# THE NEW CONSTRUCTIVE TRUST: AN ANALYSIS OF ITS NATURE AND SCOPE

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[*In this article, the nature and scope of the new constructive trust is analysed, with particular reference to recent Victorian Supreme Court and High Court cases. It is concluded that although developments are still in progress, the current approach of the High Court transcends the more conservative interpretation maintained at state level, and suggests that the constructive trust will now assume a more wide-ranging remedial function.*]

## *INTRODUCTION*

The present article aims to evaluate current Australian, and more particularly, Victorian developments in relation to the relatively novel and fluid variety of constructive trust typically, though not exclusively, associated with unconscionable conduct in the context of informal household or family arrangements.

The emergence of this trust in Australian jurisdictions has been endorsed over the last decade by widespread judicial recognition and application, underpinned by a selective and shifting acceptance of the creative line of United Kingdom authorities based on interpretation of the two seminal House of Lords cases, *Gissing v. Gissing*[1] and *Pettitt v. Pettitt*.[2] While the availability of the hitherto unprecedented species of trust consequently seems undisputed, uncertainty and ambiguity persist in many aspects of its operation. Its legitimate ambit, essential elements, relationship to other legal principles and doctrines, and, more fundamentally, its juristic basis and rationale have long eluded firm definition. However, predominant patterns of development are now emerging. Many questions respecting the nature and consequences of the new trust have hardly been explored, much less resolved. Even its formal classification as a constructive trust, although apparently entrenched by judicial usage, is debatable, because the emergent species of trust in its predominant Australian form arguably has failed to exhibit the classical (albeit slender) hallmarks of the constructive trust as traditionally defined.

Given the absence of certainty and unanimity currently encountered on basic issues of nature and scope, the wider questions of the future social function of the new trust and its potential contribution to the adequacy and rationality of the legal system resist firm resolution. However, it is possible to suggest desirable directions in the light of an assessment of the relevant interacting social and legal factors. These, it is argued, have contributed to the consistent pattern of expan-

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1 [1971] A.C. 886.

2 [1970] A.C. 777.

sion and entrenchment of the trust, despite its continuing elusive qualities and despite some notable attempts to contain or even emasculate it. The current uncertainties, while frustrating to the lawyer and litigant in the immediate case, are the inevitable by-products of a growth process which is still in progress and in which the casual occurrence of litigation prevents the assumption of a more deliberate direction.

While uncertainty and incompleteness reflect the immaturity of the trust as a legal vehicle, the present plasticity is at once the product of, and the opportunity for responsible judicial legislation. The novel constructive trust may simply be elaborated, as precedent and authority accumulate over time, becoming more clearly demarcated, consistent and rationally predictable within a limited role. Alternatively, it may furnish a corner-stone from which a general, broad and accommodating principle of unjust enrichment may ultimately evolve. If so, rather than stabilizing as simply the 'latest born' of a 'faded hierarchy'[3] of miscellaneous instances justifying the imposition of a constructive trust, the new trust will contribute significantly to the development of a resource essential to the attainment of both social justice and the maturity of the legal system which should serve that end.

During the decade-long process of the trust's incorporation into Australian law, the relatively restrained interpretation at state level reflected the earlier contained development. However, the recent High Court case of *Baumgartner v. Baumgartner*[4] both vindicates and extends the more liberal approach of Deane J. in the earlier High Court case of *Muschinski v. Dodds*.[5] *Baumgartner v. Baumgartner* has now signalled a dramatic change in direction, supporting a considerably more flexible and ambulatory construction of the nature and role of the new constructive trust. The decision represents an important landmark in the brief Australian history of the new trust. Clearly, it exerts an imperative upon inferior jurisdictions to reject undue rigidity and possible ossification of relevant criteria, in favour of an increasingly unfettered vision of the trust's definition and ambit. Accordingly, although the evolution of the new trust is far from complete, *Baumgartner v. Baumgartner* is likely to initiate an epoch of accelerated growth.

## *BACKGROUND TO THE ROLE OF THE NEW CONSTRUCTIVE TRUST*

### *The Statute of Frauds and the doctrine of part performance*

Anglo-Australian law imposes formalities upon the creation or transfer of an interest in land. These formalities were introduced by the Statute of Frauds 1677 (U.K.).[6] The relevant provisions of the Statute,[7] which currently are incorporated in the Property Law Act 1958 (Vic.) and the Instruments Act 1958 (Vic.)[8]

[3] Keats, J., *Ode to Psyche*.
[4] (1987) 62 A.L.J.R. 29.
[5] (1985) 160 C.L.R. 583.
[6] 29 Car. 2, c. 3.
[7] *Ibid.* ss. 4, 7.
[8] Property Law Act 1958 (Vic.) ss. 52-5 and the Instruments Act 1958 (Vic.) ss. 126-7 as amended by the Sale of Goods Vienna Convention Act 1987 (Vic.) s. 8.

may be viewed as a response to a particular set of historical conditions. The prevailing seventeenth century socio-economic fabric had encouraged the evolution of a caste of professional perjurers willing to testify to non-existent contracts. Further, the contemporary rules of evidence had precluded testimony by the parties, their families and interested persons.[9] The Statute thus aimed to avoid the possible effects of such false allegations of contracts, and to overcome the difficulty of proving real agreements, by stipulating that certain significant contracts must be evidenced by writing in order to be enforceable. Contracts for the transfer of an interest in land were included.[10] Ironically, the Statute of Frauds itself became a fertile source of potential fraud, for while its terms obviated the enforcement of false claims of non-existent contracts, non-compliance with the Statute provided a ready means for the opportunistic repudiation of genuine transactions.

However, it was established by the Statute itself that a sufficient note or memorandum would amount to adequate compliance.[11] The equitably-based notion that a sufficient part performance would salvage an oral contract also soon evolved. Indeed, Atiyah has argued that it is possible that contracts which had been part performed so that benefits had already been received, were never within the contemplation of the Statute of Frauds at all. It was enacted during a period of intense formative development when the unified shape of the modern law of contract was emerging from a diverse amalgam of medieval antecedents. Thus, Atiyah has suggested that the Statute was really directed at regulating 'future contracts' and that, in a sense, it constituted a reactionary legislative attempt to halt the emerging recognition of damages for loss of expectation in wholly executory contracts.[12] Such contracts, unless under seal, were not enforceable in medieval law.[13] However, contracts where benefits were already conferred were actionable as debts, even if in oral form. Due to the merging of the actions of debt and assumpsit, however (epitomized by the decision in *Slade's Case*[14] in 1602), merely oral contracts contemplating future performance became actionable for the first time.[15] Probably, the Statute was designed to inhibit this trend. If, as Atiyah argues, the Statute aimed partly to preserve the medieval tenor of the law of contract, it is reasonable to assert that it did not seek to impose additional pre-conditions of enforceability on oral transactions pursuant to which benefits had been conferred. Such agreements, even when in oral form, had always been enforceable by the traditional action for debt. Viewed in this context, the doctrine of part performance may be less an equitably-based

9 Atiyah, P. S., *The Rise and Fall of Freedom of Contract* (1979) and Law Reform Commission of Victoria, Legal Issues Paper *The Statute of Frauds and Land Contracts*.

10 Also included were contracts not to be performed within a year, promises made in consideration of marriage, contracts of suretyship, and so forth.

11 Now reflected in the Instruments Act 1958 (Vic.) ss. 126-7.

12 Atiyah, *op. cit.* 205-8.

13 The use of the term 'contract' in this context is really an anachronism. A promise under seal was enforceable through the action of covenant.

14 (1602) 4 Co. Rep. 92b; 76 E.R. 1074; Baker, J.H., 'New Light on *Slade's Case*' [1971] *Cambridge Law Journal* 51.

15 Baker, J. H., *An Introduction to English Legal History* (1979) ch. 16.

exception to the Statute of Frauds than a testimony to the limits of its legitimate operation, which were intended from the outset. If this is correct, and part-executed contracts were never intended to be governed by the Statute, then *Maddison v. Alderson*[16] (the nineteenth century source of the strict interpretation of part performance currently ascendant in Australia) entrenched a misconstruction of the function of the Statute. It aggravated a development inimical to its original intent by stressing that it is not the contract but the equities resulting from the acts done in execution which will be enforced.[17] As a result, some modern litigants seeking to enforce a contract pursuant to which they have conferred benefits which fall short of unequivocal referability may encounter less latitude and justice than medieval law would have supplied in analogous circumstances. Relevant aspects of the doctrine of part performance and its relationship to the emergence of the new constructive trust will be discussed below.

*The traditional definition of the constructive trust*

Implied, resulting and constructive trusts were also explicitly excepted from the operation of the Statute of Frauds.[18] Traditionally, there was a clear-cut distinction between resulting (implied) trusts and constructive trusts.[19] The former gave effect to the intentions of the parties in situations such as purchase in another's name, or the failure of a future interest to vest. The latter were imposed regardless of the parties' intentions in a variety of defined situations. This factor was well-established and itself participated in the classical definition of the constructive trust. In 1964, D. W. M. Waters in his study, *The Constructive Trust*,[20] wrote that despite conflict on other features,

> There is one point upon which all would agree. It is at least accepted by courts and theorists that this trust is imposed by the law and that the intention of the parties whom it affects is consequently irrelevant.[21]

A. J. Oakley,[22] over a decade later, while differing from Waters in many significant respects, concurred in the irrelevance of intention. He asserted that, unlike all other trusts, a constructive trust is imposed by the court as a result of the conduct of the trustee and therefore arises quite independently of the intention of any of the parties. As will be argued, even this fragment of basic unanimity required qualification in the light of the development of the new type of trust, although it has been restored by the very recent decision in *Baumgartner v. Baumgartner*.[23] English law traditionally recognised that a constructive trust

16 (1883) 8 App. Cas. 467.

17 See the judgment of Lord Selbourne L.C. in *Maddison v. Alderson* (1883) 8 App. Cas. 467, 475, in which it is explained that in a suit for specific performance of a part performed contract, 'the defendant is really charged upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself.'

18 Property Law Act 1958 (Vic.) s. 53(2).

19 Although not undisputed, it is probable that 'resulting trust' and 'implied trust' are synonymous. Oakley, A. J., *Constructive Trusts* (1978) 9.

20 Waters, D. W. M., *The Construction Trust: The Case for a New Approach in English Law* (1964).

21 *Ibid.* 1.

