THE MELTING DOWN OF THE REMEDIAL TRUST

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In seeking equitable solutions to some problems of commercial law, succession, family law and other fields, Commonwealth courts are finding it appropriate to modify the traditional trust concept. There is a tendency to break down the trust idea into separate components of obligation and property. This essay suggests that these are desirable developments; that they cannot and ought not to be explained by recourse to any single unifying principle; and that a more flexible theory of equity is needed. There may well be some consequences for the organisation of law school courses in trusts and equity.

I. INTRODUCTION[1]

There is turmoil in the law of trusts. Not, admittedly, a phenomenon to match the great upheavals in public law which have followed the expansion of statutory administrative law remedies, the fundamental re-alignment of the law of misrepresentation following the enactment of section 52 of the Trade Practices Act, or even the successive ructions in the law of torts after *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*[2] But still some real uncertainty in and about the law, much puzzlement about its modern role, and various prognostications for its future. At the centre of the turmoil is the remedial trust — the trust used (or abused) to provide a remedy where justice seems to require it, in cases where no one has knowingly set out on a path of trust formation. A remedial trust may, according to traditional classification, be a resulting or constructive trust. It may even be an express trust, in cases where the court's reasoning depends on finding (normally by

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1 This essay is an attempt to stand back from the details of the law of remedial trusts and assess the shape and direction of the law. Footnotes and illustrations have been kept to a minimum.

2 [1964] AC 465.

a fairly creative process of inference) an intention of some kind, but it cannot be said that trust formation was *clearly* intended. The remedial trust concept is deliberately vague.

The turmoil is of two kinds. First, courts are changing some of the rules upon the basis of which remedial trusts are found to exist. That is a very noticeable form of development and has received much attention. A second development has been less frequently noted. This is that Commonwealth courts are increasingly providing remedial solutions other than by way of trust to problems that were once regarded as resolvable within the law of trusts alone. The traditional trust concept involves trust property, equitable ownership vested in one or more beneficiaries, and a set bundle of proprietary consequences regarding bankruptcy of the trustee, priority of interests, tracing and other matters. The courts are sometimes (and increasingly) making orders which break up this bundle and are therefore rendering it possible to apply some trust consequences in a remedial solution which does not involve the entire trust bundle. In this sense, there is a tendency to melt down the remedial trust.

This essay will touch upon five areas in which this process of melting down is taking place. In a fuller exposition it would also be necessary to discuss:

(6) the residuary legatee's interest after *Livingston's* case;[3]
(7) the 'mere equity' to set aside an instrument for equitable fraud;
(8) the purchaser's interest under a contract for the sale of land;
(9) the interest of a contractual licensee of land;
(10) the interests created under a trust power which is defined with sufficient certainty to comply with *McPhail* v. *Doulton*,[4] but in which a complete list of the members of the class of objects cannot be prepared;
(11) the interests of members of an unincorporated association in the association's property;
(12) interests under non-charitable purpose trusts;
(13) interests created by certain *Romalpa* clauses;[5]
(14) interests reflected in certain kinds of tracing orders;
(15) interests satisfied by equitable liens.[6]

We can respond to these developments in any of three ways. First, we can try to force the cases artificially into the trust mould, at the cost of great intellectual effort and ingenuity. The main disadvantage of doing so is not the artificiality of the results of that process, nor the intellectual cost. It is that the whole endeavour of 'taming' the cases tends to divert us from the central issues of principle and justice which have caused the cases to happen.

3 *Commissioner of Stamp Duties (Qld)* v. *Livingston* [1965] AC 694.
4 [1971] AC 424.
5 See esp. *Clough Mill Ltd* v. *Martin* [1985] 1 WLR 111.
6 Esp. as a result of *Hewitt* v. *Court* (1983) 149 CLR 639.

Secondly, we can try to adapt the traditional trust to accomodate the new developments. But there are now so many oddities and 'exceptions' to orthodox propositions of the law of trusts, that many of the most significant propositions about the shape of the traditional trust would have to be largely qualified. Thirdly, we can leave the traditional trust concept intact but treat these developments as creating other forms of equitable rights, and get on with the main task of identifying principles which can be used to justify the new cases and provide standards for future development. The third approach is advocated here.

II. THE HISTORICAL CONTEXT

The modern trust concept, like the contract and most other common law inventions, is to a degree the product of nineteenth century scholarship. Thomas Lewin (and later, Sugden, Story, Spence, Underhill, and others) appeared to believe that as law is a science, principles of scientific inquiry required that the inchoate materials of the common law should be organised into rational form. Lewin was undoubtedly influenced by the impressive texts already written on the law of contract, and through them, by the work of continental jurists. Since the trust was a relatively young and exclusively English creature, he was free to give it an endogenous structure. If one traces through the early editions of *Lewin on Trusts*, from the first (1837) to, say, the sixth (1875) which was the author's last, one can recognise the growing particularisation of a unifying idea.

Equity lawyers are accustomed to pay tribute to the solidifying influence of Lords Hardwick and Eldon when they reflect on the development of their subject. But they (like their colleagues in the law of contract, whose short-sightedness has been eloquently corrected by Professor A.W.B. Simpson[7]) tend to overlook the influence of the great textwriters. Disguised by the fictitious apparatus of 'legal science' and fidelity to judicial law, the textwriters were able to pour the shapeless materials of the case law into a sharp and rigid mould, inventing along the way the legal propositions needed to give definition to their creature. (There is reason to believe, for instance, that the infamous 'beneficiary principle', according to which the objects of a non-charitable trust must be persons rather than purposes, was created by Lewin because he needed it to provide symmetry to the chapters in which he organised his treatise.)

Such was the influence of textwriter over judge, that in 1897 the English Court of Appeal was persuaded, primarily by Sugden's writing, to declare that mere words of confidence are not a sufficient indication of an intention to create a trust.[8] The judges of earlier centuries, accustomed to using words

7 A.W.B. Simpson, "Innovation in Nineteenth-Century Contract Law" (1975) 91 *LQR* 247.
8 *Re Williams* [1897] 2 Ch 12, 21.

like 'trust' and 'confidence' without distinction, may well have regarded this as a self-contradictory proposition. But by 1897, 'trust' had come to identify a special bundle of personal and proprietary consequences, namely the consequences expounded by the texts, and a new terminology, borrowed ironically enough from civilian law, had been found necessary so that 'confidences' which were not 'trusts' could be denoted — and so it became common to speak of 'fiduciary relationships'.

