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THE HIGH COURT'S CONSTRUCTIVE TRUST TRICENARIAN:

ITS LEGACY FROM 1985–2015

Abstract

The last 30 years or so has witnessed the High Court of Australia devote more of its energies to the constructive trust than in the preceding 80 years since its inception. As 2015 represents the Court's tricenarian since its judgment in *Muschinski v Dodds*, in which Deane J enunciated what remains essentially the only probing analysis of the nature of the constructive trust in High Court jurisprudence, this article seeks to inquire into the progeny of his Honour's analysis.

I Justifying the Focus

In an article published in volume 36(1) of the *Adelaide Law Review* in 2015, I sought to catalogue the developments in the law of express and resulting trusts in the High Court of Australia over the span of the 30 years, culminating in 2014. That article identified various themes emerging from judgments of the Court in that time.

High Court authority was examined for the obvious reason that the ratio decidendi of High Court decisions (and, it seems, also its 'considered dicta')[1] determine Australian law, including the law of trusts. While not downplaying the weight given to decisions of state and territory appellate courts, and those of the Full Court of the Federal Court of Australia, these courts must yield, in approaching the general law of trusts, to the High Court. And it follows that anything other than incremental steps in the development of the general law are to remain its sole domain.

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1 The Court so declared in a case involving constructive trusts in the context of 'recipient liability': *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 148–59 [130]–[158] ('*Farah Constructions*') (where the Full Court chastised the New South Wales Court of Appeal for propounding an unjust enrichment analysis of recipient liability in place of the accepted approach grounded in inquiry into knowledge; see Part IV.D).

Beyond mere expediency, the 30-year period straddling 1984 to 2014 was selected for the earlier article for various reasons. Reference was made to the introduction in 1984 of s 35A of the *Judiciary Act 1903* (Cth), which prescribed criteria for the grant of special leave to appeal to the High Court. Since 1984 the only (trusts) cases heard by the Court are those that, in the language of s 35A, involve a question of law that is either of 'public importance' or in respect of which there is a need to resolve differences of opinion between lower courts or the judges therein, and the 'interests of the administration of justice' require its consideration. In other words, the appeal must warrant the leadership of the peak court in the hierarchy. In turn, the trusts case law within the last 30 years or so should, at least in theory, target areas greatest in need of this leadership.

The article also noted that the alignment of a 30-year time frame with the time span of a single generation may reveal a sufficient breadth of generational thinking. Speaking of generations, it also equated to approximately twice the average tenure of a High Court judge since the Court was constituted,[2] and three times the average tenure of its Chief Justice.[3] It may well be reasonable, as a result, to expect a breadth of judicial opinion in a time frame within which on average the court has twice altered its constitution and been under the stewardship of three Chief Justices.

Given the generality of the above remarks, they remain extant when speaking of the law governing constructive trusts. The passage of a year, however, dictates a focus on the 30-year time frame between 1985 and 2015. Charting High Court authority from 1985 can, in any case, evince an independent justification. That year saw the Court decide *Muschinski v Dodds*,[4] a case that proved seminal in the recognition of the so-called 'remedial constructive trust' in Australian law. The crucial judgment was that of Deane J, whose reasons remain the only concerted effort within the High Court — not merely within the last three decades, but in the history of the Court itself — to probe the jurisprudential nature of the constructive trust in Australian law. This explains why the substance of this article commences with a review of Deane J's observations as to the nature and function of the constructive trust. Against the backdrop of these observations, the article investigates the extent to which Deane J's conceptualisation of the constructive trust has proven influential in the development of the constructive trust in Australian law.

There is another reason why the immediately preceding 30 years present as a fitting time frame within which to analyse that development. A search of High Court cases in which the expression 'constructive trust' appears in the catchwords of the Commonwealth

2 Calculated in 2014 on the basis of non-currently sitting High Court judges since the institution of the court, namely 38 judges, equating to approximately 15.2 years average tenure.

3 Calculated in 2014 on the basis of non-currently sitting High Court Chief Justices since the institution of the court, namely 11 judges, equating to approximately 10.5 years average tenure.

4 (1985) 160 CLR 583.

Law Reports reveals nine cases since 1985.[5] If one 'cheats' just a little, and includes 1984, the number increases to eleven.[6] One of those 1984 cases, *Chan v Zacharia*,[7] is significant, in part because it represented Deane J's entry into constructive trusts jurisprudence within the High Court. It is apt to be read in tandem with his Honour's (expanded) views in the ensuing year in *Muschinski v Dodds*. Nor can the remarks of Mason J, dissenting in *Hospital Products*[8] four months after *Chan v Zacharia*, be overlooked as they paralleled concepts espoused by Deane J in *Chan v Zacharia*.

It follows that the constructive trust has seen exposure in the High Court not infrequently within the last 30 (or so) years. Perhaps more telling, however, is that between the date of its first sitting on 6 October 1903 and June 1984 (when *Chan v Zacharia* was decided) — some 81 years — the expression 'constructive trust' was a much less frequent visitor before the High Court. A brief catalogue of its appearances reveals either peripheral remarks or otherwise quite specific applications of the constructive trust concept, the latter invariably proceeding more by way of assumption than analysis.

Its earliest appearance, found six years into the Court's tenure in *Nicholson v Gander*,[9] was against the backdrop of fiduciary issues within a mining syndicate. Yet two of the three judges made no mention of the constructive trust.[10] One openly conceded that '[t]here is no question of law involved in the case', which 'depends entirely upon the proper inference to be drawn from the facts proved'.[11] And the remarks of the third judge contain little that genuinely survey the nature of the constructive trust, whether in the particular context or more generally.[12]

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5 Namely, in chronological order, *Muschinski v Dodds* (1985) 160 CLR 583; *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371; *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 ('*Bathurst City Council*'); *Giumelli v Giumelli* (1999) 196 CLR 101 ('*Giumelli*'); *Halloran v Minister Administering National Parks and Wildlife Act 1974* (2006) 229 CLR 545 (further reference to this case is omitted in this article because the judgments contain little in principle directed to the general law of constructive trusts); *Farah Constructions* (2007) 230 CLR 89; *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 ('*John Alexander's Clubs*'). Though the catchwords in *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 make no mention of the constructive trust, three of the five judges addressed the constructive trust as a vehicle to give effect to an acknowledgement of a third party's contractual right to repurchase land. Reference is accordingly made of *Bahr v Nicolay [No 2]* in the article, albeit by way of footnote.

6 Namely, in chronological order, *Chan v Zacharia* (1984) 154 CLR 178; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 ('*Hospital Products*').

7 (1984) 154 CLR 178.

8 (1984) 156 CLR 41.

9 (1909) 8 CLR 648.

10 Per Griffith CJ and O'Connor J.

11 *Nicholson v Gander* (1909) 8 CLR 648, 664 (O'Connor J).

