PROPERTY, PROPRIETARY REMEDIES AND INSOLVENCY: CONCEPTUALISM OR CANDOUR?

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I INTRODUCTION: PROPERTY AND PROPRIETARY REMEDIES

Property law has been radically transformed in the past century. For example:

- the High Court of Australia has acknowledged that the common law recognises a form of native title that lies outside the system of tenures and estates;
- equitable proprietary rights play a role in commercial transactions that was only beginning to be imagined – and was still much feared – in 1900; and
- the courts have assumed a jurisdiction to adjust the property interests of unmarried couples when their relationships end.[1]

In these instances and many others the courts have responded to changes in society: to the recognition of universal human rights and to changing commercial needs and social relationships. 'Property' is recognised as being socially constructed. It is adaptable and is not frozen for all time.

At the same time, these developments have led to a degree of fragmentation of the concept of 'property'. On a practical level, new property interests have been recog-

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[1] See the following: **Native title**: *Mabo v State of Queensland [No 2]* (1992) 175 CLR 1. **Equitable proprietary rights**: contrast *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC) with *Manchester Trust v Furness* [1895] 2 QB 539, 545. It would be unreal to pretend that the 19th century fears about equitable proprietary rights in commercial transactions have entirely abated: see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 686, 689-90 (Lord Goff), 704-5 (Lord Browne-Wilkinson) ('*Westdeutsche Landesbank*'). **Unmarried couples**: *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Gillies v Keogh* [1989] 2 NZLR 327 (NZCA).

nised.[2] In theoretical discourse, 'property' is commonly analysed as a bundle of discrete rights, the contents of which are not always the same.[3] Together, these developments have shown that 'property' can only be defined in open-textured terms and that its margins are contested.[4]

We cannot predict the claims that will be made for property in the next century. No doubt new claims will emerge, just as claims have been made and sometimes allowed during this century. It is probably pointless to speculate on the next round of claims.

However we can already observe calls to entrench a conceptual approach as a response to the fragmentation that has occurred in the past century. These calls are put strongly by Professor Peter Birks, Regius Professor of Civil Law at Oxford:[5]

> Some legal concepts ought never to be deconstructed. One such example ... is charity. ... The conceptual approach – is it a charity? – creates a conceptual barrier between the law and an impossibly difficult political question [namely, does the trust deserve the attendant tax concessions that apply to charities]. At the same time, ... it prevents the fragmentation of an inquiry likely to arise in many different contexts.
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> It is the same with property, only more so.[6]

He continued:

> Lawyers have no special competence in distributive justice. They cannot be expected to say who deserves what. But, given a decent law library and some time to do the work, a lawyer can be expected to say whether a given purpose

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[2] For example, claims have been made, and sometimes recognised, for property rights in privacy, genetic material and personal reputation as follows. **Privacy**: Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193; compare *Victoria Park Racing and Recreation Ground Co Ltd v Taylor* (1937) 58 CLR 479. **Genetic material**: *Moore v Regents of the University of California* (1990) 793 P2d 479. **Reputation**: Alan Story, 'Owning Diana: From People's Princess to Private Property' (1998) 5 *Web Journal of Current Legal Issues* <http://webjcli.ncl.ac.uk-/1998/issue5/story5.html>.

[3] Following Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16; Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 *Yale Law Journal* 710. This analysis is not uncontested: see J E Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 *UCLA Law Review* 711; J Penner, *The Idea of Property in Law* (1997). Penner mounts an extended and powerful challenge to the orthodox Hohfeld-Honoré picture of property as a bundle of rights. He argues that the bundle of rights picture is not an explanatory model but rather conjures up an image without representing any clear thesis or set of propositions about what 'property' is. In his view, such a picture is deficient because '[a]ny thesis acceptable to lawyers about what property really is should serve as an aid to deciding ... specific case[s]' about what is and what is not capable of being property: Penner, 'The "Bundle of Rights" Picture of Property, ibid 722.

[4] Kevin Gray, 'Property in Thin Air' (1991) 51 *Cambridge Law Journal* 252.

[5] 'The End of the Remedial Constructive Trust?' (1998) 12(4) *Trust Law International* 202. Professor Birks has returned to this theme in 'Three Kinds of Objection to Discretionary Remedialism' (2000) 29 *University of Western Australia Law Review* 1.

[6] Birks, 'The End of the Remedial Constructive Trust?', above n 5, 214.