22 Oakley, *op. cit.* n. 15.

23 (1987) 62 A.L.J.R. 29.

would arise in a variety of situations. While the constructive trust exhibited the division of legal title from beneficial ownership characteristic of an express trust, unlike an express trust, it was imposed by law independently of intention. The defined situations in which the constructive trust is classically applicable reveal no marked identifying common thread and bear no clear relationship to one another. They usually include, although classification is debated, the following instances: circumstances where a fiduciary has gained an advantage in breach of fiduciary duty; the reception of, or dealing with, property obtained as a result of such a breach; secret trusts; mutual wills; specifically enforceable contracts for the sale of land; a mortgagee's exercise of powers; and advantages obtained as a result of fraudulent, unconscionable or inequitable conduct.[24]

Because the trust was confined to discrete categories, it has been argued that the constructive trust functions as an institution in Anglo-Australian law, in contrast to its ambulatory reach as a remedy for unjust enrichment in American law.[25]

In 1964, prior to *Gissing v. Gissing*[26] and *Pettitt v. Pettitt*,[27] Waters concluded that the constructive trust in Anglo-Australian jurisdictions was not underpinned by 'an agreed remedial' concept. It was simply recognised in a number of defined situations which had little in common, other than the possibility of credible analogy with an express trust. Consequently the typical reaction to the piecemeal state of precedent was an attempt to discover a theme in equity's exercise of her discretion, presumably applicable by analogy to any given set of circumstances.[28] In contrast, the constructive trust in America was not a substantive institution in itself. Rather, it imposed a remedy alternative to damages, and was activated by a general principle preventing unjust enrichment.[29] The application of that principle was not limited to particular and defined situations, but explicitly included both relationships and events. Although all the recognised instances of the constructive trust in English law involved the prevention of unjust enrichment, there were many other instances of unjust enrichment which could not be brought within any available classification. They thus lacked a remedy unless one could be found elsewhere. The contrasting American response was to tackle directly the initial question of whether, in a particular instance, enrichment was unjust, and then to apply the trust as a remedy where appropriate as a conscious policy decision. As the unjust enrichment was the kernel of the matter, the existence of a special relationship was not the independent basis of the action, but rather, merely symptomatic of it. In contrast, because of its obsession with securing a justifying analogy, English law stressed the existence of the fiduciary relationship. Waters argued that the more direct and comprehensive American approach was preferable and more serviceable to a rational legal system. In this context, he considered that the trust was more properly characterised as a branch

24 Waters, *op. cit.* 43-73.
25 *Ibid.* 9-19.
26 [1971] A.C. 886.
27 [1970] A.C. 777.
28 Waters, *op. cit.* 11-17.
29 *Ibid.* 20-6.

of the law of restitution than a motley adjunct to the law of trusts. He suggested that its characterisation as a trust may have been the accidental by-product of its Chancery origins, rather than a deliberate definition.[30]

Ultimately, Waters argued that the indeterminacy of the fiduciary concept could form the basis of a respectable retreat from the limited and piecemeal conception of the constructive trust, even within the bounds of precedent. If a fiduciary relationship could be liberally construed to arise on an *ad hoc* basis, the scope of the constructive trust would be extended.[31] It will be seen that although expansive developments subsequently occurred, they did not focus upon the fiduciary requirement.

Oakley, in contrast, while not opposing the development of new categories of constructive trust, rejected the notion that the trust should be employed as a general equitable remedy to do justice in the instant case. Rather, he considered that it should continue to be based on an independent legal wrong by the trustee. In support of his argument he listed the possible hardship on a trustee obliged to account where the property was no longer in his hands, the beneficiaries' priority over unsecured creditors of the trustee and innocent volunteers, and, most significantly, the threat to legal certainty posed by a general power to determine property rights in accordance with justice and equity. He did not, however, oppose the development of a principle of unjust enrichment. He simply suggested that the constructive trust was an inappropriate instrument with which to develop it.[32]

In this context, he predictably disapproved of the expansive line of Court of Appeal decisions, particularly Lord Denning's judgments on the 'new model' constructive trust (discussed below), which, he asserted, threatened the established principles of property law, certainty and third party rights.

### *Initial United Kingdom case law development of the unconscionable conduct constructive trust*

Both Waters and Oakley were elaborating philosophies of the ideal nature and function of the constructive trust generally, rather than concentrating on a particular instance of it. However, in the decade which separated their commentaries, extensive development had occurred in the sub-category of constructive trust based on fraudulent, unconscionable or inequitable conduct. This was once limited to clearly defined and determinate situations (for example, a murderer benefiting from his crime, fraud or undue influence). Nevertheless, after a series of Court of Appeal decisions during the 1970's, it was possible to argue, on a line of authority emanating from Lord Denning's judgments, that the constructive trust had assumed the function of a remedy applied to inhibit unjust enrichment, or even to reformulate proprietary interests in accordance with justice.

30 *Ibid.* 37-9.
31 *Ibid.* 67-73.
32 Oakley, *op. cit.* n. 15, 3-8.

Although it was far from unanimously approved, there was substantial development in the direction favoured by Waters.

United Kingdom developments have been analysed exhaustively in preceding articles,[33] and accordingly will not be discussed at great length here. It will suffice to note that the creative United Kingdom developments began with two House of Lords decisions, *Gissing v. Gissing*[34] and *Pettitt v. Pettitt*.[35] Each case involved an indirect contribution to the matrimonial home by a spouse who had no legal interest in the property. Had the contribution to the purchase been *direct*, it would have given rise to the presumption of a resulting trust. In the absence of a discretionary judicial power in matrimonial property rights analogous to that contained in the Family Law Act 1975 (Cth),[36] it was necessary for the claimant spouse to argue that she had acquired a beneficial interest in the property based on indirect contributions, which the legal title-holder held as a constructive trustee.

Although there was much diversity and ambiguity on particular points, the clear result of both cases was that, in the absence of particular legislation, matrimonial property disputes would be governed by the ordinary principles of the law of property. However, in *Gissing v. Gissing* it was concluded that a constructive trust could arise, based broadly on a species of fraud. When a common intention that an interest would be acquired had been acted upon to the detriment of the claimant, then the fraud lay in the legal title-holder seeking to repudiate the common understanding, whilst at the same time retaining benefits which would not have been acquired otherwise.[37] It can be seen even from the outset that the apparent rationale of the new constructive trust bears a contradictory relationship to the doctrine of part-performed contracts, potentially rendering it otiose. However, the *Gissing v. Gissing* development was more an extension of a pre-existing category of constructive trust, amplifying the requirement of fraud or unconscionability, than a radical revision of the nature of constructive trusts generally.

Lord Denning, however, in a remarkable series of Court of Appeal decisions,[38] boldly employed *Gissing v. Gissing* as authority for propagating a much more radical version of the constructive trust. In cases which exhibited no conformity to the criteria of the implicit 'test' of fraud in *Gissing v. Gissing*, he applied a constructive trust, even in circumstances which involved the further iconoclastic step of effective repudiation of the doctrine of privity of contract.[39] Although Lord Denning was frequently isolated in his radical enunciation of principle, there was unanimity of result in many of those Court of Appeal decisions.

[33] *E.g.* Neave, M. A., 'The Constructive Trust as a Remedial Device' (1978) 11 M.U.L.R. 343.
[34] [1971] A.C. 886.
[35] [1970] A.C. 777.
[36] s. 79.
[37] See Lord Diplock's judgment in *Gissing v. Gissing* [1971] A.C. 886, 903.
[38] *E.g. Eves v. Eves* [1975] 3 All E.R. 768; *Cooke v. Head* [1972] 2 All E.R. 38; *Hussey v. Palmer* [1972] 3 All E.R. 744.
[39] *Binions v. Evans* [1972] Ch. 359.

*Initial Australian reception of new developments*

As a consequence of the period of intense and confused judicial development of the constructive trust in the United Kingdom, a number of co-existent versions of the new constructive trust confronted Australian courts by the mid 1970's, all with a penumbra of uncertainty, and differing greatly in their implications. The landmark New South Wales case of *Ogilvie v. Ryan*[40] was the first Australian case involving detailed consideration of the diverse and recent United Kingdom authorities. In it, M. A. Neave detected the beginnings of a development towards the American function of the trust as a remedial device to prevent unjust enrichment.[41] In the view of the present writer, however, the decision in *Ogilvie v. Ryan* (which will be discussed below) built upon the liberal expansion of a discrete sub-category of constructive trust, rather than instituting a departure from the general theory of constructive trust established in Anglo-Australian law. While any expansion of existing sub-categories must reduce existing instances of irremediable unjust enrichment, Holland J. in *Ogilvie v. Ryan* did not embrace any over-arching general principle, but rather, expressly foreshadowed rejection of such a rationale.

*The parameters of the problem in Australia: Interacting social and legal factors contributing to the development of the new constructive trust*

The latter half of the twentieth century has witnessed an unprecedented diversity of informal household or property-sharing arrangements and new quasi-matrimonial or quasi-familial situations. One party may already hold or may acquire legal title to the premises accommodating the parties. When, in this context, another party (who is frequently, although not necessarily, more socially and materially vulnerable) makes a contribution of some kind, either to the property itself or to the title-holder personally, then the value of the property may be enhanced, the title-holder may be benefited, and the contributor herself may suffer detriment.

In some cases, the relevant contribution may be conferred as an outright gift or a unilateral act of generosity with no expectation of reward. In many cases, however, an unconditional benefit is not intended. Rather, the precise status of the contribution is never expressly considered or clearly defined by the parties, and no legal safeguards are adopted.

This common situation poses a new challenge to the legal system: the problem of defining in what circumstances such a contribution will found a claim to an interest in the property, and if so, the nature and extent of that interest. The problem frequently arises on termination of the consensual living arrangement, whether by death or otherwise.

Where the claimant has made a direct financial contribution to the purchase of the property, the presumption of a resulting trust will arise in favour of the contributor. Subject to the possibility of the presumption's rebuttal by evidence

[40] [1976] 2 N.S.W.L.R. 504.
[41] Neave, *op. cit.* 344.

that the claimant was not intended to take an interest, the title-holder will hold subject to a resulting trust. The contributor will acquire an equitable interest reflecting the proportion of the purchase price contributed. However, in many cases, the contribution will not assume such a direct form.

