Defending Discretionary Remedialism

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In a series of articles over the last 12 years, Professor Peter Birks has made a sustained and vigorous attempt to eradicate 'discretionary remedialism' from Commonwealth legal systems.[1] In this article, I argue that his attempt to do so is misconceived and should be rejected.

Discretionary remedialism is the view that courts should have a discretion to award the 'appropriate' remedy in the circumstances of each individual case rather than being limited to specific (perhaps historically determined) remedies for each category of causative events. So, for example, a court adopting this view might decide that it was 'appropriate' in the circumstances of a particular case to impose a constructive trust as a response to a breach of contract rather than award damages as would ordinarily be the case.[2] Discretionary remedialism draws on the tradition of discretionary remedies in equity[3] and on the many modern discretionary regimes established by statute.[4] It has been endorsed by the Supreme Court of Canada[5] and, implicitly and in a more muted form, by the High Court of Australia.[6] It has wide support from academic commentators** but is vehemently opposed by Birks.

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1 See for example, Peter Birks, 'The New Equity and the Need for Certainty' in F E McArdle (ed), *The Cambridge Lectures 1987* (1989); Peter Birks, 'Misdirected Funds: Restitution From the Recipient' [1989] *LMCLQ* 296; Peter Birks, 'The Remedies for Abuse of Confidential Information' [1990] *LMCLQ* 460 at 465; Peter Birks, *Restitution: The Future* (1992) at 33; Peter Birks, 'Mixing and Tracing: Property and Restitution' (1992) 45(2) *Current Legal Problems* 69 at 73; Peter Birks, 'Civil Wrongs: A New World' in *Butterworth Lectures: 1990–91* (1992) at 92–93; Peter Birks, 'Proprietary Rights as Remedies' in Peter Birks (ed), *The Frontiers of Liability* (1994) vol 2 at 215; Peter Birks, 'The End of the Remedial Constructive Trust?' (1998) 12(4) *Trust Law International* 202. More recently, his specific focus on the remedial constructive trust has given way to a more general consideration of discretionary remedialism: Peter Birks, 'Rights, Wrongs, and Remedies' (2000) 20 *OJLS* 1; Peter Birks, 'Three Kinds of Objection to Discretionary Remedialism' (2000) 29 *WALR* 1.

2 Compare *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 125–126 (Deane J).

3 See Part 3.B.i (Discretion and Equitable Remedies) below.

4 See Part 3.B.ii (Weak Discretion and Strong Sense Proprietary Remedies) below.

5 From at least *Sorochan v Sorochan* [1986] 2 SCR 38; (1986) 29 DLR (4th) 1. Most recently, see *Cadbury Schweppes Inc v FBI Foods Ltd* [1999] 1 SCR 142; (1999) 167 DLR (4th) 577.

6 *Giumelli v Giumelli* (1999) 196 CLR 101. See also *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 125–126 (Deane J) and contrast *Maguire v Makaronis* (1997) 188 CLR 449 at 495–500 (Kirby J).

Birks' arguments against discretionary remedialism originally grew out of his concern with the remedial constructive trust. However, the arguments he has presented have implications that go beyond the narrow confines of the doctrinal debate on constructive trusts. In particular, he raises important questions about the nature of proprietary remedies; the distinction (if any) between 'rights', 'liabilities' and 'remedies'; and the nature and place of discretion in judicial decision-making. Accordingly, I address Birks' analysis in the context of these broader questions and argue as follows:

1. Birks' critique of discretionary remedialism depends in part on a faulty taxonomy of remedies. There is a well-established and meaningful sense in which 'right' and 'remedy' are distinct and involve a judicial (weak) discretion.
2. Courts should openly analyse proprietary remedies as distributive phenomena. That is, courts should not analyse and justify proprietary remedies solely as a corrective response to some causative event occurring in the context of a relationship between a claimant and a defendant. They should acknowledge that proprietary remedies involve a judicial reallocation of proprietary rights and should justify such a response to the claimant's grievance by reference to its effects and the reasons for which it is sought. In particular, in insolvency, courts should justify proprietary remedies by reference to their distributive consequences for the defendant's creditors.
3. Most importantly for the purposes of this article, in doing so separating 'liability' and 'remedy', courts do not risk abandoning the rule of law in favour of the path of intuitive justice *even if* recognising a separation between 'liability' and 'remedy' means that the rules relating to remedies (and proprietary remedies in particular) involve a discretionary element. Discretion is a valid and valuable part of legal decision-making; and it is distinct from both (a) rule-based decision-making and (b) unconstrained and unaccountable discretionary decision-making.

In the remaining Parts of this article, I develop the nature and significance of my disagreement with Birks' analysis, following this outline.

1. Birks' Taxonomy of Remedies and His Critique of Discretionary Remedialism

As outlined above, discretionary remedialism is the view that courts should have a discretion to award the 'appropriate' remedy in the circumstances of each individual case rather than being limited to specific remedies for each category of causative events. Despite the support for discretionary remedialism from academic commentators, Birks argues that it is an unprincipled and unjustified departure

7 See the works cited by Birks in 'Three Kinds of Objection', above n1 at 8, nn14–18. See also Birks, 'Rights, Wrongs, and Remedies', above n1 at 22–23.

from the rule of law and the requirements of certainty in legal decision-making.[8] He also argues that it is an almost inevitable consequence of regarding liability and remedy as conceptually distinct.[9] (It follows that he is adamantly opposed to separating analysis of liability and remedy, the argument of Part 2 below.)

In order to understand Birks' argument fully, it is necessary to place it in the context of his efforts to define a taxonomy of remedies. In his earlier work this involves drawing a distinction between remedies in the 'strong sense' and remedies in the 'weak sense'. Birks uses this distinction as the basis of his critique of the remedial constructive trust.[10] I outline this part of Birks' work in Part 1.A. In Part 1.B, I consider his more recent and more elaborate taxonomy of remedies which is the basis of his critique of discretionary remedialism. In my view Birks' taxonomy overlooks important distinctions in the law of remedies and this affects his assessment of discretionary remedialism. Accordingly it is necessary to revise Birks' taxonomy in order properly to assess the viability of discretionary remedialism in the remainder of this article.

A. Birks' Critique of the Remedial Constructive Trust: Remedies in the Weak Sense and the Strong Sense

In his earlier work, Birks assumes that those who write about the remedial constructive trust and proprietary remedies generally are engaged in a meaningful discourse; that is, that it is possible to distinguish between the *remedial* constructive trust and other proprietary remedies in a meaningful way and that the distinction is encapsulated in the word 'remedial'.[11] He accepts that there is an uncontroversial sense in which some property rights may be said to be remedial: they are rights that arise by implication of law from the facts to help solve a problem or rectify a mischief. But such rights are only remedial in a *weak sense*:

> [T]heir being so described does not change their nature as rights; it merely adds a functional comment: they are rights which, in contrast to those which are facilitative in the sense that they are recognized in order to give effect to what people want, are raised regardless of intent to help solve a problem or rectify a mischief.[12]

In his view, there is no sensible distinction between 'remedy' understood in this weak sense and either 'right' or 'institution', the oppositions that those who argue for the existence of remedial proprietary rights usually seek to raise. And, for

8 See especially Birks, 'Three Kinds of Objection', above n1; Birks, 'Rights, Wrongs, and Remedies', above n1.

9 Birks, 'Rights, Wrongs, and Remedies', above n1 at 23, 24.

10 See the works cited above n1.

11 He does not, of course, embrace the unhelpful terminology of the 'remedial constructive trust': Birks, 'The End of the Remedial Constructive Trust?', above n1.

12 Birks, 'Proprietary Rights as Remedies', above n1 at 216.

reasons explored most fully in his 1999 Blackstone Lecture, *Rights, Wrongs, and Remedies*, he argues that the language of 'right' should be preferred to that of 'remedy' where there is no sensible distinction between the two.[13]

On the other hand, in Birks' view, there is only one *strong sense* in which property rights may be said to be remedial, in opposition to 'right' or 'institution', namely, that they are 'the creatures of a later judicial discretion to redress the grievance which the facts threw up'.[14] There are two aspects of this strong sense of 'proprietary remedy' that render the proprietary right distinctively 'remedial'. First, the right is not self-executing. The intervention of a court is required before it comes into being. Secondly, the right arises only as the result of the exercise of a discretion. The court's order confers rights on an individual by its own force, not merely by declaring or realising a pre-existing entitlement.[15]

Birks' critique of this *strong sense* of 'proprietary remedy' may be put quite concisely: neither of the two essential incidents of any right meaningfully described as remedial (that is, remedial in a sense that cannot be conflated with rights generally) — that it be created by the order of a court and so created in the exercise of a judicial discretion — can legitimately be an incident of a proprietary right. In particular, he argues, a non-statutory discretion to vary property rights should be regarded as highly controversial.[16] He contends that the common law has long been suspicious of such discretions, because of its tradition of the sanctity of property, its respect for the individual and for individual preferences and its fear of prejudicing third parties.[17]

As a result, he argues, *strong sense* proprietary remedies are 'noxious'[18] and should not be accepted as part of the law. Only *weak sense* proprietary remedies should be accepted as part of the law; they should be analysed as the law's response to causative events (rather than the court's or any judge's response to those events); they should arise when the causative events occur; and they should be defined by rules and not by discretion.

In other articles, Birks has generalised this critique and identified five further concerns:[19]

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13 Birks, 'Rights, Wrongs, and Remedies', above n1 at 19–25. Weak sense proprietary remedies fall within the first four senses of remedy outline by Birks in that article: see Part 1.B (Expanding Birks' Taxonomy of Remedies and Rights) below.

14 Birks, 'Proprietary Rights as Remedies', above n1 at 214. Compare *In re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC) at 99B–C, 104B–G. Strong sense proprietary remedies fall within the fifth sense of remedy outlined by Birks in 'Rights, Wrongs, and Remedies', above n1 at 16–17 (below n26).

15 Birks, 'Proprietary Rights as Remedies', above n1 at 217. See also Birks, 'Rights, Wrongs, and Remedies', above n1 at 17.

16 Birks, 'Proprietary Rights as Remedies', above n1 at 218; see also A J Oakley, *Constructive Trusts* (3rd ed 1996) at 27–28.

17 Birks, 'Proprietary Rights as Remedies', above n1 at 223.

18 Ibid.

19 See generally Birks, 'The Remedies for Abuse of Confidential Information', above n1 at 465; Birks, 'Civil Wrongs: A New World', above n1 at 92–93; Birks, 'Rights, Wrongs, and Remedies', above n1 at 22–24; Birks 'Three Kinds of Objection', above n1 at 16–17.

1. That discretionary remedialism has no historical legitimacy.
2. That the judges who would be called on to exercise such discretions need the insulation from personal criticism that can only be provided by objectively ascertainable rules and principles.
3. That discretionary remedialism is inconsistent with the judicial function and the rule of law. Accordingly, if assertions that liability must be 'flexible' or 'malleable' were taken 'to exclude the formulation of intelligible rules and principles, it would spell the end of law as we know it'.[20]
4. That the law of remedies (proprietary and otherwise) demands certainty just as much as does the substantive law and that discretions cannot provide the necessary level of certainty. Put another way, law is 'a rational and open science' which cannot 'take refuge in an inscrutable case to case empiricism', 'even in relation to remedies'.[21]
5. That discretionary remedialism depends on judges having direct access to, and acting on, 'the community's sense of justice', which leaves no protection against 'communal mood-swings' and oppression of minorities.[22]

In Part 3.C (Objections to Discretionary Decision-Making) below I evaluate these concerns and argue that they are significantly overstated.

B. Expanding Birks' Taxonomy of Remedies and Rights

It is necessary first to spell out in some detail Birks' more recent taxonomy of remedies in which he now situates these concerns. In doing so, I argue that Birks' taxonomy understates the extent to which discretion is an established element in judicial responses to the wrongs, grievances and injustices presented by claimants. An appropriately revised taxonomy of remedies leaves more room for discretionary remedialism than Birks would allow.

The issue arises in this way because Birks argues in his recent work that the institutional constructive trust and other weak sense proprietary remedies should not be referred to as remedies at all.[23] This is a logical development of his early characterisation of these so-called remedies ('they are *rights* which ... are raised regardless of intent to help solve a problem or rectify a mischief')[24] and his view that, where 'remedy' and 'right' overlap, the language of 'right' should prevail.[25] He asserts that 'remedy' and 'right' almost always do overlap in this way, except in the 'noxious' category of strong sense remedies, leaving little independent room for 'remedy' as an analytical concept and certainly making it inapt to refer to the institutional constructive trust and other weak sense proprietary remedies as 'remedies'.

