

CONSTRUCTIVE TRUSTS AND DISCRETION IN AUSTRALIA: TAKING STOCK

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In Australia, it is often thought that the decision of whether to impose a constructive trust invariably attracts the exercise of remedial discretion. This article argues that, in reality, the exercise of discretion is highly circumscribed. Further, where such discretion is exercised, it is useful to distinguish between cases where judges take into account factors affecting justice inter partes, and those where judges also take third party considerations into account. The latter sort of discretion has, to date, only been exercised systemically in one factual scenario. This revelation provides reason to reflect on the status of certain High Court dicta, the relevance of the ‘institutional’–‘remedial’ constructive trust dichotomy, and the relationship between rights and remedies.

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I INTRODUCTION

It is received wisdom that constructive trusts and judicial discretion come hand in hand. To a certain extent, this must be right: after all, in a different context, it has been said that

‘discretion’ is a somewhat protean word. It connotes the exercise of judgment in making choices. In a sense, most decisions involve the exercise of discretion ... there can also be discretion even in the hammering of a nail ...¹

In the present context, an obvious example is the court’s discretion to award constructive trust on terms² to reflect the content of an informal agreement between the parties.³

This article focuses on one of the most analytically fundamental and practically significant aspects of that discretion: the discretion whether or not to impose a constructive trust. It is in reference to this aspect of discretion that this article uses the phrase ‘remedial discretion’.

In Australia, it is often assumed that remedial discretion is, or ought to be, exercised in every case where a court contemplates imposing a constructive trust, and this always involves taking into account the actual or potential interests of third parties.⁴ This assumption manifests itself in two general discourses. On the one hand is the primarily English preoccupation concerning the dichotomy between ‘institutional’ and ‘remedial’ constructive trusts, where it is

¹ *Carty v London Borough of Croydon* [2005] 1 WLR 2312, 2319 [25] (Dyson LJ).

² *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 537-8 [57] (Gummow J).

³ See, eg, the discussion below in Parts III(B)(1) and IV(C)(3).

⁴ That is, those who do not have an immediate right to a remedy in the claim in question. Most obviously, they include the defendant’s actual or potential creditors, but in specific cases, they may also encompass others who have or potentially have a competing claim in the property: see Elise Bant and Michael Bryan, ‘Defences, Bars and Discretionary Factors’ in Elise Bant and Michael Bryan (eds), *Principles of Proprietary Remedies* (Thomson Reuters, 2013) 185, 201-2 [11.100].

unquestioningly assumed that, unlike English law, Australian law recognises and imposes ‘remedial’ constructive trusts.⁵ On the other hand is the primarily Australian discourse concerning remedies in private law more generally, where constructive trusts are increasingly perceived as being but one in a smorgasbord of options available to remedy a wrong, and which are to be imposed only as a last resort.⁶

That assumption is not entirely without basis: it reflects dicta found in a number of High Court decisions concerning whether — and how — remedial discretion is or ought to be exercised. Worryingly, however, while there is much discussion about whether discretion *ought* to be exercised, little effort has been spent examining whether those High Court dicta accurately reflect what the reality of the law *is* in Australia, and, if so, the *extent* to which the dicta hold true. Without a clear picture of the true state of the law in Australia, it is difficult to imagine how any practical strides can be made by the existing theoretical debates and discourses towards improving the law in a real and tangible way.

The central message of this article is that, in reality, in only a narrow set of circumstances do courts exercise discretion in deciding whether to impose constructive trusts. Within that group, it is useful further to distinguish between cases where judges take into account factors affecting justice *inter partes*, and those where judges also take third party considerations into account. The latter sort of discretion has, to date, only been exercised systemically in one factual scenario.

The article is structured as follows. Part II begins by recounting the relevant High Court dicta and observes that the conflicting messages they provide have spawned various generalisations and impressions concerning Australian law. Part III evaluates the constructive trusts case law and reveals that the exercise of remedial discretion is, in fact, highly circumscribed. This revelation provides three key points of reflection, discussed in Part IV, concerning the status of the relevant High Court dicta, the relevance of the ‘institutional’–‘remedial’ constructive trust dichotomy, and the relationship between rights and remedies.

II UNCERTAINTY IN THE HIGH COURT

Constructive trusts have been the subject of substantive discussion in the High Court on no fewer than nine occasions in the last 35 years.⁷ It is fair to say that

⁵ See below nn 41–3 and accompanying text.

⁶ See below n 44 and accompanying text.

⁷ See *Muschinski v Dodds* (1985) 160 CLR 583 (*Muschinski*); *Daly v The Sydney Stock Exchange Ltd* (1986) 160 CLR 371 (*Daly*); *Baumgartner v Baumgartner* (1987) 164 CLR 137

the High Court has exercised judicial creativity, introducing novel analyses and approaches to constructive trusts. Unfortunately, those dicta have left the law in a state of uncomfortable uncertainty.

A *The High Court Dicta*

It is well-known that *Muschinski v Dodds* ('*Muschinski*') marked the first major turning point for constructive trusts in Australia for recognising the possibility of imposing 'remedial' constructive trusts.⁸ In a significant passage, Deane J said:

[T]he remedial character remains predominant in that the trust itself either represents, or reflects the availability of, equitable relief in the particular circumstances. Indeed, in this country at least, the constructive trust has not outgrown its formative stages as an equitable remedy and should still be seen as constituting an in personam remedy attaching to property which may be moulded and adjusted to give effect to the application and interplay of equitable principles in the circumstances of the particular case. In particular, where competing common law or 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.⁹

On the facts of the case, constructive trusts arose for consideration in relation to the 'joint endeavour' doctrine, itself established for the first time in *Muschinski*. According to Deane J, the doctrine

operates in a case where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it. The content of the [doctrine] is that, in such a case, equity will not permit that other party to assert or retain the benefit of the

('Baumgartner'); *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 ('Bahr'); *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 ('Bathurst'); *Giumelli v Giumelli* (1999) 196 CLR 101 ('Giumelli'); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 ('Farah Constructions'); *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 ('Bofinger'); *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 ('John Alexander's Clubs').

⁸ *Muschinski* (n 7) 613 (Deane J).

⁹ *Ibid* 615.

relevant property to the extent that it would be unconscionable for [them] so to do ...¹⁰

Having found that the doctrine applied to the facts under consideration, Deane J declared that a constructive trust arose over the relevant property.¹¹ However, drawing upon the discretionary nature of constructive trusts previously elaborated, his Honour held that, '[l]est the legitimate claims of third parties be adversely affected, the constructive trust should be imposed only from the date of publication of reasons for judgment of this Court.'¹²

Six months after *Muschinski* was decided, the High Court in *Daly v The Sydney Stock Exchange Ltd* ('*Daly*') considered and rejected an argument that an errant and insolvent fiduciary held gains previously received (in the form of a loan from its principal) on constructive trust for its principal.¹³ Significant reliance was placed upon the reasoning found in the English case of *Lister & Co v Stubbs* ('*Lister*'),¹⁴ namely that it would be contrary to principle for the money to be withdrawn from the fiduciary's general creditors, or to require the fiduciary to account for any profits made with the money.¹⁵ *Muschinski* was not once cited in *Daly*, nor did the High Court in *Daly* even consider the possibility of exercising remedial discretion.

A year and a half on, in *Baumgartner v Baumgartner* ('*Baumgartner*'), the High Court approved and applied both the joint endeavour doctrine and the approach to constructive trusts propounded by Deane J in *Muschinski*.¹⁶ However, the discretion actually exercised was relatively circumspect, being limited simply to adjusting the parties' respective beneficial interests in the property in order to reflect 'the disparity between the worth of their individual contributions either financially or in kind'.¹⁷ There was an absence of any discussion as to how third party considerations would affect the exercise of discretion.

¹⁰ Ibid 620 (citations omitted).

¹¹ Ibid 623.

¹² Ibid. Although it has subsequently been relied upon by numerous later cases, Deane J's judgment on the constructive trust point was not a majority view. While Mason J agreed with Deane J's judgment, the other judge in the majority of three, Gibbs CJ, would have resolved the case by ordering a contribution from the defendant to the plaintiff, secured by way of an equitable charge upon the defendant's half interest in the property: at 598 (Gibbs CJ), 599 (Mason J).

¹³ *Daly* (n 7).

¹⁴ (1890) 45 Ch D 1 ('*Lister*').

¹⁵ Ibid 15 (Lindley J), cited in *Daly* (n 7) 379 (Gibbs CJ).

¹⁶ *Baumgartner* (n 7) 148 (Mason CJ, Wilson and Deane JJ), citing *Muschinski* (n 7) 620 (Deane J). Justice Mason in *Muschinski* (n 7) agreed with Deane J's judgment: at 598–9.

¹⁷ *Baumgartner* (n 7) 150, although adjustments by way of *personal* accounting secured by an equitable lien were also awarded: at 151.

Neither did the Court forestall any potential prejudice to third parties by imposing a ‘date of judgment’ constructive trust.

Barely six months later, however, *Muschinski* was again overlooked in *Bahr v Nicolay [No 2]* (*‘Bahr’*).¹⁸ By way of a bare majority, the High Court held that one who purchased land subject to recognising a third party’s pre-existing right would be bound by a constructive trust to the extent of the third party’s interest.¹⁹ The possibility of exercising remedial discretion was not considered.

It was only a decade later that constructive trusts featured again in the High Court, but its return was accompanied with renewed vigour in favour of the exercise of discretion. In *Bathurst City Council v PWC Properties Pty Ltd* (*‘Bathurst’*), the High Court rejected the possibility of imposing a charitable ‘remedial’ constructive trust.²⁰ However, the Court then went on to say in obiter:

In any event, before the court imposes a constructive trust as a remedy, it should first decide whether, having regard to the issues in the litigation, there are other means available to quell the controversy. An equitable remedy which falls short of the imposition of a trust may assist in avoiding a result whereby the plaintiff gains a beneficial proprietary interest which gives an unfair priority over other equally deserving creditors of the defendant.²¹

Within a year that passage was cited with approval and applied in *Giumelli v Giumelli* (*‘Giumelli’*).²² The plaintiff had successfully established a proprietary estoppel claim, but the High Court refused to award a constructive trust to provide the plaintiff with the interest he expected in the relevant property. It held that the relevant issues to be considered includes ‘the impact upon relevant third parties.’²³ Since it was thought that there were outstanding and unresolved third party claims in relation to the property in question, a money award measured by the value of the expected interest was awarded instead.²⁴

Eight years later, the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (*‘Farah Constructions’*) heard an appeal from a New South Wales Court of Appeal decision which awarded a (proprietary) constructive trust over

¹⁸ *Bahr* (n 7).

¹⁹ Justices Wilson and Toohey, as well as Brennan J, in two separate judgments held that the trust which arose was a constructive trust: *ibid* 638 (Wilson and Toohey JJ), 655–6 (Brennan J). However, Mason CJ and Dawson J held that it was an express trust: at 619. Interestingly, Mason CJ, Wilson and Toohey JJ were on the panel in *Baumgartner*, while Dawson and Brennan JJ were the dissenting judges in *Muschinski*.

²⁰ *Bathurst* (n 7) 583–5 [39]–[41] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

²¹ *Ibid* 585 [42] (citations omitted).

²² *Giumelli* (n 7) 113–14 [10] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

²³ *Ibid*.