The form of the trust idea having been set in this fashion, judges and legal practitioners were able to use the concept with confidence, and they used it in new fields. From approximately the middle to late nineteenth century, the trust became evident in the law of privity of contract, the law of gifts and of wills, the law of unincorporated associations, the law of debtors and insolvency and (with rapid escalation in the mid-twentieth century) the law concerning informal arrangements for the use and ownership of land. Legal practitioners refined the unit or investment trust, pension trusts, and other trust-based commercial vehicles. The judges were able to impose trusts as solutions to various remedial problems. Generally, but certainly not always, they called their new creatures 'constructive' trusts, but the 'constructive' epithet referred to the circumstances of creation of the trust, rather than the characteristics of the trust which was imposed. That set bundle of personal and proprietary consequences which the textwriters had expounded was, at least until recently, the uniform end product of their otherwise inventive efforts. The academic framework provided by the textwriters was a catalyst to the expansion.

Another formative influence deserves to be noted. The fusion of the courts of law and equity late in the nineteenth century had some important implications for substantive law. On a few dramatic occasions English judges attributed changes in the law to the Judicature System, arguing that the fusion of courts and procedures had carried with it a fusion of the legal principles which those courts had separately administered.[9] It was less noticeable, but probably more important for the historical development of the law, that certain forms of equitable analysis simply fell into disuse for a while after the courts were fused. For example, the equitable principles concerning estoppel by representation undoubtedly survived *Jorden* v. *Money*[10] and *Low* v. *Bouverie*,[11] but were seldom used until recent times. It is plausible to contend that the disappearance of a separate Court of Chancery was influential in this decline. Similar points can be made about the sparse use during most of the twentieth century of the equitable rules concerning set-off, contribution (though not, curiously, subrogation), liens and part performance.

9 See generally, R.P. Meagher, W.M.C. Gummow and J.R.F. Lehane, *Equity Doctrines and Remedies* (1984)(2 ed.) 36ff.

10 (1854) 5 HLC 184.

11 [1891] 3 Ch 82.

There was no doubt that the trust survived the Judicature Acts. It had been established by elaborate exposition and had many eloquent defenders, such as Maitland[12] and Hanbury.[13] And so the trust tended to eclipse the rest of equity and lawyers in fused jurisdictions were increasingly prone to approach issues of equity as if the only question was whether, in the circumstances, a trust had arisen. Facts were not pleaded in such a way that non-trusts issues could be raised; arguments were not addressed to other issues; and judges did not consider them. Many law schools in the Commonwealth confirmed this trend by replacing courses in equity with courses on trusts (including remedial trusts), so that equitable principles came to be learned, if at all, as principles leading to a single result, the existence of a trust.

In the United States however, it was postulated that the principle against unjust enrichment was an organising principle under which remedial trusts might be subsumed and university courses in Restitution became a vehicle for developing and promoting this view. The exposition of this view by Seavey and Scott in the *Restatement of the Law of Restitution*[14] was so influential as to sweep all opposition before it. Eventually in the United States everything which appeared to be related to 'constructive trusts' was vacated by trusts lawyers in favour of the restitutionists.[15] Consequently, there was a decline in learning about those equitable principles which could not be analysed as restitutionary or which did not lead to a remedy in the nature of a constructive trust. Ultimately this was reflected in judge-made law, and so the American common law, like the English law a century earlier, adjusted its shape to conform with academic prescription. While Lewin had prescribed the monolithic trust, Seavey and Scott's prescription was that the remedial part of trusts be united with quasi-contract to become restitution.

In the United States the ascendancy of Seavey and Scott's ideas was eventually so complete as to be self-stultifying. By the fourth quarter of the twentieth century it had become difficult to find either live debate in the U.S. law journals about restitution, or more than a handful of U.S. restitution lawyers in early or mid-career.[16]

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12 F.W. Maitland, *Equity* (rev'd ed by J. Brunyate, 1936) 43ff, 158.

13 "A Periodical to Equitable Principles" (1928) 44 *LQR* 468.

14 American Law Institute 1937.

15 Among restitution lawyers, there is no uniformity of general approach to the principle against unjust enrichment. Some would deny that it has much significance at all and would be as happy to call their subject 'quasi-contract and selected problems of equity' as to call it 'restitution'. Others would see unjust enrichment as a focus drawing together the materials of restitution but having no role to play in the design of principles of a kind which may be useful in the development of the law. A third group would regard the principle against unjust enrichment as (or as becoming) a true legal principle in the sense that the neighbour principle is a principle of torts, providing guidance in the development of legal rules and itself available to be converted into a rule. It is the third approach that is in contemplation in this essay.

16 A comparison of the *Index of Legal Periodicals* heading "Restitution" between the mid-1950s and the late 1970s shows that by the latter time there were significantly fewer U.S. articles on restitution. Perhaps the new *Restatement* will revive interest.

The 'unjust enrichment' hypothesis has had mixed fortunes in most Commonwealth countries. Its appropriateness as a general principle uniting the law of remedial trusts is disputed in Australia.[17] There is in this country no *general* principle of unjust enrichment, even though the concept has been recognised as a unifying influence in the law of quasi-contract[18] and some have invoked it in other contexts.[19] It has been pointed out that, even if the principle against unjust enrichment were to be recognised as a general unifying principle of the law of obligations, it would not necessarily follow that the constructive trust would be the appropriate remedy to give effect to the principle.[20]

However, Canadian judges have become an exception to this general attitude. The central authorities, *Deglman*,[21] *Rathwell*,[22] *Pettkus*[23] and *Sorochan*,[24] now support a massive superstructure of reported judgments, principally allocating property between parties to marriages and de facto relationships, claiming for ultimate support the principle against unjust enrichment. These developments are professed by a very able and productive group of Canadian legal academics, but given that *Pettkus* v. *Becker* was decided only in 1980 and the law was in great uncertainty until that time, there is still considerable doubt as to the scope of the *Pettkus* principle and the extent to which it will lead to an overall reshaping of the Canadian law of trusts on the Seavey-Scott model. It has so far been extended to other parts of the law of trusts in an unpredictable fashion.[25] Therefore, even in Canada, unjust enrichment might not be a touchstone for the general resolution of cases of all of the varieties considered below.