20 Birks, *Restitution: The Future*, above n1 at 33, n20.
21 Birks, 'Civil Wrongs: A New World', above n1 at 92.
22 Birks, 'Three Kinds of Objection', above n1 at 17.
23 Birks, 'Rights, Wrongs, and Remedies', above n1 at 12.
24 Birks, 'Proprietary Rights as Remedies', above n1 at 216 [emphasis added]; see text above, n12.
25 Birks, 'Rights, Wrongs, and Remedies', above n1 at 19–25

Obviously, if this stance is correct, then discretionary remedialism as a doctrine explicitly directed towards 'remedies' has a much narrower range of operation than it otherwise would have had. It is appropriate, therefore, to consider whether Birks is right to limit the range of judicial action that should be referred to and treated as 'remedial'.

In my view Birks' taxonomy of 'remedy' contains two significant errors.[26] That taxonomy identifies five senses of 'remedy':

- In the first sense, 'remedy' is seen 'as an action or the law's configuration of actionability',[27] as in the lawyer's advice, 'Your remedy is conversion'. In this sense, 'remedy' has little analytical force and does not present particular problems of confusion between 'right' and 'remedy'.
- The second and third senses of 'remedy' are more important. Here, 'remedy' is used to refer to a right 'born of a wrong' or of 'a grievance or injustice'.[28] In these senses 'remedy' is used in a way that overlaps with 'right': 'one level of entitlement (right) is replaced by another (remedy)'.[29]
- In the fourth sense, 'remedy' indicates the enforceable order or judgment of a court.[30] Again here the 'remedy' is a 'right' and in Birks' view should be referred to as such.
- In the fifth sense, however, 'remedy' can be distinguished from 'right', for in this sense 'the court regards its order as strongly discretionary' and it therefore cannot reflect an anterior right.[31] This sense of 'remedy' corresponds with Birks' earlier concept of strong sense proprietary remedies[32] and is the sense in which 'remedy' is used in Birks' conception of 'discretionary remedialism'.

This taxonomy is generally useful as far as it goes, in particular in identifying the overlap between 'right' and 'remedy'. In particular some fourth sense remedies (damages in particular) are only imperfectly distinguishable from the second or third sense remedy (or right) that they vindicate. The defendant's ultimate legal position depends on the court, in the sense that his or her liability is contingent until the court pronounces its order. But the dependence or contingency is a mechanical one and the court has no significant independent power to withhold its fourth sense remedy once the second or third sense remedy (or right) is established.

26 Ibid.

27 Id at 12.

28 Id at 12–15.

29 Kit Barker, 'Rescuing Remedialism in Unjust Enrichment Law: Why Remedies are Right' (1998) 57(2) *Cambridge LJ* 301 at 321. Contrast Birks, 'Rights, Wrongs, and Remedies', above n1 at 31.

30 Birks, 'Rights, Wrongs, and Remedies', above n1 at 15.

31 Id at 16.

32 See Part I.A (Birks' Critique of the Remedial Constructive Trust: Remedies in the Weak Sense and the Strong Sense) above.

However the taxonomy overstates the overlap between 'right' and 'remedy'. Birks overlooks an important sense in which 'right' and 'remedy' can be distinguished in his elaboration of the fourth sense of 'remedy'. Birks grounds this sense of 'remedy' in Blackstone's concept of a remedy as 'the enforceable order or judgment of a court':

> Although Blackstone never uses the word "right" in this connection, it is very important to notice that if we could interrogate him he would almost certainly admit, not only that the judgment generated a right, but also that the judgment was obtained as a matter of right.[33]

Judgment certainly generates a right; that much is incontrovertible. And in many cases judgment of some kind is obtained as a matter of right. However Birks overlooks the court's power (at least in equity) to determine the shape and content of that judgment. He writes:

> The essential point is that Blackstone's "remedy" — the court's order — cannot be contrasted with "right" because, although he never says so, the order generates an enforceable right and, from the moment of the commission of wrong, the victim has, but only in our terms, a right to the award which the judgment makes.[34]

But the right generated at the moment of the commission of the wrong does not (again at least in equity)[35] uniquely specify 'the award which the judgment makes'. The court's power to shape or mould its ultimate award produces a break between the right to *a* remedy and the remedy itself.[36] It precludes Birks' move to collapse the fourth sense of 'remedy' with 'right'.

The error also appears in a slightly different form in Birks' statement of his fifth sense of 'remedy', in particular when he distinguishes it from the fourth sense. Birks insists that it is only *strongly* discretionary remedies that are meaningfully distinct from rights:

> If the court regards its order as strongly discretionary, its content cannot reflect an [a]nterior[37] right. The discretion which is interposed between the plaintiff and the order shows that he has no right to that which he wants ordered. The word "strongly" needs to be added.[38]

On the other hand,

33 Birks, 'Rights, Wrongs, and Remedies', above n1 at 15.

34 Id at 16.

35 And on occasions even at law: see *Attorney-General v Blake* [2000] 3 WLR 635 especially at 639 (Lord Nicholls).

36 Birks sees this break only if the discretion is strong: 'Rights, Wrongs, and Remedies', above n1 at 17.

37 'Interior' appears here in the published version of the article.

38 Birks, 'Rights, Wrongs, and Remedies', above n1 at 16.

> Many judicial orders are weakly discretionary. ... The discretion has been settled over the centuries. To speak of a right to [many equitable remedies] is not a nonsense. We know on what facts a person is entitled to such orders.[39]

Here Birks argues, it seems, that any discretionary power in the court to refuse a remedy in the fourth sense is limited: at best it is weakly discretionary, it is most likely 'settled', and therefore it makes sense to speak of a right to the remedy.[40] But this mischaracterises both the nature of discretionary powers and the way they have been exercised in equity. Weakly discretionary decision-making is distinct from rule-based decision-making; and the discretionary power to grant, withhold and shape equitable remedies have not collapsed into rule-based decision-making. I develop this point in Part 3.B (Senses and Purposes of Discretion) below.

For now it is sufficient to observe, in short, that Birks' account of the different senses of 'remedy' is incomplete. It overlooks those remedies that amount to 'a right born of the order or judgment of a court' where it can be said that the claimant had an anterior right to *a* remedy but where the court has a discretion (albeit a weak one) as to the *form* of the remedy. That category is meaningfully distinct from the other categories identified by Birks.

It is especially significant because it is where many constructive trusts and other proprietary remedies are most aptly located. Birks cites judicial statements about constructive trusts:

> A remedial constructive trust is a trust imposed by the court as a remedy for a wrong. The entitlement to that remedy may be a matter of substantive law, but the trust itself is not created by the parties, or even by the obligation to make restitution, but by the order of the court.[41]

> The second type of trust is merely the creation by the court by way of *suitable remedy* to meet the wrongdoing alleged.[42]

In an earlier article Birks quoted from the judgment of the majority of the New Zealand Court of Appeal in *Fortex Group Ltd v MacIntosh*:

> The difference between the two types of constructive trust, institutional and remedial, is that an institutional constructive trust arises on the happening of the events which bring it into being. Its existence is not dependent on any order of the Court. Such an order simply recognises that it came into being at the earlier time *and provides for its implementation in whatever way is appropriate*.[43]

39 Ibid.

40 Ibid.

41 *Atlas Cabinets and Furniture Ltd v National Trust Co* (1990) 68 DLR 4th 161 at 173 (Lambert JA) cited in Birks, 'Rights, Wrongs, and Remedies', above n1 at 18. I read this as a reference to the fourth sense of 'remedy'.

42 *Coulthard v Disco-Mix Club Ltd* [1999] 2 All ER 457 at 479 [emphasis added] cited in Birks, 'Rights, Wrongs, and Remedies', above n1 at 18.

43 [1998] 3 NZLR 171 at 172 [emphasis added] quoted in Birks, 'The End of the Remedial Constructive Trust?', above n1 at 204.

Birks may not endorse all these statements. But the approach they represent is widespread and longstanding.[44]

For example, in many equitable estoppel cases, the approach is for the court to decide that an equity arises by estoppel from the facts to which the court then 'gives effect' by way of remedy.[45] The court will give the claimant 'such remedy as the equity of the case demands'.[46] The remedy is such as to 'satisfy' the equity.[47] Although a right to relief (characterised as an equity or bare equity) does arise on the happening of the facts,[48] the proprietary entitlement is created by the court in response to that right.[49] In that last stage, 'equity is displayed at its most flexible'.[50] Lord Browne-Wilkinson has spoken of the task of the court as being both prospective and discretionary: it must find 'the right way to give effect to the estoppel'.[51] In some cases the right created is proprietary; in some it is not. But the approach appears to be the same in both classes of cases.[52]

So in *Giumelli v Giumelli*,[53] the High Court held that the claimant did not establish 'an immediate right to positive equitable relief as understood in the same sense that a right to recover damages may be seen as consequent upon a breach of contract'.[54] Rather, the claimant's grievance generated an equity and 'the Court must look at the circumstances ... to decide in what way the equity can be satisfied',[55] including by a constructive trust or lien securing payment of a money sum. This was no new approach: the High Court adopted language used more than

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44 The phenomenon was analysed by Hammond J in *Brown v Pourau* [1995] 1 NZLR 352 at 368 (describing English legal theory and practice as 'monistic' in contrast with this 'dualistic' approach prevalent in the United States of America and increasingly in Canada and New Zealand). See Charles Rickett, 'Where are we Going with Equitable Compensation?' in A J Oakley (ed), *Trends in Contemporary Trust Law* (1996). The dualistic approach can be seen even in England: *Lord Napier and Ettrick v Hunter* [1993] AC 713 (HL) at 736–737 (Lord Templeman) and 744 (Lord Goff).

45 *In re Basham, decd* [1986] 1 WLR 1498 at 1510, citing *Griffiths v Williams* (1978) 248 EG 947 (CA) at 949 (Goff LJ).

46 *Amalgamated Investment & Property Co Ltd in Liq v Texas Commerce International Bank Ltd* [1982] QB 84 (CA) at 122 (Lord Denning MR), following the approach of Lord Goff at trial.

47 *Greasley v Cooke* [1980] 1 WLR 1306 (CA) at 1312 (Lord Denning MR).

48 *In re Sharpe (A Bankrupt)* [1980] 1 WLR 219 at 225; *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852 (CA). But contrast *In re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC) at 94.

49 *Crabb v Arun District Council* [1976] Ch 179 (CA) established that new rights are created by the estoppel.

50 Id at 189 (Lord Denning MR). See also *Pascoe v Turner* [1979] 1 WLR 431 (CA) at 438–439. The council's high-handed conduct was relevant to the determination of the appropriate fulfilment of the equity: [1976] Ch 179 at 187–190 (Lord Denning MR) and 199 (Scarman LJ).

51 *Lim v Ang* [1992] 1 WLR 113 (PC) at 118 (recording counsel's submissions with apparent approval). If the detriment or reliance of the plaintiff is such that justice cannot be done by any lesser order, the court will give effect to the representation, but it can never do more.

52 See for example, *Salvation Army Trustee Co Ltd v West Yorkshire Metropolitan County Council* (1980) 41 P & CR 179 at 197–198, where the remedy sought was personal.

53 (1999) 196 CLR 101.

a century earlier in by the Privy Council in *Plimmer v Mayor, &c, of Wellington*.[56] On this approach, the role of an appellate court in an estoppel case is to determine 'whether the relief granted ... was appropriate and whether sufficient weight was given ... to the various factors to be taken into account, including the impact upon relevant third parties, in determining the nature and quantum of the equitable relief to be granted'.[57]

Events occurring after the events that generated the claimant's grievance are relevant to determining the appropriate relief.[58] In short, the claimant's grievance generates a right (an equity) which can be accommodated within Birks' third sense of 'remedy'. But although that equity 'found[s]' 'the relief obtained' (the 'remedy' in the fourth sense) it does not determine it.[59] Rather, the 'relief obtained' is 'a remedial response to the claim to equitable intervention made out by the plaintiff'.[60]

Of course, not all judges regard the constructive trusts and other equitable remedies they order in this way.[61] For example Lord Templeman certainly did not regard the trust recognised in *Attorney-General for Hong Kong v Reid*[62] as involving any judicial discretion. In Lord Templeman's view from the time that Reid, a senior Hong Kong prosecutor, received bribes he held them and their proceeds on trust for the Crown. The trust arose as the facts happened and took its form from those facts. Similarly Lord Browne-Wilkinson regarded the claimants' rights in *Foskett v McKeown*[63] as non-remedial (and not even as arising under a constructive trust). Their claim to a share of the proceeds of a life insurance policy, two of the premiums for which were paid with trust funds to which they were entitled, was 'based on the assertion ... of their equitable proprietary interest in identified property'.[64]

However these statements cannot deny the pervasive element of discretion in shaping the court's response. Consider first *Foskett v McKeown*. Lord Browne-Wilkinson insisted:

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54 Id at 113 [9].

55 Id at 113 [10].

56 (1884) 9 App Cas 699, 714.

57 (1999) 196 CLR 101 at 113–114 [10].