> is or is not charitable, or whether on given facts a proprietary interest has arisen, and, if so, precisely of what kind.'[7]

Professor Birks' particular concern is with deciding whether a claimant should have a proprietary remedy (usually a constructive trust or resulting trust) against an insolvent defendant. In his view, that question should be resolved by determining 'whether on given facts a proprietary interest has arisen, and, if so, precisely of what kind' rather than by directly addressing the underlying distributive question. The former question, it seems, can be resolved by purely technical means – 'a decent law library and some time to do the work' – where as the latter is 'an impossibly difficult political question' in which '[l]awyers have no special competence'.

Professor Birks' view is widespread, if not always as clearly articulated or as robustly defended as by him.

In this article, however, I argue that there are serious limitations to the approach articulated and defended by Professor Birks.[8] Analysing the concept of 'property' and the types of proprietary interests that have previously been recognised cannot resolve questions about whether the claimant's claim *ought* to prevail over the claims of others, notably the defendant's general creditors. 'Property' can function as a lump-concept that distracts attention from substantive questions and distorts the process of resolving contested claims. Notwithstanding Professor Birks' injunction, 'property'-claims must be 'deconstructed' in order to preserve the rationality and coherence of the law of property as it develops into the next century.[9]

II CONSTRUCTIVE TRUSTS AND RESULTING TRUSTS

'Constructive trust' and 'remedial constructive trust' must be among the most abused phrases in the law of property.[10] They are regularly used without any clear indication of what is intended by the writer or speaker. For the purposes of this

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[7] Ibid.

[8] David Wright has also powerfully criticised Professor Birks' approach: 'Professor Birks and the Demise of the Remedial Constructive Trust' [1999] *Restitution Law Review* 128. Wright's criticism focuses on the cases analysed by Birks in 'The End of the Remedial Constructive Trust?' (above n 5) and other recent cases not discussed by Birks. He also sketches briefly an argument that is similar to that developed here.

[9] Some might object to the invocation of standards of 'rationality and coherence' in a deconstructive analysis. However, I pursue (and Professor Birks objects to) a modest deconstructive analysis, perhaps closer to 1930s realism than to post-modern deconstruction. (On the use of deconstruction as a tool, see Stephen M Feldman, 'Playing with the Pieces: Postmodernism in the Lawyer's Toolbox' (1999) 85 *Virginia Law Review* 150. Realism and post-modern deconstruction share the aim of exposing the underlying assumptions of legal doctrine. Of course, their prescriptions for what is to be done once those assumptions are exposed may differ.) It is worth noting that I do not make any assumptions about what resources can be the subject-matter of property rights or about what those rights consist of. Accordingly, there is no necessary inconsistency between my approach and conceptual approaches to those questions (such as that adopted by Penner: see works cited above n 3).

[10] See the discussion in Birks, 'The End of the Remedial Constructive Trust?', above n 5.

article, I am content to adopt the definition of Nourse LJ in *Re Polly Peck (No 2)*[11], that a remedial constructive trust is: 'an order of the court granting, by way of remedy, a proprietary interest to someone who, beforehand, had no proprietary right'.[12]

His Lordship evidently intended to draw a distinction between this concept, which in his view necessarily involved 'a discretion to vary property rights',[13] and 'a trust that arises as facts happen, leaving the court only a declaratory function' (to adopt Professor Birks' characterisation).[14]

A similar distinction was drawn by the majority of the New Zealand Court of Appeal in *Fortex Group Ltd v MacIntosh*.[15] On the one hand:

> '[A]n institutional constructive trust arises upon 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.'[16]

A remedial constructive trust, on the other hand, 'depends for its very existence on the order of the Court; such order being creative rather than simply confirmatory'.[17] It is assumed by courts and commentators that such a remedy will necessarily be discretionary.[18]

These definitions are used as the foundations for objections to the remedial constructive trust along the following lines:[19]

(a) judge-made law has shown a marked reluctance to allow judges a non-statutory discretion to vary property rights;[20]

(b) judge-made law should not allow courts such a discretion because it would require judges to resolve impossibly difficult political questions (in this case, whether particular claimants deserve priority);

(c) by contrast, the 'property' approach (employed in the doctrines of resulting trust and institutional constructive trust) leaves judges only technical questions about the nature and incidents of the property interest in issue and those questions can be answered with the aid of a decent law library; and

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[11] [1998] 3 All ER 812. The High Court has recognised the different types of constructive trust but has not been drawn on all their details: *Muschinski v Dodds* (1985) 160 CLR 583, 613-14 (Deane J); *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566, 583-5.
[12] [1998] 3 All ER 812, 830.
[13] Ibid 831.
[14] Birks, 'The End of the Remedial Constructive Trust?', above n 5, 203.
[15] [1998] 3 NZLR 171 ('*Fortex*').
[16] Ibid 172.
[17] Ibid.
[18] Birks, 'The End of the Remedial Constructive Trust?', above n 5, 203-5, discussing *Fortex* and *Westdeutsche Landesbank*.
[19] The argument is made most clearly in Birks, ibid.
[20] *Re Polly Peck (No 2)* [1998] 3 All ER 812, 831 (Nourse LJ).

