for example in the defendant's will, in reliance on which the claimant acted to his or her detriment. This is presently dealt with through the doctrine of proprietary estoppel) [*Thorner*].
28. HLA Hart, "Discretion" (Essay delivered at the Legal Philosophy Discussion Group at Harvard Law School, 19 November 1956)(2013) 127 Harvard Law Review 652 at 665.

general application,[29] might be identified to determine when a remedial constructive trust should be recognised. If it is not possible to do so, the remedial constructive trust project is doomed to failure.

There is a further difficulty with the recognition of the remedial constructive trust in England, which is that the award of such a remedy must be triggered by a cause of action. What would that cause of action be? It could be equitable wrongdoing, such as breach of trust or breach of fiduciary duty, but, following the decision in *FHR*, the constructive trust that is recognised where there is a breach of fiduciary duty is institutional in form, so there is no scope for the remedial constructive trust to operate. Similarly, where the defendant has obtained an asset from the claimant in circumstances where the defendant knows or suspects that the claimant's intention to transfer the asset has been vitiated or is absent, the defendant's unconscionable retention of that asset will trigger an institutional, rather than a remedial, constructive trust.[30] The remedial constructive trust might be considered to be an appropriate response to the defendant's unjust enrichment, and this has been recognised as the relevant cause of action in Canada.[31] But, at least in England, the fact that the defendant has been unjustly enriched at the claimant's expense is not a sufficient reason to recognise an equitable proprietary interest; the claimant should instead be confined to a personal remedy against the defendant. Something more is needed to justify the creation of an equitable proprietary interest.[32] A remedy without a cause of action is meaningless and, if such a cause of action cannot be identified, the remedial constructive trust cannot be recognised either.

So, if the remedial constructive trust is ever to be recognised in England, and if the Australian and Canadian adoption of the remedial

---

29. John Gardner, "Ashworth on Principles" in Julian Roberts and Lucia Zedner (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford: Oxford University Press, 2012) 3 at 8.
30. *Westdeutsche*, *supra* note 7.
31. See *Becker*, *supra* note 6; *Soulos*, *supra* note 6; and *Kerr*, *supra* note 6.
32. See Graham Virgo, *The Principles of the Law of Restitution*, 3d (Oxford: Oxford University Press, 2015) at 559-67.

constructive trust is to be justified, it will be necessary both to identify an underlying cause of action and clear principles which enable the judge to exercise a legitimate discretion rather than make an arbitrary choice. Both objectives can in fact be achieved by adopting a different model which involves the recognition of a hybrid, or modified, constructive trust.

IV. The Modified Constructive Trust

In England, Australia and Canada we have got caught up in a sterile debate about the constructive trust where there are two camps, institutional versus remedial. It is now time to ditch the intemperate language and the lazy characterisation and acknowledge that there is just one constructive trust, which should preferably be treated as a response to unconscionability.[33] Indeed, as Justice Deane said in *Muschinski v Dodds* "for the student of equity, there can be no true dichotomy between the two notions".[34]

Now there are certainly examples in Australia[35] and Canada[36] of judges interpreting the constructive trust in a purely remedial sense and without reference to any obvious principles. There certainly appears to be a greater willingness amongst the Australian and Canadian judiciary to embrace creative judicial decision-making with reference to the justice of the case, whereas the English judge is generally more likely to emphasise the need for certainty. This might in part be due to different commercial cultures in the different jurisdictions. The English court, especially the Commercial and also the Chancery courts, are centres for dispute resolution of international significance. Commercial players are perhaps

33. Which might even be considered to underpin the Canadian construction of unjust enrichment.
34. *Muschinski*, *supra* note 5 at para 7, per Deane J.
35. See especially Finn J in *Grimaldi*, *supra* note 5 at para 569.
36. In *Becker*, *supra* note 6 (where Laskin J described the remedial constructive trust as " … a broad and flexible equitable tool" used "… to determine beneficial entitlement [to property]" at 843-44). See also *Soulos*, *supra* note 6 (where McLachlin J, as she then was, emphasised that the equitable remedy was flexible and turned on "what is just in all the circumstances of the case" at para 34).

more likely to select the English jurisdiction and choose English law because of a desire for predictability and certainty. The Australian and Canadian courts and judges might be less concerned about the need to attract business to their courts.