58 Id at 113 [8], 113–114 [10], 125 [49].

59 Id at 112 [6].

60 Id at 112 [3].

61 Most recently, in *Parsons v McBain* [2001] FCA 376 (5 April 2001) the Full Court of the Federal Court overruled *Re Osborn* (1989) 25 FCR 547 and held that common intention constructive trusts do not first come into existence when declared to do so by the court and that the date on which such a trust comes into existence is not determined as a result of a discretionary 'weighing process': [2001] FCA 376 [13]-[15].

62 [1994] 1 AC 324 (PC). Compare also the trust 'responding' (as Birks deftly puts it: 'Rights, Wrongs, and Remedies', above n1 at 18) to the mistaken payment in *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105.

63 [2000] 2 WLR 1299 (HL).

64 Id at 1304.

> This case does not depend on whether it is fair, just and reasonable to give the purchasers an interest as a result of which the court in its discretion provides a remedy. It is a case of hard-nosed property rights.[65]

Quite. But to deny that an order is made on the basis of what is 'fair, just and reasonable' is not to deny that the order involves some measure of discretion.[66] The next page and more of Lord Browne-Wilkinson's speech is spent determining how a broadly stated set of principles (the principles of tracing) should be applied in the circumstances of this case and in particular which of two metaphorical tracing analogies was closer to the facts of this case. If the first analogy was appropriate, then the remedy was '*normally ... at the most* a proprietary lien'; but if 'to give such an interest would be *unfair*' then there might be no remedy at all.[67] If the other analogy was appropriate, it remained to identify, value and apportion various financial contributions to the life insurance policy; that process might omit 'various factors' that would complicate the process; although 'there may be a case for applying some discount' to some financial contributions.[68]

Lord Templeman's advice in *Attorney-General for Hong Kong v Reid* adopts a comparable rhetorical tone that denies any choice to the court in determining its response to Reid's conduct: from the time that the properties were acquired with the proceeds of the bribes paid to the fiduciary Reid they were held on trust for the Crown. But even in such an extreme case as this, there is a gap between the Crown's entitlement to a response from the court and the form of that response.[69] The three properties in which the Crown asserted an interest were subject to a trust in favour of the Crown only 'so far as they represent[ed] bribes' accepted by Reid.[70] To the extent that the costs of acquiring the properties might not have been derived from bribes,

> the courts have ample means of discovering by means of accounts and inquiries the amount (if any) of innocent money invested in the properties and the proportion of the present value of the properties attributable to innocent money.[71]

The taking of accounts is 'notoriously difficult in practice'[72] and what is required 'will not be mathematical exactness but only a reasonable approximation' that determines the amounts 'as accurately as possible'.[73] If Reid's wife had an equitable interest in the properties, that too could be determined by the court called on to determine the extent of the Crown's interest in the properties.[74] In a less

65 Id at 1304–1305.

66 See Part 3.B (Senses and Purposes of Discretion) below.

67 [2000] 2 WLR 1299 (HL) at 1305 [emphasis added].

68 Id at 1305 (Lord Browne-Wilkinson) and 1311 (Lord Hoffmann).

69 And recall that the Privy Council was not required to determine the extent of the Crown's interest in the properties, only that it had a sufficient interest to maintain the caveats.

70 [1994] 1 AC 324 at 339.

71 Id at 330.

72 *Warman International Limited v Dwyer* (1995) 182 CLR 544 at 556.

73 Id at 558.

74 [1994] 1 AC 324 at 330.

extreme case of breach of duty, the court would presumably be able to assess an 'equitable allowance', perhaps even on a 'liberal scale', for the fiduciary's time, skill and effort in deriving an unauthorised profit.[75]

What follows from this review of Birks' taxonomy of 'remedy'? It is clear that Birks understates an important element of discretion in remedies. Even where a claimant acquires a right to a remedy (in the second or third sense) as a response to a wrong, injustice or other grievance, that 'remedy' does not necessarily determine the court's ultimate response (the rights created by a 'remedy' in the fourth sense). The process of determining that response involves in many cases an element of discretion, but not discretion of the strong, non-judicial kind that draws the response within Birks' fifth sense of 'remedy'. It is difficult to see that this long- and well-established process can be rejected out of hand as a legitimate approach to remedies. Birks' critique of discretionary remedialism must take into account the discretion involved in 'remedies' even outside the fifth sense.

2. *Separating Liability and Remedy: Aligning Remedies and the Reasons for Remedies*

This separation between the right to a remedy (in the second or third sense) as a response to a wrong, injustice or other grievance and the court's ultimate response (the rights created by a 'remedy' in the fourth sense) is in accordance with the common analysis that separates 'liability' and 'remedy'. In this Part I argue, independently of issues of discretion, that 'liability' should indeed be considered separately from 'remedy'. Once again, my focus follows Birks' and is largely on proprietary remedies. In short, I argue:

1. The reasons that it is appropriate to award a claimant a proprietary remedy are usually distinct from the reasons that it is appropriate to award a claimant some remedy, proprietary or not.
2. Proprietary remedies ought to be analysed and defended by reference to their consequences and the reasons for which the claimant seeks the particular advantages of a *proprietary* remedy (as distinct from the reasons for which he or she seeks *a* remedy for his or her grievance).

A. Proprietary Remedies are Distributive Phenomena

A claimant may wish to obtain a proprietary remedy rather than another type of remedy for any one of a number of reasons. These include the following:[76]

1. He or she wishes to obtain a specific item of property that the defendant has.[77] (The claimant's motivation may be that the specific item of property has a

75 *Boardman v Phipps* [1967] 2 AC 46 (HL) at 104, 112; *Warman International Limited v Dwyer* (1995) 182 CLR 544; contrast *Guinness plc v Saunders* [1990] 2 AC 663 (HL).

76 A similar list appears in Robert Austin, *Trusts, Obligations and Property: Some Principles for the Development of the Law of Formation of Trusts*, DPhil Thesis, Oxford University, 1984, D 48357 at 330.

77 I exclude cases where the claimant retains legal title to the item of property in dispute.

particular value for him or her;[78] it may be that he or she would have difficulty in proving the value of the item if he or she were to seek to recover its value by way of damages;[79] or it may be something else entirely.)

2. He or she wishes to prevent the defendant from dealing with the subject matter of his or her claim before it is litigated.[80] (It may be simpler to obtain interlocutory relief if the claimant can show that he or she has a proprietary interest in the subject matter of the claim than to satisfy the requirements for the grant of a *Mareva* order.[81] Moreover, in England at least, it is not possible to obtain a *Mareva* order against a foreign defendant in respect of a foreign cause of action, and accordingly in such cases it will be necessary to demonstrate a proprietary interest in some local asset in order to restrain the defendant from dealing with the asset.[82] Equally, it will be necessary to demonstrate a proprietary interest if the claimant wants to lodge a caveat against dealing with Torrens land.)[83]
3. He or she claims to be the successor to the person whose property was originally lost.[84]
4. Conversely, he or she wishes to assert a claim to property in the hands of a third party in priority to the third party's interest in the property.[85]
5. Some statutory rule treats the classification of his or her remedy as proprietary as relevant in some manner.[86]
6. Some non-statutory rule treats the classification of his or her remedy as proprietary as relevant in some manner.[87]
7. He or she wishes to share in the increased value of some asset connected with his or her claim.[88]
8. Lastly and most importantly, he or she wishes to achieve priority in the insolvency of the defendant.[89]

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78 For example, *Soulos v Korkontzilas* [1997] 2 SCR 217; (1997) 146 DLR (4th) 214.

79 For example, *LAC Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574; (1989) 61 DLR (4th) 14.

80 For example, *Lister & Co v Stubbs* (1890) 45 ChD 1 (CA).

81 See generally *Cardile v LED Builders Pty Limited* (1999) 198 CLR 380 on the availability of *Mareva* orders in Australia.

82 *Mercedes Benz AG v Leiduck* [1996] 1 AC 284 (PC), but note the powerful dissent of Lord Nicholls.

83 For example, *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 (PC).

84 For example, *Stump v Gaby* (1852) 2 De G M & G 623 [42 ER 1015].

85 For example, *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 (PC).

86 For example, *Plimmer v Mayor etc of Wellington* (1884) 9 AppCas 699 (PC) (compulsory acquisition legislation); *Zobory v FCT* (1995) 129 ALR 484 (taxation legislation); *Daly v Sydney Stock Exchange Limited* (1986) 160 CLR 371 (financial compensation legislation).

87 For example, *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (compound interest is not available to a claimant in restitution unless it can be shown that the defendant holds the payment sought to be recovered on trust for the claimant); contrast *Hungerfords v Walker* (1989) 171 CLR 125.

88 For example, *Foskett v McKeown* [2000] 2 WLR 1299 (HL).

89 For example, *In re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC).

In one sense, a proprietary response to many of these problems may be regarded as corrective in that it affects only the relationship and respective rights of the claimant and the defendant. But the responses to the problems of priority and insolvency have overtly distributive implications, simply because a response addressing them deals with multiple competing claims to necessarily limited resources. Deciding whether or not a proprietary remedy is available in these circumstances directly affects parties other than the defendant and claimant, most obviously the defendant's general creditors but also those parties with security and other interests in the defendant's assets. In these contexts, at least, a proprietary remedy is inescapably redistributive.

Moreover, proprietary responses to problems other than priority and insolvency are also redistributive, albeit in a slightly different sense. Such responses still involve courts in adjusting property rights, in reallocating the defendant's assets to meet the claimant's claim. The rules of tracing, constructive trusts and equitable liens depart from the general approach of the common law that takes property as a baseline and under which property rights change in response only to manifestations of intention and consent. As Craig Rotherham rightly observes:

> The fact that these remedies involve judicial readjustment of property rights has tended to generate a good deal of unease among jurists, and the strange rhetoric found in the jurisprudence of this area owes much to an impulse to obscure the reality that sacred axioms of property are being contravened.[90]

The fact that this is occurring is obscured, as Rotherham observes, by the rhetoric of weak sense proprietary remedies (including the institutional constructive trust and resulting trust) and also by the animistic, self-effectuating qualities attributed to these legal devices.[91] Nonetheless, even outside insolvency, such responses are redistributive and deciding whether or not a proprietary remedy is available in these circumstances should involve explicit consideration of these redistributive effects.

B. Proprietary Remedies Should be Analysed as Distributive Phenomena

However, adopting a distributive analysis of proprietary remedies and explicitly considering their redistributive impact is no small step.

1. If proprietary remedies are founded on distributive considerations, they differ from the greater part of the law of remedies in private law. A central concern of much of the law of remedies (as of private law in general) is with implementing a scheme of corrective justice, with achieving some measure of justice between claimant and defendant.[92] The law of remedies does so

90 Craig Rotherham, 'Restitution and Property Rites: Reason and Ritual in the Law of Proprietary Remedies' (2000) 1 *Theoretical Enquiries in Law* 205 at 206.

91 Simon Evans, 'Property, Proprietary Remedies and Insolvency: Conceptualism or Candour?' (2000) 5 *Deakin LR* 31 at 37–40. See text below at n94 and following.

92 The extent to which corrective justice is (or ought to be) a (or even *the*) central concern of private law is the subject of intense debate. See for example, Emily Sherwin, 'An Essay on Private Remedies' (1993) 6 *Canadian Journal of Law and Jurisprudence* 89; Ernest Weinrib, 'Corrective Justice' (1992) 77 *Iowa LR* 403; Jules Coleman, 'Tort Law and the Demands of Corrective Justice' (1992) 67 *Indiana LJ* 349.

imperfectly and incompletely, often forced by the bilateral nature of private law adjudication and the lack of correlation between the claimant's loss and the defendant's gain either to overcompensate the claimant or to allow the defendant to retain part of the benefit of his or her conduct.[93]

But the general pattern is clear: remedies are regarded as corrective responses that strip the defendant of his or her gain or compensate the claimant for his or her loss. A distributive analysis of proprietary remedies would be out of step with the analysis of other remedies available under the general law.

2. Even if proprietary remedies are redistributive, the common law is anti-redistributive (at least on the surface). That is, courts are committed to a rhetoric of non-interference with property holdings. Blackstone's assessment, that '[s]o great ... is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community' and that it is for the legislature alone to sanction expropriation,[94] has remained generally accurate throughout the major Commonwealth jurisdictions into the twenty-first century.