(d) the alleged doctrinal shortcomings of the resulting trust and institutional constructive trust are exaggerated and do not warrant the costs that would be incurred in adopting the remedial constructive trust.

These propositions depend on assumptions about a supposed distinction between the resulting trust and institutional constructive trust on the one hand and the remedial constructive trust on the other. The assumptions are as follows:

- The rights under an institutional constructive trust or a resulting trust 'come into existence' on the happening of the events to which they respond and not as the result of the order of a court.
- Those rights come into existence as the result of rules not as the result of a discretion exercised after the event by a court.

In my view, the assumptions are unsound because firstly, it is not possible to distinguish between the two types of trusts on the basis of when rights under them 'come into existence' and secondly it is not possible to distinguish between the two types of trusts on the basis of the role of the court in making a distributive decision that affects property rights. The institutional constructive trust and resulting trust merely conceal (and do not eliminate) the distributive decision about which claimants deserve priority.

Although the remedial constructive trust is defined in *Re Polly Peck (No 2)* and *Fortex* in terms that sharply distinguish between it and the resulting trust and the institutional constructive trust, the distinction cannot be sustained once these assumptions are analysed. I consider the assumptions in turn.

A *When Rights 'Come into Existence'*

Rights are not things. They can only 'exist' in a metaphysical sense. Rather, rights are (or include) enforceable claims. To say that a right has 'come into existence' can only mean that a court will, if asked, determine the legal positions of parties on the basis that the alleged possessor of the right has such an enforceable claim. In this context, a claim to possess a right is a prediction of a court's response to the facts of the underlying claim. As Hohfeld argued:

> 'all primary, or antecedent, relations and all secondary, or remedial, relations, can, in general, be ascertained only by inference from the purely adjective juridical processes, that is, by inference from either affirmative or negative action regularly to be had from the particular courts from which a judgment or decree may be sought'.[21]

So to say that the claimant has a proprietary right which 'came into existence' on the happening of the events to which it responds *means* (and does not merely entail) that a court will treat the claimant's claim as being worthy of protection between the

[21] Wesley Newcomb Hohfeld, 'The Relations between Equity and Law' (1913) 11 *Michigan Law Review* 537, 569, note 34.

happening of those events and the court's ultimate order, and not merely from the time of that order.

But granted this, the distinction between proprietary rights that 'come into existence' on the happening of events and proprietary rights that are brought into existence by the order of a court as a response to the happening of events is illusory. *All* rights are brought into existence in this sense by courts. Whether the right so brought into existence by the court's order should be protected prior to that order is a separate question.[22] A court might be more inclined to afford this protection when the principles motivating it to award the remedy are well established and relatively certain: for example, if the claimant relies on his or her contribution to the purchase price of an asset that is held in the name of the defendant. A court might be less inclined to afford this protection when the principles the claimant relies on are less well established and more open textured: for example, if the claimant makes a novel claim as in *Re Polly Peck (No 2)* or *Fortex*. But this does not produce a useful distinction between the institutional constructive trust (and resulting trust) and the remedial constructive trust.

B *Discretion and Rules*

This also disposes of Professor Birks' assertion that a remedial constructive trust must be discretionary because 'if it were dictated by rules and principles it would arise as the relevant facts happened'.[23]

It is perfectly possible that those rules and principles dictate that the trust have effect from the date of the court's order and not before. This is only problematic if one insists on giving yet further work to the already overworked maxim that equity regards as done that which ought to be done.[24] Equally, it is perfectly possible that the rights conferred under a discretionary remedy be treated as dating from some earlier point.[25]

Moreover, it is difficult to agree that a remedial constructive trust, even if it is a discretionary remedy, involves 'a second discretionary look at the same story' after the court has already decided that there is no institutional constructive trust on the facts.[26] Rules and discretions lie on a continuum from full particularity in decision-making to wholly individualised decision-making.[27] Rules and discretions are not

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[22] In a sense, this was the question posed in *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265. The question awaits a satisfactory answer. Sometimes, however, it may be important to know the date on which the claimant's rights arise. For example, if the subject matter of the remedy is a bank account on which interest accrues, it will be necessary to determine who is entitled to the interest for income tax purposes: see *Zobory v FCT* (1995) 129 ALR 484. But (statute permitting) the court should ask directly whether the interest should form part of the claimant's income or the defendant's, rather than purporting to deduce this from the fact that the claimant's rights can be labelled 'proprietary': compare (in a non-remedial context) *Re English & American Insurance Co Ltd* [1994] 1 BCLC 649, 652.