But even so, when the Australian and Canadian cases are examined there are plenty of examples of principled reasoning. For example, Justice McMillan recognised that "[u]nstructured judicial discretion … has no place in the law of constructive trusts in Australia".[37] In Canada the remedial constructive trust has explicitly restitutionary principles to guide the exercise of judicial discretion. And Deane J in *Muschinski v Dodds* emphasised that:

> [t]he fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles … proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion, subjective views about which party "ought to win" … and "the formless void of individual moral opinion" …[38]

In fact, *Muschinski v Dodds* might be considered to be one of the worst examples in Australian jurisprudence of remedial discretion. The case concerned a cohabiting couple who held the home they had purchased and developed as tenants in common in proportion to their contribution to it by means of a constructive trust, but this trust was only imposed at the time when the reasons of the court were published. Justice Finn has described this as an "astounding proposition".[39] In some other Australian cases the remedial nature of the constructive trust has been expressed with reference to the importance of only recognising the trust if there are no other appropriate remedies available.[40] This itself is concerning, even though it purports to be principled, because it appears that there is no

37. *State Trustees Ltd v Edwards*, [2014] VSC 392 (Austl) at para 143.
38. *Muschinski*, *supra* note 5 at paras 8-9, per Deane J.
39. *Grimaldi*, *supra* note 5 at para 569.
40. *Bathurst City Council v PWC Properties Pty Ltd* (1998), 195 CLR 566 (HCA) at 585; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd*, [2010] HCA 19 at paras 37, 128.

proprietary interest until the court creates one at the time of trial having considered what other remedies might be appropriate. It would be more apposite to acknowledge that the constructive trust exists automatically at the time of the relevant triggering event, but the claimant might not be allowed to vindicate his or her equitable right because an alternative remedy would be more appropriate. Consequently, the constructive trust which already exists could be modified if other judicial orders are capable of doing full justice.

Even in England, where the constructive trust is characterised as absolutely institutional with no apparent role for the exercise of judicial discretion to modify its operation, such characterisation does not reflect the actual operation of the constructive trust. There are many significant examples of cases where the recognition or the operation of the constructive trust depends on the exercise of judicial discretion. First, where the elements of proprietary estoppel are satisfied, the claimant's rights might be vindicated by recognising that the defendant holds property on a constructive trust.[41] Secondly, in *Boardman v Phipps*,[42] fiduciaries who profited from breaching their fiduciary duty were found to hold their profit on constructive trust for the principal. But this trust was modified in respect of one of them, who was awarded an equitable allowance to reflect the value of his work in making the profit. Thirdly, if a situation arose where a fiduciary had made a profit in breach of fiduciary duty and that profit would continue to accrue over a period of time as the result of the fiduciary's continued work, surely the court would modify the constructive trust in some way, such as to limit it to the profits obtained over a restricted period of time.[43]

Finally, in England the problem of identifying beneficial interests in a house occupied by a cohabiting couple as the family home has

41. *Thorner*, *supra* note 27.
42. [1967] 2 AC 46 (HL).
43. As in the Australian case of *Warman International Ltd v Dwyer*, (1995) 182 CLR 544 (HCA).

been dealt with through the common intention constructive trust.[44] This is an apparently institutional trust which does not respond to unconscionability, but instead is triggered by reference to the express, implied, or imputed intention of the parties as to whether they have a beneficial interest in the property and, if so, what the extent of that interest might be. As the jurisprudence relating to the common intention constructive trust has developed,[45] a structured approach has been adopted involving presumptions which are rebuttable by reference to the parties' common intention. So, where the property is registered in the name of one party, it will be presumed that the other does not have a beneficial interest in it. This can be rebutted by the other party showing that there was a common intention that he or she would have a beneficial interest in the property and, having done so, what proportion of the beneficial interest is appropriate.[46] In *Jones v Kernott*[47] the majority accepted that imputation of common intent was appropriate where it was clear that the parties intended to share the beneficial interest but it was not possible to determine any agreement as to the proportions in which the interest was to be shared.[48] This does not involve proving an actual intent shared by the parties, but involves the attribution of an intention that they might not have shared, but which the court considers they would have agreed had they thought about the allocation of the beneficial interest. Where imputation of an intention is required, the court must consider what is "fair having regard to the whole course of dealing" in respect of the property, with reference to the claimant's financial and non-financial contribution to the property.[49] It is at this point that the proof of a common intention could disintegrate into a

44. This has replaced the resulting trust as the means of dealing with the proprietary consequences of a relationship breakdown where the couple is unmarried.
45. Notably through the decision of the House of Lords in *Stack v Dowden*, [2007] UKHL 17 and *Jones v Kernott*, [2011] UKSC 53 [*Jones*].
46. *Ibid*.
47. *Jones*, *supra* note 45.
48. *Ibid*, at para 31, per Lady Hale and Lord Walker.
49. *Ibid*, at para 51 (see number (4)), per Lady Hale and Lord Walker, and at para 64, per Lord Collins.

determination of an allocation of the beneficial interest that the court considers to be fair. Indeed, Etherton J has said that "there is now a hair's breadth between the [common intention constructive trust] … and a remedial constructive trust".[50] The nature of the common intention constructive trust is controversial, but, whilst in form it appears to be institutional, in reality there is scope for modification of it with reference to what the court considers to be the just result.