12 Ibid 668–70 (Higgins J).

Nor can much be gleaned, to this end, in two other cases in which 'constructive trust' appears in the catchwords. In the Court's 1980 decision in *Everett v Federal Commissioner of Taxation*,[13] that appearance is belied by its absence in the actual reasons of the Court. The same may be said of the Privy Council's advice in *Stuart v Kingston*,[14] reported in the Commonwealth Law Reports in 1924. While the several judgments of the High Court that prompted the appeal to the Privy Council did make reference to the 'constructive trust', this was primarily in the context of its use in real property legislation.[15] What is, in any case, telling regarding the (in)significance of the decision — at least so far as constructive trusts jurisprudence is concerned — is evident from the fact that the author of the headnotes omitted any reference to the constructive trust. In a later case also involving constructive trusts against a statutory backdrop, *Mayne v Public Trustee*,[16] the headnoter did likewise.

In effect, pre-1984 saw the High Court address the application of the constructive trust on only two occasions. The first of these, its venerable 1937 decision in *Birmingham v Renfrew*,[17] targeted the constructive trust as a vehicle for a third party to enforce an inter vivos promise — contained in a mutual will — as to future testamentary dispositions. The case remains the only High Court authority directly on this specific point and contributes relatively little to broader constructive trusts jurisprudence. There the constructive trust was assumed by each judge more as a matter of course than any product of principled analysis. In any case, reasons in principle exist to argue that a mutual will should be seen as enforceable by way of an express (rather than a constructive) trust.[18] It rests, after all, on an expression of (usually inferred) intention stemming from an agreement between will-makers.

The remaining pre-1984 High Court decision to consider the constructive trust was *Consul Development Pty Ltd v DPC Estates Pty Ltd*.[19] Prior the Court's 2007 decision in *Farah Constructions*,[20] *Consul Development* represented the Court's only substantive foray into the law of constructive trusts in its application to render third parties liable to account to, or compensate, a person against whom fiduciary obligations had been breached. Yet apart from highlighting the breadth of the concept of accessory liability (to encompass knowing assistance in not merely breaches of trust, but breaches of fiduciary duty more broadly) and addressing the 'knowledge threshold' for accessory liability, the judgments do little more than assume the aptness of constructive trusteeship in this context, lacking a more sophisticated inquiry into its juridical nature. Indeed, even the four majority judgments did not entirely speak

13 (1980) 143 CLR 440.

14 (1924) 34 CLR 394.

15 *Stuart v Kingston* (1923) 32 CLR 309.

16 (1945) 70 CLR 395 (in the context of limitations legislation).

17 (1937) 57 CLR 666.

18 See Gino E Dal Pont, 'Equity's Chameleon — Unmasking the Constructive Trust' (1997) 16 *Australian Bar Review* 46, 76–8.

19 (1975) 132 CLR 373 ('*Consul Development*').

20 (2007) 230 CLR 89.

with one voice regarding these matters. As foreshadowed above, in any event, the High Court seized the opportunity (upon 'provocation' by the New South Wales Court of Appeal) to revisit various aspects of third party liability via constructive trusteeship in its 2007 judgment in *Farah Constructions*.

II Justice Deane's Constructive Trusts Jurisprudence

A *Distinguishing the Constructive Trust*

In approaching Deane J's explanation in *Muschinski v Dodds* of the juridical nature of the constructive trust, it is important at the outset to appreciate what the constructive trust *is not*. Stated comprehensively, the constructive trust has no role in inhabiting the same sphere as, or otherwise mimicking, the express trust or resulting trust. The very fact of identifying a 'constructive trust' suggests it to be qualitatively distinct from both an 'express trust' and a 'resulting trust'.

It is chiefly how each of these trusts comes into being that justifies their discrete nomenclature. What marks a trust as 'express' is its creation pursuant to the express or inferred intention of a settlor (whether or not in tandem with that of the intended trustee).[21]

What brands a trust as 'resulting' is a presumption or implication as to intention the law makes in a particular type of transaction, wherein a gap in beneficial ownership is filled by recognising trusteeship over property. But any presumed or implied intention in this regard must yield to inconsistent actual or inferred intention.

It stands to reason that constructive trusts, to retain their jurisprudential uniqueness (and thus justification), must derive other than from an inquiry into express or inferred intention,[22] or from a (rebuttable) presumption or implication as to intention

21 Cf the potentially misleading reference to 'imputing' an intention, under the guise of an express trust, by French CJ in the High Court's most recent foray into express trusts: *Korda v Australian Executor Trustees (SA) Ltd* (2015) 317 ALR 225, 228 [3], 229 [8], 231 [11]. Ultimately, though, aside from the fact that the other judges in the case eschewed the language of imputation, the fact that each judge, including French CJ, was unwilling to 'impute' an intention in the circumstances speaks against any true role for imputation of intention in the law of express trusts.

22 Australian law's recognition, and application, of the so-called 'common intention constructive trust' (see, eg, *Parsons v McBain* (2001) 109 FCR 120) arguably represents a misuse of terminology, deriving from a time preceding the development, in *Muschinski v Dodds* (1985) 160 CLR 583, of the 'remedial constructive trust'. Although the seminal Australian case on the common intention constructive trust, *Allen v Snyder* [1977] 2 NSWLR 685, saw mention in the reasons of the plurality in *Baumgartner v Baumgartner* (1987) 164 CLR 137, 144–7 (Mason CJ, Wilson and Deane JJ), their Honours gave no unqualified endorsement to the concept. Moreover, whatever the nature of the common intention constructive trust, its tendency to converge with notions of equitable estoppel speaks against its use as a remedy (see IV.B), contrary to the understanding of the nature of the constructive trust espoused by Deane J in *Muschinski v Dodds*.

made by law. Hence the frequent reference to constructive trusts being 'imposed' independent of express, inferred or presumed intention. Outside of an inquiry into actual or inferred intention, or into (particular) forms of transaction in which the law presumes an intention to separate legal and beneficial ownership, the law must necessarily take steps to identify those circumstances that justify the *imposition* of a constructive trust and explain what is meant by 'imposition' in this context.

While the judgment of Deane J in *Muschinski v Dodds* provides some inkling to this end, as a preliminary aside it is curious to note that, of the other four judges in *Muschinski v Dodds*, only Mason J (in a short concurring judgment) agreed with Deane J's approach. As the only other judge in the majority, Gibbs CJ adopted an analysis divorced from constructive trusts (and not the subject of argument before the High Court or the lower courts in the case)[23] to grant the appellant relief. Although the Chief Justice ultimately sided with the order propounded by Deane J, it could not be said that Deane J's observations on the nature of the constructive trust necessarily represented a majority view within the High Court of the day.[24]

B *Targeting the Remedial Characteristic*

After noting that the nature and function of the constructive trust had been the subject of considerable discussion throughout the common law world for decades, Deane J took aim at disputing factions who tended to polarise the discussion by referring to the competing rallying points of 'remedy' and 'institution'. The perceived dichotomy between those two catchwords, he opined, was 'largely … the consequence of lack of definition', noting that, '[i]n a broad sense, the constructive trust is *both* an institution and a remedy of the law of equity'.[25] Within the ensuing three pages of the judgment, his Honour proceeded to explain how the constructive trust straddles the (alleged) institutional–remedial divide, commencing with the following remarks targeting its remedial origin:

> As a remedy, [the constructive trust] can only properly be understood in the context of the history and the persisting distinctness of the principles of equity that enlighten and control the common law. The use or trust of equity, like equity itself, was essentially remedial in its origins. In its basic form it was imposed,

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23 The Chief Justice reasoned that, as the litigants were made by the contract jointly and severally liable to pay the price for the purchase of the property in dispute, they were under a common obligation to pay the debt, and so 'the case therefore fell within the general principle applicable both in law and equity which obliged them to bear the burden equally with the consequence that if one discharged more than his or her proper share he or she could call upon the other for contribution': *Muschinski v Dodds* (1985) 160 CLR 583, 596.