Often, fairness would suggest that benefits should not be retained by the title-holder or his estate unless compensation is made reflecting the value of the contribution. Prior to the relatively recent development of the new constructive trust (and the contemporaneous development of the equity of acquiescence, which is probably completely subsumed by the widest version of the constructive trust) the legal avenues available to a contributing claimant provided very limited coverage. Moreover, even if an action *prima facie* did apply, restrictive criteria internal to the action frequently precluded successful recovery.

If the parties involved were married, express statutory machinery has been available since 1975 to resolve such problems in Australia. Section 79 of the Family Law Act 1975 (Cth) confers a discretionary power upon the Family Court to alter the proprietary interests of the spouses where it is just and equitable to do so. The Court may have reference to a comprehensive variety of factors, including direct or indirect financial contributions, and all the matters relevant to a decision on maintenance pursuant to s. 75(1) of the Act.[42]

Accordingly, while the problem is now obviated in Australia for the formally married, many parties to shared household arrangements are neither spouses nor *de facto* spouses. Where a *de facto* marriage exists, the Family Law Act 1975 does not apply, and in the absence of specific state legislation, *de facto* spouse claims are determined according to the ordinary rules and principles of property law. Recently, both New South Wales and Victoria introduced express legislation which will now cover *de facto* spouse claims, but this legislation is limited both in scope and jurisdictional application.[43]

Even where specific legislation exists, its coverage is restricted to formal or *de facto* marriages, and many parties to new shared living arrangements fall outside its ambit. Such cases may involve homosexual relationships such as may have existed in *Thwaites v. Ryan*,[44] 'substitute families' as in *Butler v. Craine*[45] or house-keeper or house-sharing arrangements by friends or relatives as demonstrated by *Ogilvie v. Ryan*[46] and *Hussey v. Palmer*.[47]

Excluded from legislation directed at marriage situations, the parties to such fluid relationships might, however, have made an arrangement which amounts to an oral contract for the acquisition of an interest in the relevant property. Even if this were so (and many loose understandings or transactions would not amount to a contract), the claimant would have to satisfy the test for part performance in

42 These are wide-ranging and include factors such as age, state of health, income, eligibility for pensions, etc.

43 De Facto Relationships Act 1984 (N.S.W.) operative from 1 July 1985 and the Property Law (Amendment) Act 1987 (Vic.). See also Chisolm, R., 'De Facto Relationships Legislation in New South Wales', (1986) 1 *Australian Journal of Family Law* 87. Note also the Family Court Act 1975 (W.A.)

44 [1984] V.R. 65.

45 [1986] V.R. 274.

46 [1976] 2 N.S.W.L.R. 504.

47 [1972] 3 All E.R. 744.

order to avoid the consequence of non-compliance with the formalities of writing imposed by the Statute of Frauds.

The classical test for part performance enunciated in *Maddison v. Alderson*[48] requires that the acts relied upon be unequivocally referable to some such agreement as that alleged. If reasonable alternative explanations of the acts exist, the test will not be satisfied. The difficulty of satisfying the test is obviously greater where a close personal or family relationship makes the relevant beneficial acts or services equally attributable to natural affection for the title-holder, or where a shared living arrangement suggests that rent-free accommodation for the contributor was a credible alternative explanation.[49]

United Kingdom authority, most significantly, *Kingswood Estate Co. Ltd v. Anderson*[50] and the subsequent House of Lords decision in *Steadman v. Steadman*[51] may indicate a liberalisation of the test to encompass acts which are, on the balance of probabilities, referable to a contract and not inconsistent with the contract entered into. Some commentators, however, dispute that conclusion;[52] and in any event, as demonstrated by the cases considered below, Australian orthodoxy is currently represented by the old case of *McBride v. Sandland*,[53] in which acts unequivocally referable to 'some contract of the general nature of that alleged' were required.[54]

Thus, in many cases, even where a contract did exist, the claim would founder on the rigidities of the doctrine of part performance. In other cases, the arrangement between the parties would give rise to no discernible contract at all. While there might still be a claim in *quantum meruit*, which would allow recovery of the value of the service or benefit, the limitations attached to such actions would also preclude universal application, particularly in a quasi-familial context. For example, it must be established that a gift was not intended, and that the relevant benefit was 'accepted' by the defendant with the actual or presumed knowledge that payment was required. Moreover, the application of such restitutionary claims to land was traditionally very doubtful.[55] It was in this context that, over the last two decades, the new 'unconscionable conduct' constructive trust in its various competing guises assumed the role of avoiding unearned windfalls and reclaiming contributions in certain situations where irremediable unjust enrichment would otherwise result.

Contemporaneously with the constructive trust, a further overlapping equitable remedy, the equity of acquiescence, was also developing, again under the

48 (1883) 8 App. Cas. 467.

49 See, for example, the acknowledgment of Hutley J.A. that 'on many occasions, the family relationship may be decisive, in that any intelligent outsider, looking at the facts, could not be satisfied that they had a contractual base just because they occurred in a family set-up' in *Millett v. Regent* [1975] 1 N.S.W.L.R. 62, 65.

50 [1963] 2 Q.B. 169.

51 [1976] A.C. 536.

52 See Spry, I. C. F., *Equitable Remedies* (2nd ed., 1980) 248-51. Spry accepts that the balance of authority favours that liberal view. Compare the opinion expressed in Meagher, R. P., Gummow, W. M. C., and Lehane, J. R. F., *Equity — Doctrines and Remedies* (1984) 492-500, where the authors suggest that a majority in *Steadman* accepted the interpretation of *Maddison v. Alderson* applied in Australia.

53 (1918) 25 C.L.R. 69.

54 *Ibid.* 78.

55 Goff, R. and Jones, G., *The Law of Restitution* (1966) 14-33.

inspiration of Lord Denning. In *Crabb v. Arun District Council*[56] the basis of the equity of acquiescence was enunciated by Lord Denning in the following terms:

> Short of an actual promise, if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights — knowing or intending that the other will act on that belief — and he does so act, that again will raise an equity in favour of the other; and it is for a court of equity to say in what way the equity may be satisfied.[57]

As has been foreshadowed, there are several versions current of the new constructive trust. At its widest, namely a 'trust imposed by law whenever justice and good conscience require',[58] the trust functions as a panacea for unjust enrichment as well as a potential sanction for unjust behaviour. This wide version of the trust completely overlaps with the equity of acquiescence, as can be seen in the case of *Hussey v. Palmer*,[59] which was decided on the basis of a constructive trust, but could have been construed just as credibly as an equity of acquiescence.

The broadest version of the constructive trust, espoused by Lord Denning, has gained limited judicial endorsement even in the United Kingdom. In Australia, it will be argued, more restrictive versions of the new trust have long predominated, and even with the more liberal and entrenched of these there is not a complete overlap with the equity of acquiescence. Although the principle has been recognised,[60] there have been few Australian cases on the equity of acquiescence, in contrast to the large number of 'unconscionable conduct' constructive trust cases. Until the constructive trust itself stabilizes, the role of the equity of acquiescence cannot be confidently predicted. If a restricted version of the new constructive trust ultimately prevailed, the equity would be more likely to assume an independent and established role. In this context, the new breadth of the trust indicated by *Baumgartner v. Baumgartner*[61] has suddenly diminished such a probability.

Thus it seems likely that the Australian and English acceptance and expansion of the new constructive trust were inspired and accelerated by an increasing incidence of disputes associated with informal matrimonial relationships and new kinds of household arrangements. The difficulty of resolving such disputes through other means was aggravated by various inadequacies of contract, restitutionary remedies and matrimonial property law. In such a socio-legal context, the relatively fluid and indeterminate form of the constructive trust facilitated its expansion to secure fair results in situations where no other remedy applied. Although the flaws of those discrete branches of law largely contributed to the trust's growth, the reform of *de facto* spouse property law, and the revision of the Statute of Frauds or the doctrine of part performance would not render the new trust redundant. Cases may occur which involve neither a contract nor a *de facto* spouse relationship, and a mature legal system requires the capacity to achieve equitable results beyond such limited contexts.

56 [1976] Ch. 179.
57 *Ibid.* 188.
58 *Per* Lord Denning in *Hussey v. Palmer* [1972] 3 All E.R. 744, 747.
59 *Ibid.*
60 *Olsson v. Dyson* (1969) 43 A.L.J.R. 77.
61 (1987) 62 A.L.J.R. 29.

It may be that comprehensive and rational coverage of meritorious claims can be achieved only by adopting a very liberal interpretation of the new constructive trust, or by embracing the broad principle against unjust enrichment which overlaps with the trust's widest form.

Resistance to the assumption of so broad a remedial role by the trust (reflected in many commentaries, and in the conservative judicial approach to the trust prior to *Muschinski v. Dodds*[62] and *Baumgartner v. Baumgartner*[63]) is founded upon concern for certainty, predictability and third party rights which, in this context, are perceived to outweigh the competing goal of individual equity. It will be argued that the maintenance of certainty and third party rights can be reconciled with a more accommodating version of the trust, and even assisted by it. Accordingly the new flexibility of *Baumgartner v. Baumgartner* is a valuable step towards an improved balance in the legal system and facilitates a more adequate legal response to social needs.

Significant New South Wales and Victorian decisions reveal little support for the broadest model of the constructive trust applicable with few defined preconditions as a remedy for unjust enrichment. However, the apparent adoption of the opposite extreme, represented by the decision in *Thwaites v. Ryan*,[64] has probably proved a transient interlude. *Thwaites v. Ryan* suggested that the trust should be restricted to matrimonial contexts, and applied additional restrictive criteria even within that limited framework. Instead, most Victorian decisions support the 'middle-line' version of the trust derived from *Gissing v. Gissing*. It is predicated on an unfulfilled implicit 'bargain'. In contrast to *Thwaites v. Ryan*, most Victorian decisions indicate a relatively liberal approach to the trust's application beyond 'marriage cases', the trust's relationships to the doctrine of part performance, the meaning of 'common intention', and the question of when that common intention must arise.

The predominant Victorian version of the trust, while more conservative than that enunciated by Lord Denning, or applied in *Baumgartner v. Baumgartner*, is itself sufficiently radical to effect a partial, unacknowledged judicial repeal of the Statute of Frauds as it has usually been interpreted. However, as indicated above, that may better accord with the Statute's originally intended role. As its current role is now questionable anyway, the Statute's eclipse by the new constructive trust may be timely rather than regrettable.[65] Nevertheless, it should be acknowledged that an explicit repeal of anachronistic legislation, based on a thorough assessment of the competing considerations, is preferable to a relatively unscrutinized, barely acknowledged judicial negation which creates potentially anomalous relationships between existing legal doctrines.