It follows that, even in England, the institutional constructive trust is not as rigid as it is often perceived to be. This should give the English court confidence to develop a new model of constructive trust which is principled but also flexible, without recourse to arbitrary choice. This model builds on the orthodox institutional constructive trust, but this trust should, however, be capable of modification in the exercise of judicial discretion, but itself in a principled and not an arbitrary way. The legitimacy of this model of trust depends on the identification of appropriate principles both as regards the identification of when the constructive trust should be recognised and when it should be modified.

A. Recognition of the Institutional Constructive Trust

The most important principle underpinning the constructive trust, at least in England and Australia, is that of unconscionability,[51] which appears to require consideration of the defendant's conduct and so is fault-based. Fault in equity is typically determined objectively, albeit assessed with reference to the defendant's knowledge or suspicion about the relevant facts.[52] That standard is appropriate to justify the imposition of personal liability, such as where the defendant is liable for receipt of property transferred in breach of trust or dishonestly assisting a breach of trust or breach of fiduciary duty. But something more should be needed for the recognition of proprietary rights in equity, which is why

50. Sir Terence Etherton, "Constructive Trusts and Proprietary Estoppel: The Search for Clarity and Principle" (2009) 2 The Conveyancer and Property Lawyer 104 at 125.
51. *De Bruyne v De Bruyne*, [2010] EWCA Civ 519 at para 49, per Patten LJ.
52. This is sometimes described as "dishonesty". See *Williams v Central Bank of Nigeria*, [2014] UKSC 10 at para 64, per Lord Neuberger.

subjective unconscionability should be the standard for the recognition of the constructive trust. This should not be the absolute standard, however, since there will be circumstances where an objective test of unconscionability can be justified, especially where a fiduciary is liable for breach of duty, because of the high standard of conduct expected of fiduciaries. That would be consistent with what Hayton has called the "good person" philosophy, namely that fiduciaries are expected to act as good people for the benefit of their principals.[53] For that reason we can justifiably deem a fiduciary to have acted unconscionably where he or she acted in breach of fiduciary duty, which would be sufficient to recognise a constructive trust.[54]

Why should the defendant's fault be relevant to create a proprietary interest? This can be justified because a defendant who can be considered to have acted unconscionably should be deprived of all benefits arising from their unconscionable conduct; the claimant's claim to the assets is stronger than that of the defendant; the defendant should have his or her conscience purged by disgorging all benefits obtained from the unconscionable conduct; and all those claiming through the defendant should likewise have their conscience purged from all possible unconscionability. Of course, these justifications become progressively more absurd and unconvincing, but that is why the constructive trust should not be absolute but should be capable of modification, with the type and extent of unconscionability of the defendant or a third party being a key factor to be taken into account.

B. Modification of the Constructive Trust

Once it is accepted that the constructive trust which has arisen by operation of law by virtue of the defendant's unconscionable conduct might be modified, it is important to consider when such modification might be justified. In assessing this, the three key implications of recognising proprietary interests in equity need to be borne in mind, namely: (i)

53. David Hayton, "The Development of Equity and the 'Good Person' Philosophy in Common Law Systems" (2012) 4 The Conveyancer and Property Lawyer 263 at 272.
54. See further Part III.B.3, below.

priority over unsecured creditors when the defendant is insolvent; (ii) obtaining the benefit of increase in the value of the property held on constructive trust; and (iii) recovery of the property, or its identifiable substitute, from a third party, even if he or she was unaware of the circumstances which triggered the constructive trust in the first place. It is important to consider whether each of these proprietary advantages is justifiable in each case.

Determining when and how the institutional constructive trust might be modified can be assessed by reference to three of the very difficult cases for the contemporary constructive trust. In each case it will be necessary to consider how the institutional constructive trust arises and whether the three advantages of having an equitable proprietary interest can be justified in the light of the state of the defendant's conscience or the conscience of a third party recipient.

1. Theft

It is recognised in both Australia[55] and in England[56] that a thief holds stolen assets on a constructive trust for the victim. This can be justified on the ground that, although the victim will typically have retained legal title to the stolen asset, the thief's conduct in committing theft constitutes unconscionable conduct and this is sufficient justification for the thief to hold possessory title on constructive trust for the victim.[57] Equity sees the fault and, from a desire to purge the defendant's conscience, will deprive the defendant of all benefits. But should this constructive trust ever be modified?