[23] Birks, 'The End of the Remedial Constructive Trust?', above n 5, 203.

[24] As occurred in *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324.

[25] *Muschinski v Dodds* (1985) 160 CLR 583, 615, 623 (Deane J); *Rawluk v Rawluk* (1990) 65 DLR (4th) 161, 177 (Cory J).

[26] Birks, 'The End of the Remedial Constructive Trust?', above n 5, 206.

[27] See generally Cass R Sunstein, *Legal Reasoning and Political Conflict* (1996).

wholly different phenomena and there is no reason to regard them as being in a hierarchy under which rules are applied first and discretions second. It is not incongruous that both a rule-generated remedy and a discretionary remedy be available on the same facts, or that one be available and the other not.

For these reasons, the presence or absence of discretion is not a basis for a useful distinction between different types of proprietary remedies.

III CHOOSING CANDOUR OVER CONCEPTUALISM

This is not to say that there are no useful distinctions that can be made between the different approaches to proprietary remedies. However, the useful distinctions do not depend on when the rights 'come into existence' or on the role of discretion. One distinction that is useful is that between proprietary remedies whose redistributive effects are not acknowledged (including the resulting trust and the institutional constructive trust) and proprietary remedies whose redistributive effects are openly acknowledged and which are defended on that basis when they are awarded.[28]

A *The Redistributive Effects of Proprietary Remedies*

Resulting trusts and institutional constructive trusts are redistributive. That is, they involve taking property from the defendant and transferring it to the claimant. If the defendant is insolvent they give the claimant priority over the defendant's general creditors in the defendant's insolvency. The claimant's rights under these remedies are not simply a continuation of his or her antecedent property rights in a new form. These remedies involve *new* rights *created* to respond to particular fact situations.[29] (Accordingly, the reluctance to allow courts a non-statutory power to vary proprietary rights should apply equally to institutional constructive trusts and resulting trusts.[30]) The justification of such redistributive remedies can only be that the claimant has a better claim to the defendant's property than the defendant (or, if the defendant is insolvent, his or her general creditors).

B *What Generates Proprietary Remedies?*

The question, then, is: What generates these new rights for the claimant in the defendant's property? As noted above, judges and jurists in the common law world anathematise judicial redistribution of property (particularly where this involves a

[28] However, there is a link between candour and discretion. Frank Michelman argued that it is difficult to cast substantively appealing and defensible distributive norms in the form of strongly objective (abstract, simple and impersonal) legal standards and that it is harder still to formulate strongly objective standards that mediate satisfactorily between distributive and possessive property claims: Frank I Michelman, 'Possession vs. Distribution in the Constitutional Idea of Property' (1987) 72 *Iowa Law Review* 1319, 1321. If he is right, it is likely that openly redistributive proprietary remedies will involve a discretionary element.

[29] See generally Craig Rotherham, 'Proprietary Relief for Enrichment by Wrongs: Some Realism About Property Talk' (1996) 19(2) *University of New South Wales Law Journal* 378.

[30] See above n 19 and accompanying text.

judicial discretion). As a result, they privilege rules and insist that the institutional constructive trust and the resulting trust are rule-bound and self-generating. The redistributive effects of these remedies are regarded as incidental or consequential; the remedies are not justified in terms of those effects.

In a commentary published in the Harvard Law Review, Pierre Schlag considered phrenology (the 19th century pseudoscience that postulated a link between behaviour and cranial features).[31] He drew parallels between phrenology and Langdellianism (the approach to law as science pioneered by Dean Christopher Columbus Langdell at Harvard). With minimal adaptations, the same analysis applies to the rules of institutional constructive trusts and resulting trusts that result in a claimant receiving priority in the defendant's insolvency:

> The structure of this kind of explanation is simple. Behaviors [for example, court orders granting priority in insolvency] are classified into descriptive categories [for example, 'institutional constructive trust' and 'resulting trust']. The descriptive categories are hypostatized and projected back onto an agency, a potentiality, or a faculty whose defining character is its ostensible capacity to produce the behavior in question. The agency, potentiality, or faculty is then offered as an explanatory cause of the behavior.
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> The core problem with this kind of explanation lies in the unthinking transformation of classifications designed to describe behavior [for example, priority for mistaken payers] into effective ontological agencies [for example, equity's willingness to impose a resulting trust]. There is thus a kind of unthought and unexamined transposition from epistemic heuristics to ontological actualities. Such transposition is a generalized ontologizing effect of language and of rhetoric. The ontological actualities produced by this transposition have nothing going for them except the generalized ontologizing effects of language and our failure to notice these effects.
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> The transposition from descriptive classification to ontological actuality occurs readily – indeed, almost automatically. Such a transposition is occasioned by three concurrent conflations. The epistemic classifications are erroneously transubstantiated into robust ontological entities that are part of the world to be explained. As the epistemic classifications are transubstantiated into robust ontological entities, they are typically reified: they become determinate object-forms with stabilized identities. And in the transition from epistemic classification to ontological agency, they are endowed with animistic properties. They become capable of producing behaviors, actions, and the like.[32]

In the process, the reason for the behaviour (a judge granting a claimant priority in the defendant's insolvency) has been lost.

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[31] 'Law and Phrenology' (1997) 110 *Harvard Law Review* 877.
[32] Ibid 888-9.

A clear example of this approach is the decision of the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*.[33] There, Lord Browne-Wilkinson said:

> [I]n order to show that the local authority became a trustee, the bank must demonstrate *circumstances which raised* a trust for the first time either at the date on which the local authority received the money or at the date on which payment into the mixed account was made.[34]

On this account, 'circumstances' 'raise' trusts – judges do not make decisions or orders that confer proprietary interests on claimants. Lord Browne-Wilkinson went on to describe the relevant 'circumstances':

> Under existing law *a resulting trust arises* in two sets of circumstances:
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> (A) Where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B ...
>
> (B) Where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest.[35]

Here, once again, the language used suggests that the resulting trust is an animate entity that is explained, rather than created, by the courts and that priority is a consequence of that trust rather than a reason for deciding it exists.[36]

Similarly, in *Attorney-General for Hong Kong v Reid*,[37] a constructive trust was held to arise automatically when the fiduciary accepted a corrupt payment. The fiduciary was obliged to account for the payment and therefore would be treated as holding it on trust for his principal forthwith. Lord Templeman gave no consideration to the defaulting fiduciary's unsecured creditors other than to assert that they could not be in any better position than their debtor.[38]

In *Re Goldcorp Exchange Ltd*,[39] the Privy Council again only recognised the interests of the defaulting fiduciary's creditors in a context where proprietary rights had already been assumed:

> The company's stock of bullion had no connection with the claimants' purchases, and to enable the claimants to reach out and not only abstract it from the assets available to the body of creditors as a whole, but also to afford a priority over a secured creditor, would give them an adventitious benefit de-

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[33] [1996] AC 669.
[34] Ibid 707 (emphasis added).
[35] Ibid.
[36] Elsewhere in his judgment, Lord Browne-Wilkinson refers cautiously to the possibility of the remedial constructive trust being introduced into English law: ibid 716. This would involve a departure from the approach analysed in the text.
[37] [1994] 1 AC 324.
[38] Ibid 331.
[39] [1995] 1 AC 74.

> void of foundation in logic and justice which underlie this important new branch of the law.[40]

And returning once more to *Westdeutsche Landesbank*, Lord Browne-Wilkinson's analysis of the practical consequences of allowing a proprietary remedy for payments under void contracts assumed that the proprietary consequences of such a remedy were fixed and inflexible, determined by the nature of the trust that arose, and affording 'absolute priority' against all but a purchaser for value of a legal interest without notice.[41] Although the reasoning in this case extends some way beyond a narrow focus on the relationship between claimant and defendant, by insisting that a resulting trust arises automatically and with rigidly defined incidents from external circumstances, it ignores the redistributive consequences of the proprietary remedy.

C *The Costs of Conceptualism*

The dangers of resolving substantive questions through this kind of 'property'-talk—conceptual reasoning about 'property'—have been known for a long time. In 1930, for example, Karl N Llewellyn argued that sale of goods cases should be decided on the basis of what he described as narrow-issue decision-making rather than on the basis of lump-concept decision-making.[42] Narrow-issue decision-making focuses on the particular matter in dispute: Is the purchaser entitled to possession? Who should bear the risk of loss? Lump-concept decision-making focuses on grand concepts like 'title' and 'property': Has title passed from vendor to purchaser? Lump-concept decision-making uses the lump-concept as a place-holder. It distracts attention from the matters really in issue and distorts both the questions and the answers. It attaches a label (for example, 'property') and purports to deduce the answers to substantive questions (for example, 'Is the vendor obliged to compensate the purchaser for the loss of the goods?') from that label.