However, the trust has not functioned in its Victorian form as a remedy activated by unjust enrichment at large. It requires a wrong by the trustee — an unconscientious defeating of a 'bargain' — although this unconscientious

62 (1985) 62 A.L.R. 429.
63 (1987) 62 A.L.J.R. 29.
64 [1984] V.R. 65.
65 See for example, Bridge, M.G., 'The Statute of Frauds and Sale of Land Contracts' (1986) 64 *Canadian Bar Review* 58.

element is liberally interpreted, and is not restricted to clear-cut fraud. *Baumgartner v. Baumgartner* has now modified the requirement of unconscionability, and has introduced the possibility that unjust enrichment may furnish an independent alternative ground for the imposition of the trust.

## *INITIAL INTERPRETATION OF THE NEW TRUST IN NEW SOUTH WALES*

Significant initial Australian judicial reactions to the diverse United Kingdom developments of the new constructive trust were registered in two early New South Wales cases, *Ogilvie v. Ryan*[66] and *Allan v. Snyder*.[67] In the former decision, Neave discerned an incipient departure from the established institutional character of the constructive trust, in favour of embracing the characteristically American function of the trust as a remedial device.[68] It is arguable, however, that the judgment, which proved influential in shaping Victorian judicial approaches to the area, in substance maintained the general institutional model of constructive trusts, whilst endorsing the expansion of the relevant constituent category based on unconscionable conduct. The decision drew on many decisions of Lord Denning as exemplary precedents. However, the moderate *Gissing v. Gissing* version of the trust was preferred to the radical ratios of the Court of Appeal judgments, which arguably supported the view that the trust could function to judicially reformulate proprietary rights where justice required.

However, although essentially supportive of the more traditional concept, *Ogilvie v. Ryan* adopted an amplified and liberal construction of the trust which implicitly extended its scope. As the case involved an arrangement which constituted a contract between the parties, the relationship of the new constructive trust to the doctrine of part performance was necessarily explored.

In *Ogilvie v. Ryan* the female defendant had for many years provided board and lodgings in rented premises to Ogilvie, an elderly widower. In view of her claim that the couple had lived 'as man and wife', it seemed likely that a *de facto* marital relationship had ultimately developed. Significantly, Holland J. expressly found it unnecessary to determine that issue. He concluded that the defendant and the deceased were on 'very close terms of friendship and affection' and that the defendant provided care 'as well as any devoted wife might have done'.[69] When the defendant's tenancy of the original premises expired, Ogilvie proposed to purchase an alternative property, where, in return for the continued provision of her services until his death, the defendant could live rent-free for the rest of her life. When the defendant accepted that proposal, he purchased a residence as sole title-holder. There the defendant, receiving no wages, duly cared for Ogilvie as contemplated until the latter's death. Nevertheless, Ogilvie's will did not devise her an interest in the property. The defendant accordingly claimed an equitable life estate in the property on the basis of a part-performed oral contract, or, alternatively, a constructive trust.

66 [1976] 2 N.S.W.L.R. 504.
67 [1977] 2 N.S.W.L.R. 685.
68 Neave, *op. cit.* 344.
69 [1976] 2 N.S.W.L.R. 504, 508.

Holland J., while accepting the existence of the oral contract alleged by the defendant, considered himself constrained by precedent to apply the strict test of part performance endorsed by *Millett v. Regent.*[70] He accordingly concluded that the defendant's contractual claim must fail. Although the defendant had changed her residence and provided exacting services without remuneration, her acts were not unequivocally referable to the agreement alleged. They were equally explicable on the alternative grounds of either a voluntary continuance of the existing relationship, love and affection, or an expectation of a reward of different character from the claimed interest in the property.[71]

Nevertheless, Holland J. considered that the defendant had established an equitable life estate on the basis of a new constructive trust. It had been argued by the plaintiff that where a contract was unenforceable due to non-compliance with the Statute of Frauds, it was not open to a court to give effect to that purported disposition by any other means, including a constructive trust, as such an approach would 'fly in the face of the Statute'.[72] Holland J. recognised that on the contrary, a constructive trust could be imposed independently of contract, and even where a contract was involved, the constructive trust itself was in no way limited by potential applications of the Statute 'because that would make the Statute an instrument of the fraud which the constructive trust is designed to prevent'.[73]

Having emphasised the independent status of a constructive trust claim, his Honour examined its conceptual basis and potential ambit in the light of the diverse and extensive United Kingdom authorities available. Curiously, while implicitly approving the success of the constructive trust claim in all cited instances, the judgment reflects little discriminating assessment of the frequently disparate, even mutually inimical, judicial reasoning underpinning the results of the various cases.

Holland J. concluded that the decided cases could be divided into two broad categories. First, there were 'cases where the constructive trustee obtained his legal title from the *cestui que trust*, and obtained it only by having agreed that the *cestui que trust* would have a beneficial interest in the property'.[74] This category extended to encompass all instances in which title was obtained from a third party on the condition that a beneficial interest would be recognised. Holland J. thought that the basis of such constructive trusts would be 'the fraud in asserting the legal title to defeat the beneficial interest on the basis of which it was obtained'.[75]

In the second category, the value of the property acquired by the constructive trustee in his own name was increased by 'direct or indirect financial contributions or work and labour provided by the *cestui que trust* on a common understanding, express, implied or imputed, that the *cestui que trust* would have a

70 [1975] 1 N.S.W.L.R. 62.
71 [1976] 2 N.S.W.L.R. 504, 525.
72 *Ibid.* 525.
73 *Ibid.* 525-6.
74 *Ibid.* 517.
75 *Ibid.*

beneficial interest in the property'.[76] Here Holland J. considered that 'the basis of the trust is the prevention of the fraud of using the legal title to retain benefits gained only because of the common understanding, yet defeat the beneficial interest for which the benefits were given'.[77]

His Honour held that the present case fell within the second established category. While the defendant had provided personal services to the title-holder rather than contributing labour to the property itself, as in previous cases, Holland J. considered that the altered character of the benefits conferred did not preclude the establishment of the substantial elements of the trust — namely, 'the fraud on the defendant of using the legal title to defeat her interest, after the benefits have been taken and she has earned her interest in the property'.[78]

He concluded that the essential common ingredient justifying the imposition of the trust was an unconscionable use of the legal title. In a fleeting recognition of the diversity of legal rationales in the area, Holland J. rejected an unjust enrichment interpretation of the constructive trust. He noted that 'It may be suggested as, perhaps, Lord Denning may have had in mind in his statement of the principle in *Hussey v. Palmer* that the basis of the constructive trust found in the second category of cases is the prevention of unjust enrichment, but I would respectfully prefer the view of Lord Reid in *Pettit v. Pettit*,[79] that the doctrine of unjust enrichment, whilst applicable to money claims, is not necessarily appropriate where the claim is to a beneficial interest in the subject property'.[80]

Ultimately, then, Holland J. considered that in the category of cases involving a contribution by the claimant to the title-holder's property or person, the constructive trust was directed at a species of fraud, rather than unjust enrichment. The proprietary interest was 'in return for benefits to be provided by, and in fact obtained from, the plaintiff'.[81] The judgment, in emphasising fraud as the essential basis of the trust, whilst simultaneously assuming the conferral of a benefit, did not indicate whether fraudulent reneging on a common intention would suffice in the absence of any objectively demonstrable benefit to the title-holder. It is possible to envisage detriment suffered by a contributor with no consequent benefit to the title-holder other than, arguably, the emotional satisfaction induced by compliance with a common intention. For example, there may be laborious but ineffective attempts to improve a property, which do not increase its value for some reason. The unconscionable behaviour of the title-holder may be equally reprehensible, whatever the ultimate result of the contribution. If fraud alone, rather than an element of compelling defendants to disgorge benefits that constitute an unjust enrichment, is the basis of the trust, then logically the trust should apply even where no benefit is obtained. Interestingly, the formulation of proprietary estoppel encountered in seminal cases such as *Crabb v. Arun District*

[76] *Ibid.*
[77] *Ibid.*
[78] *Ibid.* 518.
[79] [1970] A. C. 717, 795
[80] [1976] 2 N.S.W.L.R. 504, 518
[81] *Ibid.*

*Council*[82] and *Inwards v. Baker*,[83] suggests that no benefit would be necessary to activate that equity, so long as the conduct of a title-holder (or other party) made it inequitable to insist on his legal rights. This suggests that an equitable sanction of unfair conduct is the essential element of proprietary estoppel. Accordingly, if a benefit is necessary to activate the middle-line version of the new constructive trust, then the equity of acquiescence is more wide-ranging. It is interesting to note, however, that the stress on a benefit in constructive trust cases subsequently withered away. Rather, the emphasis eventually settled on detriment inspired by a common intention.

While Holland J.'s judgment raised rather than resolved such questions on the relationship of available competing actions, several factors finally emerged as central to his conception of the trust: a common understanding or promise that there should be an interest in the property, in return for the provision of benefits by the plaintiff; and the over-arching fraud of using the legal title in order to retain the benefits while simultaneously defeating the promised interest which induced them.

It can be seen that Holland J.'s formulation of the trust does strike at the application of the Statute of Frauds and undercuts the relevance of competing constructions of part performance. A mere 'common intention' which induces the claimant to provide benefits to the title-holder may be enforced to avoid fraud. Thus, it seems clear that where negotiations or communications which fall short of a contract, have induced detriment which would not satisfy current tests of part performance, this may form the basis of a compensable claim as a constructive trust. However, a parallel contractual action would not succeed, either because there is no contract or because it is unenforceable. By effectively by-passing the current law of contract and its evidentiary formalities, in practice the trust contributes to some restoration of the medieval recognition of liability for benefits conferred.

Accordingly, it is difficult to envisage a situation where a part-performed contract for an interest in land would not succeed as a constructive trust. The converse would not be true, unless the more restrictive interpretation of the trust proposed by Fullagar J. in *Thwaites v. Ryan* became entrenched. As discussed below, this is most improbable in view of the direction of recent High Court and Victorian Supreme Court judgments. Consequently, there is a significant possibility that claims based on part performance of oral contracts for the acquisition of an interest in land will diminish.