24 The minority, Brennan J (with whom Dawson J agreed), characterised the facts as involving a conditional gift, which potentially gave rise to a claim for compensation. But because the plaintiff asserted a proprietary (as opposed to a personal) right, the facts so characterised undermined the claim: *Muschinski v Dodds* (1985) 160 CLR 583, 607.

25 *Muschinski v Dodds* (1985) 160 CLR 583, 613 (emphasis added).

> as a personal obligation attaching to property, to enforce the equitable principle that a legal owner should not be permitted to use his common law rights as owner to abuse or subvert the intention which underlay his acquisition and possession of those rights. This was consistent with the traditional concern of equity with substance rather than form. In time, the relationships in which the trust was recognized and enforced to protect actual or presumed intention became standardized and were accepted into conveyancing practice (particularly in relation to settlements) and property law as the equitable institutions of the express and implied (including resulting) trust. Like express and implied trusts, the constructive trust developed as a remedial relationship superimposed upon common law rights by order of the Chancery Court.[26]

Justice Deane was evidently seeking to legitimise the 'remedial' aspect of the constructive trust by aligning it to the 'remedial origins' of express and resulting trusts. It is true that the express trust, as it developed as part of equity's arsenal, sought to mitigate certain rigours of the common law by giving the 'beneficiary' standing to enforce an obligation (and thus relief) that the common law courts did not recognise. In this sense, the express trust (and perhaps to some extent the resulting trust) had a 'remedial' genesis. But the reference to the express or resulting trust as a 'remedy' is arguably misleading; while the recognition of the trust, and the obligations thereunder, provided an avenue (or trigger) to secure a remedy, the trust itself was historically not the remedy. The 'remedial' constructive trust Deane J sought to espouse performs its primary role as a remedy, not as an avenue (or trigger) to secure relief.

The constructive trust, so historically conceived, therefore differs in nature from express and resulting trusts. Justice Deane accepted this to be so, noting that unlike other forms of trust, the constructive trust 'arises regardless of intention', its rationale being 'found essentially in its remedial function'.[27] But in an attempt to bring the constructive trust into the broader trusts fold, and to highlight an aspect of the 'institutional' descriptor in this context, his Honour then noted that the constructive trust 'shares … some of the institutionalized features of express and [resulting] trust', namely the 'staple ingredients' of subject matter, trustee, beneficiary and personal obligation attaching to the property.[28] This in turn prompted the observation that

> the constructive trust can properly be described as a *remedial institution* which equity imposes regardless of actual or presumed agreement or intention (and subsequently protects) to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle.[29]

26 Ibid.

27 Ibid.

28 Ibid 613–14.

29 Ibid 614 (emphasis added).

C *Converging the Institutional within the Remedial*

Justice Deane noted another aspect in which ostensibly competing 'institutional' and 'remedial' notions had populated the constructive trusts literature. The catchword 'institution' could be understood, to this end, as 'connoting a relationship which arises and exists under the law independently of any order of a court'.[30] The catchword 'remedy', conversely, could refer to the actual establishment of a relationship by such an order. His Honour, though conceding that these 'catchwords…do serve the function of highlighting a conceptual problem that persists about the true nature of a constructive trust',[31] branded any perceived dichotomy as ephemeral upon closer examination, reasoning as follows:

> Equity acts consistently and in accordance with principle. 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'. Indeed, for the student of equity, there can be no true dichotomy between the two notions.[32]

In other words, characterising the constructive trust as a remedy does not function to confine its operation to occasions where, like the ordinary concept of a remedy, the court, within its jurisdiction, 'creates' and/or 'imposes' the remedy. The court can simply *recognise and enforce* the constructive trust that has already arisen. There is no true dichotomy, as Deane J noted, as in each instance the constructive trust remains a remedy,[33] albeit that in one the court *creates* it whereas in another its prior existence is *recognised by* court order.

D *Constructive Trust Grounded in Inquiry into Conduct*

To the significant extent that equity operates on the conscience of an individual litigant, it stands to reason that the trigger for constructive trust relief is certain *conduct* by the defendant. Justice Deane, as noted earlier, spoke in terms of conduct — namely 'the retention or assertion of beneficial ownership of property' — that is 'contrary to equitable principle' as the relevant trigger.[34] The very breadth of

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30 Ibid.

31 Ibid.

32 Ibid.

33 Hence the underlying argument in the polemic piece (Dal Pont, above n 18) that all 'true' constructive trusts should be viewed as remedies.

34 *Muschinski v Dodds* (1985) 160 CLR 583, 614.

the latter descriptor no doubt served as a means of encompassing both conduct that attracts the constructive trust independent of a court order[35] and conduct that in itself motivates the court to create the trust by way of remedy. But that very breadth works against its principled application in each scenario. This in turn explains, as illustrated in High Court case law, why the 'institutional' constructive trust has been recognised most frequently against the backdrop of conduct amounting to a breach of fiduciary duty.[36] It is important to appreciate, in this regard, that a fiduciary breach may *or may not* involve unconscionable conduct as understood in equity.

Conversely, lacking a fiduciary foundation, the 'remedial' constructive trust has, deriving primarily from Deane J in *Muschinski v Dodds*, been imposed to prevent 'unconscionable' conduct. In the immediate factual context before the Court in *Muschinski v Dodds* — involving the division of property upon the breakdown of a de facto relationship, since addressed by way of statutorily conferred discretion — Deane J explained the relevant principle underscoring the 'remedial' constructive trust as follows:

> 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 … equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do …[37]

It therefore proved no surprise that, two years later when another property dispute between former de facto parties came before the Court in *Baumgartner v Baumgartner*,[38] Deane J would join in a judgment (with Mason CJ) endorsing the above

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35 In the quote extracted in the text, Deane J observed that 'there does not need to have been a curial declaration or order before equity will recognize the prior existence of a constructive trust': *Muschinski v Dodds* (1985) 160 CLR 583, 614. It is curious that his Honour spoke of equity recognising the 'prior' existence of a constructive trust. On the assumption that its existence is not premised upon a curial declaration or order, presumably equity — as in the principles of equity as opposed to the court recognising and enforcing those principles — would recognise the trust as soon as the circumstances in which it arose transpired. The word 'prior', in this regard, would therefore be superfluous, unless Deane J had something else in mind, perhaps a closer temporal alignment between equity recognising the trust and the court enforcing it.