III. SOME EXAMPLES OF 'MELTING DOWN'

History suggests that any movement away from Lewin's monolithic trust concept will be in the direction of the Seavey-Scott model. The textwriters on restitution are beginning to exert an influence which will prove inexorable unless it is counteracted. But something odd is happening in modern cases, fitting neither Lewin's model nor Seavey and Scott's. Without attempting to identify the cause for the new developments, the writer offers two comments.

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17 See *Stephenson Nominees Pty. Ltd.* v. *Official Receiver on behalf of Official Trustee in Bankruptcy* (1987) 76 ALR 485, in which Gummow J. analysed the current relationship between the concepts of constructive trust and unjust enrichment in Australia.

18 See esp. *Pavey & Matthews Pty. Ltd.* v. *Paul* (1987) 69 ALR 577.

19 Notably Gaudron J. in *Waltons Stores (Interstate) Ltd.* v. *Maher* (1988) 62 ALJR 110, 140; *Trident General Insurance Co. Ltd.* v. *McNiece Bros Pty Ltd* (High Court of Australia, 8 September 1988, unrep.).

20 Note 17 *supra*, 492.

21 *Deglman* v. *Guaranty Trust Co. of Canada and Constantineau* [1954] 3 DLR 785.

22 *Rathwell* v. *Rathwell* (1978) 83 DLR (3d) 289.

23 *Pettkus* v. *Becker* (1980) 117 DLR (3d) 257.

24 *Sorochan* v. *Sorochan* (1986) 29 DLR (4th) 1.

25 *Rosenfeldt* v. *Olson* (1985) 59 BCLR 193 is a startling application of the principle.

The first is that the common law litigious process, with its emphasis on facts and close precedents, occasionally throws up judgments which do not fit into the established order, and if enough 'anomalies' are generated, it becomes the task of academic lawyers to replace the established order with arrangements which can accomodate the new cases. The second is that the new cases seem to identify normative inadequacies in the old structure. They are cases in which the result is more just than the one which would be pointed to by an orthodox analysis. It is necessary, therefore, that academically proposed new arrangements be satisfying at a normative level. There is, it is submitted, such an ample quantity of new 'anomalous' cases in the law of remedial trusts that this task has become an urgent one.

In this essay no more can be done than to select a few of the new cases in order to give the flavour of what is happening. Five areas will be briefly discussed with a view to explaining why they are interesting at this level. Then some ideas will be sketched which might provide the basis for a fuller theoretical evaluation.

A. CARRERAS ROTHMANS — THE TRUST AS AN INSTRUMENT OF PRIORITY OVER UNSECURED CREDITORS

Carreras Rothmans Ltd. v. *Freeman Mathews Treasure Ltd.*[26] is the most recent of a line of cases, including *Barclays Bank Ltd.* v. *Quistclose Investments Ltd.*,[27] which say that moneys paid by A to B for a specific purpose which has been made known to B are received subject to a trust. In that case FMT was Rothmans' advertising agency. Rothmans' practice was to pay FMT a monthly sum to cover FMT's current debts to media creditors (mainly publishers) for placement of Rothmans' advertisements. Fearing that FMT may be insolvent, Rothmans arranged that these monthly sums be paid by FMT into a special bank account, "for the purposes only of meeting the accounts of media and production agencies incurred on [FMT's] behalf for Carreras Rothmans". When FMT subsequently went into liquidation Rothmans took an assignment from the media creditors of their rights in respect of the account and sought to enforce those rights by litigation.

Gibson J. held that the credit balance of the special account was subject to a trust enforceable by Rothmans. The result was that Rothmans could stand outside FMT's liquidation and recover its payment in full. That was, of course, exactly what Rothmans had intended to achieve and in one sense therefore, the case is unremarkable. It is noteworthy, however, that Rothmans was able to obtain this advantage by a simple contractual stipulation and a subsequent assignment without taking security or registering a charge and even though the moneys which it has paid into FMT's special account were paid in discharge of its prior contractual obligation to reimburse FMT for advertising debts.

26 [1985] Ch 207.
27 [1970] AC 567.

It may be less obvious that the *Carreras Rothmans* line of cases is out of step with the traditional trust concept. There are two problems. The first is that *in part* the arrangement between Rothmans and FMT was simply a case of repayment of a debt. If FMT had not gone into liquidation, and so had been able to pay the media creditors in the normal way, the whole transaction would have been accounted for in purely contractual terms, as a case of a debtor (Rothmans) paying its creditor (FMT), which in turn transmits payment to its own creditors (the media creditors). In the *Quistclose case*[28] Lord Wilberforce said that he found no difficulty in recognising the co-existence in one transaction of legal and equitable rights and remedies. This wholly commendable approach can be taken, however, only if one *pro tanto* abandons the traditional trust. The traditional trust relationship is comprehensive and exclusive. On the traditional view the trust is stamped across the entire relationship of trustee and beneficiary which cannot therefore be permitted to dissolve into a mere debt. The reasoning of Lord Wilberforce allows an interplay of legal and equitable rights which lead to a trust only if certain contingent events occur and this is a departure from the traditional idea.

The traditional trust concept entails a static bundle of proprietary rights and obligations. One party, the trustee, has a bare title to the trust property, while another, the beneficiary, has the equitable interest in that property. The beneficiary's holding of that interest entitles him or her to enforce the trustee's obligations.

The second problem about *Carreras Rothmans* is that it sets up a pattern of proprietary relationships which differs from the traditional proprietary model. Gibson J. took the view that after Rothmans paid the money into the special account, that company had no beneficial interest in the money until it became impossible to use the money for the purpose of paying the media creditors. Who then was the equitable owner in the time between Rothman's payment and FMT's liquidation? Not FMT, because the money was to be used to pay the media creditors and did not become part of FMT's general assets distributable on liquidation. Nor the media creditors — the money was held in trust for the purpose of paying them, but Gibson J. held that they were not beneficiaries of it. The answer, according to the judge, is that during the relevant period the beneficial interest was "in suspense".[29] Both Rothmans and the media creditors had special equitable rights which entitled them to see to it that the money was used for the purpose for which it was provided, but no one was the beneficial owner until such time as the media creditors were paid or it became impossible to pay them. The traditional approach, be it emphasised, would not allow a trust in which the beneficial ownership is in suspense.

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28 *Id.*, 582.
29 Note 26 *supra*, 224.