Llewellyn argued compellingly that lump-concept decision-making leads to distinctions without differences and irrational results.[43]

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[40] Ibid 99.

[41] *Westdeutsche Landesbank* [1996] AC 669, 703-5.

[42] Karl N Llewellyn, *Cases and Materials on the Law of Sales* (1930) chap VI. See also Felix S Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Columbia Law Review* 809; Margaret Stone, 'The Reification of Legal Concepts: *Muschinski v Dodds*' (1986) 9(2) *University of New South Wales Law Journal* 63.

[43] Llewellyn, above n 42. The narrow-issue decision-making model is reflected in §2-401 of the Uniform Commercial Code:

> Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this Article and matters concerning title become material the following rules apply.

In general, rights, obligations and remedies are defined in the Code without reference to title. Llewellyn was largely responsible for drafting the early versions of the Code. However, the extent to which a Hohfeldian 'bundle of rights' approach permeates the Code is controversial: see Jeanne L Schroeder, 'Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property' (1994) 93 *Michigan Law Review* 239, 306-12.

Of course, the conceptual (or lump-concept) approach and Schlag's criticism of it are not only applicable to constructive and resulting trusts. They can be applied to a greater or lesser extent to all common law and equitable concepts, including 'contract' and 'express trust'. What implications does this have? First, Schlag's analysis does not oblige us to abandon these concepts. Concepts and reasoning about them do perform significant (albeit contestable) functions:[44]

- Concepts can have a stabilising effect. They allow lawyers to aggregate a group of rules, rights and obligations that are commonly encountered together and to give them a name. That name can function as an organising principle and allow lawyers to impose a rational and coherent structure on the law.[45] A rational structure can in turn reduce uncertainty and facilitate planning. It provides assurance that like cases will be treated alike.

- Concepts can enhance efficiency when rules come to be applied. They frame or delimit the areas of fact and law that courts must investigate in order to resolve each case. When similar questions are likely to arise in different contexts, they assist in ensuring some measure of uniformity in the courts' responses and ensure that judges do not have to reason from first principles in each case.

- Concepts and formal reasoning function as barriers which enable the courts to avoid having to answer political questions: they enable courts to focus on resolving 'technical questions'. Such concepts, working through objectively ascertainable rules, can provide insulation from personal criticism of decision makers.[46]

- Concepts and formal reasoning reduce the area of discretion available to decision-makers and therefore reduce the risk that courts will be 'thrust ... "into the basic line-drawing process that is pre-eminently the province of the legislature" and produce judgments that [are] no more than the visceral reactions of individual Justices'.[47]

However, Schlag's account forces us to confront the costs of conceptualism and ask whether they outweigh its benefits. In the context of proprietary remedies, the costs of conceptualism are clear: the institutional constructive trust and the resulting trust approaches do not address the fundamental question whether the claimant's claim

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[44] There are some parallels here with Frederick Schauer's analysis of the reasons for rules: *Playing by the Rules: A Philosophical Examination of Rule-Based Decisionmaking in Law and in Life* (1996) especially Chapter 7. Schauer closely examines the merits of each of these claimed functions of rules.

[45] This point is developed by Jeremy Waldron in '"Transcendental Nonsense" and System in the Law' (2000) 100 *Columbia Law Review* 16 (an attempt to answer the critique of conceptual reasoning contained in Cohen, above n 42).

[46] Birks, 'The End of the Remedial Constructive Trust?', above n 5, 214-15; Peter Birks, 'The Remedies for Abuse of Confidential Information' [1990] *Lloyd's Maritime and Commercial Law Quarterly* 460, 465; Peter Birks, 'Civil Wrongs: A New World' in *Butterworth Lectures: 1990-91* (1992) 92-3.

[47] *Solem v Helm* 463 US 277, 308 (1983) (Burger CJ, dissenting), quoting from *Rummel v Estelle* 445 US 263, 275 (1980). Ample evidence of this mode of thinking appears in the contemporary Australian public debate concerning the role of the High Court: see, for example, Greg Craven, 'The High Court of Australia: A Study in Abuse of Power' (1999) 22(1) *University of New South Wales Law Journal* 216.

deserves priority over the claim of the insolvent defendant's general creditors.[48] Where, as here, the law is complex and developing rapidly, jurists should address the fundamental questions directly and not hide behind conceptual accounts that suppress these questions.[49]

IV WHEN DOES THE CLAIMANT DESERVE PRIORITY?

The question whether a claimant's claim deserves priority in insolvency is a difficult question. But it is not, as Professor Birks and others would have it, impossibly difficult.