On this view, property is the means by which individuals secure a zone of freedom from the state;[95] it is a pre-political baseline which political institutions should respect: as Richard Epstein writes, 'the state [is] the protector of property rights but not ... their source'.[96] And in particular, it is for legislatures alone — and then rarely — to vary property rights.[97]

This presents a challenge to strong sense proprietary remedies inside and outside insolvency. Judicial involvement in interfering with proprietary rights is anathema, whether it is to determine the distribution of an insolvent defendant's assets among his or her creditors or simply to reallocate some part of a solvent defendant's assets to the claimant. It is not surprising, therefore,

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93 The cases that most obviously cause difficulty are the three party cases (always difficult for corrective justice theories): for example, in unjust enrichment where the defendant receives property from a third party who has acquired it from the claimant by theft or by inducing a mistake. The duty to effect restitution does not depend on any transaction having occurred between the claimant and the defendant: contrast Kit Barker, 'Unjust Enrichment: Containing the Beast' (1995) 15 *OJLS* 457 at 470. The bilateral common law adjudicatory process predisposes judges and jurists towards corrective justice explanations and, in particular, towards assuming that the claimant's claim must be founded on some wrongful conduct *on the part of the defendant*. Arguably, this is why Lord Templeman viewed the claimant's retention of property as the unjust factor in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL).

94 William Blackstone, *Commentaries on the Laws of England* (3rd ed 1768) vol 1 at 139, concluding that by this approach 'every individual person must find himself a gainer, on balancing [sic] the account'. Compare David Hume's approach: David Hume, *A Treatise of Human Nature* (2nd edn edited by L A Selby-Bigge and P H Nidditch 1978) at 497 (Book III, Section II); id at 502 (Book III, Section III).

95 See generally Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* (1990) at 246–250.

96 *Takings: Private Property and the Power of Eminent Domain* (1985) at 217.

97 See generally Simon Evans, 'When is an Acquisition of Property Not an Acquisition of Property?' (2000) 11 *Public LR* 183 at 199–201; Rotherham, above n90.

that the orthodox analysis of proprietary remedies takes two further steps. First, not only are weak sense proprietary remedies regarded as non-redistributive (as to which see point 3 below), *only* these proprietary remedies are regarded as non-redistributive. Secondly, *only* weak sense proprietary remedies are justifiable: strong sense proprietary remedies are anathema *because* they are redistributive.[98] The orthodox analysis explicitly rejects the redistributive analysis of proprietary remedies.

3. Unsurprisingly, then, the non-redistributive analysis of proprietary remedies is widely accepted.[99] Strong sense proprietary remedies are excoriated[100] or fleetingly referred to as a possibility as yet unexplored.[101] Weak sense proprietary remedies are analysed either as a part of the law of property or as a set of remedies that supplement the non-proprietary remedies that arise from transactions or exchanges.[102] They are said to have no distributive impact and, in particular, no distributive impact on the defendant's general creditors because any remedial proprietary interest arises at once when the defendant acquires the subject matter of the remedy so that, to the extent of the remedy, he or she never has a beneficial interest in the subject matter.[103] As a result, his or her creditors have no cause for complaint when they are unable to look to it to satisfy their claims.

Despite the orthodoxy of the non-redistributive analysis and its apparently strong basis in common law traditions, it is unsound.

First, the judge-made law does not in fact give effect to the absolutism of Blackstone's and the judges' own rhetoric. The courts redistribute property when, for example, they vary the property rights of former domestic partners;[104] when they recognise proprietary rights that arise by prescription;[105] when they hold that an estoppel might be appropriately given effect by recognising the claimant as having acquired proprietary rights in the defendant's property;[106] and when (albeit

98 Birks, 'Proprietary Rights as Remedies', above n1 at 218, 223; *In re Goldcorp Exchange Ltd* [1995] 1 AC 74 at 104–105.

99 See for example, Roy Goode, 'Ownership and Obligation in Commercial Transactions' (1987) 103 *LQR* 433 at 439–440; Sarah Worthington, *Proprietary Interests in Commercial Transactions* (1996), especially Chapter 8 (a claimant can acquire a remedial interest in property that previously belonged to the defendant only if the defendant was under a mandatory and unconditional personal obligation to transfer identifiable property to the claimant: ibid 188). Compare Gbolahan Elias, *Explaining Constructive Trusts* (1990) at 35. Contrast Gerard MacCormack, *Proprietary Claims and Insolvency* (1997), especially Chapter 6.

100 In *re Goldcorp Exchange Ltd* [1995] 1 AC 74.

101 *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 716 (Lord Browne-Wilkinson).

102 In *re Goldcorp Exchange Ltd* [1995] 1 AC 74 at 104–105; *Foskett v McKeown* [2000] 2 WLR 1299 especially at 1304–1305 (Lord Browne-Wilkinson).

103 Goode, above n99 at 439–440.

104 As in *Muschinski v Dodds* (1985) 160 CLR 583.

105 As in *Delohery v Permanent Trustee Co of NSW* (1904) 1 CLR 283.

106 As in *Giumelli v Giumelli* (1999) 196 CLR 101.

rarely) they refuse to restrain tortious interference with the claimant's property and instead require the defendant to compensate the claimant for the interference.[107]

And secondly, it is quite erroneous to assert that weak sense proprietary remedies are non-redistributive. Proprietary responses to the problems of priority and insolvency are redistributive simply because any such response deals with multiple competing claims to necessarily limited resources, regardless of the form in which the rules are cast. Proprietary response to other problems, even when cast in the form of weak sense proprietary remedies, involve courts taking property from a defendant and reallocating it to a claimant.

I have argued elsewhere that the courts should avoid such obfuscation and should adopt an openly redistributive analysis of proprietary remedies.[108] That is, they should acknowledge that proprietary remedies (whether remedial in the weak sense or the strong sense) involve creating new rights.

This is most important in insolvency. In that context, courts should justify proprietary remedies by distinguishing the claimant's claim from those of the defendant's general creditors. Only such a justification is sufficient to warrant the advantages a proprietary remedy confers on a claimant against an insolvent defendant's general creditors. (As Professor RP Austin succinctly put it, '[p]rinciples which are adequate to justify imposing an obligation *of some sort* are not, except in rare instances, sufficient to justify recourse to a proprietary obligation of any sort').[109] If they do not, they simply do not address the fundamental question whether the claimant's claim deserves priority over the claim of the insolvent defendant's general creditors.

But it is also important to acknowledge the redistributive effects of proprietary remedies outside insolvency.

1. It is difficult to posit a workable distinction between insolvency and non-insolvency cases. A defendant may satisfy the triggers of the statutory insolvency processes but ultimately be able to pay its debts in full. Equally, a defendant may survive for a considerable time outside the statutory insolvency processes, relying on the assistance of related parties in meeting some but not all of its liabilities.
2. There are important reasons (including those identified by Birks)[110] to respect

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107 As considered in *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1989) 24 NSWLR 490 at 496, 497 and *Aristoc Industries Pty Ltd v R A Wenham (Builders) Pty Ltd* [1965] NSWR 581.

108 Id at 37–42.

109 Robert Austin, 'The Melting Down of the Remedial Trust' (1988) 11:1 *UNSWLJ* 66 at 85 (emphasis in original). (I have made this argument more fully in Evans, above n91.) This is not inconsistent with Professor Dan B Dobbs' proper insistence that, as remedies are the means of carrying substantive rights into effect, they should reflect those rights or the policies behind those rights as precisely as possible: Dan B Dobbs, *Dobbs Law of Remedies: Damages, Equity, Restitution* (Practitioner Treatise Series) (1993) vol 1 at 27, para 1·7. The imposition of additional limitations on the content of the secondary right to take into account the interests of other parties does not violate this principle.

110 Above n17.

property holdings and avoid redistributive remedies. There are also legitimate concerns about the expressive significance of courts redistributing property.[111] Denying the redistributive effects of proprietary remedies is not an effective strategy for dealing with these concerns. Rather courts should explicitly acknowledge the redistributive effects of the proprietary remedies they grant and justify those effects in light of the legitimate concerns about such remedies. Doing so ought also reduce instrumental reliance on proprietary remedies to attract the adventitious operation of statutory or non-statutory rules that deal with some quite different subject-matter.[112]

3. Even where the reasons for seeking a proprietary remedy do not directly raise distributive issues, the distinctive reasons for seeking such a remedy (rather than any remedy, proprietary or not) should figure in the court's analysis. If they do not, and the courts persist in the current conceptualist approaches, they 'encourage a quest for mitigation by the drawing of further fine distinctions and exceptions'[113] because the underlying rationale for awarding a proprietary remedy is not reflected in the formal structure of the rules that give effect to the orthodox approach to these remedies.[114]

Courts should, therefore, address the fundamental questions directly and not hide behind conceptual accounts that suppress these questions. It is necessary, then, to demonstrate that it is possible for them to do so. That is the object of the next Part.

3. *Discretionary Remedialism is Not Noxious*

A. A Discretionary Approach is Not Inevitable

An important aspect of Professor Birks' argument against separating liability from remedy is that he regards it as an inevitable consequence of doing so that the courts would then have a discretion in each case as to the appropriate remedy.[115] He argues that 'if [the existence of a proprietary remedy] were dictated by rules and principles it would arise as the relevant facts happened'. Accordingly a strong

111 On the social meanings of legal rules, see Lawrence Lessig, 'The Regulation of Social Meaning' (1995) 62 *University of Chicago LR* 943. On the relationship between social meaning (or expressive concerns) and consequentialist concerns, see Cass R Sunstein, 'Symposium: Law, Economics & Norms: On the Expressive Function of Law' (1996) 144 *University of Pennsylvania LR* 2021 at 2045–2048.

112 As in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669. It is also difficult to see why it is not possible to capture the increased value of an asset in the defendant's hands without a proprietary remedy: compare *Soulos v Korkontzilas* [1997] 2 SCR 217; (1997) 146 DLR (4th) 214; *LAC Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574; (1989) 61 DLR (4th) 14; *Foskett v McKeown* [2000] 2 WLR 1299. See also Birks, 'The Remedies for Abuse of Confidential Information', above n1.

113 *Nelson v Nelson* (1995) 184 CLR 538 at 558 (Deane and Gummow JJ) (in the different context of illegality and trusts).

114 On the formal structure of rules and mechanisms for avoiding the operation of rules, see Frederick Schauer, 'Formalism' (1988) 97 *YLJ* 509.

115 Birks, 'Rights, Wrongs, and Remedies', above n1 at 23 ('The core of discretionary remedialism is the separation of liability and remedy. Liability triggers the courts' discretion in the matter of remedy.')

sense proprietary remedy would involve 'a second discretionary look at the same story' after it had been determined that the 'rules and principles' relating to weak sense proprietary remedies dictated that there not be a proprietary remedy on those facts.[116]

I have argued elsewhere that discretion is *not* an inevitable consequence of recognising that the courts have a role in specifying the remedial consequences (proprietary or otherwise) of an already-established liability (or in Birks' terminology in specifying the content of a fourth-sense remedy in giving effect to an already established second- or third-sense remedy).[117] Jurists must decide whether breach of contract should be vindicated by awarding the innocent party his or her expectation or merely his or her reliance loss; whether a tortfeasor should make restitution of the profits he or she made in infringing the plaintiff's right or merely pay compensation for the loss caused to the plaintiff; whether unjust enrichment should be reversed by restitution or whether the claimant should also be able to recover his or her consequential loss from the defendant.[118] But it is possible (and indeed has generally been the case) that these issues are considered in formulating general rules that apply to large classes of cases.

This is true also of proprietary remedies. It is perfectly possible to separate liability from remedy and still have a rule-based approach to proprietary remedies under which the proprietary right does not arise until declared to do so by the court.[119] Indeed, such remedies are recognised already when courts characterise (in a transparently instrumental manner) the claimant's rights as a 'mere equity' that is subsequently 'recognised' or 'given effect' by the court as an equitable interest.[120] The 'mere equity' is a place-holder. It is invoked in order to suggest that the proprietary interest that the claimant acquires is not created by the court but pre-dates the court's determination, albeit in inchoate form.

Nonetheless, some commentators who support discretionary remedialism in general and the remedial constructive trust in particular do write in terms of discretion, most commonly a discretion as to the appropriate remedy in the circumstances of the individual case.[121] In the remainder of this Part, I argue that such a discretionary approach to remedies (including proprietary remedies) is not 'noxious' even if it is compelled by a decision to separate liability and remedy.

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116 Birks, 'The End of the Remedial Constructive Trust?', above n1 at 206.

117 Evans, above n91.

118 Compare Birks, 'Rights, Wrongs, and Remedies', above n1 at 34. Even if restitution is the only available response to unjust enrichment, the court must decide whether that response is proprietary or non-proprietary. See Part I.B (Expanding Birks' Taxonomy of Remedies and Rights) above.

119 Ibid. (Compare A J Oakley, 'The Precise Effect of the Imposition of a Constructive Trust' in Stephen Goldstein (ed), *Equity and Contemporary Legal Developments* (1992). Oakley is no discretionary remedialist but argues that a constructive trust should not arise until declared to do so by a court.) Equally it is possible to have a discretionary approach to proprietary remedies under which the proprietary right is regarded as arising on the occurrence of some causative event.

120 On other occasions, mere equities are used instrumentally to reach desired conclusions about the priority of competing interests: *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265 especially per Kitto J.