It is notable that both of these 'problems' with *Carreras Rothmans* merit consideration only if we regard it as necessary to fit the decision into the traditional trust framework. Approaching the case as trusts lawyers (especially as lawyers endeavouring to teach a course on the law of trusts), we may feel compelled either to reject the decision or to force it into some pattern of harmony. Most of the discussions of the case and its predecessors have focussed on such doctrinal possibilities. One obvious example of this approach is an article by P.J. Millet Q.C. (as he then was).[30]

It is submitted that discussion at the doctrinal level inhibits consideration of the main question. It is unduly narrow to see the case purely in terms of the law of trusts. The case is better seen as one in which the court is developing principles about equitable rights and obligations of a less specific kind. It is no objection to the judgment that the reasoning does not conform to traditional principles of the law of trusts if the judgment does not set out to produce principles which are solely about trusts. In *Carreras Rothmans* 'trusts' is treated as an aspect and a consequence of a broader complex of rights and obligations. The main problem to be solved in *Carreras Rothmans* was really this: did the facts justify the application of any special rights and obligations beyond those arising under debtor and creditor law?

Gibson J. was careful to emphasise Rothmans' concern about the possibility that FMT might cease trading, about the effect of this on Rothmans' business and on the media creditors and Rothmans' wish to have the moneys protected while they were in FMT's account. If Rothmans had not intervened FMT's failure would probably have been accelerated. There was a very specific intention that the money should never become beneficially the property of FMT. That circumstance was sufficient to justify the creation of a special equitable right on Rothmans' part and on the part of the media creditors to see to it that the money was applied only for the agreed purpose.

There is, accordingly, a breaking down of the trust concept in the *Carreras Rothmans* decision. The justification for the decision is that Rothmans and FMT developed, and Rothmans acted in reliance upon, a very specific intention regarding the control and ownership of the money, the judicial recognition of which will facilitate salvaging operations for businesses of doubtful solvency. It is either unhelpful or inaccurate to say that the result is justified by the principle against unjust enrichment. The real contest was between Rothmans and FMT's unsecured creditors, of whom it could hardly be said that they would be unjustly enriched but for the relief which Rothmans obtained. The principle against unjust enrichment gives us no guidance as to whether Rothmans' claim was stronger than theirs. The principle at stake is a special 'corporate salvage' principle.

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30 P.J. Millet, "The Quistclose Trust: Who Can Enforce It?" (1985) 101 *LQR* 269. See also L.J. Priestley, "Aspects of Liquidation" in R.P. Austin and R.J. Vann (eds.), *The Law of Public Company Finance* (1986) 374ff.

B. FIDUCIARY DUTIES AND THE TRUST

Since there are several fiduciary duties it needs to be specified that the following discussion is directed to the 'conflict' and 'profit' rules.[31] It seems generally to be accepted now that a breach of these fiduciary duties may lead to the imposition of a constructive trust. *Lister* v. *Stubbs*,[32] which was once taken to deny that a trust may arise, has been variously criticised, confined, distinguished, ignored and most recently (as will be seen) explained.

Traditional trusts law would regard the trust as an automatic consequence of a breach of fiduciary duty. Older textbooks dealt with breach of fiduciary duty in the chapter which they devoted to constructive trusts. In recent cases, however, the overwhelming tendency has been to treat the trust as one possible remedial consequence, merely a part of the judicial armoury available to provide the 'most appropriate' remedy.

Three illustrations are offered.

The first is *Hospital Products Ltd.* v. *United States Surgical Corporation*.[33] In that case the High Court of Australia, by a majority, overruled findings by the trial judge and the New South Wales Court of Appeal that a fiduciary duty had arisen. Therefore the majority did not reach the issue of remedies. At first instance, however, McLelland J. had found that the defendant HPI was a fiduciary which had breached its duty. HPI had 'reverse-engineered' the plaintiff's surgical staple product and had manufactured and sold the product to the plaintiff's customers, while ostensibly acting as the plaintiff's Australian distributor. McLelland J. held that HPI should account for a profit calculated on the 'headstart' principle — that is, the gain attributable to the difference between the business profits in fact made and the profits which would have been made had HPI properly disengaged from the plaintiff before setting up in competition.[34] On the other hand, the Court of Appeal took the view that HPI's gain from its breach of duty was its entire business and held that the assets and undertaking of the business were held on constructive trust. In so concluding the Court evidently recognised that, once a breach of duty is found, the Court has a discretion to determine the most appropriate form of relief.[35]

Hospital Products indicates a move away from the traditional trust approach. A trust arises, if at all, at the end of the analysis rather than at the beginning and is treated as one of a variety of remedial choices. The analysis of the Court of Appeal seems incompatible with the principle against unjust enrichment. The Court of Appeal treats the fiduciary principle as prophylactic rather than restitutionary.

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31 In the sense defined by the writer in "Fiduciary Accountability for Business Opportunities" in P.D. Finn(ed.), *Equity and Commercial Relationships* (1987) 146ff.

32 (1890) 45 Ch 1.

33 (1984) 156 CLR 41.

34 *United States Surgical Corporation* v. *Hospital Products Intl. Pty. Ltd.* [1982] 2 NSWLR 766.

35 See esp. *United States Surgical Corporation* v. *Hospital Products Intl. Pty. Ltd.* [1983] 2 NSWLR 157, 247ff.

The same can be said of *Paul A. Davies (Aust.) Pty. Ltd.* v. *Davies* (No.2).[36] In that case the defendants were the directors of the plaintiff company which traded in automobile sales. They held two of the five issued shares, the other three being vested in trustees for their children. They operated a running loan account with the plaintiff, borrowing and paying back with only the barest of accounting records. When the company's business declined, the defendants decided to try another venture. They bought a boarding house. They obtained the deposit by debiting the loan account to the tune of $86 000. Later, when the time came to close the purchase, they borrowed the balance of $295 000 upon the security of a mortgage on which they became jointly and severally liable. It was found that they had committed no fraud or conscious wrongdoing. They had not diverted any opportunity from the company. If the shareholders had unanimously or formally approved their actions there could have been no basis for subsequent complaint. But they had never put their arrangements to a formal meeting of shareholders for approval and they had not obtained the informal assent of the trustee shareholder. The taking of loans in this fashion therefore constituted a clear, though innocent, breach of fiduciary duty.