36 Indeed, later in his reasons Deane J noted that '[t]he principal operation of the constructive trust in the law of this country has been in the area of breach of fiduciary duty', but rejected the view that the constructive trust is confined to cases where some pre-existing fiduciary relationship can be identified: *Muschinski v Dodds* (1985) 160 CLR 583, 616.

37 Ibid 620 (citations omitted).

38 (1987) 164 CLR 137.

proposition.[39] As unconscionable conduct is not, as noted above, any prerequisite for a fiduciary breach, there clearly remain discrete areas of operation for 'institutional' constructive trusts on the one hand and 'remedial' constructive trusts on the other.

E *Role for Curial Discretion*

There also remains scope for distinctions as to the temporal application of the constructive trust, depending on whether the trust is 'institutional' or 'remedial'. This may assume practical relevance,[40] as questions of priority where property interests are involved are often influenced by questions of timing. Timing may, for instance, also prove crucial in the context of insolvency, taxability and standing to lodge a caveat. Prima facie, the court's recognition of the prior existence of a constructive trust dictates that the trust operates from the moment that the relevant conduct triggered its existence. Conversely, the remedial constructive trust, imposed as it is by the court following a finding of unconscionable conduct vis-a-vis an interest in property, like other remedies should in theory take effect from the date of the court's order.

That High Court judges do not always agree as to whether a particular factual scenario is best explained as an institutional constructive trust, or instead a remedial constructive trust,[41] does not render the above distinctions irrelevant in practice. Without

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39 Ibid 147–8 (Mason CJ, Wilson and Deane JJ) (speaking in terms of 'the foundation for the imposition of a constructive trust in situations of the kind mentioned is that a refusal to recognize the existence of the equitable interest amounts to unconscionable conduct and that the trust is imposed as a remedy to circumvent that unconscionable conduct': at 147). See also 156–7 (Gaudron J). Cf 152–4 (Toohey J) (favouring an approach grounded in unjust enrichment).

40 See Gino E Dal Pont, 'Timing, Insolvency and the Constructive Trust' (2004) 24 *Australian Bar Review* 262.

41 See, eg, *Bahr v Nicolay [No 2]* (1988) 164 CLR 604. In a case where C, in a contract to purchase land from B, acknowledged A's contractual right to repurchase the property from B, the privity issues with enforcing A's claim against C were addressed by each member of the court via the law of trusts. Mason CJ and Dawson J, in a joint judgment, adopted the express trust, evincing a willingness to infer an intention to create a trust to protect A's interest. The remaining judges, presumably unwilling to make such an inference, grounded their intervention by reference to the constructive trust. Wilson and Toohey JJ ruled that by taking a transfer with the said acknowledgement, C became subject to a constructive trust in favour of A: at 638. This assumes that the constructive trust arose at the time of the transfer, and was thus independent of a court order (that is, it was 'institutional' in nature). Brennan J, conversely, reasoned that should C repudiate A's right to repurchase, 'equity imposes a constructive trust so that [C] holds his title on trust for [A] to the extent of [A's] interest': at 655. This assumes the imposition of the constructive trust by the court premised upon proof of unconscionable conduct (and thus 'remedial'), Brennan J opining earlier in his judgment that 'the fraud which attracts the intervention of equity consists in the unconscionable attempt by the registered proprietor to deny the unregistered interest to which he has undertaken to subject his registered title': at 654. Though nothing turned on this distinction on the facts before the court, it may well have been otherwise had another party secured an interest in the land in the intervening period.

the cover of judicial discretion, they could conspire to undermine Deane J's attempt to converge constructive trust jurisprudence under a broader remedial banner. It is regrettable then that his Honour did not elaborate the role of judicial discretion in the recognition, imposition and timing of the relevant constructive trust.

Justice Deane did not, however, entirely overlook questions of judicial discretion. So far as timing was concerned, his Honour accepted that

> 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*.[42]

This presupposes some exercise of judicial discretion. And he described the constructive trust 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'.[43] Again, the reference to equity 'moulding' and 'adjusting' the remedy is premised upon some judicial discretion.

But Deane J's chief concern, in implicitly countenancing judicial discretion, was to disclaim any notion of constructive trusts, of whatever variety, being grounded in little short of appeals to fairness.[44] In remarks frequently cited, his Honour emphasised that

> [t]he fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles … [45]

In particular, his Honour stressed that rights in property, including those impacted upon by constructive trusts, must 'fall to be governed by principles of law and not by some mix of judicial discretion'.[46] Critically, these remarks do not serve to outright

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42 *Muschinski v Dodds* (1985) 160 CLR 583, 615 (emphasis added). In his order, Deane J declared 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': at 623.

43 Ibid 615.

44 Cf Brennan J, dissenting, remarking that '[t]he flexible remedy of the constructive trust is not so formless as to place proprietary rights in the discretionary disposition of a court acting according to vague notions of what is fair', before characterising the argument for a constructive trust on the facts as no more than 'a plea for the return of the interest given on the grounds of fairness': *Muschinski v Dodds* (1985) 160 CLR 583, 608, 609.

45 Ibid 615 (citations omitted).

46 Ibid 616.

deny a role for judicial discretion in granting a remedy under the banner of the constructive trust, whether or not property interests are involved, but to circumscribe the exercise of that discretion by legal principle and associated legal reasoning. This description, in any case, reflects what has ordinarily been understood as the exercise of a 'judicial discretion'.[47] The foregoing is not to deny that identifying *where* unfair conduct translates along the continuum of behaviour to that which is unconscionable remains shrouded in degree. This Deane J conceded, noting that 'general notions of fairness and justice … remain relevant to the traditional equitable notion of unconscionable conduct which persists as an operative component of some fundamental rules or principles of modern equity'.[48]

III Backdrop to Deane J in *Muschinski v Dodds*

Explicit in Deane J's exposition is that the constructive trust, in its main forms, has a distinct remedial flavour. It is a remedy attracted by reason of certain types of conduct upon which equity frowns, chiefly breaches of fiduciary duty and unconscionable conduct. And while careful to refute (in the law of constructive trusts) the exercise of unbridled judicial discretion, his Honour hardly constrained his views by reference to inflexible outcomes. That he perceived a need to dispel discretion grounded in mere fairness itself is testament to the recognition of a judicial discretion, albeit of a principled kind.

Once, therefore, it is accepted that the constructive trust — whether against the backdrop of a breach of fiduciary duty or stemming from a finding of unconscionable conduct in relation to property — is potentially available to be recognised or imposed as a remedy, the question then turns to what, as a matter of principle, may impact upon how and whether that remedy will issue. Inklings into this preceded Deane J's reasons in *Muschinski v Dodds*, in the two 1984 decisions of the Court discussed immediately below, as well as in subsequent High Court decisions on constructive trusts, a discussion of which forms the substance of the remainder of the paper.