²⁴ *Ibid* 125 [49]–[50].

property in the hands of third party recipients of proceeds of an alleged breach of fiduciary duty.²⁵ The Court of Appeal's decision was quashed, essentially due to a misapplication of fiduciary law and the principles relating to the 'first limb' of *Barnes v Addy*, that is, knowing receipt.²⁶ However, in obiter, the High Court went on to criticise the Court of Appeal's award of a constructive trust, citing *Giumelli* for the proposition that '[o]rdinarily relief by way of constructive trust is imposed only if some other remedy is not suitable'.²⁷

Shortly thereafter, in *Bofinger v Kingsway Group Ltd* ('*Bofinger*'), the High Court held that an errant fiduciary was liable to account personally towards its principal-guarantor for engaging in activities in breach of the no-conflict rule.²⁸ But in obiter, the High Court cited the 'remedial constructive trust' as an example of an equitable device reflecting 'the importance attached by equity to the fashioning of the particular remedy to meet the nature of the case'.²⁹

The latest occasion for substantive discussion of constructive trusts comes from *John Alexander's Clubs Pty Ltd v Waker Corporation Pty Ltd* ('*John Alexander's Clubs*').³⁰ In that case, the High Court held that no fiduciary duty arose on the facts between the relevant parties.³¹ However, in an obiter passage which considered — and accepted — counsel's argument that the lower court had erroneously awarded a constructive trust, the Court drew on the '*Giumelli* line of cases' to make the following three points.³² First, '[a] constructive trust ought not to be imposed if there are other orders capable of doing full justice'.³³ Second, 'care must be taken to avoid granting equitable relief which goes beyond

²⁵ *Farah Constructions* (n 7).

²⁶ *Ibid* 150–1 [134] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ), discussing *Barnes v Addy* (1874) LR 9 Ch App 244.

²⁷ *Ibid* 172 [200].

²⁸ *Bofinger* (n 7) 290–1 [49]–[50] (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

²⁹ *Ibid* 300 [91].

³⁰ *John Alexander's Clubs* (n 7).

³¹ *Ibid* 36–8 [92]–[95] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ).

³² *Ibid* 45–6 [129]. The line of cases referred to is *Giumelli* (n 7) 113–4 [10], 125 [49]–[50] (Gleeson CJ, McHugh, Gummow and Callinan JJ); *Bathurst* (n 7) 584–5 [40]–[43] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Farah Constructions* (n 7) 172 [200] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Muschinski* (n 7) 623 (Deane J); see *John Alexander's Clubs* (n 7) 45 [126] n 123.

³³ *John Alexander's Clubs* (n 7) 45 [128]. This statement was repeated and cited in the High Court by Gageler J in *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1, 32 [74], although without any substantive discussion.

the necessities of the case.’³⁴ Finally, ‘third party interests must be borne in mind in deciding whether a constructive trust should be granted’.³⁵

B *Conflicting Messages*

As dicta emanating from the High Court, it is unsurprising that they have been taken as representing the state of the law in Australia. However, a closer inspection reveals that these dicta do not speak with one voice, but provide the potential for drawing three different messages from them.

The first message, gleaned from *Daly* and *Bahr*, is that remedial discretion in relation to constructive trusts is not something to be exercised on a case-by-case basis. Instead, once an authoritative decision has been made as to whether constructive trusts should or should not arise in a particular set of circumstance or doctrine, that decision is to be applied consistently in all cases falling within that ambit. Thus, *Daly* might suggest that constructive trusts should never arise in relation to errant fiduciary gains where the fiduciary is insolvent,³⁶ while *Bahr* is to the effect that constructive trusts should always arise in ‘subject to’ cases.³⁷ In modern times the first message has not been taken seriously as representing Australian law, where it is now recognised that *some* discretion is indeed exercised. Of course, uncertainty remains as to when, and to what extent, it is exercised.

The second message, which might be drawn from *Muschinski* and *Baumgartner*, is that the discretion *to* impose constructive trusts is wide-ranging: it can — at least in principle — actively be exercised, and need not logically be limited to any particular set of circumstance or doctrine. As Deane J suggested in *Muschinski*:

Neither principle nor authority requires ... that [the constructive trust] be confined to ... any ... category or categories of case. Once its predominantly remedial character is accepted, there is no reason to deny the availability of the constructive trust in any case where some principle of the law of equity calls for the imposition upon the legal owner of property ...³⁸

³⁴ *John Alexander’s Clubs* (n 7) 45–6 [129].

³⁵ *Ibid* 46 [129].

³⁶ See, eg, *Daly* (n 7) 379 (Gibbs CJ).

³⁷ See, eg, *Bahr* (n 7) 632–8 (Wilson and Toohey JJ), 656 (Brennan J).

³⁸ *Muschinski* (n 7) 616–17 (citations omitted).

In addition, that discretion is also wide-ranging in terms of the internal effects of the trust: the date from which constructive trusts take effect can be adjusted at the court's discretion.³⁹

The third message is gleaned from the latest string of High Court decisions, starting from *Bathurst* and ending with *John Alexander's Clubs*. Here, the message is that the discretion is to be exercised such that constructive trusts are imposed only as a last resort.⁴⁰

Strictly speaking, the third message is not entirely inconsistent with the second message, since it is possible to reconcile them by approaching constructive trusts as a last-resort remedy in *any* circumstance or doctrine which may call for its imposition. However, it remains observable that the two messages reflect a crucial distinction as to the judicial attitude demanded. The imperative in the third message is a negative one: constructive trusts ought *not* to be imposed *unless* justified; the imperative in the second message is positive: constructive trusts can in principle *be* imposed where called for. The former suggests caution in the established circumstances and doctrines in which constructive trusts would otherwise ordinarily arise; the latter encourages foraying into uncharted territory to consider the potential appropriateness of constructive trust awards.

The difference between the two messages is clearly seen in the two very different impressions which they have spawned. For English lawyers, Australian law reflects the second message. For example, in the course of their well-worn and oft-repeated antagonism towards the 'remedial' constructive trust,⁴¹ English judges have taken objection to an expansive exercise of discretion, which they attribute to Australian law.⁴² The same impression of Australian law is

³⁹ *Ibid* 615.

⁴⁰ *Bathurst* (n 7) 585 [42] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *John Alexander's Clubs* (n 7) 45 [128] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ).

⁴¹ See, eg, *Re Sharpe (a bankrupt)* [1980] 1 WLR 219, 225 (Browne-Wilkinson J); *Lonrho plc v Fayed [No 2]* [1992] 1 WLR 1, 9 (Millett J); *Re Goldcorp Exchange Ltd (in rec)* [1995] 1 AC 74; *Re Polly Peck International plc (in admin) [No 2]* [1998] 3 All ER 812, 827 (Mummery LJ), 831 (Nourse LJ) ('*Re Polly Peck*'); *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in admin rec)* [2011] 4 All ER 335, 346 [37] (Lord Neuberger MR); *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] 1 AC 250, 274 [47] (Lord Neuberger PSC) ('*FHR European Ventures*'); *Bailey v Angove's Pty Ltd* [2016] 1 WLR 3179, 3191 [27] (Lord Sumption JSC).

⁴² While the tendency is to lump together the 'remedial' constructive trust as found in Australia, the United States, Canada, and New Zealand, there are specific instances directed towards Australia: see, eg, *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] 1 Ch 1, 9 [13] (Lewison J), *affd* *FHR European Ventures* (n 41); *Investment Trust Companies v Revenue and Customers Commissioners* [2018] 1 AC 275, 304–5 [69] (Lord Reed).

taken by influential English commentators.⁴³ In contrast, Australian lawyers tend to cast constructive trusts in a cautious light, in line with the third message. For example, in *Grimaldi v Chameleon Mining NL [No 2]* ('*Grimaldi*') the Full Federal Court suggested that the award of a constructive trust 'should not ever be regarded as mandatory. It should be possible for a court to exercise a discretion against decreeing proprietary relief if the circumstances suggest that it would be unwise to do so.'⁴⁴

III EVALUATION

There has been little effort made to date to assess the extent to which the High Court dicta reflects the reality of adjudication in the lower courts. This Part examines the relevant case law to demonstrate that there is a disjunction between those High Court dicta and what goes on in the lower courts.

A Non-Discretionary Constructive Trusts

It is beyond doubt that many constructive trust doctrines which do not involve the exercise of remedial discretion continue to flourish in Australia. A significant majority of these doctrines were established long before *Muschinski* was decided, and they continue to apply uninterrupted by the supposed imperative from the High Court concerning the exercise of remedial discretion.

The 'common intention constructive trust' ('CICT') doctrine provides an excellent example. Where one of two parties to a family home detrimentally relies on an express or inferred common intention as to how the beneficial interest in the property is to be shared amongst themselves, a CICT arises to reflect their intended beneficial split. This doctrine was first developed by the

⁴³ See, eg, Peter Birks, *Can Sense Be Made of the Remedial Constructive Trust?* (The University of Western Australia Law School, 1999) 20 [26] ('Remedial Constructive Trust'); Graham Virgo, 'The Genetically Modified Constructive Trust' (2016) 2(2) *Canadian Journal of Comparative and Contemporary Law* 579, 583–4.

⁴⁴ (2012) 200 FCR 296, 405 [511] (Finn, Stone and Perram JJ) ('*Grimaldi*'), quoting RP Austin, 'Constructive Trusts' in PD Finn (ed), *Essays in Equity* (Law Book Co, 1985) 240. The Australian commentary also reflects the cautious approach: see, eg, Thomson Reuters, *Ford & Lee: The Law of Trusts* (online at 21 January 2020) [22.120], [22.480] ('*Ford & Lee*'); JD Heydon, 'Comment on Lord Neuberger's "The Remedial Constructive Trust: Fact or Fiction"' in John Sackar and Thomas Prince (eds), *Heydon: Selected Speeches and Papers* (Federation Press, 2018) 729; Elise Bant and Michael Bryan, 'Constructive Trusts and Equitable Proprietary Relief: Rethinking the Essentials' (2011) 5(3) *Journal of Equity* 171, 191 ('Rethinking the Essentials'); Keith Mason, 'Deconstructing Constructive Trusts in Australia' (2010) 4(2) *Journal of Equity* 98, 109–13; Simon Evans, 'Defending Discretionary Remedialism' (2001) 23(4) *Sydney Law Review* 463, 485.

United Kingdom ('UK') House of Lords in the twin cases of *Pettit v Pettit*⁴⁵ and *Gissing v Gissing*,⁴⁶ and was subsequently imported and applied in Australia in *Allen v Snyder* in 1977.⁴⁷ Its existence and scope of application has not been affected by the newer joint endeavour doctrine, which also applies in the family home context: courts have recognised the distinctiveness of both doctrines, noting that unlike the joint endeavour doctrine the CICT is based on actual intentions.⁴⁸ Critically, a CICT is understood as creating 'substantive rights and is not merely an equitable remedy that comes into existence when a court makes a declaration to that effect'.⁴⁹ Remedial discretion is not exercised, and courts do not take into account matters arising after the events which trigger CICTs, for example the bankruptcy of one of the relevant parties, to consider the appropriateness of any 'lesser remedy'.⁵⁰

There are numerous other examples. For instance, constructive trusts imposed by way of the mutual wills doctrine have explicitly been recognised as arising outside the scope of remedial discretion, crystallising on the death of the survivor and invariably giving the beneficiaries priority over any other competing third parties.⁵¹ Constructive trusts which arise in the context of *Black v S Freedman & Co* ('*Black*'),⁵² namely those arising over stolen property, as well as those arising in relation to original traceable proceeds retained by innocent volunteer recipients, also do not attract remedial discretion: there is no 'basis

⁴⁵ [1970] 1 AC 777.

⁴⁶ [1971] 1 AC 886.

⁴⁷ (1977) 2 NSWLR 685.

⁴⁸ See, eg, *Miller v Sutherland* (1990) 14 Fam LR 416, 423–4 (Cohen J) ('*Miller*'); *Parsons v McBain* (2001) 109 FCR 120, 125–6 [13] (Black CJ, Kiefel and Finkelstein JJ) ('*Parsons*'); *Clout v Markwell* [2001] QSC 91, [20] (Atkinson J) ('*Clout*'); *Shepherd v Doolan* [2005] NSWSC 42, [31]–[32], [44] (White J); *Sivritas v Sivritas* (2008) 23 VR 349, 375 [134] (Kyrou J); *Trajkoski v Western Australia* [2017] WASC 273, [28] (Le Miere J) ('*Trajkoski*'). A minority of cases conflate the two doctrines, citing *Muschinski* (n 7) as authority for the common intention constructive trust ('CICT') doctrine: see, eg, *McDonald v Dunscombe* [2018] VSC 283, [181] (McMillan J); *Lu v Yu* [2019] VSC 499, [8] (Derham ASJ). This conflation is clearly *per incuriam* Deane J's judgment in *Muschinski* (n 7), where his Honour developed the joint endeavour doctrine *in order to* 'consider whether there is any narrower and more specific on which, *independently of the actual intention of the parties*', the plaintiff was entitled to relief: at 617 (emphasis added).