The company's automobile business failed and it went into liquidation. The liquidator sued in the company's name for breach of fiduciary duty and was successful. The remedy was a declaration that the boarding house property and business was held on trust for the plaintiff, subject to an allowance for remuneration to the defendants for their work in acquiring and maintaining the property and recompense for any expenditure by them on the property.

Notwithstanding the allowance for work and expenditure, the breadth of the remedy is striking. At first instance Waddell J. had limited the trust to the proportion that the loan funds bore to the total purchase price, the balance of which had been provided, via the mortgagee, by the defendants themselves. The Court of Appeal said that it was sometimes appropriate to restrict recovery in that fashion but it was more appropriate here to impose a trust on the entire property, because the loan account provided all of the cash needed to buy the property, and the mortgage borrowing, though it was made by the defendants personally, was secured on the property which would not have been acquired but for the cash from the loan account.[37]

The case is interesting for two points. First, it confirms the trend of the other cases by treating the remedial question as a discretionary search for the most appropriate relief rather than an automatic doctrinally determined result. Secondly, it underscores dramatically the prophylactic non-restitutionary nature of fiduciary principles and remedies. The defendants' unjust enrichment at the expense of the plaintiff was either $86 000 or

36 [1983] 1 NSWLR 440.
37 [1983] 1 NSWLR 337, 342.

(at most) a share of the boarding house in the proportion that $86 000 bore to the total purchase price. The Court's remedy was more extensive. The Court recognised that it was providing an unmerited windfall gain to the unsecured creditors of the automobile business, who would be the primary beneficiaries of recovery by the liquidator. Nevertheless their Honours insisted that the policy of the law required an account of profit rather than mere compensation for damage.

The third case is *Daly* v. *The Sydney Stock Exchange Limited*.[38] The Securities Industry legislation allows a claim to be made against the fidelity fund in respect of an insolvent stockbroker where, relevantly, there has been a defalcation by the broker in respect of money entrusted to an employee of the firm for or on behalf of the claimant or in circumstances where the firm was a trustee of the money. The question was whether a claim could be sustained against the fidelity fund on the following facts.

In April 1975 Dr. Daly sought investment advice from Patrick Partners. At that time Patricks appeared to be a large and prosperous firm but they were in fact in a precarious financial position. An employee of Patricks advised Daly that it was not a good time to buy shares and suggested that Daly deposit his money with the firm until the market bottomed out. He said, and believed, that the firm was as safe as a bank. Daly thereupon lent money to Patricks at a high rate of interest on ninety day's call. In June 1975 he deposited more money on the same terms and assigned the debts to his wife. In July 1975 Patricks ceased trading and were unable to repay the loans.

Counsel for Mrs. Daly argued that the members of the firm were in a fiduciary relationship with Dr. Daly and were in breach of their fiduciary duty because they had failed to disclose to him their unsatisfactory financial position. The High Court unanimously agreed. However, the Court rejected the next step in counsel's reasoning. Counsel submitted that the consequence of the firm's breach of duty was that they received the deposits subject to an immediate constructive trust and accordingly the deposits were money held on trust for the purposes of the Securities Industry legislation.

Gibbs C.J. (with whom Wilson and Dawson JJ. agreed) held that Patricks held the deposits simply as debtor. He referred to the argument that the law should recognise a general right of restitution whenever a person has been incontrovertibly benefited at another's expense. He pointed out that even if this were so, it would not be necessary to impose a constructive trust to avoid unjust enrichment in the present case. The firm had the obligation of a debtor to repay the debt. The ordinary legal remedy of a creditor would have been adequate to prevent the firm from being benefited at the expense of Mrs. Daly. Having regard to the consequences of transforming a creditor into the beneficiary of a constructive trust, it would be contrary to principle to do so in a case such as the present — one undesirable consequence would be that

38 (1986) 160 CLR 371.

the money would be withdrawn from the general body of creditors in the firm's bankruptcy and another would be that Mrs. Daly could require the firm to account to her for any profits made with the use of the money. *Lister* v. *Stubbs* should be followed in a case where the claimant has simply made an outright loan to another, though a trust may arise where a loan is made for a specified purpose which fails and there is an express or implied agreement that the fund be held in trust in that event.

Brennan J. (with whom Wilson J. also agreed) adopted a more doctrinal analysis. He reasoned that the loan contract was voidable for breach of fiduciary duty. Where a contract is voidable in equity, a transfer of property made under the contract may be set aside, and when it is, the property is held on constructive trust if it is identifiable. Prior to the setting aside of the contract the party who elects to avoid it has an equitable interest in the property but it is not at that stage the interest of a beneficiary of a constructive trust. Rights of this kind, though substantial, do not fit the statutory criteria for recovery from the fidelity fund.

The analysis of Brennan J. would have led him into difficult questions of tracing had the statute made it relevant for him to carry the analysis through to its conclusion. Had that been so, Mrs. Daly's rights may ultimately have depended on accidental circumstances, such as whether the firm had mixed the loan funds with client funds or had paid it into its own account and on the subsequent operations of the account into which the money had been paid. The approach of Gibbs C.J. on the other hand, leads us to address the main questions going to the fairness and appropriateness of the remedial alternatives. His reasoning rejects the view that a constructive trust is the automatic consequence of a finding of breach of fiduciary duty and allows the consequences of the imposition of a trust to be taken into account in determining the most appropriate remedy.

C. THIRD PARTY ASSISTANTS AS CONSTRUCTIVE TRUSTEES

The rules that stem from *Barnes* v. *Addy*[39] are still discussed in textbooks under the heading 'Constructive Trusts'. Nowadays the most vital of those rules is the one which says that a third party who knowingly assists a trustee or fiduciary in a "dishonest and fraudulent design" is liable as a constructive trustee. Several cases, the most complete being the *Baden Delvaux* case,[40] recognise that this category of liability applies even where the third party receives no property. His wrongdoing is his knowing assistance, whatever form it takes.

But the rule says that he is 'liable as a constructive trustee'. How can you be a constructive trustee when you have obtained no property which might

39 (1874) LR 9 Ch App 244.

40 *Baden Delvaux and Lecuit* v. *Societe General pour Favoriser le Development du Commerce et de l'Industrie en France SA.* [1983] BCLC 1.

be the subject of a trust? How can there be a trust, even a constructive trust, without trust property?