First, if the thief has become insolvent, should his or her creditors be able to assert a claim against the stolen assets in priority to the claim of

55. *Black v S Freedman and Co* (1910), 12 CLR 105 (HCA).
56. *Westdeutsche*, *supra* note 7.
57. *Armstrong DLW GMBH v Winnington Networks Ltd*, [2012] EWHC 10 (Ch) at paras 277-78 [*Winnington Networks*], per Stephen Morris QC. See John Tarrant, "Property Rights to Stolen Money" (2005) 32:2 University of Western Australia Law Review 234 at 245; John Tarrant, "Thieves as Trustees: in Defence of the Theft Principle" (2009) 3 Journal of Equity 170 at 172.

the victim? Since the stolen property never legitimately formed part of the thief's pool of assets, there is no reason why the creditors of the thief should gain priority over the victim, so the constructive trust should not be modified for this reason.

Secondly, if the stolen asset has increased in value there is no reason why the victim of the theft should be deprived of the benefit of this increase either, since the thief should not profit from his or her crime in any way. Consequently, the constructive trust should not be modified to enable the thief to keep the benefits of the increase in value. Even if, for example, money has been invested or used to buy a national lottery ticket which has won a jackpot, all these profits, whether obtained directly or indirectly, should be considered to be the proceeds of the crime and should be held on the constructive trust, such is the extent of the defendant's unconscionable conduct in stealing in the first place.

Finally, should innocent third parties who subsequently obtained possession of the stolen asset or its identifiable substitute be allowed to keep the asset, or must they give it up to the victim of the theft? It appears to be a vital consequence of the stolen asset being held on constructive trust that, if the asset is received and retained by a third party, it continues to be held on constructive trust for the victim of the theft, regardless of the fact that the third party was unaware of the circumstances of the theft so that their conscience cannot be considered to have been tainted in any way. This position is, however, qualified in two situations. First, if the third party recipient of the stolen property or its traceable substitute had provided value and acted in good faith, the victim's equitable proprietary claim will be defeated. Secondly, if the third party received but did not retain the stolen asset, he or she will be personally liable for the value of the asset but only if he or she should have been aware that it had been held on constructive trust, in the light of the facts known or suspected by the defendant. It follows that, where the third party did not provide value for what had been received and has retained the stolen asset or its traceable substitute, that asset will still be held on constructive trust so that the victim's equitable proprietary right will defeat the third party's possessory right. But, whilst this appears to be a fundamental principle of equitable proprietary rights, is it defensible? Where the third party

recipient of the stolen asset is unaware of its provenance, such that the third party's conscience is not tainted in any way by the theft, why should the victim's equitable proprietary right prevail? Would it not be preferable to conclude that, as between the two innocent parties, their claim should be at least as good, and possibly the third party's claim even better than that of the victim of the theft? There was even an indication in a recent decision of the English Court of Appeal which is consistent with such an approach. In *Relfo Ltd v Varsani*[58] Arden LJ stated that money or its substitute could be recovered from a third party where the money was stolen by the fiduciary, if the money or its substitute was *knowingly* received by the third party. Whilst she did not elaborate on the significance of knowledge, and she might have been meaning to refer to a personal claim for knowing receipt, her dictum might be considered to reflect the fact that, absent knowledge, the recipient's conscience would not have been affected such that the constructive trust should be treated as terminated, with the victim of the theft confined to a personal claim against the thief.

It follows that the constructive trust of stolen property should not be modified to benefit creditors of the thief or the thief him or herself, but there might be a case to treat the constructive trust as revoked once the asset has been received by an innocent third party, albeit that he or she had not provided value for the receipt.

2. Mistaken Payment

Where the claimant has paid money to the defendant as a result of a mistaken belief that the claimant was liable to pay the money, the defendant will be personally liable to the claimant to restore the amount of money paid by virtue of a claim in unjust enrichment. Legal title in the money will typically pass, so that it belongs to the defendant. Some cases in Australia,[59] Singapore[60] and in England[61] recognise that, if the

58. [2014] EWCA Civ 360 at para 1.
59. *Wambo Coal Co Pty Ltd v Ariff*, [2007] NSWSC 589 (Austl).
60. *Wee Chiaw Sek Anna v Ng Li*, [2013] SGCA 36 at paras 169-84.
61. *Westdeutsche*, *supra* note 7 at 709, per Lord Browne-Wilkinson and *Winnington Networks*, *supra* note 57.