121 See the works cited below at n147 and following.

B. Senses and Purposes of Discretion

Discretion is primarily a technique (or rather a set of techniques) for contextualising legal decisions in a manner which experience reveals is impossible by the use of rules alone. As a legal technique, it enables decision-making that cannot be encapsulated in rules. Its virtue is its potential to produce morally sensitive and morally nuanced decisions[122] and to mediate effectively between competing values. It is readily apparent that this is an important aspiration of those advocating a discretionary approach to proprietary remedies.[123]

However, 'discretion' can be understood in several senses and it is as important to distinguish them as it is to distinguish the various senses of 'remedy'. The first and most important point is that 'discretion' is not the same thing as power to decide in accordance with what is 'fair, just and reasonable'.[124] Such a broad and barely constrained decision-making power is certainly discretionary but it is hardly typical of the concept and it is certainly not typical of the discretion exercised by courts.

For present purposes, the most useful starting point in considering the concept is the distinction that Professor Ronald Dworkin draws between two weak senses and one strong sense of 'discretion':[125]

- In the first weak sense, 'we use "discretion" ... simply to say that for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgment'.
- In the second weak sense, 'we use the term ... to say only that some official has final authority to make a decision and cannot be reviewed and reversed by any other official'.
- In the strong sense, '[w]e use "discretion" ... not merely to say that an official must use judgment in applying the standards set him by authority, or that no one will review that exercise of judgment, but to say that on some issue he is simply not bound by standards set by the authority in question'.

These categories are problematic on a number of grounds, not least because the first weak sense of 'discretion' shades into the strong sense if the standards to be applied by the official are vague and open textured.[126] A richer analysis recognises that discretionary decision-making forms part of the continuum of decision-making (as Kent Greenawalt puts it) from 'simple factual judgment' to 'wide

122 The phrase is Professor Neil MacCormick's: Neil MacCormick, 'Discretion and Rights' (1989) 8 *Law and Philosophy* 23 at 36.

123 See, for example, Paul Finn, 'Equitable Doctrine and Discretion in Remedies' in William R Cornish, et al (eds), *Restitution: Past, Present and Future* (1998) at 251; *Rawluk v Rawluk* (1990) 65 DLR (4th) 161 (SCC) at 181 (Cory J); *Pettkus v Becker* (1980) 117 DLR (3rd) 257 (SCC) at 273 (Dickson J).

124 Contrast The Rt Hon Lord Justice Bingham, 'The Discretion of the Judge' [1990] *Denning LJ* 27 at 28; *Foskett v McKeown* [2000] 2 WLR 1299 at 1304–1305 (Lord Browne-Wilkinson), 1322–1323 (Lord Millett).

125 Ronald Dworkin, *Taking Rights Seriously* (4th impression 1984) at 69.

126 Kent Greenawalt, 'Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges' (1975) 75 *Columbia LR* 359 at 365–366.

freedom of choice'[127] or from rule-following to unconstrained choice. Nonetheless, 'weak' and 'strong' discretion remain useful shorthands for the two ends of the discretionary decision-making continuum.

In his recent writing, Birks also uses the language of weak and strong discretion and, although he does not refer explicitly to Dworkin, it appears likely that he is using the terms in the sense given currency by Dworkin. Birks first distinguishes rights from remedies that depend on a strong discretion:

> If the court regards its order as strongly discretionary, its content cannot reflect an [a]nterior right. The discretion which is interposed between the plaintiff and the order shows that he has no right to that which he wants ordered.[128]

This must be right. Such a plaintiff only has a right to an exercise of the discretion, not to a favourable exercise of the discretion.

However, in Birks' view, weakly discretionary remedies do reflect anterior rights:

> Many judicial orders are weakly discretionary. Orders for specific performance and for injunctions and all others rooted in the Court of Chancery are weakly discretionary. The discretion has been settled over the centuries. To speak of a right to specific performance or injunction or an account is not nonsense. We know on what facts a person is entitled to such orders. ... However, if the court has a strong discretion to give or to withhold, and to shape, the order which it will makes, clearly the order becomes a remedy which is not a right.[129]

This is problematic in two ways.

1. It wrongly conflates weak discretion (and in particular, the discretion to award or withhold equitable remedies) with rule-based decision-making.
2. It wrongly characterises the discretion involved in discretionary remedialism and strong sense proprietary remedies as a strong discretion; it concludes therefore that discretionary remedialism and strong proprietary remedies are not an acceptable part of a legal system that adheres to the rule of law.

I consider these points in turn.

(i) Discretion and Equitable Remedies

Birks' attempts to eradicate discretionary remedialism would be doomed to fail if the firmly established discretionary approach to equitable remedies were an instance of discretionary remedialism. Unsurprisingly, then, Birks contends that the discretionary approach to equitable remedies is *not* an instance of discretionary remedialism. He argues instead that the discretion in relation to equitable remedies has been 'settled' and apparently supplanted by rules.[130] He observes that a

127 Id at 366.

128 Birks, 'Rights, Wrongs, and Remedies', above n1 at 16 (see also the discussion in the text above n38).

129 Id at 16–17 (internal citations omitted).

130 Id at 16. In some contexts, of course, the discretion is more constrained by principle and precedent than in other areas.

detailed and extensive jurisprudence constrains the discretion in relation to equitable remedies and asserts that '[t]he discretion has been settled over the centuries' so that it is meaningful to speak of a right to the remedy.[131]

This is difficult to reconcile with the approach of the courts and commentators. As Millett LJ observed in *Jaggard v Sawyer*,[132] the most that any decision on the exercise of discretion to award an equitable remedy can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way *but it does not follow that it would be wrong to exercise it differently.* There is a discretion at work that precludes the full operation of the principles of *stare decisis*. Loughlan put it as follows in her analysis of the remedial discretion in equity:

> These rules for the guidance of a discretionary judgment are not, however, rules in the Dworkinian sense: they do not dictate a particular result. Even in those areas of equitable relief which have been so extensively litigated that a "settled practice" of granting or withholding the relief has emerged, courts of equity reserve to themselves what appears to be a "discretionary space" wherein they have authority to diverge from the practice.[133]

The discretion is constrained and weak but nonetheless it is a real discretion.

Birks argues, in effect, that any 'discretionary space' can and should be restated in terms of qualifications to a right that is remedial only in one of the weak senses.[134] Once again, here, Birks appears to conflate discretion with strong discretion and weak discretion with rules. And there is a further difficulty. Birks would have equitable remedies determined by a rule with a set of exceptions. The rule and exceptions would be comprehensive — they would provide an answer to all problems within their domain[135] — and they would be determined once and for all (subject of course to the ordinary evolutionary processes of the judge-made law). This formalist approach would eliminate the 'discretionary space' described by Loughlan in the current approach to equitable remedies. Would such a development be desirable?[136] The distinctive features of the current approach are well captured in Frederick Schauer's description of an approach to decision-making he calls 'presumptive formalism':

> Under such a theory ... there would be a presumption in favor of the result generated by the literal and largely acontextual interpretation of the most locally

131 Ibid. Compare also the language of *Warman International Limited v Dwyer* (1995) 182 CLR 544 at 559 but contrast below n136.

132 [1995] 1 WLR 269 (CA) at 288.

133 Patricia Loughlan, 'No Right to the Remedy?: An Analysis of Judicial Discretion in the Imposition of Equitable Remedies' (1989) 17 *MULR* 132 at 135 (internal citation omitted).

134 Birks, 'Rights, Wrongs, and Remedies', above n1 at 16.

135 Subject to problems of filling gaps left by the rules' formulation: see Frederick Schauer, *Playing by the Rules* (1992) at 222–228

136 It certainly does not reflect the approach in *Warman International Limited v Dwyer* (1995) 182 CLR 544 where the High Court developed principles guiding, but not extinguishing, the discretionary remedy of an account of profits. (I am grateful to an anonymous referee for this observation.)

> applicable rule. Yet that result would be presumptive only, subject to defeasibility when less locally applicable norms, including the purpose behind the particular norm, and including norms both within and without the decisional domain at issue, offered especially exigent reasons for avoiding the result generated by the presumptively applicable norm.[137]

Under the current approach, courts can 'temper the occasional unpleasant consequences of [a formal system of acontextual rule-following] with an escape route that allow[s] some results to be avoided when their consequences would be especially outrageous'[138] by access to a wider set of norms than under the approach favoured by Birks. Obviously, the current approach is more consistent with the origin and historical purpose of equity as an institution that ameliorates the rigidity of the common law by contextualised decision-making based on general standards.[139] Birks does not demonstrate that it is now desirable to depart from this approach and eliminate the discretionary space from the rules relating to equitable remedies.

(ii) Weak Discretion and Strong Sense Proprietary Remedies

It is important to bear in mind that the discretion involved in equitable remedies is not a strong discretion. In ameliorating the rigidity of the law by reference to general standards and discretions, equity has not become divorced from the idea of law. It has not replaced a law of rights with an arbitrary power to vary rights. Discretion has not become the dominant legal technique and corrosive of civic independence.[140]

Rather, the discretion in equity is constrained, girded and guided by principle.[141] As Loughlan has demonstrated, in exercising the discretion to grant or withhold an equitable remedy, equity employs principles and standards in the same manner as they are employed in deciding hard cases at law.[142] In exercising

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137 Schauer, above n114 at 547.

138 Ibid. Compare *Warman International Limited v Dwyer* (1995) 182 CLR 544 at 561 (discussing the doctrine of unjust enrichment as a limiting — but not defining — principle on the defaulting fiduciary's liability to account).

139 Thurman Arnold, 'The Restatement of the Law of Trusts' (1931) 31 *Columbia LR* 800 at 822–823. Arnold's context was slightly different but the point remains sound.

140 MacCormick, above n122 at 36. Compare *State of New York v United States* 342 US 882 (1951) at 884 (Douglas J) ('Absolute discretion, like corruption, marks the beginning of the end of liberty.')

141 Finn, above n123 at 267.

142 Loughlan, above n133. Similarly, in applying its general standards, in particular the unconscionability standard, equity does not employ unstructured discretions but reasons as courts do in hard cases. See also Stephen M Waddams, 'Judicial Discretion' (2001) 1 *Oxford University Commonwealth LJ* at 59–63. Waddams argues that characterising a decision as 'discretionary' in order to signal a higher threshold before appellate intervention is possible misses the real reasons for imposing such a higher threshold. But he emphasises importantly that where a decision is described as 'discretionary' merely because it is based on rules that are open-textured, no particular deference is due from appellate courts to the judge at first instance: id at 60. He appears to agree that, even when the principles are open-textured, courts search for the right answer: id at 61.

this discretion the judges are employing an approach considered legitimate in other areas of law. They are engaged in the same way in a search for the right answer using legal and not extra-legal standards.[143]

The aim of discretionary remedialism is not (as Birks would have it) 'to arrive at something which is impossible for the human intellect to achieve, namely, perfectly flexible focus without sacrifice of stability and predictability'.[144] It is not the case that discretionary remedialism 'purports to be a strong discretion which must be kept fresh for each exercise' rather than being 'on its way to a weak, rule-based discretion'.[145] It is not correct to assume that discretionary remedialism is meaningfully distinct from rule-based decision *only* if it is based on strong discretion.[146] These propositions are supported by the approach of the leading advocates of discretionary remedialism to whose work Birks refers.

- Donovan W M Waters concludes that 'the occasional rhetoric of judgments proclaiming with some fanfare the existence of judicial discretion does not necessarily reflect anything more than the desire that formulae and rules shall not settle upon the law before the formative age is clearly over'.[147]
- J D Davies argues that '[e]lements of discretion are involved' in developing an approach that separates liability and remedy but that the discretionary elements 'can be made to add to rather than detract from the effectiveness of the law'.[148] There is nothing in the works cited by Birks that suggests he is committed to strong discretion.
- Kit Barker is certainly a committed remedialist but is no supporter of strong discretion. He argues that discretionary remedies need not 'signal the end of all certainty and stability in the law *any more than a system of apparently stable rules guarantees it*'.[149] In his view, as in mine and those of the other commentators referred to by Birks, the impact of discretionary remedies depends upon the way in which discretions are structured and in particular 'the extent to which factors operating within that structure are articulated'.[150] An important element of discretionary remedialism is a commitment to candour about the basis on which remedies are awarded and withheld, in preference to the obfuscation of current approaches (particularly in relation to proprietary remedies).

143 Id at 138.

144 Birks, 'Rights, Wrongs, and Remedies', above n1 at 23.

145 Birks, 'Three Kinds of Objection', above n1 at 13.

146 Ibid.

147 Donovan Waters, 'The Nature of the Remedial Constructive Trust' in Peter Birks (ed), *The Frontiers of Liability* (1994) vol 2 at 165, 184. Inevitably, the uncertainty of a discretionary approach will decrease with experience of its application: Simon Gardner, 'The Element of Discretion' in Peter Birks (ed), *The Frontiers of Liability* (1994) vol 2 at 198–199; Anthony Mason, 'The Australian Judiciary in the 1990s' (1994) 6 *Sydney Papers* 111 at 113.