The answer is probably this. There can be no trust in the traditional sense unless the third party has received something or made some profit which he can be required to hold in trust. But a third party can be liable *as if he or she were* a trustee, even in cases where no property has been acquired. After all, a trustee has personal as well as proprietary duties, and the personal duties are capable of being extended by analogy to the third party who assists in a breach of trust but has not received property. A constructive trust in the full sense will arise only if it is appropriate in the circumstances to impose a trust on some property in the defendant's hands rather than to invoke some other personal or proprietary remedy.

However, if this is the meaning of 'liable as a constructive trustee', it is at the very best misleading to treat this chapter of the law as if it were part of 'constructive trusts'. It should be recognised that the real subject is third party liability for involvement in breach of trust or fiduciary duty. In the case of both the fiduciary's own liability for breach and of the assistant's liability, a trust is just one of the remedial results which a court may select as an appropriate remedy.

Like the law of fiduciary duties, this category of liability does not and ought not to bear the banner of unjust enrichment. The balance of authority, especially since *Baden Delvaux*, is to the effect that 'knowing assistance' may occur in cases of constructive knowledge.[41] Certain agents of fiduciaries, for instance banks and solicitors acting for trustees or company directors, have a duty to make inquiries when the circumstances call for investigation, and they will be liable for 'knowing' assistance in their clients' breaches of duty if they were in fact unaware of the wrongdoing but would have discovered the truth had proper inquiries been made. The effect of these propositions is to set a high prophylactic standard of professional conduct for such agents and to render them accountable in circumstances where it cannot meaningfully be said that they have been unjustly enriched at the plaintiff's expense.

D. THE FLOATING OBLIGATION IN SECRET TRUSTS

In *Ottaway* v. *Norman*[42] Brightman J. was prepared to assume, without deciding, that the following arrangement is valid. By his will A bequeaths property to B; B agrees with A that when B dies she will bequeath to C whatever property she then possesses. The agreement generates an enforceable secret trust, subject to one difficulty. There appears to be no certainty of trust property and it is axiomatic textbook knowledge that every trust must have an ascertained subject-matter. Adherents to the traditional

41 See R.P. Austin, "Constructive Trusts" in P.D. Finn, *Essays in Equity* (1985) 239.
42 [1972] Ch 698.

analysis have therefore strongly criticised Brightman J. for making an assumption which flies in the face of basic doctrine.[43]

The criticism is valid only if we assume that Brightman J. was speaking of an arrangement which was wholly and at all times a trust. There is an alternative analysis suggested by the judgment of Dixon J. in *Birmingham* v. *Renfrew*.[44] This is to say that upon A's death there arises a floating obligation, suspended as it were over B's assets and allowing her to deal with them in any way not subversive of her agreement. When she dies the floating obligation crystallises and becomes a trust of such assets as are in her hands at that time. There is no trust until B dies and the trust which then arises is a trust of ascertained property. The floating obligation is not inconsistent with the trust notion because it is not a trust at all. There is a problem with this reasoning only if we assume that all equitable aspects of an arrangement which includes a trust must comply with the continuing pre-requisites for trust formation. But why be so rigid? If the critics' strict, doctrinal approach were sound, equity could not have developed the floating charge.

Once again, therefore, *Ottaway* and *Birmingham* are illustrations of a judicial flexibility which is inconsistent with strict adherence to the traditional trust concept. The obligation generated by the secret trusts cases is probably reliance-based rather than restitutionary and it lies outside the proper scope of the unjust enrichment idea.

E. INFORMAL ARRANGEMENTS AFFECTING LAND

The law reports are full of cases in which land is acquired by A, who is in some close domestic relationship with B, for their common use. A and B may be spouses, de facto spouses, parent and child, mother-in-law and daughter-in-law, brothers, sisters or in some other close relationship. For present purposes the relationship does not matter, although some statutory systems, such as the Family Law Act 1975 (Cth.) and the De Facto Relationships Act 1984 (N.S.W.), treat certain relationships as worthy of special legislative attention. The central fact, however, is that the parties fail to spell out their intentions as to the ownership of the land, because the domestic circumstances of their relationship lead them to believe that such formality is unnecessary. Later (typically though not invariably because of a falling out) it becomes necessary to decide whether B has any claim either on A personally or against the land which A acquired.

Until recently, there was a very strong tendency for lawyers to regard this situation as exclusively within the province of the law of trusts. Lawyers will consider, in turn, whether the facts give rise to an express, resulting or constructive trust. Over the last two decades there has been a continual struggle between adherents to two lines of thought. The "justice and equity"

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43 For instance, A.J. Oakley, *Constructive Trusts* (1978), 108.
44 (1937) 57 CLR 666.

school (to use the terminology of Dickson C.J.[45]) seek to impose a constructive trust whenever a remedy is demanded by considerations of fairness. The 'intent' school deny that constructive trusts have any legitimate use here, but will allow an express or resulting trust to arise where an actual or presumed intention can be discovered concerning the land's ownership.

In some jurisdictions, including England and Australia, the 'intent' school is still dominant. In Canada, a version of the "justice and equity" approach prevailed in *Pettkus* v. *Becker* after much controversy. The debate is normally presented as a choice between two kinds of trust. The disadvantages of the 'intent' school are almost self-evident. *Ex hypothesis*, our parties have not formed any clear intention about ownership because of the domestic nature of their relationship. Dickson C.J. has referred to this as the "phantom intent" problem.[46] The disadvantages of the "justice and equity" line of cases are equally obvious. If one takes the version of Lord Denning M.R., the purest version because he allowed the court to consider any circumstance which would make it 'inequitable' not to impose a trust, it is evident that certainty and predictability of the law become impossible. The approach of Lord Denning threw into the discretionary melting pot facts concerning the parties' intentions and declarations, their financial contributions to acquisition and to mortgage instalments and improvements, their indirect contributions as homemakers, their labour around the house, the fact that one party had children by the other and cared or would care for them, the fact that the other party had taken a lover or had behaved deceptively or callously and so on. These were stirred and simmered and a judgment was served in which the claimant was awarded some defined portion of the land claimed by the imposition of a trust for that proportion. There was little indication of the significance or weight of each ingredient. Is it more important to show lecherous misconduct or low financial input? There was no informative principle underlying the court's approach. It appears that intention, reliance, unjust enrichment, prevention of fraud and unconscionability were all relevant, but it is normally impossible to say of any given judgment 'the real point there was the parties' intention or the plaintiff's reliance or some other factor'. The reasoning hinted at but did not fully develop all manner of ideas.