defendant knew of the mistake and failed to repay, the property will be held on constructive trust. The failure of the defendant to repay the money when he or she knew of the mistake constitutes unconscionable conduct which triggers the institutional constructive trust by operation of law. Crucially, at least in Australia and England, this trust is not triggered by the defendant's unjust enrichment. In England, establishing the elements of the unjust enrichment claim will simply enable the mistaken payer to bring a personal claim against the recipient, this being a strict liability claim which can be established even if the defendant was unaware that the money had been paid by mistake. To establish an equitable proprietary claim to the money paid by mistake, fault needs to be proved by showing that the defendant knew that the money had been paid by mistake, for then the defendant's conscience will have been tainted. But will there ever be any circumstances where the proprietary implications of this constructive trust should be modified?

First, if the defendant has become insolvent, there is no reason why the defendant's creditors should have a better claim to the money held on trust than the claimant. Since the money has been received from the claimant it should be restored to the claimant. If the defendant's receipt is unconscionable an equitable proprietary interest should be recognised. By virtue of the analogy with theft, there is no reason why the creditors of the defendant should obtain any advantage over the claimant.

Secondly, the defendant should not be allowed to benefit from any gain arising from retention of the money paid by mistake, save where that gain cannot be causatively linked to the receipt. So, if the asset is invested and increases in value, the defendant should hold that increase on constructive trust. But, if the defendant used the money paid by mistake to buy a lottery ticket which wins the jackpot, to determine whether that jackpot is held on constructive trust should depend on whether it can be shown that, but for the receipt of the money paid by mistake, the defendant would not have bought the ticket. If the defendant would have bought the ticket anyway, and used the mistaken payment by chance, this would be an appropriate reason to modify the constructive trust so that the jackpot is not held on trust. If the defendant did not rely on the receipt to buy the ticket, there is no reason why the claimant should have

a proprietary claim to the jackpot.

Finally, should the equitable proprietary right of the claimant be defeated by the innocent receipt of a third party who has not provided value for the property? Whilst the law assumes that the claimant should have a proprietary claim against such a third party recipient,[62] this is difficult to defend. The claimant should be confined to a personal claim in unjust enrichment against the direct recipient of the mistaken payment, who has not retained that payment or its traceable substitute, and not have a proprietary claim against an innocent third party recipient, at least where the only reason why the equitable proprietary right was created was because of the defendant's unconscionable retention. If the third party's receipt cannot similarly be characterised as unconscionable, there is no reason why the claimant should have a proprietary claim against that recipient.

3. Gains obtained in breach of fiduciary duty

Where a fiduciary has profited from breach of his or her fiduciary duty it has been a matter of some controversy as to when these profits should be held on constructive trust for the principal.

Where the fiduciary has misappropriated an asset from the principal, it has long been recognised that the asset will be held on constructive trust for the principal.[63] This includes where the fiduciary has obtained a bribe or a secret commission and it can be shown that this was derived from money which was paid by the principal to the fiduciary.[64] The recognition of a constructive trust in such circumstances is defensible because the profits made by the defendant can be considered to represent the fruits of the claimant's property. Consequently, it is entirely appropriate that the claimant should have an equitable proprietary interest in those profits. In addition, it is justifiable that the fiduciary should hold property on constructive trust where the consequence of the breach of duty is that

62. *Re Diplock's Estate*, [1948] Ch 465 (CA (Eng)) at 539.
63. See *Primlake Ltd v Matthews Associates*, [2006] EWHC 1227 (Ch) at para 334, per Collins J.
64. *Daraydan Holdings Ltd v Solland International Ltd*, [2004] EWHC 622 (Ch) at paras 60, 87-88 [*Daraydan Holdings*].

the fiduciary obtains property which the principal would have obtained had the defendant not breached his or her duty. Goode has described the property which the defendant obtains in such circumstances as a "deemed agency gain",[65] which should be held on constructive trust for the principal simply because the demands of the fiduciary relationship are such that it should be assumed that the defendant obtained the property for his or her principal rather than for him or herself. This is illustrated by *Cook v Deeks*,[66] where the directors of the claimant company were negotiating a contract with a third party on behalf of the company. Rather than signing the contract on behalf of the company some of the directors signed it on behalf of themselves. It was held that the directors were liable for a breach of fiduciary duty and held the profits they had made on constructive trust for the company. This can be justified because, had the defendants not breached their duty, the company would have obtained the contract, so the defendants' gain could be presumed to have been made on behalf of the company.