The first thing to observe is that, as demonstrated in the previous section, it is inescapably a question of distributive justice. The claimant, who would otherwise have to share rateably in the defendant's assets, seeks a proprietary remedy that will increase his or her share of the defendant's assets and reduce the value of the assets available to the defendant's other general creditors. (The claimant may also seek priority over the defendant's secured creditors.[50]) This at once shows how unsuited the question is to being resolved by asking whether the plaintiff has a proprietary interest and if so from what moment it takes its priority. Such a process does not admit the interests of the defendant's creditors as a directly relevant consideration at all.

As a question of distributive justice, it is a question unlike most questions that arise in the judge-made law. Most doctrines are conceptualised as based on principles of corrective justice, as involving a relationship of doer and sufferer. Judges attempt to do justice as between the parties to the particular dispute. Of course, judges cannot pretend that their decision does not have distributive implications. However, in most cases, they do not venture into such issues.[51]

Questions of distributive justice are often more contentious than other questions. Judges and jurists have anathematised redistribution, notwithstanding the existence of many phenomena that must be regarded as redistributive.[52] It may be that repre-

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[48] Those approaches also have the potential to give the claimant priority over those of the defendant's secured creditors who hold uncrystallised floating charges.

[49] It is worth noting that if Penner in 'The "Bundle" of Rights" Picture of Property' (above n 3), is correct and there is a stable concept of property, an approach to proprietary remedies that focuses on the underlying rationale for such remedies will distort the concept of property *less* than one invoking the concept instrumentally and inappropriately: compare Craig Rotherham, 'The Metaphysics of Tracing: Substituted Title and Property Rhetoric' (1997) 34 *Osgoode Hall Law Journal* 321. See also text below, n 56 and following.

[50] For example, *Re Goldcorp Exchange Ltd* [1995] 1 AC 74.

[51] The most conspicuous example of this selective blindness is the common law's refusal—perhaps now only its reluctance—to consider the availability of insurance as a means of loss spreading and shifting in tort claims.

[52] Courts redistribute property when they invoke the following doctrines: prescription (for example, *Delohery v Permanent Trustee Co of NSW* (1904) 1 CLR 283); constructive trust (for example, *Muschinski v Dodds* (1985) 160 CLR 583); proprietary estoppel (for example, *Giumelli v Giumelli* (1999) 196 CLR 101. They also redistribute property when (comparatively rarely, it must be acknowledged) they refuse an injunction to restrain a trespass: for example, *LJP Investments Pty Ltd v Howard Chia Invest-*

sentative political institutions are better able to assemble the information necessary to determine the wider ramifications of a choice between particular distributional outcomes.[53] Accordingly, courts should not embark on these questions lightly. But this deference to representative institutions does not deny to the courts any role in developing the common law, even when questions of distributive justice are involved. In the late twentieth century, Australian courts unambiguously rejected any such self-limiting role. Sir Anthony Mason argued:

> Sometimes judicial initiative is inevitable. ... It is no longer feasible for courts to decide cases by reference to obsolete or unsound rules which result in injustice and await future reform at the hands of the legislature. There is a growing expectation that courts will apply rules that are just, equitable and soundly based except in so far as the courts are constrained by statute to act otherwise. Nothing is more likely to bring about an erosion of public confidence in the administration of justice than the continued adherence by the courts to rules and doctrines which are unsound and lead to unjust outcomes.[54]

Should the courts nonetheless exercise restraint and refrain from developing an *openly* redistributive approach to proprietary remedies? In my view, the courts should confront the issue head on and *not* refrain from developing such an approach.

First, as argued above, the resulting trust and institutional constructive trust are already redistributive, even if not openly acknowledged as such.

Secondly, the requirement of rationality that is central to the rule of law[55] in and of itself requires a more open approach. The prevailing approach (employing the resulting trust and institutional constructive trust) fails to acknowledge the relevance of the defendant's general creditors' interests.

Thirdly, the 'property'-centred approach of the institutional constructive trust and resulting trust also distorts the inquiry that the court must make into the facts before it. It results in an artificial and unnecessary search for a 'proprietary base'.[56] It encourages courts to model proprietary remedies (and adjacent doctrines such as tracing) on inappropriate analogies with conventional property law.[57]

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ments Pty Ltd (1989) 24 NSWLR 490, 496, 497; *Aristoc Industries Pty Ltd v R A Wenham (Builders) Pty Ltd* [1965] NSWR 581.

[53] Compare Sunstein, above n 27, 177-8.