148 J D Davies, 'Restitution and Equitable Wrongs: An Australian Analogue' in Francis Rose (ed), *Consensus Ad Idem: Essays on Contract in Honour of Guenter Treitel* (1996) at 158, 174 (see also id at 177–178 where again there is no suggestion that Davies supports a strong discretion).

149 Barker, above n29 at 317 [emphasis added].

150 Ibid. Compare DM Wright, *The Remedial Constructive Trust* (1998) at 142–143 ([4.19]).

- Grant Hammond, therefore, insists strongly that 'the exercise of remedy allocation must be one of candour'.[151] '[I]n cases where there are genuine choices to be made, full articulation is surely required'.[152]
- Paul Finn endorses an approach that emphasises standards rather than rules and a 'far more instance-specific evaluation of conduct'.[153] He sees the jurisprudence of remedies as evolving, a process that requires comparison, evaluation and analysis, not intuitive solutions.[154] And yet he directly rejects Birks' contention that any discretion involved in equitable remedies is 'an embarrassing discretion, inimical to legal certainty'; that contention 'misconceives both the orientation of modern equity and the constraints which gird and guide such judicial discretion as there is in the matter'.[155] Identifying the appropriate remedy is, as in Hammond's analysis, something that involves principled reasoning and not judicial fiat.[156]

Even if these commentators were to advocate that the availability of remedies (and in particular proprietary remedies) be determined by the exercise of a strong discretion, it is unthinkable that the courts would adopt such an approach. Discretions conferred on or held by courts are interpreted as judicial discretions, not arbitrary discretions. As Lord Mansfield said long ago in *Rex v Wilkes*:

> [D]iscretion, when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule; not by humour: it must not be arbitrary, vague, and fanciful; but legal and regular.[157]

More recently, Mason and Murphy JJ wrote in *The Queen v Joske; Ex parte Shop Distributive and Allied Employees' Association* of a newly conferred statutory discretion:

> Many examples are to be found in the exercise of judicial power of orders which alter the rights of the parties or are the source of new rights. Likewise, there are countless instances of judicial discretions with no specification of the criteria by reference to which they are to be exercised — nevertheless they have been accepted as involving the exercise of judicial power ... . It is no objection that the function entrusted to the Court is novel and that the Court cannot in exercising its discretion call in aid standards elaborated and refined in past decision; it is for the Court to develop and elaborate criteria regulating the discretion, having regard to

151 Grant Hammond, 'Rethinking Remedies: The Changing Conception of the Relationship Between Legal and Equitable Remedies' in Jeffrey Berryman (ed), *Remedies: Issues and Perspectives* (1991) at 87, 107.

152 Ibid.

153 Finn, above n123 at 260.

154 Id at 262. See also the Hon Mr Justice Ipp, 'Introduction' in Robyn Carroll (ed), *Civil Remedies: Issues and Developments* (1996) at xxvii, xxxi.

155 Finn, above n123 at 266, 267, quoting Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *WALR* 1 at 39.

156 Finn, above n123 at 267–273.

157 (1770) 4 Burr 2527 at 2539 [98 ER 327 at 334].

> the benefits which may be expected to flow from the making of an order ... and the impact which such an order will have on the interests of persons who may be affected.[158]

It is not as if remedial discretions are a new phenomenon. To take only Australian examples, section 89 of the *Matrimonial Causes Act* 1899 (NSW) gave the Supreme Court a discretionary power to vary marriage settlements following the dissolution of marriages; section 3 of the *Testator's Family Maintenance and Guardianship of Infants Act* 1916 (NSW) gave the Supreme Court a discretionary power to make such provision 'as the court thinks fit' out of the testator's estate for the maintenance, education and advancement of his or her family. More recent examples include section 87 of the *Trade Practices Act* 1974 (Cth), section 79 of the *Family Law Act* 1975 (Cth), Part 5.7B (and in particular section 588FF) of the *Corporations Act* 2001 (Cth) and sections 7 and 9 of the *Contracts Review Act* 1980 (NSW). Their (weakly) discretionary nature is well established.[159] They take their place with the equitable remedial discretions I have discussed above in the body of law administered by the courts.[160] Even the most open textured of these discretions do not appear to excite controversy or to threaten the institutional legitimacy of Australian courts, provided only that the discretionary function conferred on the court does not 'create a dangerous propinquity with the executive or legislature, so undermining public confidence in judicial independence'.[161] And if the evil of such discretions lies in the threat to the institutional legitimacy of the courts, the source of the discretion in statute or the judge-made law is not directly relevant.[162] At least under an entrenched system of separation of powers, the legislature cannot authorise the courts to exercise a function that threatens their institutional legitimacy just as the courts cannot assume such a function for themselves.[163]

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158 (1976) 135 CLR 194 at 215–216. Contrast *Mallett v Mallett* (1984) 156 CLR 605. Of course to argue that a discretion should not be structured by adopting a presumption as to how it should be exercised is not the same as to argue that the discretion should not be structured at all: see generally Simon Gardner, 'The Remedial Discretion in Proprietary Estoppel' (1999) 115 *LQR* 438.

159 Section 588FF: *Re Pacific Hardware Brokers (Qld) Pty Ltd* (1998) 15 ACLC 442 at 447; *McDonald v Hanselmann* (1998) 28 ACSR 49 at 53 (Young J) but note *Cashflow Finance Pty Limited (In Liquidation) v Westpac Banking Corporation* [1999] NSWSC 671 at [566]–[570] (Einstein J).

160 On the unified body of statute and common law, see Chapter 1 (The Common Law and Statute) of William M C Gummow, *Change and Continuity: Statute, Equity and Federalism* (1999). (I am grateful to an anonymous referee for this reference.)

161 *Re Australasian Memory Pty Ltd* (1997) 149 ALR 393 at 435. See also Owen Fiss, 'Objectivity and Interpretation' (1982) 34 *Stanford LR* 739 at 744; Tom Tyler, and Gregory Mitchell, 'Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights' (1994) 43 *Duke LJ* 703.

162 Subject, of course, to the proviso that any discretion deriving from judge-made law be developed in the ordinary incremental manner: see below text at n172 and following.

163 *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1; *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51; *Yanner v Minister, Aboriginal & Torres Strait Islander Affairs* (2001) 181 ALR 490.

In short, if the discretion involved in the decision to grant proprietary remedies is of the same kind as the discretion in relation to equitable remedies, it is distinctly discretionary but is not amorphous, arbitary or unstructured 'strong' discretion. As Deane J said in *Muschinski v Dodds*, '[n]otions of what is fair and just are relevant but only in the confined context of determining whether conduct should, by reference to legitimate processes of legal reasoning, be characterised as unconscionable for the purposes of a specific principle of equity'.[164] The equitable remedy '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'.[165] There is a clear difference between such an approach and the feared jurisdiction to alter property rights 'whenever justice and good conscience require it'.[166]

C. *Objections to Discretionary Decision-Making*

It remains necessary to examine more closely five further objections to a discretionary approach to proprietary remedies that Birks advances.[167]

(i) Historical Legitimacy

Birks makes three points about the historical approach to remedies that he contends undermine the legitimacy of discretionary remedialism:

1. It is not possible to 'revivify the old discretion surrounding [equitable remedies], which has long since withered away' to provide a foundation for a wider doctrine of discretionary remedialism.[168]
2. Historically it has been 'the law [that] makes the choice' of the appropriate response to causative events, 'not the judge'.[169]

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164 (1985) 160 CLR 583 at 621.

165 Id at 615.

166 *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 152 quoting *Hussey v Palmer* [1972] 1 WLR 1286 at 1290.

167 See text above n19. Some may see a further problem arising when a non-judicial decision-maker is required to determine the extent of a person's assets as an element of their eligibility for a social welfare payment or in their liability to pay some tax. If proprietary remedies depend on the exercise of judicial discretion then the extent of the person's assets will not be finally determinable until the discretion is exercised by a judge in appropriate proceedings. Until then statutory language requiring the decision-maker to determine a person's assets will not encompass the subject-matter of a proprietary claim that person has or exclude the subject-matter of a proprietary claim against him or her. But statutory language can be changed and the decision-maker could be empowered to make his or her decision on the basis of his or her assessment of what a judge would ultimately decide on the facts presented. Of course *even on current approaches* to proprietary remedies a non-judicial decision-maker's determination about a person's assets is necessarily provisional: it is of the essence of the separation of powers that non-judicial decision-makers are incapable of making binding determinations of fact or law. Their determinations about a person's proprietary rights are only data for their decisions and cannot amount to binding determinations of a person's proprietary rights. Their determinations are always liable to be confounded by a subsequent judicial determinations. Discretionary remedialism does not present a problem of a different order.

168 Birks, 'Three Kinds of Objection', above n1 at 14.

169 Id at 9.

3. Where the law determines that there is more than one appropriate response, it is the claimant and not the judge that makes the 'choice between them'.[170]

I have discussed the first point previously and do not repeat my comments here.[171]

As to the second point, it does not take an extreme legal realist or sceptical post-modernist to recognise the mythic elements of the claim that it is the law that makes decisions about remedies, not judges. That myth, intimately connected with the declaratory theory of judicial decision-making, is long exploded.[172] As Lord Browne-Wilkinson put it in *Kleinwort Benson Ltd v Lincoln City Council*,[173] the 'underlying myth [that judges do not make or change the law] has been rejected'.[174] Judges make decisions about remedies just as they make decisions that make and change the law. But judges remain constrained. Kirby J, writing extra-judicially, developed the point in this way:

> The problem of the past fifty years, as the declaratory theory has crumbled away as an explanation of depersonalised judicial reasoning and decision-making, is the lack of any agreement about what should take its place. No one (least of all the judges) suggests that a judge, in deciding the law, is a completely free agent, able to follow his or her whim, imposing this or that construction of the Constitution or the Acts of Parliament or this or that vision of the content of the common law. Such a view of the judicial role would be opposed to the conception of a judge as a person obliged to *apply* the law which pre-exists, as distinct from *inventing* it as the judge goes along.[175]

In *Kleinwort Benson*, Lord Goff similarly saw the judge's role as involving law-application, even though the judge does on occasions develop the law:

> When a judge decides a case which comes before him, he does so on the basis of what he understands the law to be. This he discovers from the applicable statutes, if any, and from precedents drawn from reports of previous judicial decisions .... In the course of deciding the case before him, he may, on occasion, develop the

170 Id at 10.

171 Above Part 3.B.i (Discretion and Equitable Remedies).

172 See Lord Reid, 'The Judge as Law Maker' (1972) 12 *The Journal of the Society of Public Teachers of Law* 22.

173 [1999] 2 AC 349.

174 Ibid at 358; see also id at 377–379 (Lord Goff of Chieveley), 393–394 (Lord Lloyd of Berwick), 398–399 (Lord Hoffmann) and 410–411 (Lord Hope of Craighead). However, when judges make or change the law, their decisions have retrospective effect. The extent of that retrospective effect was the central issue and cause of disagreement in this case.

175 The Hon Justice Michael Kirby, AC CMG 'Judging: Reflections on the Moment of Decision' (1999) 18 *Australian Bar Review* 4 at 6–7. Compare The Hon Justice Kenneth Hayne, 'Letting Justice Be Done Without the Heavens Falling' (The Fourth Fiat Justitia Lecture, Monash University, 21 March 2001) <http://www.hcourt.gov.au/speeches/haynej/haynej_fo21301.htm>: 'The search for results which are seen as giving a just result in the individual case, by using techniques which employ such apparently open-ended concepts as "unconscionability" or "discretion", taken with the realisation that the common law is made by judges, not simply discovered, provides a heady cocktail for the unwary judge'.

> common law in the perceived interests of justice, though as a general rule he does this "only interstitially". ... This means not only that he must act within the confines of the doctrine of precedent, but that the change so made must be seen as a development, usually a very modest development, of existing principle and so can take its place as a congruent part of the common law as a whole.[176]

These substantive constraints on judicial decision-making are fundamental. But so too are the methodological constraints identified by Kirby J:

> The grant of power ... to decision-makers who hold judicial office, ought to be conditional upon the exercise of that power in a way which the people governed by it understand and generally accept. To keep in the dark those affected by the exercise of power and to disguise from them the true processes engaged in, is the way of autocracy which fears sharing the truth with the people. My thesis is that judicial candour, although perhaps initially unsettling to those who hanker for fairytales, is more appropriate to our times.[177]

We should, as Lord Goff put it in *Kleinwort Benson*, 'look at the declaratory theory of judicial decision with open eyes and reinterpret it in the light of the way in which all judges, common law and equity, actually decide cases today'.[178] Acknowledging the role of judges in identifying the appropriate remedy in a particular case does not require any more than this.