The most controversial issue arises where the fiduciary has obtained a benefit from a third party rather than misappropriating the principal's property or depriving the principal of the opportunity to make a profit. This has proved to be particularly controversial where the fiduciary has received a bribe or a secret commission from a third party. In such circumstances the profit cannot be considered to have derived from the principal. Consequently, the orthodox view has been that only the personal remedy of an account of profits was available, and not a proprietary constructive trust. The leading English case was *Lister & Co v Stubbs*[67] in which the defendant was employed by the claimant company to purchase supplies for the claimant firm. He bought goods from another company, having received secret commissions of over £5,000 to induce him to place

65. Roy Goode, "Property and Unjust Enrichment" in Andrew Burrows, ed, *Essays on the Law of Restitution* (Oxford: Clarendon Press, 1991) 215 at 230.

66. [1916] 1 AC 554 (PC (Canada)); see also, *Keech v Sandford* (1726), Sel Cas Ch 61 (Eng).

67. (1890) 45 Ch D 1 (CA (Eng)). See also, *Metropolitan Bank v Heiron* (1880), 5 Ex D 319 (CA (Eng)).

orders with that company. The defendant invested this money in land. It was held that the bribes did not belong to the claimant, for otherwise the claimant would have priority over the defendant's unsecured creditors if the defendant were to become insolvent, and, if the bribes were invested in property that increased in value, the claimant would get the benefit of that increase in value. Neither of these conclusions was considered to be appropriate. The relationship between the parties was consequently not one of trustee and beneficiary, but was simply one of debtor and creditor

This was, however, rejected by the Supreme Court in *FHR*.[68] It was held that, wherever a fiduciary is liable to account for profits made as a result of a breach of fiduciary duty, they will be held on constructive trust for the principal, even though they did not derive from interference with the principal's property or from the exploitation of an opportunity which should have been exploited for the principal. Consequently, wherever a fiduciary receives a bribe or secret commission in breach of fiduciary duty, the money will be held on constructive trust. The decision in *Lister & Co v Stubbs* was also overruled. The constructive trust recognised by the Supreme Court is an institutional constructive trust and is justified because the fiduciary is treated as though he or she had acquired the bribe or secret commission on behalf of the principal,[69] who therefore has an equitable proprietary interest in it. This involves the creation of equitable rights in property which did not exist before.

The decision of the Supreme Court in *FHR* does at least resolve a long-standing controversy as to the role of the constructive trust where the fiduciary has profited from breach of his or her fiduciary duty. The real difficulty with *FHR* relates to the Supreme Court's emphasis that the constructive trust was institutional, arising by operation of law, rather than remedial. But might there be circumstances where the proprietary consequences of this constructive trust could be modified?

First, if the defendant fiduciary has become insolvent, should the principal have priority over the defendant's unsecured creditors? This can be easily justified where the fiduciary has misappropriated the principal's

68. *FHR*, *supra* note 2.

69. *Ibid* at para 7, per Lord Neuberger.

property, since it is not appropriate for the principal's existing proprietary rights to be subject to the claims of the defendant's creditors. In such circumstances the restoration of the principal's property effects corrective justice. It would also be appropriate to reach such a conclusion where the profit would have been made by the principal had the defendant not breached his or her fiduciary duty. This too can be considered to correct an injustice, by restoring to the principal what he or she had lost as a result of the breach of fiduciary duty. But, should the principal be accorded such priority where the profit was obtained from a third party and would not have been obtained by the principal had the defendant not breached his or her fiduciary duty, such as where the defendant has obtained a bribe or a secret commission from a third party? Lord Millett[70] has argued that the principal should gain priority in such circumstances, because the fiduciary's creditors claim through the fiduciary and should have no better claim to property to which they are not entitled. In *Grimaldi v Chameleon Mining NL (No 2)*,[71] however, Finn J said that the bribe should be held on constructive trust but, if the fiduciary was bankrupt, he considered that a lien would be sufficient to ensure practical justice. This was obiter and is, frankly, an odd distinction to draw. Even if a lien was awarded, the principal would still have priority over the fiduciary's creditors by virtue of the security interest, but would not obtain the fruits of the bribe, and it is difficult to see why the fact of the fiduciary's insolvency should prevent the principal from claiming all the fiduciary's profits. It is true that this would mean that those profits would be available to the fiduciary's creditors, but this would be a blunt instrument for effecting such a result. The judgment of Finn J does, however, indicate a willingness to modify the constructive trust where the fiduciary was insolvent.