A *Chan v Zacharia*

As noted earlier, though the High Court's decision in *Chan v Zacharia*[49] marginally falls outside the chosen 30 year time frame, there is reason for 'cheating' a little given its backdrop to Deane J's remarks on the nature of the constructive trust in *Muschinski v Dodds* the ensuing year. Unlike *Muschinski v Dodds*, moreover, *Chan v Zacharia* involved a constructive trust of an 'institutional' variety, stemming from a partner's breach of fiduciary duty to a fellow partner in personally securing the renewal of a lease rather than as an asset of the partnership in the course of its winding up. The primary issue was whether fiduciary duties inherent in partnership

47 On the broader concept of 'judicial discretion' see Ronald Dworkin, 'Judicial Discretion' (1963) 60 *Journal of Philosophy* 624.

48 *Muschinski v Dodds* (1985) 160 CLR 583, 616.

49 (1984) 154 CLR 178.

persisted for the purposes of its winding up, and so the Court's remarks on constructive trusteeship were a segue to a finding that those duties indeed did. In delivering the leading judgment, in which Brennan and Dawson JJ concurred,[50] Deane J made the following remarks pertaining to the relationship between fiduciary breaches and the constructive trust:

> Stated comprehensively in terms of the liability to account, the principle of equity is that a person who is under a fiduciary obligation must account to the person to whom the obligation is owed for any benefit or gain (i) which has been obtained or received in circumstances where a conflict or significant possibility of conflict existed between his fiduciary duty and his personal interest in the pursuit or possible receipt of such a benefit or gain or (ii) which was obtained or received by use or by reason of his fiduciary position or of opportunity or knowledge resulting from it. *Any such benefit or gain is held by the fiduciary as constructive trustee* … That constructive trust arises from the fact that a personal benefit or gain has been so obtained or received and it is immaterial that there was no absence of good faith or damage to the person to whom the fiduciary obligation was owed.[51]

Several observations can be made regarding this extract. First, Deane J locates the relevant trigger for the constructive trusteeship under the banner of a fiduciary breach, whether the benefit or gain stems from a yielding to a conflict between interest and duty, or otherwise from a misuse of position or opportunity derived therefrom. Secondly, that trigger is not, in this context, premised upon proof of unconscionable conduct; there can hardly, it seems, be unconscionable conduct in the presence of good faith. The fiduciary breach is sufficient to this end. Thirdly, having identified a fiduciary breach as the cause of action, constructive trusteeship is evidently the remedy to rectify the breach. Fourthly, his Honour's language aligns with the notion that here constructive trusteeship arises as a matter of law once the illegitimate benefit or gain is made, and thus independently of a court order. This, as mentioned earlier, dictates that the court *recognises* rather than creates the constructive trust, and that accordingly the timing of the relevant obligation thereunder antedates any court order.

What is perhaps most striking about Deane J's observations is the ostensibly unyielding link between fiduciary breach and constructive trusteeship. His Honour declared that any such benefit or gain derived in fiduciary breach 'is' held by the fiduciary as constructive trustee. The causal connection is expressed categorically; the language is imperative ('is') rather than, say, 'may be'.

But this is not entirely how it appears, in two main ways. First, constructive trusteeship in these circumstances is not an invariable outcome. Any 'presumption' that the gain or benefit is held as constructive trustee, as Deane J and Gibbs CJ in *Chan v Zacharia* explained, is rebuttable.[52] The relevant liability to account will not, for

50 Ibid 186 (Brennan J), 206 (Dawson J).

51 Ibid 199 (emphasis added) (citations omitted).

52 Ibid 181 (Gibbs CJ), 204 (Deane J).

instance, arise where what would otherwise have constituted the fiduciary breach was authorised by the principal. It may alternatively be lost by the operation of other equitable doctrines, such as laches or estoppel.

Secondly, it is instructive to note that Deane J spoke of the benefit or gain being held 'as constructive trustee', not 'on constructive trust'. At first glance this appears to be a distinction without a difference; after all, it could be reasoned that a person upon whom a constructive trust is imposed is, by definition, a constructive trustee. Indeed, this is true. Yet by the terminology 'as constructive trustee', when placed in the context of 'the liability to account', it is probable that Deane J intended to convey the notion that the fiduciary's liability is one akin to that of a trustee (under an express trust). The primary liability of the latter is a *personal* one to account to the beneficiaries for any gains or benefits secured in breach of trust. It may well be that Deane J thereby sought to counter any view that constructive trusteeship *necessarily* involves liability of a proprietary character. Read in tandem with his Honour's remarks in *Muschinski v Dodds*, it appears that his concern with avoiding 'idiosyncratic notions of justice and fairness' targeted constructive trusteeship with proprietary consequences.

The constructive trust, therefore, is not invariably premised (like the usual express trust and the resulting trust) upon a dichotomy between legal and beneficial ownership in property. Being primarily remedial in character, as Deane J reasoned in *Muschinski v Dodds*, like most other legal and equitable remedies it is directed at securing an outcome triggered by a cause of action. That outcome may involve a re-vesting of property, but it may just as easily (and perhaps more commonly) involve an order against the person to pay a monetary sum. Its remedial flavour should make it unsurprising, to this end, that the constructive trust can be utilised to secure personal accountability.

B *Hospital Products*

This same view inhered in the reasons of Mason and Deane JJ later in 1984 in *Hospital Products*.[53] The case involved, inter alia, the issue of whether a distributorship contract attracted fiduciary duties in the distributor to the manufacturer, such as to justify the court granting equitable relief in the form of an account of profits or a constructive trust, rather than being confined to awarding damages for a contractual breach.

As Mason and Deane JJ, in separate judgments, recognised some fiduciary obligations as between the contracting parties (and dissented in so doing), they were compelled to address the scope for constructive trusteeship arising out of fiduciary breaches. In this context, Mason J reiterated the principle Deane J had stated in *Chan v Zacharia*, extracted earlier, albeit without attribution. He similarly concluded that '[a]ny profit or benefit obtained by a fiduciary in either of the two situations [so] described is held by him as a constructive trustee',[54] and that the

53 (1984) 156 CLR 41.

54 Ibid 107.

fiduciary 'must account for it and in equity the appropriate remedy is by means of a constructive trust'.[55]

Justice Mason added that, in determining the scope of the relevant remedy, 'the form of inquiry to be directed is that which will reflect as accurately as possible the true measure of the profit or benefit obtained by the fiduciary in breach of his duty'.[56] Though accepting that occasions 'to do justice by making available relief in specie through the constructive trust'[57] may arise out of a fiduciary breach,[58] on the facts his Honour was unwilling to accept that relief in specie — whereby the manufacturer could claim the competing business illegitimately established by the distributor as the beneficiary of a constructive trust — accurately represented the measure of the profit or benefit obtained by the distributor in breach of fiduciary duty.[59] Instead his Honour restored the orders of the trial judge, McLelland J, who had issued an account of profits (or, at the election of the manufacturer, equitable compensation).[60] Justice Deane, in a briefer treatment of the issue, agreed that the manufacturer was entitled to an order that the distributor account, as constructive trustee, for any profits it derived in breach of fiduciary duty.[61]

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55 Ibid 108.