Holland J.'s relatively open-ended formulation of the new trust, based on a flexible but moderate response to United Kingdom authority, provided a persuasive precedent for later Australian courts. When contrasted with the subsequent Victorian decision in *Thwaites v. Ryan*, *Ogilvie v. Ryan* is illuminating for its absence of restrictions on the operation of the trust. While the decision by no means offered a comprehensive coverage for unjust enrichment in relation to land claims, as the stipulation of a common intention and fraud would preclude

[82] [1976] Ch. 179.
[83] [1965] 2 Q.B. 29.

universal recovery, it indicated latitude in many respects. The possibility of a contractual claim was held not to hamstring the operation of the trust. There was no stipulation that the common intention should arise at the time of acquisition of the subject property. Although a common intention was required (in contrast to Lord Denning's liberal formulation), Holland J. seemed prepared to contemplate its imputation. The suggested liberality on this aspect may have provided a covert *rapprochement* with the Denning view, but was rejected in subsequent New South Wales and Victorian decisions. Further, detriment was construed widely to comprehend not just financial contributions but also labour (which could be unconnected to the property itself, though a connection with its *occupation* was suggested). Finally, there was no suggestion that the relatively novel trust was limited to matrimonial contexts, but rather Holland J.'s deliberate refusal to determine the nature of the couple's relationship provided a pointed contrary indication.

Following *Ogilvie v. Ryan*, in *Allen v. Snyder*[84] the New South Wales Court of Appeal further pursued the definitional problems and uncertainties generated by the new trust. The leading judgment of Glass J.A. in particular, explicitly recognised the trust's emergence as a valuable legal response to changing social needs, with the accompanying caveat that new judge-made rules should be related to fundamental doctrine and 'a construction of the new rules which can accommodate them within the old structure is to be preferred to one which does not'.[85]

In *Allen v. Snyder*, a male *de facto* spouse purchased a property in which he resided for many years with the female defendant. The female defendant furnished the house using her own funds, and the plaintiff executed a will devising her the property, to which he had sole legal title. It was established that while there was a common intention that the defendant should receive an interest in the event of the plaintiff's death, or on their marriage, she was not intended to take an interest in other circumstances. Moreover, her purchase of furniture was not based on any assurance of a present interest in the property.

On the termination of the relationship, the defendant claimed an interest in the property. At the time, no legislation covering the mutual proprietary rights of *de facto* spouses had been enacted in New South Wales.[86] The defendant failed to establish her claim at first instance, and on appeal to the Court of Appeal argued that in such circumstances, a common intention to confer a beneficial interest should have been imputed as a matter of law.

The defendant's claim was rejected. The Court held that an intention which did not exist could not be imputed as a matter of law because it was 'fair' to do so. It can be seen that the requirement of a common intention would present no great hurdle to many claimants if it were imputed judicially whenever that seemed fair. Acceptance of judicial imputation accordingly would facilitate development towards Lord Denning's broad views on the function of the trust.

[84] [1977] 2 N.S.W.L.R. 685.
[85] *Ibid.* 689.
[86] De Facto Relationships Act 1984 (N.S.W.) operating from 1 July 1985.

While Holland J. in *Ogilvie v. Ryan* may have courted the possibility of judicial imputation, it was consciously rejected in *Allen v. Snyder*, which crystallised the pursuit of the moderate *Gissing v. Gissing* conception of the trust. In *Allen v. Snyder* the defendant's claim failed as no intention actually existed and the contribution of furniture was not related to any such understanding. The court held that property interests could only be declared, and the common intention could not be imputed. The *Gissing v. Gissing* rationale was stressed, namely, that the contribution had to be inspired by the common intention, rather than based independently.

Although the court in *Allen v. Snyder* did not accept judicial imputation of a common intention, it considered that the intention could be inferred, and that the common agreement or intention could arise, after the home had been acquired. Further, it recognised that many of the early instances of the trust had arisen in matrimonial contexts, but emphasised that generally 'the principles governing equitable interests are the same in disputes between spouses as in a dispute between other parties'.[87] By inference, the trust was not limited to such relationships. Glass J.A. also pointedly stressed the contrary view. 'It will be seen that the law does not countenance, in this respect, different rules for the married and the unmarried. Nor should it be overlooked that the rules, however they come to be formulated, ought to apply indifferently to all property relationships arising out of cohabitation in a home legally owned by one member of the household, whether that cohabitation be heterosexual, homosexual, dual or multiple in nature.'[88]

In the course of his judgment, Glass J.A. analysed the nature of the 'entirely novel constructive trust' in terms of traditional classification and recognised that, unlike the classical constructive trust imposed without regard to the intentions of the parties, the *Gissing v. Gissing* constructive trust involved giving effect to an actual common intention. Accordingly, it did not conform to the accepted definition. Thus while the 'entirely novel' trust would seem to be more accurately identified as a resulting or implied trust, which *does* give effect to intention, Glass J.A. considered that the lack of any necessary proportion between the agreed interest and the contribution was inconsistent with that analysis. 'Since the respective shares of the spouses may be unrelated to their respective contributions to the purchase price, it is not suggestive of a resulting or implied trust.'[89] His Honour concluded that the novel trust was actually an express trust dependent on intention, which lacked writing, but which would be enforced in order to prevent the Statute of Frauds from being used as an instrument of fraud. Samuels J. concurred with much of that analysis, adding that 'the constructive trust may represent the remedy by which the plaintiff seeks to vindicate an express trust founded upon a common intention which the defendant later repudiates. Or it may be seen as a separate class of a trust raised by the existence of some fiduciary

87 [1977] 2 N.S.W.L.R. 685, 690.
88 *Ibid.* 689.
89 *Ibid.* 692.

or other relevant relationship between the parties, or by the defendant's unconscionable conduct'.[90]

The judicial analysis of the trust in *Allen v. Snyder* is, exceptionally pithy and incisive in its acknowledgment of difficulties and ambiguities. This is in marked contrast to the more commonly encountered judicial approach, in which assumptions emerge by inference or definitional conundrums are expressly eschewed.

Finally, it was recognised that the application of the term 'constructive trust' was now entrenched, whether or not it was academically defensible. Glass J.A. noted in this context, 'But when it is called a constructive trust, it should not be forgotten that the courts are giving effect to an arrangement based upon the actual intentions of the parties, not a rearrangement in accordance with the considerations of justice.'[91]

The analysis of Glass J.A. pinpoints an issue that is still not fully recognised or resolved. There may be a disproportion between the contribution and the agreed interest, but the 'intention' to confer the contemplated interest will still be upheld on the basis of a constructive trust, provided that the intention's repudiation can be seen as fraudulent. A very large intended interest in return for a ridiculously small contribution or insignificant detriment might be precluded on the ground that failure to confer it would be no fraud. In general, however, there has been no attempt to balance the relative value of the property secured by the imposition of the trust against that of the contribution or the detriment of the claimant. Accordingly, a considerable property might arguably be secured by a relatively small service. Thus, the new trust does not appear to depend upon weighing an exchange of objectively measurable material values. Rather, it is directed at achieving equity in a wider and more subjective sense, an underlying aim which it apparently shares with the equity of acquiescence. In terms of an objective market value or commercial *quid pro quo*, the trust could potentially attract a windfall for the claimant, securing a 'reward' disproportionate to the service, so long as the detriment suffered by that individual would make repudiation of the common intention unconscionable or fraudulent. Thus, even the *Gissing v. Gissing* model trust still has the potential to act flexibly against unjust enrichment, and implicitly retains, in a very real but covert way, the power to reformulate proprietary rights in accordance with justice. The fact that disproportion between the agreed interest and the contribution may represent a windfall has been specifically recognised in the English case *Re Densham*,[92] where the excess interest conferred on the claimant was 'clawed back' by the title-holder's trustee in bankruptcy as a voluntary settlement. There was, however, no suggestion that the trust would not be enforceable between the parties themselves, any more than a valid gift could be retracted, although the claimant's interest in excess of the worth of her contribution was vulnerable to the claims of the title-holder's unsecured creditors. The application of bankruptcy provisions to the novel trust must moderate the concerns of those who fear its potential to undermine the rights of creditors.

[90] *Ibid.* 699.
[91] *Ibid.* 693.
[92] [1975] 1 W.L.R. 1519.

The decisions in *Ogilvie v. Ryan* and *Allen v. Snyder* demonstrate a restrained initial Australian judicial response to the various possible versions and rationales of the new United Kingdom trust. The new legal vehicle was not rejected outright, but its most radical manifestations were deliberately eschewed in favour of the *Gissing v. Gissing*-inspired model. This provided the basis for relatively liberal indigenous development. While the decision in *Allen v. Snyder* crystallised the more conservative elements of the accommodating judgment in *Ogilvie v. Ryan*, it was not rigid, and did not import gratuitous technical limitations to minimise the operation of the trust. Indeed Glass J.A., while concerned to itly recognised the positive value of legal development in response to new social needs. 'It is inevitable that judge-made law will alter to meet the changing conditions of society. That is the way it has always evolved.'[93]

## *INITIAL VICTORIAN JUDICIAL APPROACHES TO THE NEW CONSTRUCTIVE TRUST*

Victorian judicial response to the novel trust has fluctuated, although the High Court decision in *Baumgartner v. Baumgartner* will now exert a considerable impact. While the earlier Victorian cases built upon *Ogilvie v. Ryan* and *Allen v. Snyder*, the Victorian Full Court decision in *Thwaites v. Ryan*,[94] followed in *Vedejs v. Public Trustee*,[95] constituted a major impediment to the trust's application and development. It confined the trust to a matrimonial context and imposed further restrictive pre-conditions within that framework.