The possibility of such modification was even canvased in *FHR*.[72] In a very significant dictum the Supreme Court recognised that concern about the position of unsecured creditors of the defendant fiduciary will

70. Peter Millett, "Bribes and Secret Commissions Again" (2012) 71:3 Cambridge Law Journal 583.
71. *Grimaldi*, *supra* note 5 at para 583.
72. *FHR*, *supra* note 2 at para 43.

have considerable force in some contexts, although it was considered only to have limited force in the context of bribes and secret commissions. The Court did not elaborate beyond this and it is unclear why the position of unsecured creditors might matter more in some contexts, such as where the fiduciary's profit took the form of bribes or secret commissions. But, acknowledging that the position of the unsecured creditors of the fiduciary might need to be considered in some cases is very important. It suggests a willingness of the English court to recognise the existence of an institutional constructive trust, but to modify its effects to ensure that the relative positions of the principal and unsecured creditors are treated equally.

Such modification of the constructive trust is especially appropriate where the fiduciary's profit was obtained from a third party in the form of a bribe or secret commission. This is because the rationale behind imposing liability on the defendant fiduciary in such circumstances is different from other situations where a profit is made. Where the fiduciary has profited by appropriating property from the principal, the fiduciary is liable to make restitution of that property or its value to the principal; this is justified as effecting corrective justice. Where, however, the defendant fiduciary's profit derived from a third party, requiring the defendant to disgorge that profit to the principal is not justified by correcting injustice through restoring to the principal what he or she has lost, since the principal has not lost anything. Rather, the imposition of liability on the fiduciary effects distributive justice, by ensuring that the fiduciary is deprived of the gain.[73] Since the focus of equity's response is on the defendant's gain rather than reversing loss, there is no reason why the principal's proprietary claim should rank above the claims of the defendant's unsecured creditors. The principal should simply be regarded as any other unsecured creditor, whose claim should rank equally with those of all the defendant's creditors. It follows that the advantage of the constructive trust of obtaining priority over other creditors should be

73. Katy Barnett, "Distributive Justice and Proprietary Remedies Over Bribes" (2015) 35:2 Legal Studies 302. See also, Matthew Harding, "Constructive Trusts and Distributive Justice" in Elise Brant and Michael Bryan, eds, *Principles of Proprietary Remedies* (Sydney: Lawbook Co, 2013) 211.

modified where the fiduciary's profits derive from a third party. Indeed, rather than being a scenario where, as the Supreme Court suggested, modifying the constructive trust is less defensible, this is a situation where modification of the proprietary consequences of the constructive trust is much easier to justify. This focus on the distinction between effecting corrective and distributive justice must, however, be treated with some caution where the relevant profit obtained in breach of fiduciary duty is a bribe or secret commission. This is because there will be circumstances where the bribe or secret commission does reflect a loss suffered by the principal, such as where the fiduciary has induced the principal to enter into a transaction where the price paid by the principal was inflated to reflect the amount of the bribe or the secret commission received by the defendant.[74] But, where the principal has not suffered loss, there is much greater scope for modifying priority as between the principal and creditors of the fiduciary.

Secondly, where the defendant has profited from the investment of the profit made in breach of fiduciary duty, he or she should not benefit from this indirect profit, so the institutional constructive trust should not be modified to exclude such profits because of the strict nature of fiduciary duties. So, for example, in *Attorney-General for Hong Kong v Reid*[75] ("*Reid*") the defendant fiduciary held a number of public offices in Hong Kong, including that of acting Director of Public Prosecutions. He had accepted bribes to induce him to obstruct the prosecution of some criminals. He purchased land in New Zealand with this money and the claimant claimed that it had an equitable proprietary interest in this land. The Privy Council agreed and ordered that the land was held by the defendant on constructive trust for the claimant. This must be right. Fiduciary duties are strictly interpreted and enforced to ensure that the fiduciary complies with the strictest standards of loyalty and is not tempted to act against the principal's interests.

Finally, should the equitable proprietary rights of the principal be defeated if the profit which is held on constructive trust has been

74. *Daraydan Holdings*, *supra* note 64.
75. [1994] 1 AC 324 (PC (NZ)) [*Reid*].