56 Ibid 110.

57 Ibid 100.

58 His Honour cited *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488 as an example: *Hospital Products* (1984) 156 CLR 41, 115–16.

59 Ibid 114 (noting that the claim for a constructive trust of all the assets of company illegitimately established by the distributor (HPI) 'ranges far beyond the profits and benefits obtained by HPI in breach of its fiduciary duty' because it 'fails to make any allowance for the contribution in time, effort and finance made by HPI to the acquisition and creation of [its] assets' and it 'would be to debar HPI from competing with [the manufacturer] in the United States market, notwithstanding that the contract between the parties contained no such embargo during the currency of the contract or after its termination').

60 *United States Surgical Corporation v Hospital Products International Ltd* [1982] 2 NSWLR 766.

61 *Hospital Products* (1984) 156 CLR 41, 124. Justice Deane, however, envisaged that the plaintiff was entitled to a declaration that the defendant:

> was liable to account as a constructive trustee for the profits of that Australian business in accordance with the principles under which a constructive trust may be imposed as the appropriate form of equitable relief in circumstances where a person could not in good conscience retain for himself a benefit, or the proceeds of a benefit, which he has appropriated to himself in breach of his contractual or other legal or equitable obligations to another (125).

As this particular aspect of the matter was not explored in argument and a majority of the Court found no basis for a constructive trust, his Honour deferred 'until some subsequent occasion a more precise identification of the principles governing the imposition of a constructive trust in such circumstances': at 125. That occasion never transpired, and the notion that mere contractual breaches could form a foundation for constructive trusteeship has not seen subsequent endorsement.

That Mason J, as well as Deane J, was willing to countenance a personal remedy, while concurrently endorsing the proposition that profits gained in fiduciary breach are held as constructive trustee, discloses an alignment between constructive trusteeship and relief of a non-proprietary nature. In so doing it reveals an underlying discretion within the court, including under the banner of constructive trusteeship, as to *form and extent* of relief. It thus speaks against fixed rules in equating and quantifying relief in this context.

IV Upshot of the Constructive Trust as a Remedy

It stands to reason that the critical aspect emanating from Deane J's jurisprudence, with support from Mason J, is that the constructive trust is a remedy, which like other equitable remedies is punctuated by judicial discretion. The latter is essential because, consistent with equitable relief more generally, its availability is premised upon inquiry into the conduct of the defendant and, as elaborated below, may need to yield to alternative forms of relief, in particular where the interests of innocent third parties may be prejudiced. The remedial focus, grounded in judicial discretion informed by the defendant's conduct, is likewise reflected below by reference to the relationship between the constructive trust and equitable estoppel, and the constructive trust's application in accessory and recipient liability scenarios.

A *Constructive Trust Relief Not 'Automatic'*

The need for flexibility and discretion — which inheres in the broader ideal of (equitable) relief 'doing justice' in the circumstances — dictates that a constructive trust is not an 'automatic' remedy when a fiduciary breach or unconscionable conduct is shown. Other remedies may suffice. Nor does the curial inquiry to this end need to be constrained by the interests of the litigants before the court. In 1986 Gibbs CJ in *Daly v Sydney Stock Exchange Ltd*,[62] where the Court ruled that a stockbroking firm breached its fiduciary duty by accepting a deposit of client moneys without disclosing its parlous financial position, uttered the following remarks as to the constructive trust as a remedy for this breach:

> the demands of justice and good conscience could have been satisfied without the creation of a constructive trust. In deciding whether or not the money should be held to have been subject to a constructive trust it is not unimportant that the ordinary legal remedy of a creditor would have been adequate to prevent the firm from being benefitted at the expense of the appellant … Further, the consequences of holding the money to be subject to a constructive trust and thereby transforming the creditor into a beneficiary suggest that it would be contrary to principle to recognize the existence of a constructive trust in a case such as the present. One consequence would be that the money, and any property acquired with it, would, on the firm's bankruptcy, be withdrawn from the general body of

62 (1986) 160 CLR 371.

> creditors; another would be that the appellant could require the firm to account for any profits made with the use of the money.[63]

Chief Justice Gibbs noted that considerations of this kind led Lindley LJ in *Lister v Stubbs*[64] to say that to brand the relationship between the parties — there a company and its agent who had corruptly received a commission — as trustee and beneficiary would confound ownership with obligation. The Chief Justice branded Lindley LJ's reasons as 'impeccable when applied to the case in which the person claiming the money has simply made an outright loan to the defendant'.[65]

Though the correctness of *Lister v Stubbs* — which declares that an agent who receives a profit in breach of fiduciary duty other than by use of the principal's property holds that profit as a debtor, not as a constructive trustee for the principal — in Australian law is unlikely to survive, given the Full Federal Court's 2012 decision in *Grimaldi v Chameleon Mining NL (No 2)*[66] (and it was indeed overruled in 2014 in England),[67] the concerns raised by Gibbs CJ as to the automatic application of the constructive trust remain extant. Indeed, the court in *Grimaldi* noted that 'to accept that money bribes can be captured by a constructive trust does not mean that they necessarily will be in all circumstances',[68] as 'a constructive trust ought not to be imposed if there are other orders capable of doing full justice'.[69] One scenario it envisaged as capable of challenging the appropriateness of the constructive trust was where a 'third party issue arises',[70] namely where the trust could adversely affect the legitimate interests of an innocent third party.

Critically, in rejecting the constructive trust as the relevant remedy, the High Court in *Daly v Sydney Stock Exchange Ltd* proceeded on the basis that the constructive trust sought was to have proprietary consequences. Given that the alleged trust would have arisen at the time of the fiduciary breach, there necessarily arose the prospect that, should the trust create a proprietary interest in the moneys in question, any 'innocent' third parties who secured some claim to or interest in those moneys could be unduly prejudiced. Hence the need for curial discretion, as explicitly envisaged in *Grimaldi*, in determining what relief, short of constructive trusteeship *with a proprietary consequence*, would do justice as between the competing claimants.

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63 Ibid 379. His Honour ultimately concluded that no constructive trust came into existence when the client paid the moneys to the stockbroking firm because it was 'unnecessary to protect the legitimate rights of the lender and … could lead to consequences unjust both to the creditors of the borrower and the borrower itself': at 380 (citations omitted).

64 (1890) 45 Ch D 1, 15.

65 *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 379.

66 (2012) 200 FCR 296 ('*Grimaldi*').

67 *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250.

68 *Grimaldi* (2012) 200 FCR 296, 422–3 [583].