Finally, Birk's third point (that where the law determines that there is more than one appropriate response to the claimant's claim it is the claimant and not the judge that makes the choice between those responses) depends for much of its normative power on Birks' analysis of fourth-sense remedies (rights arising from the order of a court) as rights that proceed directly from second- and third-sense remedies (rights responding to wrongs, injustices and other grievances) without any significant role for the judge in shaping the remedy. I have argued above that that analysis is faulty and that courts already have a significant role in shaping remedies.[179] Given this and given the analogical practice of judges selecting the appropriate remedy from a statutory remedial menu, it is difficult to see that it is beyond the legitimate evolutionary processes of the judge-made law to allow judges to select the appropriate response to a claimant's claim when there is more than one appropriate response.

(ii) Insulating Judges

Birks' next objection is that only objectively ascertainable rules can insulate decision makers from personal criticism; that employing 'intuitive solutions' derived from discretionary approaches demands that decision makers' authority be unchallenged; and that demand is no longer met.[180]

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176 [1999] 2 AC 349 at 377.

177 Above n175 at 8.

178 [1999] 2 AC 349 at 377.

179 Above Part 1.B (Expanding Birks' Taxonomy of Remedies and Rights).

Some empirical support for this objection may be found in the observation that, even when a statute provides for a discretion, courts are on occasion driven to 'bright line' tests to avoid decisions that will be perceived as subjectively based.[181] Examples may also be found in judge-made law. In the common law, the best known example is the English rejection of liability for negligently inflicted pure economic loss.[182] But that bright line has been rejected in Australia[183] and in Canada.[184] Similarly the bright line adopted for England and Wales in *Tinsley v Milligan*[185] has been rejected by the High Court of Australia in *Nelson v Nelson*[186] in favour of a substantive approach. These examples, and others can be found,[187] demonstrate that the need for insulation and the fear of criticism does not deter the judiciary, at least outside England and Wales, from seeking to adopt and employ substantive open textured standards, confident that these are nonetheless legal standards to be employed accordingly. And if there be criticism, it is the duty of the judge to ignore it.[188]

(iii) Discretion and The Judicial Function

Even if discretion is not problematic from the point of view of the judges who exercise it, it is problematic from the point of view of the parties affected by it to the extent that it constitutes an area of power unconstrained by legal rules.[189] This objection follows the classical idea that only by divorcing legal decisions from their contexts — by abstract principles and rules — can neutral and apolitical law be achieved. As one strand of judicial thinking holds, making decisions based on discretionary factors 'thrust[s] the Court inevitably "into the basic line-drawing process that is pre-eminently the province of the legislature" and produce[s] judgments that [are] no more than the visceral reactions of individual Justices'.[190] A more sophisticated account of this fear is given by Professor George P

180 Birks, 'The Remedies for Abuse of Confidential Information', above n1 at 465. See also Birks, 'Civil Wrongs: A New World', above n1 at 92–93; Compare, text above n 170 where Birks appears to assume that if a decision is not conceptualised as the law's decision, it must be the unconstrained decision of the decision-maker.

181 George C Christie, 'An Essay on Discretion' 1986 *Duke LJ* 747 at 776; The Hon Justice McHugh AC, High Court of Australia 'The Growth of Legislation and Litigation' (1995) 69 *ALJ* 37 at 43–44; See also The Hon A Murray Gleeson AC, Chief Justice, Supreme Court of New South Wales 'Individualised Justice — The Holy Grail' (1995) 69 *ALJ* 421 at 431.

182 *Murphy v Brentwood DC* [1991] 1 AC 398 (HL).

183 *Bryan v Maloney* (1995) 182 CLR 609.

184 *Canadian National Railway Co v Norsk Pacific Steamship Co Ltd* [1992] 1 SCR 1021; (1992) 91 DLR (4th) 289.

185 [1994] 1 AC 340 (HL).

186 (1995) 184 CLR 538.

187 Including Kirby P's dissenting judgment in *Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26.

188 *Planned Parenthood of Southeastern PA v Casey* 505 US 833 (1992) at 958 (Rehnquist CJ dissenting).

189 See for example, Kenneth Culp Davis, *Administrative Law Treatise* (2nd edn 1979) vol 2 at 165–166, para 8·3; Compare Christie, above n181 at 752, 754.

190 *Solem v Helm* 463 US 277 (1983) at 308 (Burger CJ dissenting), quoting from *Rummel v Estelle* 445 US 263 (1980) at 275.

Fletcher.[191] In the Western tradition, and in particular in the common law tradition, law is understood as a rational process. Judgments are regarded as legitimate if they are *rationally* supportable. They are legitimated externally by reference to sources of law and to reason, and not internally by reference to the personal judgement of the decision maker. So an appeal to discretion is a means of 'backing out of the obligation to present a convincing reason': the exercise of discretion is not a reason for judgment, but the denial of one; it cuts off justification short of rational persuasion.[192]

This would be a cogent objection to a discretionary approach to proprietary remedies if (contrary to my argument) the discretion was a strong discretion.[193] Moreover, it is not only in discretionary decision-making that the reasons run out short of rational persuasion. The controversy surrounding the correctness of *Lister & Co v Stubbs*,[194] and now of *Attorney-General for Hong Kong v Reid*,[195] is ample evidence of this. Some jurists find reasons for the grant of a proprietary remedy persuasive; others find reasons for withholding one persuasive.[196] Similarly, the reasons stop some way short of rational persuasion on Birks' approach to proprietary remedies for mistaken payments: for example, how exactly is a mistake 'sufficiently fundamental to prevent the property from passing' to be identified?[197] The reason that this is so is easily identified: as in most of the law concerning proprietary remedies, there are factors that suggest that a proprietary remedy is appropriate and factors that suggest that one is not. But the ultimate decision is no less legal in that it depends on a balancing of factors. In a deeper sense, it is inevitable that reasons should run out in this manner. Law, after all, is a normative exercise and normative premises cannot be established or defended analytically. Avoiding discretion does not and cannot overcome this fact.

(iv) Certainty

Birks' fourth objection to a discretionary approach to proprietary remedies is based on the importance that the legal system attaches to certainty.

For reasons given above, Birks overreaches when he argues that the aim of discretionary remedialism and the discretionary approach to proprietary remedies

191 George P Fletcher, 'Some Unwise Reflections About Discretion' (1984) 47(4) *Law and Contemporary Problems* 269 at 284–285; Compare Peter BM Birks, 'Civil Wrongs: A New World', above n1 at 92.

192 Fletcher, above n191 at 284, 285. See also *Planned Parenthood of Southeastern PA v Casey* 505 US 833 (1992) at 865 (O'Connor, Kennedy and Souter JJ): '[A] decision without a principled justification would be no judicial act at all'.

193 Dworkin, above n125 at 69.

194 (1890) 45 ChD 1 (CA).

195 [1994] 1 AC 324 (PC).

196 There is a difference between the discretion involved in deciding between *Lister & Co v Stubbs* and *Attorney-General for Hong Kong v Reid* and the discretion involved in a case by case determination of the appropriate remedy. But it is a difference of degree rather than of kind and one which will inevitably diminish over time as the discretion becomes structured according to the decided cases.

197 Peter Birks, *An Introduction to the Law of Restitution*, (revised edn 1989) at 379.

is to achieve 'perfectly flexible focus without sacrifice of stability and predictability' and that is 'impossible for the human intellect to achieve'.[198] Equally, his argument that 'strong remedial discretion would make the management of litigation impossible, promoting unjust settlements based on guesswork as to the operation of the discretion'[199] overstates the position in so far as he assumes that discretionary remedialism involves a strong discretion.

However, there is plainly merit in the argument that discretionary approaches to decision-making are less predictable and certain than approaches based on clear rules. Clear rules provide parties with the information they need to negotiate rational compromises of their disputes. The less predictability and certainty there is, the less likely it is that parties will be able to settle disputes without litigation. And the public interest in resolving disputes without incurring the financial costs and delays of litigation is particularly significant in the context of insolvency when litigation erodes the assets available for distribution among the defendant's creditors and the delays finalisation of the insolvency process.

But even this argument raises important legal and empirical questions. Once again I focus on proprietary remedies. The questions include:

1. How predictable and certain are the current ostensibly rule-based approaches to proprietary remedies? How clear are the signals they send to future litigants about the likely outcome of their cases? Do those signals enable litigants to settle their cases prior to litigation on a rational basis? (The volume of academic commentary suggests that the current rules are far from certain and leave considerable room for argument in individual cases.)
2. How constrained (and therefore how predictable and certain) is any plausible discretionary approach to proprietary remedies likely to be? Can a discretionary approach be constrained and structured in a way that enables litigants to settle cases prior to litigation on a rational basis? (I have argued above that any plausible discretionary approach is likely to be substantially constrained and certainly will not be a strong or arbitrary discretion).[200]
3. How significant is any additional uncertainty involved in a remedial discretion when compared with the usual forensic uncertainty about which facts can be proven to the necessary standard given the time and financial resources available to the litigating parties?
4. When a claimant seeks a proprietary remedy against the estate of an insolvent corporation, how significant is any additional uncertainty involved in a remedial discretion given the existing constraints on the liquidator's ability to compromise doubtful claims?[201]
5. When a liquidator seeks a proprietary remedy to augment the estate of an insolvent corporation, how significant is any additional uncertainty involved

198 Birks, 'Rights, Wrongs, and Remedies', above n1 at 23. See above, text at n145.

199 Ibid.

200 Evans, above n91; Part 3.B.ii (Weak Discretion and Strong Sense Proprietary Remedies) above.

201 Section 477 of the *Corporations Act* 2001 (Cth) subjects the power of the liquidator to compromise claims to the control of the Court, creditors and contributories.

> in a remedial discretion when his or her more wide ranging statutory powers to avoid pre-insolvency transactions also depend on a remedial discretion (albeit one conferred by statute)?[202]

These questions require empirical work, well beyond the scope of Birks' work or this article, before the argument that discretionary approaches to decision-making are less predictable and certain than approaches based on rules can finally be assessed.

Beyond even these questions, there are questions of valuation: just how important is certainty? Birks is not alone in seeking certainty, stability and predictability in the law of proprietary remedies. Professor Goode has written of the need for certainty lest 'the free flow of assets in the stream of trade' be interrupted.[203] Indeed he has written that '[p]rinciples of equity, however sophisticated, are ... intrinsically unsuitable as a medium for resolving competing interests in commercial assets.'[204] Lord Millett has insisted that proprietary remedies 'are not discretionary':

> They do not depend upon ideas of what is 'fair, just and reasonable.' Such concepts, which in reality mask decisions of legal policy, have no place in the law of property.[205]

Similarly, theorists who apply an economic analysis to law seek to promote certainty and stability and predictability in the law at the expense of discretionary approaches and open textured standards.[206] The economic analysis presumes that private transactions between rational actors operate to maximise social wealth and that the law's function is to uphold those transactions and to correct market imperfections. If the legal position of the parties in connection with a transaction can be determined after the event on the basis of a judge's personal assessment of what is 'just' or 'appropriate', the parties cannot calculate in advance the costs and benefits of the proposed transaction. This lack of information deters parties from engaging in transactions and as a result social wealth is not maximised. In short, prospective rules enable prediction and valuation; retrospective external assessment and discretion undermine them.

The economic analysis is not uncontroversial.[207] And although in this instance the economic analysis does conform to the traditional reluctance to incorporate equitable principles into commercial contexts, that reluctance is by no means

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202 Section 588FF of the *Corporations Act* 2001 (Cth).

203 R M Goode, 'The Right to Trace and its Impact in Commercial Transactions—II' (1976) 92 *LQR* 528 at 568.

204 Id at 565.

205 *Foskett v McKeown* [2000] 2 WLR 1299 at 1322–1323 (Lord Millett).

206 See Emily Sherwin, 'Law and Equity in Contract Enforcement' (1991) 50 *Maryland LR* 253 at 269; Compare Donald Harris, *Remedies in Contract and Tort* (1988) at 160.