⁴⁹ *Trajkoski* (n 48) [28]. See also *Statz v Berry* [No 3] (2019) 138 ACSR 231, 276 [166] (Derrington J) ('*Statz*'), citing *Imam Ali Islamic Centre v Imam Ali Islamic Centre Inc* [2018] VSC 413, [402]–[405] (McMillan J) ('*Imam Ali*'); *Parsons* (n 48) 125–6 [13]–[15]; *King v Adams* [2016] NSWSC 1798, [89] (Sackar J). A rare outlier is *Williams v Nathan* [2019] QSC 127, [91]–[96] (Boddice J).

⁵⁰ See, eg, *Clout* (n 48) [20]–[21].

⁵¹ *Hubbard v Mason* (Supreme Court of New South Wales, Santow J, 9 December 1997) [11]–[12]; *Grimaldi* (n 44) 403 [504] (Finn, Stone and Perram JJ).

⁵² (1910) 12 CLR 105 ('*Black*').

for imposing some other measure of relief, such as equitable compensation, as an alternative to proprietary relief.⁵³ The same is the case in relation to constructive trusts arising in the contexts of contracts for the sale of land,⁵⁴ the doctrine in *Rochefoucauld v Boustead*,⁵⁵ the doctrine in *Pallant v Morgan*,⁵⁶ the rule in *Re Rose*,⁵⁷ *donatio mortis causa* [gift on the occasion of death],⁵⁸ and agreements to convey future property where consideration has been executed:⁵⁹ these constructive trusts arise from the moment the relevant events trigger them, and no discretion is ever exercised. Additionally, in *Wambo Coal Pty Ltd v Ariff* ('*Wambo Coal*'), White J explicitly held that constructive trusts arising over the retention of property mistakenly acquired with knowledge of the mistake were 'institutional' and not 'remedial': they arise automatically from the time the knowledge was acquired.⁶⁰

B 'Discretionary' Constructive Trusts

There is a fairly narrow range of circumstances in which remedial discretion has been exercised in relation to constructive trusts. These circumstances are: liability for knowing receipt, the joint venture doctrine, proprietary estoppel, and fiduciary receipt of bribes and secret commissions. Upon closer inspection, the perceived relevance of discretion in knowing receipt cases is in fact based on a misapprehension of a fundamental point of law. The exercise of discretion in the other three circumstances is justified; however, discretion to take into account third party considerations is only relevant in relation to the last-mentioned scenario.

⁵³ *Sze Tu v Lowe* (2014) 89 NSWLR 317, 348 [157] (Gleeson JA) ('*Sze Tu*'); See also *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230, 265–6 [154]–[155] (Allsop P) ('*Heperu*'); *Jones v Southall & Bourke Pty Ltd* [2004] FCA 539, [56] (Crennan J).

⁵⁴ See, eg, *PSAL Pty Ltd v Raja* [2016] WASC 295, [69] (Pritchard J); *ISPT Nominees Pty Ltd v Chief Commissioner of State Revenue* (2003) 53 ATR 527, 598–601 [307]–[325] (Barrett J) ('*ISPT Nominees*').

⁵⁵ *Rochefoucauld v Boustead* [1897] 1 Ch 196, 206 (Lindley LJ for the Court). See, eg, *ISPT Nominees* (n 54) 602 [329]; *Ciaglia v Ciaglia* (2010) 269 ALR 175, 192 [72] (White J).

⁵⁶ *Pallant v Morgan* [1953] 1 Ch 43. See, eg, *Comlin Holdings Pty Ltd v Metlej Developments Pty Ltd* [2018] NSWSC 761, [189]–[190] (Parker J).

⁵⁷ *Re Rose (deceased)* [1952] 1 Ch 499, also known in Australia as the rule in *Corin v Patton* (1990) 169 CLR 540. See, eg, *Sydney Futures Exchange Ltd v Australian Stock Exchange Ltd* (1995) 56 FCR 236, 270 (Gummow J).

⁵⁸ *Hobbes v NSW Trustee & Guardian* [2014] NSWSC 570, [59]–[60] (White J).

⁵⁹ *Tailby v Official Receiver* (1888) All ER Rep 486, 492 (Lord Herschell). See, eg, *Grimaldi* (n 44) 403 [504] (Finn, Stone and Perram JJ).

⁶⁰ (2007) 63 ACSR 429, 437 [42] ('*Wambo Coal*').

1 *Knowing Receipt: No Discretion Exercised*

In the context of the so-called ‘*Barnes v Addy* liabilities’, knowing recipients and knowing assistants are often referred to as persons ‘liable as ... constructive trustee[s]’.⁶¹ This phrase does not imply that defendants are subjected to a *trust*, properly so-called: as observed in *Grimaldi*, it has ‘long been recognised’ that ‘the essential characteristic of the *Barnes v Addy* liabilities [is that] they expose the persons to whom they apply to personal, to *in personam*, liabilities.’⁶² Since recipients and assistants are only ‘subject to a personal liability as a “constructive trustee”’,⁶³ the precise wording of the phrase ‘liable as a constructive trustee’ is crucial to a proper understanding of those liabilities: that phrase indicates that the defendant ‘is not in fact a trustee at all, even though [they] may be liable to account as if [they] were.’⁶⁴

In *Bofinger*, the High Court held that ‘the term “constructive trust” may be used not with respect to the creation or recognition of a proprietary interest but to identify the imposition of a personal liability to account upon a defaulting fiduciary.’⁶⁵ The imposition of constructive trusts was also said to be an example which reflected the ‘importance attached by equity to the fashioning of the particular remedy to meet the nature of the case.’⁶⁶

It is certainly possible for constructive *trusts* to be relevant to the imposition of personal remedies in the way in which that point arose in *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (‘*Cassegrain*’).⁶⁷ There, the Court’s finding that a constructive trust did arise in the past (over property which the defendant had later dissipated) was necessary both to allow the plaintiff’s claim for equitable compensation, and for sidestepping a time-bar issue.⁶⁸ Wrongfully dissipated trust property does not absolve the wrongdoer from personal liability, and therefore it is crucial in such cases to find that a constructive trust did in fact arise in the past, when the property was still retained by the wrongdoer.

In contrast, the choice of phrase ‘constructive trust’ as opposed to the more accurate ‘liability as a constructive trustee’, used in conjunction with the ‘*Barnes v Addy* liabilities’, is misleading. In particular, it suggests that the elements of a

⁶¹ See, eg, *Grimaldi* (n 44) 439 [667].

⁶² *Ibid* 359 [253].

⁶³ *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143, 153 (McLelland AJA).

⁶⁴ *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400, 409 (Millett LJ). See also Tom Besanko, ‘Refining the Constructive Trust’ (2011) 5(2) *Journal of Equity* 108.

⁶⁵ *Bofinger* (n 7) 290 [47] (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

⁶⁶ *Ibid* 300 [91].

⁶⁷ (2013) 281 FLR 409 (‘*Cassegrain*’).

⁶⁸ *Ibid* 446 [192]–[193] (Basten JA).

knowing receipt claim need to be made out before the beneficiary can recover property (original property or traceable proceeds of the relevant breach) remaining in a third party's hands by way of a (proprietary) constructive trust,⁶⁹ and that a constructive trust can be withheld at the court's discretion.⁷⁰

Factually, it is of course possible for a third party who retains the relevant property over which a (proprietary) constructive trust is sought also to have the requisite degree of knowledge such that they are a 'knowing recipient'. However, it is tempting but wrong to suggest that, in such cases, the constructive trust is but one of a range of possible remedies available pursuant to a successful knowing receipt claim.⁷¹

To the contrary, the constructive trust claim over property subsisting in a third party's hands is not a knowing receipt claim as such. It is a distinct claim 'based on [equitable] title',⁷² which reflects the principle that equitable property rights persist against anyone except a bona fide purchaser for value without notice ('BFP').⁷³ Thus, as explained in *Grimaldi*, a non-BFP

will be liable in proprietary, *in rem*, proceedings to make specific restitution to the 'true owner' of such trust property (or its traceable proceeds) as remains in [their] hands. While this type of claim is, potentially, available to be made in *Barnes v Addy* 'knowing receipt' cases, it is a separate and distinct liability. It is, in essence, a claim to priority.⁷⁴

Therefore, for a successful proprietary claim to be made against a recipient, it is necessary only that the recipient was a volunteer, or that they had 'notice'. In Australia, 'notice' for the purposes of determining whether a BFP defence

⁶⁹ See, eg, *Robins v Incentive Dynamics Pty Ltd (in liq)* (2003) 175 FLR 286, 301 [72] (Mason P) ('*Robins*'); *Grimaldi* (n 44) 404 [510] (Finn, Stone and Perram JJ).

⁷⁰ See, eg, *Westpac Banking Corporation v The Bell Group Ltd (in liq) [No 3]* (2012) 44 WAR 1, 208 [1213] (Lee AJA); *Gordon v Leon Plant Hire Pty Ltd (in liq)* (2015) 16 ASTLR 185, 207 [63]–[65] (Black J).

⁷¹ Precisely such a confusion was detected in *Robins* (n 69) 301 [74].

⁷² *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732, 742 [44] (Leeming JA). See also *Re Australia's Residential Builder Pty Ltd (in liq)* [2019] VSC 115, [57] (Robson J); *Smith v Smith* [2017] NSWSC 408 [481], [490] (Lindsay J).

⁷³ See, eg, *Commonwealth v Davis Samuel Pty Ltd [No 7]* (2013) 95 ACSR 258, 519 [1922] (Refshauge J).

⁷⁴ *Grimaldi* (n 44) 358–9 [251]. See also *Konann Pty Ltd v Commissioner of State Revenue (Vic)* (2015) 100 ATR 772, 796–7 [51] (Croft J).

succeeds is reflected in category five on the so-called ‘Baden’⁷⁵ scale of knowledge,⁷⁶ which is the least culpable category within that scale. On the other hand, it is also well-established in Australia that ‘knowledge’ for the purposes of knowing receipt liability requires the recipient to possess at least category four knowledge on the *Baden* scale.⁷⁷ The upshot is that it is *easier* to succeed in a proprietary claim against property retained in a recipient’s hands, than it is to hold that recipient personally liable to restore the value of the property where it is dissipated. While demonstrating ‘knowledge’ for the purposes of a knowing receipt claim will necessarily entail that the recipient is a non-BFP, the two claims are conceptually distinct and ought not to be confused.⁷⁸

A proper understanding also explains why the constructive trust does not engage remedial discretion. As Allsop P explained in *Heperu Pty Ltd v Belle* (*‘Heperu’*), ‘the trust rests on the existence of property rights and in that sense is not purely remedial. The court declares that a trust exists and existed (though the innocent volunteer did not know it).’⁷⁹ It would be most destabilising for (equitable) property owners if the existence and enforceability of their proprietary rights were subjected to the courts’ overriding discretion. Certainly, this does not entail that the beneficiary’s proprietary right prevails over any and all rights of others who may have obtained an interest in the property in question while in the hands of the recipient. For example, if the recipient had mortgaged the property before the plaintiff’s claim was brought, the mortgagee would take priority over the beneficiary, insofar as the mortgage is concerned, if it were itself a BFP. There is no need to exercise remedial discretion to protect such ‘innocent’ parties.⁸⁰

⁷⁵ The scale of knowledge found in *Baden v Société Générale pour Favoriser le Développement du Commerce et de l’Industrie en France SA* [1993] 1 WLR 509, ordered in reverse order of culpability, is as follows: (i) actual knowledge, (ii) wilfully shutting one’s eyes to the obvious, (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make, (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable person, (v) knowledge of circumstances which would put an honest and reasonable person on inquiry: at 575–6 (Peter Gibson J).

⁷⁶ *Farah Constructions* (n 7) 163–4 [177]; *Grimaldi* (n 44) 361 [259].

⁷⁷ *Farah Constructions* (n 7) 163–4 [177]; *Grimaldi* (n 44) 418 [565].