69 Ibid, citing *John Alexander's Clubs* (2010) 241 CLR 1, 45 [128].

70 Ibid 423 [583].

The High Court's most recent mention of constructive trusts, *John Alexander's Clubs*,[71] saw a return to this theme. In a unanimous judgment their Honours referred to a line of authority supportive of the following propositions:

> A constructive trust ought not to be imposed if there are other orders capable of doing full justice. … One point … is that care must be taken to avoid granting equitable relief which goes beyond the necessities of the case. Another point … is that third party interests must be borne in mind in deciding whether a constructive trust should be granted. [The law] does not permit a constructive trust to be declared in a manner injurious to third parties merely because the plaintiff has no other useful remedy against a defendant.[72]

And the year before, citing the same line of authority that informed the above propositions, the Full Court of the High Court in *Bofinger v Kingsway Group Ltd* noted 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'.[73] Later in its reasons, the Court emphasised the 'importance attached by equity to the fashioning of the particular remedy to meet the nature of the case' by reference to, inter alia, 'the remedial constructive trust'.[74]

B *Constructive Trust as a Remedy Contrasted with Estoppel*

The line of authority mentioned in the two preceding paragraphs emanated from the High Court's 1999 decision in *Giumelli*.[75] The case involved no fiduciary issue — it arose out of unfulfilled promises by parents to their son as to ownership of part of the family farming property — and so any finding of a constructive trust rested upon a finding of an unconscionable denial of a beneficial interest in property. In the Full Court of the Western Australian Supreme Court, from which the appeal to the High Court came, Ipp J (with whom Franklyn J concurred) imposed a constructive trust over the property the subject of the promises, reasoning that the parents' denial to their son of a beneficial interest therein amounted to unconscionable conduct in view of the son's contributions to the property and associated farming business.[76] While the third judge, Rowland J, instead approached the case from the perspective of estoppel — finding that the parents' backflip from their promises was unconscionable — he agreed with the order proposed by Ipp J, 'whether based on a constructive trust or on equitable estoppel'.[77]

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71 (2010) 241 CLR 1.

72 Ibid 45–6 [128]–[129].

73 (2009) 239 CLR 269, 290 [47].

74 Ibid 300 [91].

75 (1999) 196 CLR 101.

76 *Giumelli v Giumelli* (1996) 17 WAR 159, 172–5.

77 Ibid 167.

Although the High Court approached its decision ultimately by reasoning grounded in estoppel, as a prelude thereto it made several remarks pertaining to constructive trusts. As to the constructive trust alleged on the facts in question, their Honours noted that it was 'proprietary in nature'.[78] Such a trust, they observed, 'is a remedial response to the claim to equitable intervention made out by the plaintiff', which 'obliges the holder of the legal title to surrender the property in question, thereby bringing about a determination of the rights and titles of the parties'.[79] It followed that it 'does not necessarily impose upon the holder of the legal title the various administrative duties and fiduciary obligations which attend the settlement of property to be held by a trustee upon an express trust for successive interests'.[80]

Rather, the constructive trust in this context, should it be apt, is utilised essentially to secure the effective conveyance of a property interest. As foreshadowed in the remarks of Gibbs CJ in *Daly v Sydney Stock Exchange Ltd*, albeit against the backdrop of a fiduciary breach (and thus an 'institutional'-type constructive trust), though, the High Court in *Giumelli* was not constrained to accept that an unconscionable denial of a beneficial interest in property should necessarily sound in the conveyance of specific property via the constructive trust as the remedy. In the face of, inter alia, improvements to the property the subject of the promise by other family members, and the continued residence therein by the plaintiff's younger brother, any order to convey the property to the plaintiff would have adversely affected third parties. Accordingly, their Honours saw *Giumelli* as a case for the fixing of a money sum to represent the value of the plaintiff's equitable claim to the promised property.[81]

Nonetheless, what the court omitted to investigate, other than cursorily, is the relationship between equitable (proprietary) estoppel and the (remedial) constructive trust. Equitable estoppel is not a remedy, but either a cause of action or defence, premised upon proof of an unconscionable resiling from a promise that reasonably induced the promisee to act to his or her detriment. The remedy stemming from a successful claim of estoppel, when pleaded as a cause of action, may vary according to the circumstances, but has in recent times been identified by the High Court as starting from an assumption that the promise ought to be enforced.[82] When the promise relates to property, it may be enforced by an order that the property be conveyed in accordance with the promise. In effect, the conveyance can be effected in this scenario via a (remedial) constructive trust of the variety discussed by the High Court in *Giumelli*.

If, though, the property no longer exists in the relevant form, or some innocent third party has secured an interest therein, an order for the payment of a monetary sum, equivalent in value to the subject matter of the promise, may be more appropriate.

78 *Giumelli* (1999) 196 CLR 101, 112 [5] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

79 Ibid 112 [3].

80 Ibid 112 [5].

81 Ibid 125 [49]–[51].

82 See *Sidhu v Van Dyke* (2014) 251 CLR 505.

Even in a purely promissory estoppel case, the latter may be apt where necessary to avoid the litigants having to continue some business association.[83] None of these scenarios is consistent with a constructive trust, in a proprietary sense, as the remedial response.

It stands to reason that while a constructive trust may, in some circumstances, represent an appropriate remedial response to a cause of action in equitable estoppel, it need not necessarily do so. More to the point, to accept, as Deane J did in *Muschinski v Dodds*, that the constructive trust is essentially remedial in character, is to differentiate it by juridical nature from equitable estoppel.[84] That some constructive trusts require unconscionable conduct as a trigger, and that equitable estoppel is likewise premised upon unconscionable conduct, does not serve to equate the relevant legal inquiries in each event, let alone the substantive nature of the concepts in issue.

C *Distinguishing the Source of the Claim from the Remedy*

The need to be clear as between the source of a legal claim and the remedy, in an environment involving an attempt to trigger a constructive trust, also presented itself to the High Court in 1998 (the year before *Giumelli* was decided). Indeed, in *Giumelli* their Honours cited the case, *Bathurst City Council*,[85] as authority for the proposition that '[b]efore a constructive trust is imposed, the court should first decide whether, having regard to the issues in the litigation, there is an appropriate equitable remedy which falls short of the imposition of a trust'.[86] In *Bathurst City Council* the Full Court, on this point, remarked as follows:

> 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.[87]

These observations sit well with the flow of High Court authority, and the discretion that goes to a judicial determination of the most appropriate equitable remedy in the circumstances. In *Bathurst City Council* the Court was pressed to recognise a 'charitable' remedial constructive trust. This it refused, reasoning that '[a] charitable trust … imposed by a court as a remedy for unconscientious conduct by a defendant would lack certain distinctive, if not vital, attributes of trusts for a charitable purpose',[88] including a general charitable intention, and indefiniteness of duration.

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83 See, eg, the order in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

84 In this regard, English courts' reticence to accept the remedial constructive trust may well explain why they continue to struggle with the distinction between equitable estoppel and the constructive trust: see, eg, Sir Terence Etherton, 'Constructive Trusts and Proprietary Estoppel: The Search for Clarity and Principle' [2009] *Conv* 104.

85 (1998) 195 CLR 566.

86 *Giumelli* (1999) 196 CLR 101, 113 [10] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

87 *Bathurst City Council* (1998) 195 CLR 566, 585 [42].