Eves v. *Eves*[47] is a very good illustration of the approach of Lord Denning. In that case his Lordship considered relevant the facts that Janet Eves had done heavy physical work about the house, breaking up and clearing away concrete, she had borne and cared for Stuart's children, he had misled her by saying that the house was "theirs", he had deserted her and driven her out through threats of violence and he had taken a new lover. The result was a trust of a one quarter interest.

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45 Note 23 *supra*, 274.
46 *Id.*, 275.
47 [1975] 1 WLR 1338.

The approach of Lord Denning raises another concern. Curiously, it is in one way too inflexible a solution, as Mr J.D. Davies has cogently pointed out[48]. However discretionary and flexible may be the grounds for imposing a trust, the remedy is always the same. At the end of the day, either there is a trust bearing all of the attributes defined by the textbooks or there is nothing. There is very little scope to tailor the remedy to fit the circumstances of the case. Suppose, for instance, that Stuart Eves had engaged tradesmen to help Janet break and clear away the concrete and had become bankrupt before paying their accounts. The judgment of Lord Denning would allow Janet to stand outside the bankruptcy and recover her one quarter interest in the house without diminution, but the tradesman, who had done similar work, would stand in line with his other unsecured creditors. Is this fair? In some ways, they have a better case for legal protection than she has. As small tradesmen they have little scope to protect themselves and if the trade practice is (say) to invoice at the end of the month they cannot normally do otherwise. Janet might have taken steps to protect herself by, for instance, insisting that he marry her, but she did not. The trust is too complex a remedy, with too many collateral implications, to make it a satisfactory panacea.

In *Pettkus* v. *Becker* the Supreme Court of Canada, by majority, held that in a domestic situation of the kind described here, the court may impose a constructive trust by recourse to the principle against unjust enrichment. This approach shares with the approach of Lord Denning the inflexibility of remedy which has just been noted. It appears, however, to offer a principle of determination and therefore to allow for reasonably predictable decisions. According to Dickson C.J., one must address three requirements: an enrichment, a corresponding deprivation and the absence of any juristic reason for the enrichment. With respect, this impression of precision is dashed when one looks closely at its application to the facts. At the factual level, ingredients savouring of estoppel,[49] compassion,[50] and guesswork[51] seem to take over and there is no real attempt to compare her loss with his id this fact lead to a quarter interest in his property? Should it really have been relevant that the beehives weighed 80 pounds and she weighed 87 pounds?[52]

This apparent discrepancy between the principle enunciated in *Pettkus* (which appears scientific and precise) and its application to the instant facts (at which level a jumble of considerations of 'fairness' seem to vie for prominence), is confirmed by later Canadian case law.[53]

48 J.D. Davies "Informal Arrangements Affecting Land" (1979) 8 *Syd L R* 578.
49 Note 23 *supra*, 274.
50 *Id.*, 277.
51 *Ibid.*
52 *Ibid.*
53 From the many post-*Pettkus* cases, two are especially good illustrations: *Palachik* v. *Kiss* (1983) 146 DLR (3d) 385 and *Murray* v. *Roty* (1983) 41 OR (2d) 705.

In some parts of the Commonwealth a new set of solutions is developing. Courts are applying to this domestic context several well established equitable doctrines. First, where it is plausible notwithstanding the domestic circumstances to find an oral contract between the parties, specific performance may be decreed if the contract has been partly performed.[54] Secondly, if the defendant's promise is to allow the plaintiff to live on the land for a term or for life, that promise will create a contractual licence which will be irrevocable in equity and may (though this is controversial) create proprietary rights binding third parties and giving priority in bankruptcy.[55] Thirdly, where the parties bind themselves jointly and severally to provide purchase money to the vendor and one party pays more than his or her share, that party may have a right of contribution against the other, which the court may be prepared to support by an equitable lien.[56] Fourthly, where the substratum of a joint relationship is removed without attributable blame and the benefit of property contributed by one party for the purpose of the relationship would otherwise be unfairly retained by the other, the court may intervene to prevent that other party retaining the property to the extent that it would be unconscionable for him or her to do so.[57] Fifthly, where the defendant has expressly or impliedly made some representation to the plaintiff relating to the land, and the plaintiff relies on that representation to her or his detriment, the court may conclude that the ingredients of equitable estoppel are made out. That doctrine provides a cause of action.[58]

Of course, none of these doctrines is available unless the facts fit. Implied agreements are not always discoverable in domestic arrangements, though agreements are probably more common now than they were at the time of *Balfour* v. *Balfour*,[59] just as a matter of social fact.

Perhaps the most widely available of these alternative approaches is equitable estoppel. If one analyses the facts of the leading "justice and equity" trusts cases, one will very frequently find that the central ingredient of justice is the existence of some express or implied representation, relied upon to detriment. Janet Eves relied upon Stuart's representation that the house was "theirs" and her blisters ensued. The element of reliance figured strongly in the judgment of Dickson C.J. in *Pettkus* v. *Becker*.[60]

The advantage of equitable estoppel over trust is two-fold. First, the doctrine identifies a principle capable of realistic application to the domestic

54 See, for example, *Steadman* v. *Steadman* [1976] AC 536; *Riches* v. *Hogben* [1985] 2 Qd R 292.
55 See esp. *Re Sharpe* [1980] 1 All ER 198.
56 *Muschinski* v. *Dodds* (1986) 160 CLR 583, 596ff *per* Gibbs C.J.
57 Id., 620 *per* Deane J. The utility of this approach depends on how widely the principle of Deane J. is interpreted in later cases. If it is read very widely, it will become indistinguishable from the *Pettkus* v. *Becker* approach, or even that of Lord Denning. It was stretched to its outer limit by Mason C.J., Wilson and Deane JJ. in *Baumgartner* v. *Baumgartner* (1987) 164 CLR 137.
58 *Waltons Stores (Interstate) Ltd.* v. *Maher* note 19 *supra*.
59 [1919] 2 KB 571.
60 Note 23 *supra*, 274.

facts. The generative, justifying idea is reliance; the obligation is reliance-based,[61] not (as with unjust enrichment) benefit-based. It is unnecessary to attempt a matching of contribution and benefit, and so many of the difficulties faced and not really overcome in *Pettkus* are avoided. Secondly, once the ingredients of equitable estoppel are made out, there is great flexibility as to remedies. The court should tailor relief so as to provide the minimum equity necessary to do justice to the plaintiff. In the exercise of this mandate courts have ordered that the property be conveyed, that a lease be executed, that an equitable lien be imposed on the property, that the land be held wholly or proportionately in trust, that the plaintiff have a licence to remain for life with or without payment for it, or that the plaintiff be compensated.[62] The court can leave the sledgehammer trust in the woodshed and apply a scalpel to the problem.