⁷⁸ Another way in which the two claims differ is that the recipient’s mental element is an ingredient which needs positively to be established in order to mount a successful knowing receipt claim, whereas it is a matter for the recipient to disprove in order to obtain the protection of the bona fide purchaser for value without notice (‘BFP’) defence: Matthew Conaglen and Amy Goymour, ‘Knowing Receipt and Registered Land’ in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 163.

⁷⁹ *Heperu* (n 53) 266 [155] (citations omitted). See also *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] 1 Ch 91, 122 [77] (Lloyd LJ).

⁸⁰ Cf *SE Vineyard Finance Pty Ltd (rec and mgr apptd) v Casey* [2011] VSC 403, [165] (Habersberger J) (*‘SE Vineyard’*).

2 *The Joint Endeavour Doctrine: Third Party Considerations Not Relevant*

In relation to the joint endeavour principle, remedial discretion is clearly exercised, although there remains much confusion as to what precisely the appropriate approach is. Some cases suggest that the remedy must be ‘the minimum relief necessary to satisfy the equity’⁸¹ or to ‘quell the controversy’;⁸² others have held that ‘the prima facie remedy ... is the return of contributions’;⁸³ yet others have suggested that it may be ‘necessary for the Court to start by determining what the respective beneficial entitlement of the parties was at the time of the initial acquisition of the property’.⁸⁴ Whatever the precise approach, it is clear that third party considerations have almost invariably been ignored, with the question of priority left to be governed by orthodox principles.

The clearest way to demonstrate this is to point to cases where one of the parties is declared bankrupt and the other party relies on the joint endeavour doctrine to claim an interest in the property. If third party considerations were truly relevant, one would expect remedial discretion to be exercised in favour of protecting the innocent creditors of the bankrupt party. However, this is not what we find happening.

There appears only to be a single instance, in 1989, where a court refused to impose a constructive trust which would ‘operate at a date prior to bankruptcy’ in order to protect the interests of innocent creditors.⁸⁵ In a long line of cases spanning three decades, which usually (but not invariably) involve a claim by a wife against her husband’s trustee in bankruptcy, courts have awarded constructive trusts such that the plaintiff’s interests take priority over the bankrupt’s creditors.⁸⁶ Many of these cases do not even address the relevance of third party interests in the exercise of discretion.⁸⁷ Even more striking, however, is the fact that the cases which have explicitly discussed the matter indicate an unmistakable apathy towards third parties.

⁸¹ *Tasevska v Tasevski* [2011] NSWSC 174, [82] (Einstein J).

⁸² *Australian Receivables Ltd v Tekitu Pty Ltd* (2011) 7 ASTLR 480, 512 [132] (Ward J) (‘*Australian Receivables*’), quoting *Bathurst* (n 7) 585 [42] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

⁸³ *McKay v McKay* [2008] NSWSC 177, [33] (Brereton J) (‘*McKay*’).

⁸⁴ *Spink v Flourentzou* [2019] NSWSC 256, [273] (Robb J).

⁸⁵ *Re Osborn* (1989) 25 FLR 547, 554 (Pincus J).

⁸⁶ See, eg, *Re Sabri; Ex parte Brien v Sabri* (1996) 137 FLR 165; *Clout* (n 48); *Parianos v Melluish (Trustee)* (2003) 30 Fam LR 524 (‘*Parianos*’); *Huen v Official Receiver* (2008) 248 ALR 1; *Pilato v Stankovic* [2012] FMCA 736; *Tamer v Official Trustee in Bankruptcy* [2016] NSWSC 680 (‘*Tamer*’); *Saba v Plumb* (2018) 97 NSWLR 278 (‘*Saba*’); *Trustees of the Property of Batavia (a bankrupt) and Batavia* [2018] FamCA 860 (‘*Batavia*’); *Miller* (n 48); *Staatz* (n 49).

⁸⁷ See, eg, *Tamer* (n 86); *Parianos* (n 86); *Staatz* (n 49); *Miller* (n 48).

For example, in *Re Sabri; Ex parte Brien v Sabri* ('*Re Sabri*'), despite finding that the bankrupt husband had not acted unconscionably prior to the act of bankruptcy — indeed, the couple's joint endeavour had not yet failed — Chisholm J went so far as to hold that the wife would obtain the benefit under a constructive trust, which took priority over the husband's trustee in bankruptcy because it was sufficient that 'it would have been unconscionable for the husband to assert sole title to the property'.⁸⁸ In *Saba v Plumb*, the fact that the relevant events arose 'long before' the debt was owed by one of the parties to a third party creditor was sufficient to justify an award of a constructive trust which took priority over that third party.⁸⁹ In *Trustees of the Property of Batavia (a bankrupt) and Batavia* ('*Batavia*'), Cronin J categorically held that 'the [t]rustees [in bankruptcy] stand in the shoes of the [b]ankrupt'.⁹⁰ And, most directly, in *Clout v Markwell* ('*Clout*'), Atkinson J held that '[a]lthough this may be inconvenient for the administration of bankrupt estates ... [c]reditors should be expected in these times to be aware of the possibility of constructive trusts or of equitable interest which may arise when the debtor is married or in a de facto relationship'.⁹¹

In cases where a constructive trust was denied and a lesser remedy awarded instead, the exercise of remedial discretion was based exclusively on factors relating to the 'requirements of conscionable behaviour'⁹² — that is, matters relating *only* to the parties themselves. Thus, for example, a constructive trust was denied in *Hill v Hill* ('*Hill*') because unlike the typical joint endeavour case 'the plaintiff owned the relevant property all along' and the defendant's improvements to the property were not shown to have increased its value;⁹³ in *Kavurma v Karakurt*, it was because the facts did not involve a failure of 'a very substantial and long-standing relationship' but one between a man and his mistress;⁹⁴ in *Stoklasa v Stoklasa* it was because of the need for a clean break between the plaintiff and defendant.⁹⁵ In sum, there is scant evidence of judges exercising remedial discretion in a way that takes third party considerations into account.

⁸⁸ *Re Sabri* (n 86) 182 (Chisholm J).

⁸⁹ *Saba* (n 86) [124] (Black J).

⁹⁰ *Batavia* (n 86) [51].

⁹¹ *Clout* (n 48) [21].

⁹² *McKay* (n 83) [33] (Brereton J).

⁹³ [2005] NSWSC 863, [38], [41] (Campbell J) ('*Hill*').

⁹⁴ (Supreme Court of New South Wales, Santow J, 7 November 1994) 19.

⁹⁵ [2004] NSWSC 518, [42] (Gzell J).

3 *Proprietary Estoppel: Third Party Considerations Not Relevant*

When a plaintiff successfully makes out a proprietary estoppel claim against the defendant, it is clear that courts exercise remedial discretion to determine whether the provision of expectation relief is justified.⁹⁶ In determining the appropriate ‘measure of relief’,⁹⁷ judges are supposedly ‘obliged to consider all the circumstances of the case’,⁹⁸ including ‘the impact upon relevant third parties’,⁹⁹ to decide if a lesser remedy would be more appropriate, before awarding a constructive trust. It is often thought that the decision in *Giumelli* provides the key example where a third party’s interest led the court to refuse the award of a constructive trust. However, a careful consideration of the facts of the case indicates that there was in fact no third party interest which called for protection.

In *Giumelli*, Robert Giumelli’s parents had promised in 1981 to subdivide their farm (‘Dwellingup’) and to transfer an un-subdivided portion (the ‘promised lot’) to Robert. In reliance, Robert worked without wages and developed and improved the farm, built a house on the property, and refused outside employment. When his parents reneged on their promise in May 1985, Robert moved out. Thereafter, Robert’s brother, Steven, got married and lived with his family on the promised lot, making improvements to it. In 1986, Robert instituted a partnership action, which related to a partnership formed more than a decade earlier by members of the family to develop a different piece of land as an orchard. Although it did not own Dwellingup, improvement work was done on Dwellingup in 1973 which was charged to the partnership. Robert’s partnership action, to which Steven was a party, sought (among other things) a declaration that the partnership was entitled to a charge over Dwellingup to the extent of the value of improvements made on it.¹⁰⁰

The High Court held that Robert had made out a successful estoppel claim. However, it went on to hold that a constructive trust ought to be denied, and a monetary award substituted instead, in view of ‘all the circumstances of the case’, which were: ‘the still pending partnership action, the improvements to the promised lot by family members other than Robert, both before and after his residency there, the breakdown in family relationships and the continued residence on the promised lot of Steven and his family.’¹⁰¹ It is demonstrably clear,

⁹⁶ Ying Khai Liew, ‘The “*Prima Facie* Expectation Relief” Approach in the Australian Law of Proprietary Estoppel’ (2019) 39(1) *Oxford Journal of Legal Studies* 183 (‘The “*Prima Facie* Expectation Relief” Approach’).

⁹⁷ *Giumelli* (n 7) 125 [51] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

⁹⁸ *Ibid* 125 [49].

⁹⁹ *Ibid* 113–14 [10].

¹⁰⁰ *Ibid* 114–16 [12]–[23].

¹⁰¹ *Ibid* 125 [49].

however, that *none* of these matters point to any relevant third party consideration which ought to have affected the remedy imposed.

First, it is clear that the ‘breakdown in family relationships’ referred to the relationship between Robert and his parents, the parties to the claim; it did not involve any third party. Secondly, Steven and his family were mere volunteers in relation to the promised lot with no legal or equitable entitlement. Indeed, even Steven’s improvements to the promised lot could not have given Steven an equity in the lot: those improvements were undertaken purely voluntarily.¹⁰² And for the sake of argument, even *if* those improvements did give Steven an equity in the lot, Robert’s interest was undoubtedly first in time and would have prevailed.¹⁰³ Thirdly, since Dwellingup was never partnership property, the improvements to Dwellingup which were charged to the partnership were simply *expenditures*.¹⁰⁴ Expenditures (as opposed to investments) are generally netted off against gains; they do not give rise to any proprietary right or other equity. Finally, Robert’s partnership action would have been potentially detrimental *to himself*, and not *to any third party*: the improvements made to Dwellingup at the partnership’s expense were carried out years before the facts occurred upon which Robert’s proprietary estoppel claim was founded. Thus, even if Robert’s partnership action eventually succeeded, the charge over Dwellingup (including the promised lot) would have taken priority over Robert’s interest in the promised lot obtained by way of proprietary estoppel. In short, *Giumelli* does not provide unequivocal authority for third party considerations to be taken into account in relation to proprietary estoppel.

Making the point positively, there are a number of reasons which compel the conclusion that third party considerations do not — or at the very least do not mainly — feature in proprietary estoppel. These have been explored extensively in a recent published article,¹⁰⁵ a summary of which is as follows.

First, in a range of cases where a potentially prejudiced third party was explicitly identified in order to support the argument that a lesser remedy ought to be ordered,¹⁰⁶ courts have invariably held that the third party’s interest was

¹⁰² See *ibid* 116 [22].

¹⁰³ This is not to deny that the High Court would have been able to make a constructive trust award conditional upon Robert repaying Steven for his outlay, or to award a lien to that effect, on the basis that Robert should not be unjustly enriched by the value of the improvements at Steven’s expense.

¹⁰⁴ *Giumelli* (n 7) 115 [15], 126 [55].

¹⁰⁵ Ying Khai Liew, ‘Proprietary Estoppel in Australia: Two Options for Exercising Remedial Discretion’ (2020) 43(1) *University of New South Wales Law Journal* 281 (‘Proprietary Estoppel in Australia’).