207 See for example, Ronald Dworkin, *A Matter of Principle* (1986) at 237–289; Compare The Honourable Sir Anthony Mason, AC, KBE, Chief Justice of Australia, 'Law and Economics' (1991) 17 *Monash ULR* 167 at 174, 179, 181.

absolute nor is it as strong as it once was.[208] As Professor R P Austin has pointed out, there are objections to three groups of equitable doctrines intruding into commercial dealings: those that set impractical standards of investigation, those that invalidate agreements, and those that produce proprietary rights.[209] But, as he went on to argue, there is no reason to elevate any of these objections into a blanket exclusion, counsel the courts have followed in recent years.[210]

More generally, Sir Anthony Mason has argued persuasively that certainty should not be the paramount concern at all stages in legal development.[211] Writing of the then emerging unconscionability standard as a unifying factor in Australian equity, he noted that in the early stages of elaboration or re-working of existing doctrine by reference to general concepts in the search for substantive justice, the principle will often lack definition and sharpness of focus, leading to some degree of uncertainty. But, he continued, the search for greater certainty will yield a more certain principle, until, in turn, the perceived inflexibility of that new principle causes the process to begin again. He observed:

> There are some who, placing a lower value on certainty, see no fault in this because they lament the rigidity that is associated with sharp definition. What is happening is but one stage in a course of continuous cyclical development in the search for greater certainty. Eventually the search yields a principle more fixed in its application until a time is reached when dissatisfaction with the inflexibility of the principle in its application to new situations results in its giving way to another re-working of doctrine.[212]

It is difficult to disagree with this dynamic vision of the law. Certainty is not the only value pursued by the law. Throughout the law, certainty is but one element in the search for justice. For example, in the law of penalties, whereas the common law adopts the purely mechanical test of whether a contractual provision exceeds the damages the innocent party could obtain for breach of contract, in equity, relief may be obtained on a discretionary basis where the relationship between the parties makes the contractual provision in question unconscionable.[213] It is plain that the former approach upholds the values of certainty and predictability, based on a 'bright line' test, a prospective evaluation, and decontextualised enquiry, whereas the latter is contextualised and normative, and based on a standard and not

208 See for example, *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 100 (Mason J), 122, 124 (Deane J); *Quistclose Investments Ltd v Rolls Razor Ltd* [1970] AC 567 (HL); *Electrical Enterprises Retail Pty Ltd v Rodgers* (1988) 15 NSWLR 473 at 492E–493C; *Walker v Corboy* (1990) 19 NSWLR 382 at 390C–D.

209 Robert P Austin, 'Commerce and Equity—Fiduciary Duty and Constructive Trust' (1986) 6 *OJLS* 444 at 452.

210 Id at 455; See for example, cases cited above, n208, and compare *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER Ch D 700 at 759–761; Anthony J Duggan has argued that equity is more efficient than commonly supposed: Anthony J Duggan, 'Is Equity Efficient?' (1997) 113 *LQR* 601.

211 The Hon Sir Anthony Mason, 'Themes and Prospects' in Paul Desmond Finn (ed), *Essays in Equity* (1985) at 242, 244.

212 Id at 244.

a rule. Similarly, the law of relief against forfeiture balances the certainty of upholding contractual exchanges with a contextualised equitable discretion to award or withhold relief against forfeiture when the circumstances have changed or a party's behaviour warrants relief.[214]

A number of commentators have observed similar trends in other contexts. For example, Professor Paul Finn has identified a move away from regimes requiring that parties' actions fit 'some antecedently established template' before legal consequences are triggered towards regulatory regimes based on standards rather than rules, and sensitive to actual interests, expectations and vulnerabilities.[215] Sir Anthony Mason observed in 1994 that the principles of both statute and judge-made law were expressed, to a greater extent than before, in terms of standards rather than strict rules.[216]

None of this is to deprecate Birks' concern with certainty. *Excessive* uncertainty is to be avoided. But determining what is excessive requires assessment of the *extent* of the likely uncertainty and an assessment of its *significance* in light of the other values that the law pursues.

(v) A New Concept of Law?

Birks presents the choice between his preferred approach to remedies on the one hand and discretionary remedialism on the other as a choice between 'the rationality of the rule of law' and decision-making by 'direct access to the community's sense of justice'.[217] He argues:

> It is all too evident that the community's sense of justice is prone to pathological lapses. Communities are error-prone. Like individuals, they can lose their grip on right and wrong. ...
>
> Reasoned law does not provide guaranteed protection. If it could, the holocaust would never have happened. Yet ghastly failures do not make a good argument against trying to reduce the risk of a repetition. Nor for assuming that mega-oppressions are the only oppressions of which the community is capable. Precautions can be taken. It is possible to steer away from a style of law which has no in-built protection against communal mood-swings .... Given that the conscience of all the different social groups is volatile, the only hope for peace

213 *P C Developments Pty Ltd v Revell* (1991) 22 NSWLR 615 at 650G–651B; Contrast C J Rossiter & Margaret Stone, 'The Chancellor's New Shoe' (1988) 11(1) *UNSWLJ* 11 at 34–37. Compare *Troja v Troja* (1994) 33 NSWLR 269, considering two approaches to the forfeiture rule whereby the law will not enforce rights accruing under the will of a testator in favour of the person who killed him or her; See now the *Forfeiture Act* 1995 (NSW) and compare the *Forfeiture Act* 1982 (UK).

214 *Stern v McArthur* (1988) 165 CLR 489; Compare Rossiter & Stone, above n213 at 27–34.

215 Paul Desmond Finn, 'Constructive Trusts—A New Era—Equity, Commerce and Remedy' [1993] *New Zealand Law Conference* 203 at 205.

216 The Hon Sir Anthony Mason, above n147 at 113; See also D J Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1990) at 86–88; The Hon Chief Justice Murray Gleeson, above n181 at 425–427, 430–432; Julius Stone, 'From Principles to Principles' (1981) 97 *LQR* 224 especially at 238 and following.

217 Birks, 'Three Kinds of Objection', above n1 at 17; See Birks, 'Rights, Wrongs, and Remedies', above n1 at 23–24.

> and moderation in society is a legal system which insists on rationality, and law which ... is obstinately committed to the restraining discipline of analytical interpretation.[218]

I have argued in the previous Parts of this article that discretionary remedialism does not seek 'direct access to the community's sense of justice' and does not break with the rationality of the rule of law. I do not repeat that argument here.

Nonetheless, Birks is right to draw attention to the fact that discretionary remedialism does embody a different concept of law from the formalist[219] approach he prefers. The analysis in the previous Parts of this article suggests two different and competing legal traditions: one focusing on facts occurring in transactions between individuals and favouring certainty and predictability achieved through rules (as in Birks' preferred approach); the other considering the situation more broadly and attempting to achieve substantive justice through contextualised and perhaps discretionary decision-making. Neither tradition is perfectly represented in any real legal system. Rather they are ideal types, identified here in somewhat stereotyped form.

Some years ago, Professors Eugene Kamenka and Alice Tay described two similar co-existing and competing legal traditions.[220] The *Gesellschaft* tradition 'is oriented to the precise definition of the rights and duties of the individual through a sharpening of the point at issue' and emphasises 'impartiality, adjudicative justice, precise legal provisions and definitions and the rationality and predictability of legal administration'.[221] In the *Gemeinschaft* tradition, on the other hand, the emphasis is on substantive decision-making in the particular case, rather than the enunciation of general rules or precedents.[222] Building on this work, Christopher J Rossiter and Margaret Stone described the growing influence of the unconscionability standard in the 1980s as a shift from a *Gesellschaft*-type approach, which had achieved a dominant position after Lord Eldon's Chancellorship, towards a more *Gemeinschaft*-type approach.[223] This, they argued, was the consequence of a recognition that relief from the effects of unconscionability can be expressed in the form of rules only at the cost of rigidity, and therefore of injustice.

What then is the explanation for this shift to a concept of law that favours broad standards and discretion? Rossiter and Stone argued:[224]

> In some measure this trend to *Gemeinschaft* evidences the judiciary's, and the society's, confidence, not only in its judges' integrity but also in the community of their values. The attraction of formalism, of the *Gesellschaft* approach, is perhaps greatest in times of turbulence, when the values within a community are disparate and disputed both in content and intensity. ... But when we can rely, not

218 Birks, 'Three Kinds of Objection', above n1 at 16–17.

219 This is not a term of disparagement; See Schauer, above n114.

220 Eugene Kamenka & Alice Erh-Soon Tay, 'Beyond Bourgeois Individualism: the Contemporary Crisis in Law and Legal Ideology' in Eugene Kamenka & RS Neale (eds), *Feudalism, Capitalism and Beyond* (1975) at 126.

221 Id at 137.

222 Id at 136.

223 Rossiter & Stone, above n213 at 23–24.

224 Id at 23–24.

> only on a judge's integrity, but also on our substantial common ground on fundamental principles of behaviour, then we are prepared to accept decisions that flow from the exercise of individual discretion and to allow the subjective judgment which would be excluded by precise rules.

Birks argues that this common ground is not present in modern pluralistic societies and it is one reason he favours the formalist *Gesellschaft* approach.[225] By contrast, such common ground seems to have been assumed in Australia in the 1950s, yet that was the very era in which Sir Owen Dixon demanded (at least in his public writings) 'strict and complete legalism' as the only 'safe guide to judicial decisions in great conflicts' and also as the preferable approach to judicial decision-making in general.[226]

It appears, therefore, that a more complex explanation than that given by Rossiter and Stone is necessary to explain (and perhaps justify) the recent trend towards the *Gemeinschaft* approach to decision-making. Here it is possible only to speculate about some of the likely elements of any such explanation.

1. Rossiter and Stone suggest that *Gemeinschaft*-style decision-making will not be favoured when social values are disparate and disputed. Perhaps, instead, *Gemeinschaft*-style decision-making is most attractive to decision-makers in precisely these circumstances because it allows the courts to mediate those values in the context of individual cases and to seek the best accommodation of competing concepts of substantive justice.[227]
2. The trend towards *Gemeinschaft*-style decision-making has not occurred in isolation from other legal-administrative developments. The courts inhabit a legal culture that also includes legislatures and bureaucrats. It is most unlikely that some elements of the particularist and contextualised approach to decision-making that welfare state legislatures require of administrative decision-makers have not been transplanted into judicial decision-making.
3. Those legislative developments have not only provided a lead to the courts but have altered citizens' expectations. As Gleeson CJ wrote extra-judicially in 1995:

> The citizens of the late 20th Century have an attitude towards all forms of authority which is questioning, demanding and self-assertive. They seem to place less value on predictability than former generations, and are impatient of what they regard as mere formalism.[228]

Of course, these are possible explanations, not justifications, for the apparent trend towards the *Gemeinschaft* approach to decision-making. But whatever the

225 See for example, Birks, 'Three Kinds of Objection', above n1 at 16–17; Compare Birks, 'Rights, Wrongs, and Remedies', above n1 at 23–24.

226 Swearing in of Sir Owen Dixon as Chief Justice [of the High Court of Australia], (1952) 85 CLR xi, xiv; Compare The Right Honourable Sir Owen Dixon, OM, GCMG, 'Concerning Judicial Method' in *Jesting Pilate: and Other Papers and Addresses* (1965) at 153, 154–156 (referring to 'strict logic and high technique').

227 Compare Professor Charles E F Rickett's analysis of a substantive interest based approach: Rickett, above n 44. The accommodation is rational, external and legal: see text above, at n192 and following.

228 The Hon A Murray Gleeson, above n181 at 430.

explanation and whatever the justification, the tradition favouring substantive justice over certainty is more influential and accepted than Birks' arguments against discretionary remedialism assume. The tradition favouring certainty is but one tradition and it does not have dispositive normative force against a discretionary approach to proprietary remedies.

D. A Discretionary Approach is Viable

In short, even if those who favour separating liability from remedy are necessarily discretionary remedialists, they do not abandon the rule of law in favour of arbitrary discretion; nor are they driven to the impossible dream of achieving 'perfectly flexible focus without sacrifice of stability and predictability'.[229] They aim, reasonably, to strike a different balance between flexible focus on the one hand and stability and predictability on the other.

4. Conclusion

Birks has raised significant issues in his efforts to eradicate discretionary remedialism and strong sense proprietary remedies (typified by the remedial constructive trust) from Commonwealth legal systems. He reminds us that it is important to distinguish different senses in which rights can be said to be remedial; that it is important to maintain continuity with the traditions of the common law; and that it is important to acknowledge the disadvantages of discretionary decision-making.

But it is also important to acknowledge the strengths of discretionary decision-making as a legal technique and the constraints that ensure that it does not depart from the rule of law. In particular, it can be a viable technique in reforming the orthodox approach to proprietary remedies. Weak sense proprietary remedies, cast as the law's response to causative events (rather than the court's response to those events) and regarded as arising when those causative events occur as the result of rules (rather than at the time of the court's decision as the result of an exercise of discretion), are no less redistributive for the form in which they are cast. It is just that the orthodox approach relegates the interests of the defendant's general creditors to a marginal role in shaping the available remedies and fails to acknowledge explicitly the factors that justify a proprietary response (rather than any other response) to the claimant's grievance.

Strong sense proprietary remedies, cast as the creatures of a later judicial (and therefore weak) discretion to redress the claimant's grievance, are not illegitimate because they explicitly acknowledge their distributive implications. They do not involve a strong discretion. They replace conceptualism and obscuring rhetoric with the candour that is the obligation of judicial decision-makers.

Accordingly, Birks' efforts to eradicate discretionary remedialism and the remedial constructive trust should be rejected and jurists should concentrate their efforts on discussing candidly the circumstances in which it is appropriate that remedies (proprietary and otherwise) should be granted or withheld.

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229 Birks, 'Rights, Wrongs, and Remedies', above n1 at 23.