[54] Sir Anthony Mason, 'The Australian Judiciary in the 1990s' (1994) 6 *Sydney Papers* 111, 114. Compare *Lankow v Rose* [1995] 1 NZLR 277, 280 (Cooke P).

[55] At least on T R S Allan's account: 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1999) 115 *Law Quarterly Review* 221.

[56] Peter Birks, *An Introduction to the Law of Restitution* (1989) 378-9.

[57] Simon Evans, 'Rethinking Tracing and the Law of Restitution' (1999) 115 *Law Quarterly Review* 469; Craig Rotherham, above n 49. Compare *Foskett v McKeown* [2000] 2 WLR 1299. The case concerned claims to the proceeds of a policy of life insurance. The insured had fraudulently paid some of the premiums out of funds of which he was trustee. Following the death of the insured and discovery of the fraud, the beneficiaries of the funds claimed that they were entitled to a proportionate share of the proceeds of the policy which their funds had partly purchased. The nominal beneficiaries of the policy

The courts will not overreach themselves in adopting a more openly redistributive approach. Any such approach must be developed from the existing case law and be consistent with statute law. That imposes two important constraints, one methodological and one substantive.

The methodological constraint is fundamental. The judge-made law develops, as Deane J said in *Muschinski v Dodds*, '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 [existing] principles'.[58] The analogical method is built on principle and reason. It expresses the values of the rule of law. It constrains judges and forces them to justify their decisions openly and rationally. It does not admit untrammelled discretion.

The substantive constraint derives from insolvency legislation.[59] Its underlying norm is one of rateable distribution – the equal treatment of creditors. Subject to statutory priorities, all general creditors receive a proportionate share of the insolvent's assets. If the law is to determine that certain claimants are to receive a proprietary remedy, and therefore are to stand outside the regime of rateable distribution, the law's requirement of rationality demands that that different treatment be justified by a principle that distinguishes those claimants from the general creditors. It can only do so by demonstrating how their claims differ from those of the general creditors. It is not sufficient merely to say that those claimants have a proprietary interest if we cannot also explain how that proprietary interest arose *by reference to criteria that distinguish the claimants' claims from the claims of the defendant's general creditors*.

It may very well be outside the proper bounds of the courts' function to devise a distributional schema from scratch. But that is not the task. For well over a century, the courts have asserted a jurisdiction to exempt the holders of judicially created proprietary interests (that is, interests under resulting and institutional constructive trusts) from the regime of rateable distribution. Openly recognising that those interests are judicially created surely does not require the courts to abandon the jurisdiction. But it requires them openly to articulate the basis on which the holders are exempted from rateable distribution by means of (and not by reason of) their having a proprietary interest.

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claimed that the beneficiaries of the trusts were entitled at most to return of their funds. A sharply divided House of Lords held that the case '[fell] to be decided ... by determining who enjoys the ownership of the property in which the ... unexpected benefit is reflected' (at 1302, Lord Browne-Wilkinson). This was determined by 'fixed rules and settled principles' which were part of the law of property, not of the law of unjust enrichment (at 1322, Lord Millett).

[58] (1985) 160 CLR 583, 615. Compare Sunstein, above n 27, passim. See also Sir Gerard Brennan's comment in 'A Tribute to Sir Anthony Mason' in Cheryl Saunders (ed), *Courts of Final Jurisdiction, The Mason Court in Australia* (1996) 13:

> Judicial policy, informed by precedent and disciplined by analogy, confines the scope of discretionary judgment. But the risk of confusion between judicial policy and political policy [has] to be run in order to guarantee integrity of the judicial process and to bring the influence of contemporary values to bear on modern expositions of legal principle.

[59] *Bankruptcy Act 1966* (Cth), Division 2 of Part VI; Corporations Law, Subdivision D of Division 6 of Part 5.6.

V CONCLUSION: THE WAY FORWARD

The language of 'deconstruction' causes some scholars to fear for the end of objectivity, for the end of law as a scientific discipline governed by reason, for decision-making by untrammelled discretion. The much more modest deconstruction of 'property'-claims and proprietary remedies that I have proposed here should not cause such alarm.

Concepts such as 'property' perform valuable functions in the law. However, the conceptual approach has serious limitations. In particular, as with any rule-based approach, it forecloses enquiry into matters that are normatively relevant in the individual case.

Ultimately, then, when novel property claims are presented—as they inevitably will be—and where the conceptualism of the conventional approach to proprietary remedies conceals or suppresses choices about relevant policy issues (such as which claims should receive priority in insolvency), the courts can and should adopt a more open approach. Courts should be prepared to defend their decisions candidly on the basis of their consequences and should not shelter behind opaque conceptualism.