Relatively recent examples of the use of equitable estoppel to facts which would probably be analysed in Canada in terms of the *Pettkus* trust include *Pascoe* v. *Turner*,[63] *Jackson* v. *Crosby* (No. 2),[64] and *Morris* v. *Morris*.[65]

Morris is instructive. There the plaintiff, a widower, sold his home unit and used the proceeds to pay for an extension to his son's house, so that he could live there indefinitely. Later the son's marriage broke down, as did the plaintiff's personal relationship with his daughter-in-law. There was insufficient evidence to establish a trust but it was held that the ingredients of an equitable estoppel existed, and in the circumstances the most appropriate remedy was to impose an equitable lien on the property to secure the amount of the expenditure. Since his expectation was merely that he would receive an indefinite right of residence, a trust would give him too much. But, the relationship having broken down, it was appropriate to give him a secured right to recover the cost of his reliance, the money which he had paid for the extension.

IV. SOME BRIEF NOTES TOWARDS A THEORY

Plaintiffs are literally clamouring for curial relief in the fields to which the remedial trust has been extended. Throughout the Commonwealth the court lists are overflowing with cases of this sort, particularly in the areas of domestic arrangements and fiduciary duties. In the short term we need a theoretical response which courts can use immediately. In one crystalline gesture therefore, we can remove from consideration the two most noticeable

61 This is especially obvious in the judgment of Brennan J. in *Waltons Stores* note 19 *supra*, 127; compare Mason C.J. and Wilson J., 116.

62 See J.D. Heydon, W.M.C. Gummow and R.P. Austin, *Cases and Materials on Equity and Trusts* (1982) (2 ed.) 311.

63 [1979] 2 All ER 945.

64 (1979) 21 SASR 280.

65 [1982] 1 NSWLR 61.

components of current North American juristic thought. Neither the law and economics movement nor critical legal studies will produce for us the kind of theoretical argument that an Australian court would directly adopt.

What, then, should we be looking for? It is submitted that we need to develop a set of principles, using the word "principles" in the way Professor MacCormick does in his *Legal Reasoning and Legal Theory* (1979). That is to say, we need relevant propositions which are relatively general, desirable, and with explanatory and justificatory force — explanatory and justificatory in a way which can be taken into account by judges and which will provide generative norms for legal development.

As stated at the beginning of this essay, the traditional law of trusts neither explains current developments nor adequately justifies results in remedial cases. Principles 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, let alone to that special bundle of personal and proprietary obligations involved in the traditional trust. We should develop the habit of approaching equitable problems by analysing at two levels: is there justification for imposing an obligation?; if so, is there justification for a proprietary obligation of one kind or another? The justification for an obligation may influence the shape of the proprietary remedy. For instance, if the obligation is reliance-based, the remedy should be directed towards correcting the reliance, while if it is based on unjust enrichment the remedy will be directed towards returning the defendant's enrichment to the plaintiff, at whose expense it was gained. The justification for an obligation will not normally tell us whether we need to go beyond a personal remedy into the proprietary sphere. That latter question involves comparing the merits of the plaintiff with the merits of the defendant's unsecured creditors and with third parties claiming the defendant's property in priority to the plaintiff. It involves comparing the plaintiff's and defendant's claims to any increase in value of property in the defendant's hands. And it involves many other "proprietary" questions.

It is suggested that we need to break up these proprietary issues also and find ways of providing remedies which answer one sort of proprietary question without incidentally committing ourselves to resolving other proprietary questions which have not yet arisen on the instant facts. That will be very hard to do. In the meantime, we need to develop the surgical instruments which are within our grasp, like the injunction, the account of profits, the equitable lien, contribution, set-off, indemnity and subrogation, and receivership. These are all remedies capable of providing a fairer and more principled solution than the over-used trust.

If these tentative views are correct, there will be some implications for law teaching. Courses on Restitution which are organised around the principle against unjust enrichment need not be altered. The principle against unjust enrichment is an important principle of obligation and therefore is an appropriate organising principle for law teaching. But the restitutionists

should not claim too much for that principle. It is subject to two important limitations. The first is that their principle is only one of the generative principles which operate in the area which their courses cover. There are other important principles of obligation standing independent of the unjust enrichment concept: a full list would include principles about reliance, agreement and a prophylactic proscription of fraud. The second limitation is that neither unjust enrichment nor any of these other principles of obligation dictates a solution to the question whether, in the remedial circumstances, a move from obligation to property is warranted. Individual restitution lawyers have some interesting ideas on that issue but their ideas take us well beyond the principle against unjust enrichment.

Law school courses on Trusts should obviously be retained, but unless the subject-matter is widened to encompass general equity, these courses should be confined to creation and formalities, administration of trusts, perhaps the taxation of trusts and a few other matters. Resulting and constructive trusts and those cases on creation of 'express' trusts which are litigated precisely because the author's intention is unclear, do not properly belong to a course which explores the deliberately formed trust.

The cases about remedial trusts should be seen as cases about the nature and scope of certain personal and proprietary obligations and remedies. It is unsatisfactory to deal with them in a course styled 'Remedies', just as it would be unsatisfactory for a veterinarian to offer a course on the hind quarters of domestic animals. The cases are about both obligations and remedies and are at risk of being devalued if the focus of the course is 'remedies' in an unspecified sense. Such an approach leads inevitably to arid and potentially misleading debate about whether the remedial trust is, and is nothing but, a remedy.[66] The issues raised by the cases on remedial trusts are of great importance but they can no longer be taught both properly and honestly either in a course called 'Trusts' or in one on 'Remedies'. Proper treatment requires that we move beyond the trust into general equity, considering and evaluating all doctrines pertinent to the issue and avoiding the distortion which arises when these questions are forced into the trusts mould. Honest treatment entails that we rename our course 'Equity'.

66 Deane J. has explained the misleading nature of the question, is the constructive trust an institution or a remedy? See *Muschinski* v. *Dodds* note 56 *supra*, 612ff.