¹⁰⁶ See, eg, *McNab v Graham* (2017) 53 VR 311 (‘*McNab*’); *De Blac v Lo* [2014] NSWSC 142; *Mould v Canale* [2017] VSC 793 (‘*Mould*’).

an irrelevant consideration.¹⁰⁷ In fact, on one such occasion, a constructive trust was even awarded in favour of a bankrupt plaintiff, framed in such a way that it would take effect from the time of his discharge from bankruptcy, in order to protect the debtor's interest, arising by way of estoppel, *from his creditors*.¹⁰⁸

Second, no Australian proprietary estoppel case has ever in fact taken third party considerations into account in determining the appropriate remedy. Apart from *Giumelli*, there have only been three occasions on which courts have supposedly relied upon third party considerations to deny a constructive trust remedy.¹⁰⁹ However, in none of those cases was third party considerations even remotely an operative reason which led to the remedy ultimately awarded.¹¹⁰

Third, taking into account third party considerations is inconsistent with the aim of proprietary estoppel, which is the avoidance of detriment.¹¹¹ Any remedy given to a successful plaintiff is an award made against the defendant in order to avoid the plaintiff from suffering (or continuing to suffer) detriment due to the defendant's renegeing on the induced assumption for which the defendant is responsible. This implies that remedial discretion ought to be exercised only by taking into account factors which affect the parties themselves. Conversely, consideration of matters affecting the interests of those extraneous to the parties themselves cannot be reconciled with the aim of proprietary estoppel. Put another way, given the aim of proprietary estoppel, it is by no means clear why, if at all, third party considerations might itself provide a reason to deny to the plaintiff a constructive trust where they would otherwise obtain that remedy.

4 *Fiduciary Bribes and Secret Commissions: Third Party Considerations Relevant*

Errant fiduciaries may receive gains in different ways, but the case law concerning the relevance of remedial discretion in relation to constructive trusts arising over those gains is confusing.

High Court authorities predating *Muschinski* indicate that constructive trusts invariably arise over gains which represent the original or traceable

¹⁰⁷ Liew, 'Proprietary Estoppel in Australia' (n 105) 287–8.

¹⁰⁸ *O'Brien v Sheahan* [2002] FCA 1292, [67] (Carr J).

¹⁰⁹ *Australian Building & Technical Solutions Pty Ltd v Boumelhem* (2009) 2 ASTLR 336 ('*Australian Building & Technical Solutions*'); *Van Dyke v Sidhu* (2013) 301 ALR 769, affd *Sidhu v Van Dyke* (2014) 251 CLR 505 ('*Sidhu*'); *Grant v Roberts* [2019] NSWSC 843.

¹¹⁰ Liew, 'Proprietary Estoppel in Australia' (n 105) 286–7.

¹¹¹ See generally *ibid* 292–306.

proceeds of the principal's property,¹¹² and those which represent the proceeds of the exploitation of an opportunity which, if the fiduciary chose to exploit, ought to have been exploited in favour of the principal;¹¹³ these constructive trusts do not engage the exercise of remedial discretion. Although occasionally lower courts have suggested, in obiter, that such constructive trusts can be varied or refused based on third party or other considerations,¹¹⁴ others take the orthodox position as the prevailing position.¹¹⁵ The position taken by the latter group of cases is to be preferred because the former is likely to be *per incuriam* longstanding and uncontroverted authority.¹¹⁶

The position is different in relation to bribes and secret commissions, gains which represent 'extant property which a delinquent fiduciary ... has derived on *their own account* as a result of their wrongdoing'.¹¹⁷ In relation to these gains, it is clear that, in addition to *inter partes* considerations,¹¹⁸ courts also exercise remedial discretion by taking into account third party considerations.

Although Australian courts have only been called upon to determine a principal's remedy in relation to fiduciary bribes and secret commissions on a handful of occasions, the cases firmly indicate that third party considerations are of central relevance. This reflects the Full Federal Court's statement in *Grimaldi* that:

In Australia, the constructive trust in this setting is a discretionary remedy ... [T]o accept that money bribes can be captured by a constructive trust does not mean that they necessarily will be in all circumstances. As is well accepted, a

¹¹² *Black* (n 52).

¹¹³ *Chan v Zacharia* (1984) 154 CLR 178, 199 (Deane J); *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 107–8 (Mason J).

¹¹⁴ See, eg, *Zobory v Federal Commissioner of Taxation* (1995) 64 FCR 86, 91–2 (Burchett J); *Kat-tingal Pty Ltd v Amor* (1999) 162 ALR 287, 292 [11] (Burchett J); *Re O'Keeffe Heneghan Pty Ltd (in liq)* [2018] NSWSC 1958, [15] (Black J).

¹¹⁵ See, eg, *Sze Tu* (n 53) 346–8 [151]–[158] (Gleeson JA); *Malek Fahd Islamic School Ltd v The Australian Federation of Islamic Councils Inc* [2017] NSWSC 1712, [45] (Black J); *Cassegrain* (n 76) 446 [193] (Macfarlan JA).

¹¹⁶ See also Matthew Harding, 'Constructive Trusts and Distributive Justice' in Elise Bant and Michael Bryan (eds), *Principles of Proprietary Remedies* (Thomson Reuters, 2013) 19, 21–4 [2.20]; Elise Bant and Michael Bryan, 'A Model of Proprietary Remedies' in Elise Bant and Michael Bryan (eds), *Principles of Proprietary Remedies* (Thomson Reuters, 2013) 211, 217–18 [12.160].

¹¹⁷ *Grimaldi* (n 44) 260 [256] (Finn, Stone and Perram JJ) (emphasis added).

¹¹⁸ For example, considerations of breach, causation, and remoteness: see Ying Khai Liew, *Rationalising Constructive Trusts* (Hart Publishing, 2017) 226–30.

constructive trust ought not to be imposed if there are other orders capable of doing full justice ...¹¹⁹

Thus, for example, in *Suzlon Energy Ltd v Bangad* ('*Suzlon*'), the Court exercised that discretion, although it ultimately concluded that 'there is no effective remedy other than the imposition of a constructive trust';¹²⁰ and in *Disctronics Ltd v Edmonds* ('*Disctronics*'), the judge held that 'the consequences of a declaration in the circumstances of this case were not the subject of sufficient evidence as to the risks to other parties such that I would be prepared to impose a constructive trust in this matter'.¹²¹

Taking third party considerations into account is also consistent with the supposed aim of the law to effectuate deterrence in subjecting the fiduciary to a liability in relation to bribes and secret commissions.¹²² It is trite that the award of a constructive trust is not the only way in which that aim can be achieved: 'other personal remedies [may also] further a policy of deterrence ... in particular exemplary damages and the account of profits'.¹²³ Therefore, it remains *necessary* for courts to take into account third party considerations to determine whether a constructive trust ought to be awarded.

IV REFLECTIONS

The reality of the present state of Australian law is that discretion is not exercised nearly as extensively as the High Court suggests, and third party considerations are only relevant in relation to fiduciary bribes and secret commissions. This reality compels us to reflect on a number of important matters which may have hitherto been taken for granted: the bindingness of the High Court dicta, the (ir)relevance of the distinction between 'institutional' and 'remedial' constructive trusts, and the relationship between rights and remedies.

¹¹⁹ *Grimaldi* (n 44) 422–3 [582]–[583] (citations omitted). See also *Suzlon Energy Ltd v Bangad* [2014] FCA 1105, [75] (Rares J) ('*Suzlon Energy*').

¹²⁰ *Suzlon Energy* (n 119) [79].

¹²¹ [2002] VSC 454, [213] (Warren J) ('*Disctronics*').

¹²² *Grimaldi* (n 44) 421 [576] (Finn, Stone and Perram JJ). Cf Katy Barnett, 'Distributive Justice and Proprietary Remedies over Bribes' (2015) 35(2) *Legal Studies* 302; Harding (n 116) 31–5 [2.40].

¹²³ Bant and Bryan (n 116) 224–5 [12.210]. In addition, where the fiduciary is insolvent, third party considerations come to the fore because 'the real dispute is between the claimant and the third parties who also assert claims to the property. Specific deterrence cannot justify a proprietary remedy because the defendant is indifferent to whether a proprietary remedy is imposed': Barnett (n 122) 305–6.

A *The Status of the High Court Dicta*

Given the precedential value of statements emanating from the High Court, some might be tempted simply to conclude that lower courts have fallen into error by approaching constructive trusts in a manner largely inconsistent with the High Court dicta. However, this assumes that lower courts have an obligation to follow those dicta. It is necessary to consider whether such an obligation arises.

The clearest indication to date from the High Court concerning how lower courts ought to treat High Court dicta comes from *Farah Constructions*, where the High Court criticised the Court of Appeal for coming to a conclusion of law at odds with ‘long-established authority and seriously considered dicta of a majority of this Court.’¹²⁴ Extrajudicially, Justice Keith Mason argued that this approach marked a ‘profound shift in the rules of judicial engagement’,¹²⁵ and Professors Matthew Harding and Ian Malkin have demonstrated that decisions post-*Farah Constructions* bear out this point: lower courts now ‘believe that in *Farah [Constructions]* the High Court has told them that they have a duty of obedience to its dicta, at least in certain circumstances.’¹²⁶ As Harding and Malkin point out, however, fundamental difficulty remains ‘with ascertaining the circumstances in which such a duty might be triggered.’¹²⁷ They conclude that a plausible interpretation of the requirements of ‘long-established authority’ and ‘seriously considered dicta’ are that they are treated as cumulative.¹²⁸ They also point out, based on the literature and cases discussing the doctrine of precedent, that the factors typically affecting whether non-binding dicta of superior courts ought to be followed includes ‘a careful consideration of ... relevant authorities by [the superior] court[s].’¹²⁹

Turning to the relevant High Court dicta on constructive trusts discussed earlier,¹³⁰ the first point to be made is that only in three of those cases, namely

¹²⁴ *Farah Constructions* (n 7) 151 [134] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

¹²⁵ Justice Keith Mason, ‘President Mason’s Farewell Speech’ (2008) 82(11) *Australian Law Journal* 768, 769.

¹²⁶ Matthew Harding and Ian Malkin, ‘The High Court of Australia’s Obiter Dicta and Decision-Making in Lower Courts’ (2012) 34(2) *Sydney Law Review* 239, 247.

¹²⁷ *Ibid* 253.

¹²⁸ *Ibid* 253–4, discussing *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 161 [473] (Heydon J); *CGU Workers Compensation (NSW) Ltd v Garcia* (2007) 69 NSWLR 680, 693 [61] (Mason P); *Net Parts International Pty Ltd v Kenoss Pty Ltd* [2008] NSWCA 324, [28] (Macfarlan JA).

¹²⁹ Harding and Malkin (n 126) 260.

¹³⁰ See above Part II(A).

Muschinski, *Baumgartner*, and *Giumelli*, do we find the issue of remedial discretion arising as part of their rationes decidendi: it is only in those cases that we find the exercise of remedial discretion making a genuine difference to the outcomes of the cases. These three cases involve only two doctrines — the joint endeavour doctrine and proprietary estoppel. Less obvious but equally true is the fact that in none of those three cases did third party considerations actually form part of their rationes. In *Muschinski*, only two¹³¹ of the five judges were in favour of imposing a ‘date of judgment’ constructive trust,¹³² and in any event there was no known third party whose interest fell to be considered on the facts of the case. In *Baumgartner* the issue of third party considerations was not even discussed. And in *Giumelli*, although the High Court appeared to withhold a constructive trust on the basis of third party considerations, there was in fact no third party whose interest called for protection, as discussed above.¹³³

The upshot is that lower courts do indeed have an obligation to exercise remedial discretion in relation to the joint endeavour doctrine and proprietary estoppel. However, two essential questions remain: do the High Court dicta oblige lower courts also to take into account third party considerations within those two doctrines? And, are lower courts obliged to exercise any remedial discretion (whether or not this includes third party considerations) outside those doctrines?

It is at least clear that there is no ‘long-established authority’ for the proposition that constructive trusts invariably attract remedial discretion. In the pre-*Muschinski* case law, one would be hard-pressed to find any authority generally providing for the exercise of remedial discretion in relation to constructive trusts; rather, we encounter High Court decisions, such as *Black and Birmingham v Renfrew*,¹³⁴ which treat constructive trusts as anything but discretionary. The situation is not improved even if we take into account the High Court decisions post-*Muschinski*: any suggestion that the sort of discretion contemplated by Deane J in *Muschinski* is of application to constructive trusts generally is quickly dismissed by *Daly and Bahr* — High Court decisions which treat constructive trusts as being non-discretionary. Neither does *Giumelli* provide such ‘long-established authority’ for the wide-ranging proposition: the discretion exercised in that case was explicitly based on a long-established line of (English)

¹³¹ *Muschinski* (n 7) 623–4 (Deane J, Mason J agreeing at 599).