88 Ibid 584 [41].

Albeit not addressed explicitly by the Court, there is another reason why the charitable trust cannot operate as a remedy in the fashion proposed. Charitable trusts are express trusts, as highlighted in part by the above reference to a charitable intention. There is no need to introduce a constructive trust as a vehicle to enforce an express trust or to remedy its breach.[89] After all, the entire notion of a 'constructive' trust derives from the absence of equitable obligations imposed under an express (or resulting) trust. And, as is evident from the tide of High Court authority, a remedial response via a constructive trust will not ensue where it is not needed.

D *Translation to Remedy in Third Party Scenarios*

As foreshadowed earlier, the principal aim of Deane J's foray in *Muschinski v Dodds* into the juridical nature of the constructive trust was to highlight its remedial nature and function, as distinct from express trusts and resulting trusts. Correlative to this objective, his Honour firmly sourced the trigger for constructive trusteeship by reference to conduct 'contrary to equitable principle'.[90] Justice Deane envisaged that conduct amounting to a breach of fiduciary duty, or an unconscionable denial of (or assertion to) a beneficial interest in property, met this description.

Against this backdrop, it is instructive to consider the 2007 remarks of the Full Court of the High Court in *Farah Constructions*,[91] where the main remedial issues before the Court targeted constructive trusteeship in the context of accessory and recipient liability. It should be recalled, for this purpose, that the High Court, in its 1975 decision in *Consul Development*,[92] endorsed the availability of equitable relief — via the constructive trust — against persons ('strangers') who, though not fiduciaries or trustees themselves, either knowingly receive trust property ('recipient liability') or knowingly assist a trustee or fiduciary in a dishonest or fraudulent design ('accessory liability').[93]

Vis-a-vis the law of constructive trusts, the principal focus of the judgment in *Farah Constructions* was on the *conduct* of an alleged accessory or recipient that justifies constructive trusteeship. The Court endorsed the view that, as the alleged accessory or recipient does not owe fiduciary or trust duties to the principal, proof of *fault* in an involvement in the fiduciary breach is core to rendering him or her a constructive

89 In *Brown v Pourau* [1995] 1 NZLR 352, 368 Hammond J viewed a secret trust as an express trust, but added that the trustee's obligation is supported by a remedial constructive trust. But as the court enforces express trusts according to ordinary trusts principles, any constructive trust is superfluous for this purpose. Cf *Bathurst City Council* (1998) 195 CLR 566, 583 [39], where by way of obiter the court classed a secret trust as '[o]ne species of constructive trust', but did not explain how one of its core elements — proof of intention — sits with constructive trusts jurisprudence.

90 *Muschinski v Dodds* (1985) 160 CLR 583, 614.

91 (2007) 230 CLR 89.

92 (1975) 132 CLR 373.

93 Thus applying the venerable remarks of Lord Selborne LC in *Barnes v Addy* (1874) LR 9 Ch App 244, 251–2.

trustee. So, in the case of accessory liability, the Court favoured the view, open on one reading of *Consul Development*, that an accessory's liability as constructive trustee could be triggered by the accessory's *constructive knowledge* of the dishonest and fraudulent design.[94]

That their Honours expressly disclaimed any analogy between the constructive trust involved in *Muschinski v Dodds* and that capable of arising for the purposes of recipient liability[95] did not preclude their focus (as did Deane J in *Muschinski*) on the recipient's *conduct* as a determinant of relief. In particular, the Court adamantly rejected the alternative approach espoused by the New South Wales Court of Appeal — which located constructive trusteeship for the purposes of recipient liability under the rubric of unjust enrichment[96] — in favour of the traditional approach, espoused in *Consul Development*, resting in knowledge in the recipient. In so doing, it rebuffed the view that constructive trusteeship could be triggered by a consequentialist inquiry into the injustice surrounding an outcome, at the expense of an inquiry into the conduct of the recipient, by reference to his or her state of mind.

In so doing, their Honours were pursuing no new course of reasoning. In *Baumgartner v Baumgartner*,[97] for instance, Toohey J's analysis grounded in unjust enrichment saw no encouragement from the other four judges, who squarely identified unconscionable conduct as the threshold for constructive trust relief. It has witnessed no encouragement thereafter either. In 2009, in a unanimous judgment, the Court rejected 'all-embracing theories of unjust enrichment'[98] as a foundation for, inter alia, constructive trusteeship, declaring that these 'may conflict in a fundamental way with well-settled equitable doctrines and remedies'.[99]

V Conclusion

In *Muschinski v Dodds*[100] Gibbs CJ spoke of 'the ill-defined limits of the rules relating to constructive trusts'. This view no doubt influenced his Honour to pursue a different path to relief in that case. The constructive trust has, after all, been described as 'a vague dust-heap for the reception of relationships which are difficult to classify or which are unwanted in other branches of the law'.[101] It has also been bedevilled

94 *Farah Constructions* (2007) 230 CLR 89, 160 [163].

95 Ibid 162–4 [171]–[179].

96 See *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 (15 September 2005) [207]–[237] (Tobias JA). See also Mason P at [1], Giles JA at [2].

97 (1987) 164 CLR 137, 152–4 (although Toohey J conceded that the outcome of the case would have been the same on an unconscionable conduct analysis: at 154).

98 *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 300 [90].

99 Ibid 300 [91].

100 (1985) 160 CLR 583, 595.

101 Edward I Sykes, 'The Doctrine of Constructive Trusts' (1941) 15 *Australian Law Journal* 171, 175.

with terminological difficulties. Only last year Lord Sumption remarked that 'there are few areas in which the law has been so completely obscured by confused categorisation and terminology as the law relating to constructive trustees'.[102]

While the only dedicated analysis of the juridical nature of the constructive trust at High Court level within the last 30 years (and indeed within the history of the Court), it is noteworthy that Deane J's reasons in *Muschinski v Dodds* do little to add precision to the occasions when constructive trusts arise. And while those reasons do address at least one question of terminology — namely the descriptors 'institutional' and 'remedial' — they appear directed more at breaking down divisions than sustaining them. At least in this sense, Deane J could be accused of contributing little that is genuinely concrete to constructive trusts jurisprudence.

Yet this conclusion overlooks some basal elements of his Honour's analysis, which as explained in this paper have influenced subsequent High Court thinking. Justice Deane's attempt to cast the constructive trust as primarily remedial has produced a lasting impact on Australian law. It has served to accentuate the distinctions between the constructive trust and other forms of trusts. And as an equitable remedy, its application is not constrained by fixed rules — whether as to availability, effect or timing — but rather grounded in equitable principle, namely by reference to discretion informed not only by the conduct of the defendant but by justice to others. As each of these points has seen subsequent High Court endorsement and application, Deane J's legacy vis-a-vis constructive trusts is hardly insubstantial. And the elapsing of the last 30 years has sustained not only the flexibility of the concept but a step in the convergence of that jurisprudence at a conceptual level.

102 *Williams v Central Bank of Nigeria* [2014] AC 1189, 1197 [7].