As the Family Law Act 1975 (Cth) already covered property claims for *de jure* marriages, and as legislation empowering the adjustment of the property claims of *de facto* spouses was subsequently introduced in Victoria,[96] had the reductive approach of *Thwaites v. Ryan* prevailed, the novel trust, in the Victorian jurisdiction at least, would have been completely otiose and consequently short-lived. As the traditionally strict test of part performance has been upheld consistently, cases of unconscionable behaviour resulting in windfalls to title-holders would have multiplied, unless an alternative remedy, such as proprietary estoppel, had developed. Both the present value and the potential of the trust would have been lost. Fortunately, most Victorian decisions after *Thwaites v. Ryan*, whilst upholding the orthodox interpretation of part performance, confined the decision to its facts and distanced their interpretation from it. The general distance for *Thwaites v. Ryan*'s essential repudiation of the new trust was recently reaffirmed in the Full Court decision of *Higgins v. Wingfield*.[97] While the High Court decision in *Muschinski v. Dodds*[98] had little direct application, it too provided no support for the limitations proposed by *Thwaites v. Ryan*. Even more recently, *Baumgartner v. Baumgartner* provided a conception of the trust irreconcilable

[93] [1977] 2 N.S.W.L.R. 685, 689.
[94] [1984] V.R. 65.
[95] [1985] V.R. 569.
[96] Property Law (Amendment) Act 1987 (Vic.) first read 12 August 1987.
[97] [1987] V.R. 689.
[98] (1985) 160 C.L.R. 583.

with *Thwaites v. Ryan*'s rigidity. Thus while it seems that the trust will play a continuing role, it is necessary to examine some of the major decisions in order to assess the trust's main elements, emerging rationales, unresolved features and likely future directions.

*(i) Kardynal v. Dodek*

In *Kardynal v. Dodek*,[99] there was an early but unsuccessful attempt to rely on the new constructive trust in Victoria. In that case, the female defendant sought to rely on an extremely slight input of labour or attention to the house of the title-holding male plaintiff, in which she had lived alone and rent-free. The parties had been engaged to be married. They had a sexual relationship, but maintained separate residences. Rejecting her claim that there had been a common intention to confer a beneficial interest in the property, Brooking J. also considered it likely that any detriment she had suffered was very small, and would have been compensated by the rent-free accommodation she had enjoyed. His approach on that issue demonstrated that the over-arching requirement that the repudiation of the common intention must constitute a fraud on the claimant could operate to prevent the new constructive trust from consummating, rather than inhibiting, unjust enrichment. However, that does not resolve the related problem of disproportion between the interest and the detriment, which does not, in itself, preclude fraud.

While stressing that the common intention could not be imputed, and distancing himself from Holland J.'s contrary suggestion, Brooking J., in other respects, endorsed *Ogilvie v. Ryan* as a legitimate authority on the new trust. There was no need to consider explicitly the application of the trust outside the context of a *de facto* marital relationship. The issue was not addressed, but the judgment refers to reported cases on disputes between 'man and wife or man and mistress.'[1] Further, the title-holder had owned the relevant property prior to his relationship with the defendant, but Brooking J. did not include that circumstance in his reasons for rejecting the claim. Accordingly it may be safely inferred that he considered it irrelevant that the property had been acquired before the common intention arose.

*(ii) Hohol v. Hohol*

In *Hohol v. Hohol*,[2] a claim based on the new trust did succeed. The conditions adumbrated in *Ogilvie v. Ryan* and *Allen v. Snyder* were crystallised and refined. While the *Hohol v. Hohol* formulation of the test accorded with relatively conservative conceptions of the trust, the test itself was applied liberally, in order to produce a remedial result.

The plaintiff in *Hohol v. Hohol* was the longstanding *de facto* wife of the defendant legal title-holder who had purchased a farm property on which the family lived. The plaintiff had supplied labour and companionship in the

99 (1980) Australian Family Law Cases 75, 194.
1 *Ibid.* 75,201.
2 [1981] V.R. 221.

harsh living environment provided, but had made no direct contributions to the property. She claimed a beneficial interest on the basis of a constructive trust. O'Bryan J, noting without pursuing the ambiguities of formal classification, considered that 'Perhaps it is really unnecessary to confer a name upon the trust which the law has created'.[3] He proceeded to distil from the decided cases three elements essential to its application.

> From the cases I have referred to it can be said that the essential elements of the trust are, first, that the parties formed a common intention as to the ownership of the beneficial interest. This will usually be formed at the time of the transaction and may be inferred as a matter of fact from the words or conduct of the parties. Secondly, the party claiming a beneficial interest must show that he, or she, has acted to his, or her, detriment. Thirdly, that it would be a fraud on the claimant for the other party to assert that the claimant had no beneficial interest in the property.[4]

His Honour seemed to contemplate that the common intention should exist at the time of acquisition of the property. However, the judgment is ambivalent on that aspect, because at one point he stated that it would 'usually' exist at that time. The facts of the case did not require a determination of the issue. Nevertheless, it was firmly held that the intention could not be imputed, though it might be inferred. Clearly, O'Bryan J. did not envisage the trust as a vehicle of redistributive justice, and expressly rejected its broadest manifestations. 'The Court of Appeal in that decision [*Eves v. Eves*] appears to have gone further than any Court in Australia in imputing a constructive trust.'[5] While the judgment contains possible indications that O'Bryan J. envisaged the new trust as applicable solely to matrimonial situations (for example, his adoption of the discussion in *Gissing v. Gissing*), his approval of the wider application endorsed in *Allen v. Snyder* obviates ambiguity, and indicates that he would not confine the trust to marriage or *de facto* marriage cases.

The stress on the detriment suffered by the contributor, rather than the benefit obtained by the title-holder, represented a subtle variation from the formulation in *Ogilvie v. Ryan*. It increased the probability that the trust was not activated by unjust enrichment as such, but by fraud or unconscionability. While the two factors will frequently co-exist, there may be cases where they do not. O'Bryan J.'s emphasis on detriment indicated that fraud alone would suffice. On the other hand, it suggested that the trust would not bind a title-holder in circumstances where an 'unfair' windfall was divorced from any unconscionability. However, that suggestion may now be qualified by the decision in *Baumgartner v. Baumgartner*.

Ultimately, the judgment offered a simple three-fold test of common intention, detriment and fraud, which if satisfied, could give effect to common intentions, inchoate agreements and contracts which were not adequately part-performed.

In *Hohol v. Hohol*, O'Bryan J. found that the relevant common intention existed, based on the defendant's statement 'It's for all of us, for you and for me', and that the plaintiff had suffered the detriment of leaving her former

[3] *Ibid.* 225.
[4] *Ibid.*
[5] *Ibid.*

situation and contributing her labour, so that it would be a fraud to deny her an interest.[6]

Resiling from the controversy surrounding the jurisprudential basis, or even the appropriate designation, of the trust, O'Bryan J. in *Hohol v. Hohol* applied and clarified a comprehensible doctrine which accurately reflected moderate precedent. Although conservative in its strong preference for the *Gissing v. Gissing* rather than the Denning model, it did accept the new trust without gratuitous restrictions likely to inhibit a positive social role.

## *THWAITES v. RYAN*[7]

In contrast, the subsequent Full Court decision of *Thwaites v. Ryan*, particularly the leading judgment of Fullagar J., indicated a hostile reaction to the new trust, generated by concern with its threat to certainty and established doctrine. This was accompanied by a strict approach to the doctrine of part performance. Fullagar J. enunciated an exceedingly reductive interpretation of the trust and its legitimate scope, confining it to matrimonial situations and imposing additional pre-conditions, although interestingly, the need to establish detriment was removed.

In *Thwaites v. Ryan*, the plaintiff Ryans, a married couple, claimed an interest in the residence of a deceased friend, Atkins. The male plaintiff had met Atkins many years earlier. The Ryans' marriage was moribund, and they were also threatened with eviction from their own rented premises. At that point, the impecunious male plaintiff moved into the house of Atkins, the title-holder. The following year, Atkins executed a will devising his entire residuary estate, including the house, to the Ryans. Ryan continued to reside with Atkins, but after ten years had elapsed, Atkins revoked the will in favour of the Ryans, and died shortly after.

The plaintiffs argued that they had acquired an interest pursuant to an agreement which they had sufficiently part-performed. Alternatively, they claimed that Atkins had constituted himself a trustee for their remainder interest in the property. At first instance, they had succeeded, apparently on the basis that a beneficial interest had been acquired pursuant to a constructive trust.

On an appeal by Atkins' heirs under his revised will, the Full Court of the Supreme Court of Victoria found against the plaintiffs on the claims of both contract and trusts.

The leading judgment of Fullagar J., with which both Young C.J. and Starke J. apparently concurred, may be viewed as a deliberately reactionary response to the developing role of the constructive trust as a remedial legal device which would provide a remedy otherwise precluded by the operation of the Statute of Frauds, coupled with the ascendant rigid Australian construction of part performance. It unquestionably introduced some novel restrictions on the ambit of this hybrid species of constructive trust, founded on an idiosyncratic and highly debatable interpretation of relevant precedent. His Honour did concede the con-

[6] *Ibid.* 227.
[7] [1984] V.R. 65.

structive trust a legitimate operation in relation to spouses, but even in that area, limitations were imposed which would considerably reduce its effective application.

The restrictions were neither dictated by precedent nor logically compelling and, if implemented by later courts, would operate to erode an established and comprehensible doctrine convincingly applied in *Ogilvie v. Ryan* and *Hohol v. Hohol*.

Further, the judgment was underpinned by a disturbingly narrow conception of the family, at odds with expansive modern views. The limitation of the trust's remedial role to married or *de facto* heterosexual couples would preclude relief in otherwise identical fact situations where the claimants had entered into some alternative family structure. This is in contrast to the perception of Glass J. A. in *Allen v. Snyder*, where he recognised 'the velocity of social change . . . producing new forms of association outside marriage'.[8]

Nevertheless, it should be noted from the outset that on the interpretation of the facts adopted by Fullagar J. in *Thwaites v. Ryan*, the plaintiffs' claim would not have succeeded on even the broadest view of the contractual aspects of their case, or on the most liberal theory of constructive trusts.

Fullagar J. found that there was never any agreement or common intention that the Ryans would acquire a beneficial interest in Atkins' property as a condition of the male plaintiff's cohabitation and provision of services. On the contrary, Ryan's marriage was effectively over, and Atkins had charitably supplied him with free accommodation. Atkins did not require the health care asserted by Ryan, nor did the latter perform any of the services alleged, at least for the latter part of Atkins' life. The initial devise of the property to the plaintiffs could be simply construed as a further act of generosity independent of any contract or assumption of mutual obligations. On that view of the facts, Ryan was merely the undeserving beneficiary of the title-holder's generosity, and it would be ironic indeed if an equitable doctrine worked to consummate the plaintiff's 'free-riding' with an even more substantial windfall from the estate of his benefactor. The result in *Thwaites v. Ryan* accordingly is convincing, but the theoretical framework in which it is presented invites criticism.