¹³² Chief Justice Gibbs agreed with the result but not with the reasoning which led to it: *ibid* 598.

¹³³ See above Part III(B)(3).

¹³⁴ (1937) 57 CLR 666.

authority which indicates that remedial discretion is exercised *specifically* in relation to proprietary estoppel.¹³⁵

Are the statements from the High Court concerning third party considerations ‘considered dicta’? There is good reason for thinking not. It is only Deane J’s dicta in *Muschinski* which comes anywhere close to being properly ‘considered’, and even there, a blanket exercise of discretion is not advocated. Rather, ‘the constructive trust ... may be moulded and adjusted ...’, and ‘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.’¹³⁶ This calls for the exercise of some constraint in the exercise of remedial discretion.

In contrast, the expansive and general statements found in the newer High Court dicta is anything but ‘considered’: they far from reflect any ‘careful consideration of ... relevant authorities’,¹³⁷ and in fact appear to approximate more closely to being bare assertions. It is observable that the dicta concerning the need to consider lesser remedies first and to take into account third party considerations made its maiden appearance in *Bathurst*,¹³⁸ and that proposition was subsequently cited in *Giumelli*.¹³⁹ *Giumelli* was then itself cited in *Farah Constructions*¹⁴⁰ and *John Alexander’s Clubs*.¹⁴¹ This snowballing of citations of the expansive proposition gives the illusion of ‘careful consideration’, but in fact in none of these cases was there any attempt meaningfully to engage with the substantive validity or practical effect of the proposition. Most damningly, in the original case, *Bathurst*, the only authorities which were cited in relation to the expansive approach were the English case of *Re Polly Peck International plc (in admin) [No 2]* (*‘Re Polly Peck’*)¹⁴² and the New Zealand case of *Fortex Group Ltd v MacIntosh*.¹⁴³ Both cases were preceded by the abbreviation ‘cf’, which indicated that those cases were cited *in contrast to* the proposition propounded

¹³⁵ See *Giumelli* (n 7) 113–14 [10] (Gleeson CJ, McHugh, Gummow and Callinan JJ), citing *Plimmer v Mayor, Councillors and Citizens of the City of Wellington* (1884) 9 App Cas 699, 714 (Sir Arthur Hobhouse for the Court).

¹³⁶ *Muschinski* (n 7) 615 (emphasis added).

¹³⁷ Harding and Malkin (n 126) 260.

¹³⁸ *Bathurst* (n 7) 585 [42] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

¹³⁹ *Giumelli* (n 7) 113 [10].

¹⁴⁰ *Farah Constructions* (n 7) 172 [200] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

¹⁴¹ *John Alexander’s Clubs* (n 7) 45–6 [129] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ).

¹⁴² *Re Polly Peck* (n 41) 826–7 (Mummery LJ), cited in *Bathurst* (n 7) 585 [42].

¹⁴³ [1998] 3 NZLR 171 (*‘Fortex’*), cited in *Bathurst* (n 7) 585 [42].

by the High Court.¹⁴⁴ There was a complete absence of any relevant authority positively supporting the expansive approach.

In sum, outside the joint endeavour, proprietary estoppel, and fiduciary bribes and secret commissions cases, lower courts are not obliged to exercise remedial discretion, let alone to take into account third party considerations. In relation to the first two doctrines aforementioned, the consideration of third party interests is not obligatory. This explains *precisely* what we find in the case law emanating from the lower courts.

B 'Institutional' vs 'Remedial' Constructive Trusts

It is well-known that the distinction between 'institutional' and 'remedial' constructive trusts can be traced back to 1922, when Roscoe Pound first distinguished between 'remedial' and 'substantive' constructive trusts.¹⁴⁵ It might be thought that this distinction is no longer relevant in Australia, although it remains a live topic in English law.¹⁴⁶ But the analysis in this article cautions against this hasty conclusion.

1 *Distinction Remains Relevant*

In English law, 'institutional' refers to situations where constructive trusts are triggered by, and arise from, the occurrence of pre-defined events or facts, such that 'the trust arises by operation of law as from the date of the circumstances which give rise to it' without the exercise of remedial discretion.¹⁴⁷ On the other hand, 'remedial' refers to situations where constructive trusts do not so arise: their imposition, whether or not operating retrospectively, lies 'in the discretion of the court'.¹⁴⁸

In Australia, things might be thought to be different. In *Muschinski*, Deane J attempted to de-emphasise the difference between the two terms, describing

¹⁴⁴ Unsurprisingly, too, as *Re Polly Peck* (n 41) stands for the proposition that English law does not accept the 'remedial' constructive trust: at 823–7. However, *Fortex* (n 143) doubts the usefulness of that device: at 177 (Gault, Keith and Tipping JJ).

¹⁴⁵ Roscoe Pound, 'The Progress of the Law, 1918–1919: Equity' (1920) 33(3) *Harvard Law Review* 420, 420–1.

¹⁴⁶ See generally Ying Khai Liew, 'Reanalysing Institutional and Remedial Constructive Trusts' (2016) 75(3) *Cambridge Law Journal* 528.

¹⁴⁷ *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] 1 AC 669, 714 (Lord Browne-Wilkinson) ('*Westdeutsche*').

¹⁴⁸ *Ibid* 714–15.

the dichotomy as ‘ephemeral upon closer examination.’¹⁴⁹ Specifically, his Honour held:

The old maxim that equity regards as done that which ought to be done is as applicable to enforce equitable obligations as it is to create them and, notwithstanding that the constructive trust is remedial in both origin and nature, there does not need to have been a curial declaration or order before equity will recognize the prior existence of a constructive trust. Where an equity court would retrospectively impose a constructive trust by way of equitable remedy, its availability as such a remedy provides the basis for, and governs the content of, its existence inter partes independently of any formal order declaring or enforcing it. In this more limited sense, the constructive trust is also properly seen as both ‘remedy’ and ‘institution.’¹⁵⁰

On the basis of this dicta, it might be thought that the distinction between ‘institutional’ and ‘remedial’ constructive trusts is no longer relevant in Australia, at least from the perspective of remedial discretion.¹⁵¹ Thus, some lower courts have used the ‘institutional’ label to refer only to the element of timing — that particular constructive trusts arise ‘from the moment at which the conduct giving rise to its imposition occurs.’¹⁵² This understanding is based on the superficial analysis that, at least in theory, ‘institutional’ constructive trusts remain the product of the exercise of remedial discretion in order *not* to disturb the availability and timing of those trusts.¹⁵³

¹⁴⁹ *Muschinski* (n 7) 614 (citation omitted). See also Pamela O’Connor, ‘Happy Partners or Strange Bedfellows: The Blending of Remedial and Institutional Features in the Evolving Constructive Trust’ (1996) 20(3) *Melbourne University Law Review* 735, 735–6.

¹⁵⁰ *Muschinski* (n 7) 614. To be precise, in a slightly earlier passage in the judgment, Deane J also describes how ‘[i]n a broad sense, the constructive trust is both an institution and a remedy’ — a ‘remedy’ because it is a ‘personal obligation attaching to property’, and an ‘institution’ because it shares ‘some of the institutional[s]ed features of express and implied trust’ viz ‘subject-matter, trustee, beneficiary ... and personal obligation attaching to the property’: at 613–14. This broader conception is not considered in the main text because it does not speak to the element of discretion, which is the focus of the present discussion.

¹⁵¹ See *E Co v Q* [No 4] [2019] NSWSC 429, [626] (Ward CJ in Eq). See also Robert McDougall, ‘Remedies in Commercial Litigation’ (Paper, The College of Law, 2014) 40 [40]; Nicholas Allton, ‘The Boundaries of Proprietary Claims’ (1997) 13 *Queensland University of Technology Law Journal* 276, 285.

¹⁵² *Imam Ali* (n 49) [405] (McMillan J). See also *Staatz* (n 49) 279 [175] (Derrington J); *Ying Mui Pty Ltd v Hoh* [2018] VSC 214, [44] (Vickery J); *Re Sabri* (n 86) 178 (Chisholm J).

¹⁵³ The literature reflecting this sort of analysis includes: Bant and Bryan, ‘Rethinking the Essentials’ (n 44) 186, citing *Ford & Lee* (n 44) [22.060]; Evans (n 44); David Wright, ‘Proprietary Remedies and the Role of Insolvency’ (2000) 23(2) *University of New South Wales Law Journal* 143; McDougall (n 151) 14 [40]; O’Connor (n 149) 735–6.

Upon closer inspection, Deane J's dicta does not provide any support for this conclusion. It can be seen from the quote above that is Honour maintained a distinction between the 'enforcement' and 'creation' of constructive trusts (ie 'equitable obligations'). This recognises that discretion can be exercised to different extents in the two distinct cases: more extensively when a constructive trust is 'created' by the court, and less extensively when such a trust is simply 'enforced'. After all, 'enforcement', as opposed to 'creation', implies that there is a trigger for the trust which lies outside the court's discretion.

In addition, the sentence which refers to the retrospective imposition of constructive trusts is preceded by the word 'where', and this crucially implies, first, that not all constructive trusts which take effect from the occurrence of conduct giving rise to its imposition are retrospectively imposed, and second, that it is only constructive trusts which *are* retrospectively imposed which are the product of judicial discretion.

This analysis of Deane J's dicta is fortified by Australian case law. In the context of the non-discretionary doctrines discussed earlier, constructive trusts are described as creating 'substantive rights', as opposed to being an 'equitable remedy' such that a lesser remedy must be considered first. The clear irrelevance of remedial discretion in those doctrines inextricably leads to the conclusion that the distinction between 'institutional' and 'remedial' constructive trusts remains relevant, insofar as the dichotomy indicates that remedial discretion is exercised in the latter, but not the former, group of constructive trusts.

2 *Distinction Requires Refinement*

Notwithstanding the above, the dichotomy is liable to give the misleading impression that discretion is a binary, all-or-nothing concept. It is most obviously not: there are different degrees and shades to it. As the earlier discussion of the discretionary constructive trust doctrines indicates, it is vital to refine the category of 'remedial' constructive trusts by distinguishing between factors affecting justice *inter partes* ('*inter partes* discretion') and third party considerations ('third party discretion').

English law provides a useful starting point for demonstrating the importance of drawing that distinction. The repeated rejection of 'remedial' constructive trusts by English judges might be thought to indicate the rejection of remedial discretion in relation to the award of constructive trusts. Curiously, however, English courts indisputably exercise remedial discretion in the context of proprietary estoppel, where a constructive trust or a lesser remedy may be awarded in order to reflect 'the minimum equity to do justice to the

plaintiff.¹⁵⁴ In order to reconcile the two apparently inconsistent phenomena, it might be tempting simply to conclude that proprietary estoppel is, after all, an example where ‘the principles of remedial constructive trusts’ apply in English law.¹⁵⁵ However, a better and more meaningful explanation lies in the fact that English judges employ the term ‘remedial’ pejoratively to indicate their hostility, not towards the exercise of discretion *simpliciter*, but towards the exercise of *third party discretion*. They take no issue with the exercise of *inter partes* discretion in relation to proprietary estoppel,¹⁵⁶ since this allows them ‘to do justice between the parties.’¹⁵⁷ Conversely, the ability explicitly to consider the appropriateness of granting plaintiffs priority over (for example) their creditors in bankruptcy or other parties with a later claim over the property in question is deemed to be heretical. Thus, in *Re Polly Peck*, Mummery LJ held that

[the law] cannot be legitimately moved by judicial decision down a road signed ‘No Entry’ by Parliament. The insolvency road is blocked off to remedial constructive trusts, at least when judge driven in a vehicle of discretion ... To a trust lawyer and, even more so to an insolvency lawyer, the prospect of a court imposing such a trust is inconceivable and, in my judgment ... the scheme imposed by statute for a fair distribution of the assets of an insolvent company precludes the application of the equitable principles manifested in the remedial constructive trust ...¹⁵⁸

¹⁵⁴ *Crabb v Arun District Council* [1976] 1 Ch 179, 198 (Scarman LJ).