transferred to an innocent third party who had not provided value for its receipt? Again, where the asset which is held on constructive trust has been appropriated from the principal, or would have been obtained by the principal had the fiduciary not intervened, the proprietary claim of the principal should prevail against all recipients. But this is much more difficult to justify where the profits derived from a third party rather than the principal. In such circumstances it would be appropriate to modify the institutional constructive trust so that the principal and third party volunteer share the property equally. Indeed, in *FHR*[76] Lord Neuberger indicated that bribe money held on constructive trust by a fiduciary could be claimed from a *knowing* recipient, suggesting that an innocent recipient might not be liable to disgorge it to the principal. Where, however, the third party's receipt and retention[77] can be considered to be unconscionable, because they knew or suspected that the fiduciary had obtained the profit in breach of fiduciary duty, it is appropriate to enable the principal to assert his or her equitable proprietary rights against the third party, whose conscience has been tainted. So, for example, in *Reid*[78] assets were transferred to the fiduciary's wife and his solicitor who appear to have been aware that they had been purchased with bribe money. In such circumstances it is appropriate that the proprietary claim of the principal should prevail over such recipients whose consciences have been tainted by their knowledge of the breach of duty. But, as English law stands, the principal has a proprietary claim against the third party recipient who has received and retained the property or its substitute which was held on constructive trust, regardless of the recipient's ignorance of the breach of fiduciary duty. This is an unfortunate consequence of the recognition of the institutional constructive trust, which could be avoided if there

76. *FHR*, *supra* note 2 at para 44.

77. Where the third party has received but not retained the property in which the principal has an equitable proprietary interest, the third party will only be personally liable to the principal for the value of the property received if he or she should have realised that the property had been transferred in breach of fiduciary duty, in the light of the facts known by the third party.

78. *Reid*, *supra* note 75.

was greater willingness to modify the proprietary impact of such a trust.

V. Conclusions

The appropriate model of the constructive trust in England, but, it is submitted, in Canada and Australia as well, is one where the trust arises by operation of law, and preferably where the defendant's receipt or retention of property is characterised as unconscionable, whether actual or deemed. This trust can be modified with reference to recognised principles, such that the proprietary nature of the trust might sometimes be defeasible, especially where innocent third parties have received the property which has been held on trust.

Whilst this modified constructive trust model has not yet been recognised in English law, its recognition is not necessarily inconsistent with authority, including the decision of the Supreme Court in *FHR* itself. Crucially, the recognition of a modified constructive trust would assuage some of Lord Neuberger's judicial and extra-judicial concerns. This model of the constructive trust is not remedial in the sense that the judge creates equitable proprietary rights through the exercise of his or her discretion. Consequently, it should not be considered to subvert the statutory insolvency regime, for, what equity has created, equity can take away, as long as this is done on a principled basis. Indeed, the very creation of equitable proprietary rights by operation of judge-made law might be regarded as upsetting the statutory insolvency regime, but there are numerous examples of equity doing that. Modification of the institutional constructive trust is much less controversial than, for example, the *Quistclose* trust,[79] which clearly has the potential to subvert the statutory insolvency regime.

A key benefit of recognising the modified constructive trust is that it is possible to move on from the old debate about whether the institutional or the remedial constructive trust should be recognised. The modified constructive trust should be classified as institutional in origin but with scope for the judge to modify it on a principled basis.

---

79. *Barclays Bank Ltd v Quistclose Investments Ltd*, [1970] AC 567 (HL); *Twinsectra Ltd v Yardley*, [2002] UKHL 12.

This model of the constructive trust balances the need for certainty and predictability in the law, with the ability to achieve an equitable outcome on the facts of the case, something which the pure interpretation of the remedial constructive trust in Canada and Australia fails to do. The need for legal cultures to respect certainty and predictability was expressed powerfully by Llewellyn:

> unless the appellate courts consciously awaken to what their duty is in this regard ... they are threatened with loss of their own souls, and we are threatened with loss of the greatest asset of the common law. Every opinion must be directed forward, it must make sense and give guidance for tomorrow for the type of situation in hand. Only in the light of that are the equities and decencies of the particular case to be attended to, for in the working out of that forward-looking guidance two things occur: first, the authoritative material at hand to work with exercises its due restraint … and that gives a court firmness of heart and rock-solidity of work; second, no pressure of the particular case can readily mislead into sentimentality when all is judged against right guidance through the type of situation for the future … [80]

Ultimately the true role of the constructive trust in contemporary equity reflects a battle about the very nature of private law. There is a spectrum of approach. At one end is the pure logic of the law, founded on reason and principle and predictability; at the other, reflected in the approach of many judges, is the desire to reach the just result on the facts. The preferable approach falls somewhere between the two extremes. Discretionary justice is principled. In the same way as scientists having mapped the genome, which enables them to understand the nature of DNA, such that genetic modification becomes possible in a principled way, so too lawyers need to map the nature of the institutional constructive trust and, only having done so, start to engage with modification of that trust, but always with reference to clear and accepted principles.

---

80. Karl Llewellyn, *The Bramble Bush* (New York: Oxford University Press, 2008) at 15.