Fullagar J. found that there was no contract, but, had one existed, it would not have been satisfactorily part-performed, even on the most liberal view of part performance. Ryan had acted entirely to his own advantage, obtaining much needed rent-free accommodation, and had failed to perform the services alleged. Nevertheless, his Honour took the opportunity to endorse the application of the traditionally strict test of part performance in *Maddison v. Alderson*[9] and *McBride v. Sandland*[10] in preference to the arguably more liberal test introduced by *Steadman v. Steadman*.[11]

He also found against the plaintiffs on the basis of the constructive trust. There had been no agreement, and hence, no common intention. In this context, his

[8] [1977] 2 N.S.W.L.R. 685, 689.
[9] (1883) 8 App. Cas. 467.
[10] (1918) 25 C.L.R. 69.
[11] [1976] A.C. 536.

Honour seemed to require an agreement as a higher but essential requirement, manifesting the accompanying common intention. Further, on the facts, there was no detriment and no connection between the plaintiff's conduct and any promised interest in the property. Overall, it was not possible to conclude that denial of such an interest would be unconscionable. By inference then, his Honour *did* analyse the facts in *Thwaites v. Ryan* in terms of the *Hohol v. Hohol* test, and convincingly demonstrated that the claim should not succeed. However, Fullagar J. elaborated a rationale of the relevant trust which departed from the tenor of previous decisions. Rather than stressing general unconscionable or fraudulent conduct in relation to legal title which activated a broad equitable jurisdiction, he defined the trust as a peculiar response to the special claims of a matrimonial situation. He stated that 'A trust was "constructed" where land was, as each spouse knew, *acquired* for the purposes of marriage'. This view of a special basis dictated a further restriction on the trust's application, *viz* the common intention manifesting the trust must be present *ab initio* — at the time the property was acquired. Making it plain that he considered the liberal reach of the trust could corrode certainty and established principles and doctrines, such as the Statute of Frauds, Fullagar J. did not overtly reject the cited precedents. However, he interpreted their flexibility on evidentiary requirements as responsive to, and solely justified by, the special relationship of husband and wife or the *de facto* spouse relationship. On this view, the husband or *de facto* husband would never be the sole owner in equity, because the property would be imprinted with the trust from the moment of acquisition. Fullagar J. warned that the 'specially indulgent' view of the courts should be 'confined to very special relationships indeed', which the courts have some reason of 'high policy' to foster and assist. He observed in that context, 'But if the reason for special treatment extends beyond marriages *de jure* and *de facto* . . . I would be of [the] opinion that it cannot extend to all cohabitant friends'.[12] Because the trust was peculiarly explicable by the 'high purpose' of assisting 'the propagation of the race' by protecting matrimonial or *de facto* relationships and the children of such unions, Fullagar J. considered the establishment of independent detriment to the claimant unnecessary.[13]

It can be seen that Fullagar J. was concerned to cut back the trust whilst constrained to acknowledge the precedents which produced it. Accordingly, he stressed the genesis of the trust in matrimonial cases, without conceding that the commonly stated underlying principles potentially extended well beyond that formative context. While acknowledging *Ogilvie v. Ryan*, his Honour explained it by reference to a *de facto* marriage, although clearly the decision of Holland J. did not depend on that factor.

Although the relevant precedents were mainly matrimonial cases, the concept of the trust itself was founded on a species of unconscionability in a title-holder, rather than imposed for policy reasons to uphold a special relationship. Even if the trust's sole legitimate role were the maintenance of matrimonial and family

[12] [1984] V.R. 65, 93.
[13] *Ibid.* 93.

relationships, that goal would not be rationally or effectively pursued if the title-holding 'breadwinner' could escape liability on the fortuitous ground that he owned the property prior to the formation of the common intention. Thus Fullagar J.'s interpretation of the new trust developments did not accord with the spirit of established authority. Further, it would produce anomalous results even within its own terms.

It exemplifies the narrow, pigeon-hole approach to constructive trusts attacked by Waters, which focuses upon relationships rather than events, and depends heavily on analogy with an express trust. Fullagar J. is isolated in his explicit stipulation of that limited ambit, and in his reduction of an apparently broad equitable principle to a special rule for particular relationships.

## *VICTORIAN JUDICIAL REACTION TO* THWAITES v. RYAN

### *Vedejs v. Public Trustee*[14]

While the decision of the Full Court in *Thwaites v. Ryan* was unanimous, neither Young C.J. nor Starke J. reiterated the reasoning of Fullagar J. although they concurred in his conclusion. Thus, it is not possible to infer explicit support for the reasoning expressed, but it is significant that neither judge took the opportunity to dissent. Further, in the subsequent Victorian case of *Vedejs v. Public Trustee*, Nicholson J. concurred with Fullagar J. in recognising that 'the special status of what has come to be described as the "marriage cases"' dictated an evidentiary latitude justifiable by the unique nature of the relationship involved.[15] In this context, he concurred with O'Bryan J. in *Hohol v. Hohol* by holding that the constructive trust would not be limited to *de jure* marriage cases (on which it would have little continuing impact in view of the Family Law Act 1975 (Cth)), but also extended to *de facto* marital unions. He noted without disapproval Fullagar J.'s 'strong reservations about any further extension of the principle'.[16] In *Vedejs*, the parties were involved in a *de facto* marriage, and the property was acquired with the relevant common intention, so acceptance of those debatable pre-conditions did not preclude the success of the claim against the title-holding party's estate. The claimant *de facto* wife had contributed directly to the property, but considerably less than the title-holder himself. Apparently entertaining Fullagar J.'s view that detriment was not essential, Nicholson J. concluded that even if it were, her lesser contributions would constitute sufficient detriment.[17] He found that she and the title-holder were joint tenants in equity. Accordingly, on the latter's death, the plaintiff became solely entitled by virtue of the *jus accrescendi*.

### *The retreat from* Thwaites v. Ryan

Following that initial acceptance of the limitations specified in *Thwaites v.*

[14] [1985] V.R. 569.
[15] *Ibid.* 572.
[16] *Ibid.* 573.
[17] *Ibid.*

*Ryan*, Victorian courts have cautiously discarded them, confining the decision to its facts and construing Fullagar J.'s restrictive interpretation as *obiter*. The reaffirmation of *Hohol v. Hohol* adumbrated in *Butler v. Craine*[18] was supported by the very recent Full Court decision of *Higgins v. Wingfield*.[19] However, while consistent with the liberal approach of *Ogilvie v. Ryan*, the judgments in *Higgins v. Wingfield* did not expressly endorse the application of the trust beyond marriage cases, although the rationale adopted accords with an extended reach. Amendments proposed to the Property Law Act 1958 (Vic.)[20] will introduce provisions empowering the adjustment of the real property interests of *de facto* partners of at least two years standing, where it seems just and equitable to do so, having regard to a number of circumstances. They include the direct or indirect contributions made to the property, or contributions made as a homemaker or parent to the welfare of the partner or children.[21] Accordingly, the continued impact of the new trust is dependent upon clear judicial approval of its wider application, which is now foreshadowed, if not explicit, in Victorian decisions and also clearly indicated in *Baumgartner v. Baumgartner*.[22]

*(i) The South Yarra Project Pty Ltd v. Gentsis*[23]

After *Thwaites v. Ryan*, but prior to *Vedejs v. The Public Trustee*, Kaye J. of the Supreme Court of Victoria, without referring to *Thwaites v. Ryan* but citing *Allen v. Snyder*, applied the constructive trust in a non-marital context. In *The South Yarra Project Pty Ltd v. Gentsis* the claimant, who was the lessee of business premises, gave a sublease of the premises and a lease of the goodwill and plant to his employee. The reversion of the head lease of the property passed to a corporate third party, which planned to demolish the existing premises, and accordingly, induced the sub-lessee to surrender his rights under the sub-lease. The sub-lessee then declined to renew the lease of goodwill and plant, and the claimant consequently suffered loss. Kaye J. considered that the lease of goodwill was only to the extent to which it actually attached to the premises. Accordingly, when the sub-lessee refused to renew the lease of the goodwill, he could not effectively 'deliver up' that goodwill without the premises to which it was annexed. His Honour concluded that a constructive trust accordingly arose. The new head-lessor's assertion of its legal title was a denial of the claimant's beneficial interest in the goodwill and lease, of which it had notice.

Recognising the unsettled state of the authorities and commentaries, Kaye J. concluded that a loosely-construed equitable fraud in relation to reliance on legal title would found a constructive trust. In this context, he cited authority indicating that 'the denial of a common intent between parties to an oral agreement was fraudulent conduct which in equity raised a constructive trust.'[24]

[18] [1986] V.R. 274.
[19] [1987] V.R. 689.
[20] Property Law (Amendment) Act 1987 (Vic.) first read 12 August 1987.
[21] *Ibid.* ss. 275-302. There are some exceptions to the general requirement of a relationship of two years' standing: see s. 281(2).
[22] (1987) 62 A.L.J.R. 29.
[23] [1985] V.R. 29.
[24] *Ibid.* 38.

His broad approach, while not directly addressing the issues raised by *Thwaites v. Ryan*, demonstrated a willingness to employ the constructive trust, whatever its formal classification, in pursuit of equitable results. Interestingly, in the later case of *Riley v. Osborne*[25] Kaye J. expressed a preference for the more liberal approach to part performance derived from *Steadman v. Steadman*, as it was of weightier authority and 'more practical'. Nevertheless, he was constrained by 'Fullagar J.'s expressed understanding of the law in this State'[26] to uphold the narrower approach of *McBride v. Sandland*.

*(ii) Butler v. Craine*[27]

Following the more accommodating approach in *Gentsis*, in *Butler v. Craine*, Marks J. of the Supreme Court of Victoria also took the opportunity to dissent from Fullagar J.'s restrictive interpretation, asserting support from the recent High Court decision of *Muschinski v. Dodds*. As it was possible to uphold the claim in *Butler v. Craine* on the basis of part performance alone, the discussion of constructive trusts was unnecessary to its determination.

In *Butler v. Craine*, the claimant was the long-standing *de facto* husband of the deceased title-holder. He had contributed labour and financial payments to the property of the *de facto* wife, which she had owned prior to the relationship, and where they had both resided. The deceased had promised to devise the property to the plaintiff, but her attempts to do so were ineffective due, apparently, to a solicitor's neglect. Having found that even on the stricter test of part performance the plaintiff's acts were unequivocally referable to a contract to acquire a beneficial interest in the property, Marks J. found that he would also succeed on the alternate ground of constructive trust.