¹⁵⁵ As Lord Scott suggested in *Thorner v Major* [2009] 1 WLR 776, 781 [14], 784–5 [20]–[21]. Cf *Crossco No 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619, [84] (Etherton LJ); Lord Neuberger, ‘The Remedial Constructive Trust: Fact or Fiction’ (Speech, Banking Services and Finance Law Association Conference, Queenstown, 10 August 2014) [20].

¹⁵⁶ It might also be said that the English CICT doctrine is an area where *inter partes* discretion is exercised, although courts do not have the option of awarding a monetary remedy: see Ying Khai Liew, ‘The Secondary-Rights Approach to the “Common Intention Constructive Trust”’ (2015) 79(3) *Conveyancer and Property Lawyer* 210, 223.

¹⁵⁷ See, eg, *Gillett v Holt* [2001] 1 Ch 210, 237 (Robert Walker LJ); *Liden v Burton* [2016] EWCA Civ 275, [35] (Hamblen LJ); *Davies v Davies* [2015] EWHC 1384 (Ch), [55] (Jarman J); *Thompson v Foy* [2009] EWHC 1076 (Ch), [98] (Lewison J). In *Jennings v Rice* [2002] EWCA Civ 159, Robert Walker LJ suggested in obiter that courts could take into account ‘(to a limited degree) the other claims (legal or moral) on the [defendant] or [their] estate’ in determining the appropriate remedy: at [52]. English courts have never actually done so. In fact, in *Moore v Moore* [2018] EWCA Civ 2669, the interests of third parties were expressly dismissed as irrelevant: at [87] (Henderson LJ).

¹⁵⁸ *Re Polly Peck* (n 41) 827. See also *Wambo Coal* (n 60) 438 [43] (White J); Birks, ‘Remedial Constructive Trust’ (n 43) 19–20 [24]–[25]; Virgo (n 43) 585; Peter Birks, ‘Three Kinds of Objection to Discretionary Remedialism’ (2000) 29 (March) *Western Australian Law Review* 1, 12.

The distinction between *inter partes* discretion and third party discretion is brought to bear in Australia in relation to the discretionary constructive trust doctrines. In an earlier discussion, it was seen that the joint endeavour doctrine and proprietary estoppel have overwhelmingly (if not exclusively) engaged the exercise of *inter partes* discretion only, while in relation to fiduciary bribes and secret commissions courts systemically exercise third party discretion. These phenomena tell us something important about what is going on with these doctrines.

The joint endeavour doctrine and proprietary estoppel can be understood as existing primarily (if not exclusively) to (re)adjust the rights of *the parties in the dispute* in relation to the property in question, in light of circumstances which have occurred in the past. This suggests that the aim of these doctrines is to achieve justice *inter partes*: they aim to give to *the plaintiff* by taking away from *the defendant* what is adjudged to be owed by *the defendant, to the plaintiff*.¹⁵⁹ To that end *inter partes* discretion is exercised. Critically, these doctrines do not (or do not primarily) aim to achieve distributive justice, and therefore third party discretion is not (or is not usually) exercised. This explains why, where constructive trusts are awarded in these doctrines, plaintiffs almost invariably obtain priority over other third parties with competing claims: once justice *inter partes* is achieved, issues of priority are determined by orthodox principles such as the ‘first in time’ and the BFP rules. In fact, this also explains why in cases where there is no evidence available as to whether any third party would be affected by the constructive trust remedy, the default position courts take in relation to the joint endeavour doctrine and proprietary estoppel is to impose a constructive trust.¹⁶⁰ It is therefore confusing and fundamentally misleading to criticise judges in these cases, as Professor GE Dal Pont does, for ‘recognis[ing] or impos[ing] an equitable interest ante-dating creditors’ claims.’¹⁶¹ Similarly, it would be wrong for judges to take the liberty of withholding constructive trusts simply to protect innocent creditors, as Habersberger J did in *SE Vineyard Finance Company Pty Ltd (rec and mgr apptd) v Casey* (‘*SE Vineyard*’).¹⁶²

¹⁵⁹ See generally Peter Benson, ‘The Basis of Corrective Justice and Its Relation to Distributive Justice’ (1992) 77(2) *Iowa Law Review* 515, 569.

¹⁶⁰ See *Australian Receivables* (n 82) 512 [133]–[134] (Ward J); *McNab* (n 106) 343 [104] (Tate JA).

¹⁶¹ GE Dal Pont, ‘Timing, Insolvency and the Constructive Trust’ (2004) 24(3) *Australian Bar Review* 262, 274.

¹⁶² (n 80) [165]–[166] (Habersberger J) (‘*SE Vineyard*’). In any event, the creditor’s priority in this case would have been protected anyway by virtue of its status as a BFP: see above n 73 and accompanying text.

On the other hand, in relation to fiduciaries, the receipt of a bribe or secret commission is clearly a breach of fiduciary duty, and in recognition of this fact a fiduciary is always *personally* liable to account for the amount of the gain to the principal.¹⁶³ But as to the constructive trust issue, namely whether the principal is entitled to a *proprietary interest* in the gain or traceable proceeds, the answer is less straightforward, essentially because it cannot be said that the principal had any pre-existing proprietary entitlement or opportunity to take the bribe or secret commission. In other words, it is by no means obvious that a constructive trust must arise over a bribe or secret commission *as a matter of inter partes justice*. Consequently, distributive justice considerations come into play: whether the principal *deserves* the property is a critical and open question.¹⁶⁴ To that end, third party discretion is exercised in order to address whether the principal deserves to take the property in question *in the light of any other third party's competing claim*. The fact that courts cast their eyes beyond the immediate parties to the dispute is also confirmed by the fact that the default response of Australian courts is to *refuse* to impose a constructive trust where there is no evidence available as to whether third parties would be affected by its award.¹⁶⁵

To be clear, the argument is not that, because distributive justice considerations come into play, therefore the exercise of third party discretion is the only sensible legal response. It remains possible for the law, if it so chose, to take the position that principals are *never* entitled to a proprietary remedy (similar to the position the High Court took in *Daly*), or that a proprietary remedy is *invariably* justified (as appears to be the present position in English law).¹⁶⁶ The argument made here is simply that, *given* that Australian courts systemically exercise third party discretion in relation to bribes and secret commissions, they are explicable in the light of distributive justice considerations — considerations which do not arise in the joint endeavour and proprietary estoppel cases.

¹⁶³ See *Grimaldi* (n 44) 422–3 [583] (Finn, Stone and Perram JJ).

¹⁶⁴ Barnett (n 122) 306. Indeed, the United Kingdom Supreme Court's decision in *FHR European Ventures* (n 41) explicitly considered that, in relation to the appropriate remedy, 'it is not possible to identify any plainly right or plainly wrong answer': at 269 [32] (Lord Neuberger PSC). While in that case the Court decided to opt for the 'simple answer', viz the invariable imposition of a constructive trust, Australian courts have taken a more nuanced approach.

¹⁶⁵ See, eg, *Mernda Developments Pty Ltd (in liq) v Alamanda Property Investments No 2 Pty Ltd* (2011) 86 ACSR 277, 290 [49] (Warren CJ, Mandie JA and Judd AJA); *Disctronics* (n 121) [213] (Warren J). Cf the Court's dicta in *Grimaldi* (n 44) 422–3 [583].

¹⁶⁶ See above n 56.

C *Rights and Remedies*

In the wake of the High Court dicta there is now a tendency to analyse rights¹⁶⁷ and remedies¹⁶⁸ in Australian private law as ‘disassociated’.¹⁶⁹ From the perspective of remedies, the claim is that, due to the interpolation of discretion, the award of the appropriate remedy is now an exercise to be undertaken freed from the constraints of the particular right which triggers its award — that courts can freely select from a ‘basket of remedies’¹⁷⁰ to ‘quell the controversy’.¹⁷¹ From the perspective of rights, such remedial discretion is a response to a ‘breach of duty or wrongdoing’;¹⁷² in other words, it is only sensible to speak of the protection of the plaintiff’s rights in terms of those arising from the defendant’s wrongful act, since it is the wrong which triggers the court’s remedial discretion.

The analysis in this article calls for a serious rethink of this understanding: a more nuanced account of the relationship between rights and remedies is required, at least insofar as constructive trusts are concerned.

1 *Non-Discretionary Constructive Trusts: Replicative Remedies*

It has been explained earlier that the non-discretionary constructive trust doctrines are understood as creating ‘substantive rights’ which take effect from the occurrence of their relevant triggering events. Put in another way, upon the occurrence of the relevant triggering events, the law immediately recognises that a right–duty relationship arises between the plaintiff and defendant. If the plaintiff later goes to court to enforce the duty owed by the defendant towards her, the court would award a ‘constructive trust’ remedy, which is *replicative* in the sense that it attempts to replicate the content of the parties’ pre-trial relationship as closely as possible.

¹⁶⁷ A ‘right’ is ‘one which is vested in a person at law independently of any court order’: Roy Goode, ‘Property and Unjust Enrichment’ in Andrew Burrows (ed), *Essays on the Law of Restitution* (Oxford University Press, 1991) 215, 222.

¹⁶⁸ A ‘remedy’ is simply an order of the court: Rafal Zakrzewski, *Remedies Reclassified* (Oxford University Press, 2005) 17.

¹⁶⁹ David Wright, ‘Third Parties and the Australian Remedial Constructive Trust’ (2014) 37(2) *University of Western Australia Law Review* 31, 38.

¹⁷⁰ Paul Finn, ‘Equitable Doctrine and Discretion in Remedies’ in WR Cornish et al (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Hart Publishing, 1998) 252, 255; or a ‘remedial menu’: Evans (n 44) 491; *Koops Martin v Dean Reeves* [2006] NSWSC 445, [10] (Brereton J); *Fitzgibbons v Shaftsbury Pty Ltd* (2011) 16 BPR 30837, 30840 [15] (Brereton J). See also Grimaldi (n 44) 403 [504].

¹⁷¹ *Bathurst* (n 7) 585 [42] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

¹⁷² Grimaldi (n 44) 405 [510]. See also Finn (n 170) 255; Wright (n 153) 165 n 165; Natalie Skead, ‘Undue Influence and the Remedial Constructive Trust’ (2008) 2(2) *Journal of Equity* 143, 148.

It is important to note that the events which trigger replicative constructive trust remedies are not wrongs: that is to say, there need not be a breach of a duty by the defendant before the plaintiff's pre-trial rights arise which these constructive trust remedies replicate. Rights arising from events which are not wrongs have been labelled 'primary rights',¹⁷³ to indicate that those rights exist 'in and per se'.¹⁷⁴ This is reflected in the events which trigger the non-discretionary constructive trust doctrines, for example, detrimental reliance on a common intention, the acquisition of property pursuant to an informal agreement, or the acquiring of knowledge of a mistaken payment. None of these events imply that the defendant has committed any wrongdoing.

The fact that replicative constructive trusts aim to replicate primary rights explains why little remedial discretion is detected in relation to their imposition. The fact that the law deems the parties' pre-trial primary right–duty relationship to be worthy of being enforced indicates that the plaintiff has an *entitlement*, which courts have no discretion to deny in order to achieve other aims.¹⁷⁵ Moreover, because those primary rights are not triggered by any wrongdoing, replicative constructive trusts are not concerned with readjusting the rights of the parties in relation to the property in question; rather, they have the simple aim of restating, as closely as possible, the pre-existing relationship between the parties. Hence, little remedial discretion is exercised.

The replicative nature of these constructive trust remedies indicates that their content seeks as far as possible to mirror the content of the parties' pre-trial primary right–duty relationship. The precise content differs from doctrine to doctrine. For example, the content of the constructive trust arising in a *Black, Re Rose*, or *Wambo Coal*-type situation would be akin to a bare trust, whilst those arising in relation to the doctrines in *Rochefoucauld* or *Pallant*, or agreements to convey future property, would mirror the terms of the parties' agreement.¹⁷⁶ Therefore, it is misleading to suggest, as RP Meagher does, that 'if the constructive trust is an institution ... [it is] to that extent indistinguishable from

¹⁷³ In the contractual context, see *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association* [1966] 1 WLR 287, 341 (Diplock LJ), recently cited by the High Court in *Mann v Paterson Constructions Pty Ltd* (2019) 373 ALR 1, 54–5 [197] (Nettle, Gordon and Edelman JJ).

¹⁷⁴ John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, ed Robert Campbell (John Murray, 5th ed, 1885) 762 (emphasis in original). See also Donal Nolan and Andrew Robertson, 'Rights and Private Law' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2014) 1, 19.

¹⁷⁵ Thus, 'a primary event implies a very narrowly defined response': Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 (July) *Western Australian Law Review* 1, 14.

¹⁷⁶ See generally Daniel Reynolds, 'What Are the Duties of Constructive Trustees?' (2018) 41(4) *University of New South Wales Law Journal* 1297.

the normal express trust ... [and] the normal incidents and duties of a trusteeship apply to the constructive trustee.¹⁷⁷ Whether or not this is so depends on the type of primary right–duty relationship between the parties.

2 *Constructive Trusts with Inter Partes Discretion: Reflective Remedies*

The constructive trust remedies which arise in the context of the joint endeavour doctrine and proprietary estoppel have a looser (although by no means in-existent) relationship with the pre-trial rights which trigger them. This can be understood on the basis that these constructive trust remedies are *reflective* in nature: rather than being imposed to replicate primary rights, they aim to reflect secondary rights, which are rights which ‘arise out of violations of primary rights.’¹⁷⁸

A plaintiff obtains a secondary right to a remedy when the defendant commits or plans to commit the relevant wrong or breach. Australian cases are widely in agreement that the relevant breach in relation to the joint endeavour doctrine is the ‘retention of the contributions of one party by another in circumstances where it would be unconscionable for them to do so,’¹⁷⁹ while in relation to proprietary estoppel it is the reneging or ‘deser[tion]’¹⁸⁰ from the assumption which the defendant induced in the plaintiff.¹⁸¹ These breaches (or planned breaches) can occur in a variety of different contexts, which are affected by different factual variables. In relation to the joint endeavour doctrine, the joint endeavour may be of different lengths and types; the failure may take different forms; the contributions of the plaintiff retained by the defendant may be of different extents. In relation to proprietary estoppel, the plaintiff’s assumption and detrimental reliance, and the defendant’s role in inducing the assumption, can be of various types and degrees. The exercise of remedial discretion is therefore *essential* in order to ensure that the remedy reflects the plaintiff’s secondary rights, because there cannot be a one-size-fits-all solution. In other words, the discretion allows courts to tailor the content of the remedy to fit the severity, extent, and type of the wrong in question.

¹⁷⁷ RP Meagher, ‘Constructive Trusts: High Court Developments and Prospects’ (1988) 4(1) *Australian Bar Review* 67, 71.

¹⁷⁸ Austin (n 174) 762.

¹⁷⁹ *Payne v Rowe* (2012) 16 BPR 30869, 30895 [99] (Ball J). See also *Muschinski* (n 7) 614 (Deane J); *Baumgartner* (n 7) 148 (Mason CJ, Wilson and Deane JJ); *McKay* (n 83) [30] (Brereton J).

¹⁸⁰ *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674 (Dixon J), cited with approval in *Sidhu* (n 109) 528–9 [80] (French CJ, Kiefel, Bell and Keane JJ).

¹⁸¹ *Priestley v Priestley* [2017] NSWCA 155, [134]–[135] (Emmett JA); *Sidhu* (n 109) 522–3 [58].

However, because the function of the imposed remedy is to reflect secondary rights, the remedial discretion is hardly at large: the aim or goal of the imposed remedy is constrained by the aim or purpose of the doctrine in question¹⁸² — that is, the underlying rationale for why the law requires the correction of the effects of the defendant's wrongdoing in the first place. Australian cases are widely in agreement that the aim of the joint endeavour doctrine is to avoid one party from obtaining a windfall,¹⁸³ and the aim of proprietary estoppel is to avoid detriment.¹⁸⁴ Since these aims are designed to achieve justice *inter partes*, there is little (if any) room for third party discretion to be exercised.

If after *inter partes* discretion is exercised a constructive trust is determined to be the appropriate remedy, its proprietary effects are taken to arise from the time of the defendant's breach or planned breach.¹⁸⁵ There are two possible explanations for this phenomenon. The first is that the constructive trust arises for the first time when the court imposes it, but its proprietary effect is invariably backdated 'by virtue of some doctrine of relation back'¹⁸⁶ to the time of the defendant's breach. The second is that a constructive trust '*prima facie*' arises from the time of the breach, but that the court has discretion to reduce that award if called for at the date of judgment.¹⁸⁷ Whichever way, the plaintiff is taken not to have a 'mere equity' but an 'equitable interest',¹⁸⁸ which gives them priority over the creditors of the defendant who may have subsequently become insolvent, and which is regarded as giving rise to a claim 'to recover ... trust property' such that no limitation period applies to bar the claim.¹⁸⁹

3 *Constructive Trusts with Third Party Discretion: Transformative Remedies*

The link between right and remedy is the most fragile in relation to constructive trusts imposed over fiduciary bribes and secret commissions. When a fiduciary receives such gains, this clearly constitutes a breach of their fiduciary duties, which gives the principal a secondary right. The law's response is to impose on

¹⁸² John Gardner, 'What Is Tort Law For?' (Pt 1) (2011) 30(1) *Law and Philosophy* 1, 40.

¹⁸³ See *Henderson v Miles [No 2]* (2005) 12 BPR 23579, 23581 [19] (Young CJ in Eq).

¹⁸⁴ Liew, 'The "Prima Facie Expectation Relief" Approach' (n 96) 184–93.

¹⁸⁵ In relation to the joint endeavour doctrine, see, eg, *Clout* (n 48) [21] (Atkinson J); *Payne* (n 179) 30895 [99] (Ball J). In relation to proprietary estoppel, see, eg, *McNab* (n 106); *Mould* (n 106).

¹⁸⁶ Kevin Gray and Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 5th ed, 2009) 1235 [9.2.89]. Cf *McNab* (n 106) 344–5 [109], where Tate JA erroneously suggests that any backdating necessarily occurs arbitrarily.

¹⁸⁷ *Secretary, Department of Social Security v Agnew* (2000) 96 FCR 357, 365 [18] (Drummond, Sundberg and Marshall JJ).

¹⁸⁸ *Re Jonton Pty Ltd* [1992] 2 Qd R 105, 107 (Mackenzie J).

¹⁸⁹ *Limitation of Actions Act 1958* (Vic) s 21(1)(b), discussed in *McNab* (n 106) 355 [139].

the fiduciary a personal liability to account for those gains to the principal — that is, a reflective remedy. However, to go further to impose a *constructive trust* over those gains may not always be necessary for the purposes of deterrence.¹⁹⁰ To determine whether to impose a constructive trust, Australian courts exercise discretion to weigh the numerous other potentially competing policy *goals* or *aims* which may bear upon that decision.¹⁹¹ They do not only include those affecting justice *inter partes*, such as to avoid the fiduciary from being ‘unjustly enriched in consequence of their own wrongdoing’ and to disallow the fiduciary from ‘reap[ing] the fruits of their wrongdoing’¹⁹² (although these may well be relevant), but also include those involving a wider net of actually or potentially affected third parties, such as the need to ‘vindicat[e] and protect ... fiduciary relationships’, to ‘deter ... improper profit-making conduct’,¹⁹³ and, of course, interests of third parties affected by the constructive trust award.¹⁹⁴ As Harding writes, ‘in Australian equity at least, judges deciding whether to award a remedial constructive trust, as opposed to an account of profits, in cases where a fiduciary receives unauthorised gains must grapple with relevant reasons bearing on that decision largely unguided by determinate rules or principles.’¹⁹⁵

Therefore, where a constructive trust is imposed, it can be understood as a *transformative* remedy, in that it transforms and substantially alters the fiduciary’s and principal’s pre-trial rights and duties¹⁹⁶ by creating ‘a legal relation that significantly differs from any legal relation that existed before the court order was made.’¹⁹⁷ Thus, where a constructive trust is imposed, it alters the obligations of the fiduciary, which previously concerned properties and opportunities properly belonging *to the principal*, by extending it to cover bribes and secret commissions — gains over which the principal *had no previous entitlement*. Unsurprisingly, courts are reluctant to transform the parties’ pre-trial rights and duties unless they can be convinced that innocent parties would not be prejudiced by their doing so.¹⁹⁸

¹⁹⁰ See above n 123.

¹⁹¹ *Robins* (n 69) 302 [77] (Mason P); *Grimaldi* (n 44) 422–3 [583] (Finn, Stone and Perram JJ).

¹⁹² *Robins* (n 69) 302 [77].

¹⁹³ *Ibid.*

¹⁹⁴ *Grimaldi* (n 44) 422–3 [583].

¹⁹⁵ Matthew Harding, ‘Equity and the Rule of Law’ (2016) 132 (April) *Law Quarterly Review* 278, 289.

¹⁹⁶ Zakrzewski (n 168) 102.

¹⁹⁷ *Ibid.* 203.

¹⁹⁸ See above Parts II–IV; above n 167 and accompanying text.

The above analysis explains three important features of transformative constructive trusts more generally. First, they allow courts the greatest degree of flexibility to respond to the specific facts of particular cases. Second, it is difficult to predict in advance whether a constructive trust will be awarded in a particular case. Finally, as transformative remedies, constructive trusts which attract third party discretion have the greatest potential to cause instability and uncertainty due to their unpredictability. It follows that the imposition of such constructive trusts ought to be carefully constrained. Contrary to the High Court dicta discussed earlier, this is in fact what we find in Australia. Transformative constructive trusts arise only (or primarily) in the isolated instance of fiduciary bribes and secret commissions, where the negative effects of their unpredictability is of little consequence to fiduciaries, principals and creditors of insolvent fiduciaries: none of them had any right to those gains in the first place anyway.

V CONCLUSION

In *Bofinger*, the High Court suggested that ‘the experience of the law does not suggest debilitation by absence of a sufficiently rigid taxonomy in the application of equitable doctrines and remedies’.¹⁹⁹ The reality is, unfortunately, quite the opposite: the High Court’s unexacting dicta have thrown the law of constructive trusts in Australia into an uncomfortable state of confusion. As Ward J has lamented on more than one occasion, there is ‘no authoritative guidance’ as to what ‘unfair priority’ means or how that factors in to the exercise of remedial discretion.²⁰⁰

Fortunately, the law has not yet reached the point of no return. If ‘experience of the law’ is anything to go by, then the way in which lower courts approach constructive trusts sends two crucial messages: that remedial discretion is not (and ought not to be) invariably exercised, and that the scope for exercising third party discretion (as opposed to *inter partes* discretion) is immensely constrained.

A close examination of Australian case law demonstrates that non-discretionary, ‘institutional’ constructive trusts doctrines continue to enjoy a healthy existence, and that discretionary constructive trust doctrines usually involve only the exercise of *inter partes* discretion: third party considerations are relevant only in one specific type of case.

¹⁹⁹ *Bofinger* (n 7) 300–1 [93] (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

²⁰⁰ See, eg, *Australian Building & Technical Solutions* (n 109) 370 [165]; *Varma v Varma* (2010) 6 ASTLR 152, 261 [517]; *Australian Receivables* (n 82) 510 [121], 512 [132].

This state of affairs reveals that the relevant High Court dicta paints a misleading picture of the reality of Australian law. Reflecting on this realisation, this article has suggested, first, that the relevant High Court dicta may not be 'considered *dicta*' such that they attract an obligation on the part of lower courts to follow them; second, that the distinction between 'institutional' and 'remedial' constructive trusts remains useful in Australia, but can be refined by distinguishing between *inter partes* discretion and third party discretion in order better to reflect the reality of the law; and third, that the relationship between right and remedy is much more nuanced than usually assumed: constructive trusts either replicate, reflect, or transform pre-trial rights and duties.