Recognising that here, the title-holder had owned the property 'before any common intention could have been formed', Marks J. characterised Fullagar J.'s views in *Thwaites v. Ryan* as *obiter*, in which he had diverged from the acceptance of *Gissing v. Gissing* by the New South Wales Court of Appeal, from 'single judges of this court' and from *obiter* by members of the High Court in the recent case of *Muschinski v. Dodds*.[28] Marks J. noted that *Allen v. Snyder* itself had been viewed as a 'great step backwards'[29] in its refusal 'to endorse the general discretion based on "fairness" '.[30] Cognisant that this was prior to the much more reactionary step of *Thwaites v. Ryan*, he sought to restore the pre-existing scope of the trust, without embracing a Denning-influenced liberality. In this context, his Honour noted that 'there is also now much judicial expression of opinion which supports the law presently being able to give effect to a common intention formed after the property has been acquired.'[31] As well as denying that the common intention need exist at the time that the property was acquired, his Honour considered that the common intention could be independent of any

25 [1986] V.R. 193.
26 *Ibid.* 199.
27 [1986] V.R. 274.
28 *Ibid.* 285.
29 *Ibid.* quoting counsel for the appellant in the High Court in *Muschinski v. Dodds*.
30 *Butler v. Craine* [1986] V.R. 274, 285.
31 *Ibid.* 286.

'agreement'. Both *Allen v. Snyder* and, by inference, *Muschinski v. Dodds*, supported that view.[32]

Acknowledging the confusion and diversity of opinion encountered, Marks J. expressed the view that the *Gissing v. Gissing* rationale of the trust was valid, and legitimately expressed in the three-fold test of *Hohol v. Hohol*. He considered that the 'common intention' constructive trust was possibly a defined expression of a wider class, in which the common link was equitable fraud by the constructive trustee. He observed that 'Denial of an actual common intention is clearly within the concept'.[33]

While concerned to reject the superfluous pre-conditions of an 'agreement' and an intention co-existent with acquisition of the property, Marks J. did not explicitly consider the limitation of the trust to matrimonial contexts. However, no such requirement appeared in his statement of the three-fold test. Interestingly, in the case at hand, he thought that 'The parties were thrown together more by their mutual accommodation problem than by mutual personal attraction. The alliance blossomed out of their arrangements in relation to the subject property, and in time, they became linked to it and each other as do married couples.'[34] The recognition that accommodation needs may be central to personal associations emphasises that the trust has a valid role to play beyond the context of *de facto* relationships.

### *The Impact of* Muschinski v. Dodds[35]

Although Marks J. drew supportive negative inferences from the High Court case of *Muschinski v. Dodds*, that case, rather than resolving uncertainty, demonstrated an absence of judicial unanimity in relation to the constructive trust's valid ambit and future role.

*Muschinski v. Dodds* did not involve an unconscionable denial of a beneficial interest typical of the *Hohol v. Hohol* type constructive trust. Rather, it involved the conferral of a beneficial interest in a property, in anticipation of a continuing relationship and a projected common business enterprise, which did not eventuate for reasons divorced from unconscionability. The claimant, a *de facto* wife, had purchased a property with her *de facto* husband as a tenant-in-common in equal shares, although she had provided almost all of the purchase price. It was agreed that despite his small contribution, the *de facto* husband would acquire a beneficial half share, in return for assurances that he would help to establish a business and to build a house on the property with money obtained from his expected divorce settlement and future earnings. However, the necessary building permits were refused and the relationship ultimately dissolved, rendering the fulfilment of their plans impossible. In Deane J.'s terms, 'the substratum of a joint relationship or endeavour [was] removed without attributable blame'.[36] At first instance, and in the New South Wales Court of Appeal, it had been held that

[32] *Ibid.* 285.
[33] *Ibid.* 284.
[34] *Ibid.*
[35] (1985) 160 C.L.R. 583.
[36] *Ibid.* 620.

there was neither a resulting nor a constructive trust in favour of the *de facto* wife. She had intended to confer an immediate beneficial interest on the *de facto* husband, based on the assurances he had given, rather than the fulfilment of those assurances.

On appeal to the High Court, Mason and Deane JJ. found that there was a constructive trust, while Gibbs C.J., Brennan and Dawson JJ. did not. Gibbs C.J., however, concurred with the order proposed by Mason and Deane JJ., while disagreeing on the existence of the trust.[37] Accordingly, the claimant succeeded but, significantly, only two of the five judges supported the imposition of a constructive trust in the circumstances. While not directly applicable to the 'unconscionable conduct' species of constructive trust, the decision illuminated significant judicial divergences in relation to constructive trusts and unjust enrichment generally.

The appellant *de facto* wife had argued that although the non-fulfilment of their plans was not the consequence of the *de facto* husband's fraud, this was not fatal to her claim. She argued that Lord Diplock in *Gissing v. Gissing* had indicated that a breach of faith was unnecessary; rather, the court could impose a constructive trust wherever the conduct of the legal owner made it equitable to do so. Gibbs C.J. rejected that proposition, noting that it took Lord Diplock out of context. Further, although some judgments, particularly those of Lord Denning, supported the view that 'the trust could be imposed by law whenever justice and good conscience require it'. Gibbs C.J. stressed that, '[T]he view that the court can disregard legal and equitable rights and simply do what is fair is not supported by the decisions of the House of Lords in *Pettit v. Pettit* and *Gissing v. Gissing* . . . and it is contrary to established doctrine in Australia'. His Honour agreed, in this context, that a common intention could not be judicially imputed.[38]

Brennan and Dawson JJ. also considered that there was no constructive trust. The *de facto* husband did not take his beneficial interest subject to a condition subsequent of fulfilling the assurances which were ultimately thwarted by circumstances. Those assurances were not intended to operate as forfeiture clauses, and accordingly, his retention of the interest was not unconscionable as such. Brennan J. remarked that 'the argument for a constructive trust in the present case proves, on analysis, to be a plea for the return of the interest given on the ground of fairness . . . There is no jurisdiction in an Australian court of equity to declare an owner of property to be a trustee of that property for another merely on the ground that, having regard to all the circumstances, it would be fair so to declare . . . The flexible remedy of the constructive trust is not so formless as to place proprietary rights in the discretionary disposition of a court acting according to vague notions of what is fair'.[39]

Deane J., with whom Mason J. concurred, imposed a constructive trust in the circumstances, but he broadly agreed with Brennan J. in his rejection of a

[37] Gibbs C.J. relied on the quasi-contractual right of contribution between joint and several debtors.

[38] (1985) 160 C.L.R. 583, 594.

[39] *Ibid.* 608.

discretionary judicial power for the reformulation of proprietary rights on the basis of redistributive justice. 'Thus it is that there is no place in the law of this country for the notion of "a constructive trust of a new model" which, "[b]y whatever name it is described, . . . is . . . imposed by law whenever justice and good conscience" (in the sense of "fairness" or what "was fair") "require it"[40] . . . Under the law of this country — as, I venture to think, under the present law of England . . . proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion, . . . subjective views about which party "ought to win" . . . and "the formless void of individual moral opinion" . . . The mere fact that it would be unjust or unfair in a situation of discord for the owner of a legal estate to assert his ownership against another provides, of itself, no mandate for a judicial declaration that the ownership in whole or in part lies, in equity, in that other'.[41]

Despite his recognition that the certainty and fundamental principles of property law must be upheld, so that 'the fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice',[42] Deane J. was prepared to extend it flexibly within the confines of the established equitable principles. Accordingly, he found that the *de facto* husband held his beneficial interest as a constructive trustee, by analogy with a partner's or a failed joint venturer's entitlement to a proportionate refund of his contribution on dissolution or collapse of the association or venture. Like Kaye J. in *Gentsis*, he relied on a broad equitable jurisdiction to prevent an unconscionable exercise or retention of legal title.

Deane J., in analysing the fundamental nature of the constructive trust, thought that 'the perceived dichotomy' between 'competing rallying points of "remedy" and "institution"' was largely 'a consequence of lack of definition' as 'in a broad sense the constructive trust is both an institution and a remedy of the law of equity.' While, like all trusts, it was essentially remedial, 'the constructive trust shares . . . some of the institutionalized features of express and implied trust . . . when established or imposed, it is a relationship governed by a coherent body of traditional and statute law. Viewed in its modern context, the constructive trust can properly be described as a remedial institution which equity imposes regardless of actual or presumed agreement or intention (and subsequently protects) to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle.'[43]

While the constructive trust might be seen as an institution 'connoting a relationship which arises and exists under the law independently of any order of a court' rather than a remedy in the sense of 'the actual establishment of a relationship by such an order',[44] the distinction was illusory in the sense that, when

[40] Citing here the opinion of Lord Denning M.R. in *Eves v. Eves* [1975] 3 All E.R. 768,771 and *Hussey v. Palmer* [1972] 3 All E.R. 744,747.
[41] (1985) 160 C.L.R. 583, 615-6.
[42] *Ibid.* 615.
[43] *Ibid.* 614.
[44] *Ibid.*

justified by established principle, a curial declaration would be unnecessary for its prior existence. However, although simultaneously both institutional and remedial, its characteristic flexibility indicated that where competing claims were involved, a declaration of constructive trust by way of remedy can be properly framed so that the consequences of its imposition are operative only from the date of judgment or formal court order or from some other specified date. Accordingly, the constructive trust was imposed at the date of judgment 'lest the legitimate claims of third parties be adversely affected.'[45]

Predictably, given his relatively flexible notion of the constructive trust, which has not outgrown its formative stages as an equitable remedy and the necessity to maintain fluidity in order to pursue its continuing rule, Deane J. did not consider that it should be confined to cases involving a pre-existing fiduciary relationship. He predicted that alignment with the American 'general doctrine of unjust enrichment . . . providing an acceptable basis in principle for the imposition of a constructive trust' might ultimately be achieved. 'It may well be that the development of the law of this country on a case by case basis will eventually lead to the identification of some overall concept of unjust enrichment as an established principle constituting the basis of decision of past and future cases, . . . however, no such general principle is as yet established as a basis of decision as distinct from an informative generic label for purposes of classification, in Australian law. The most that can be said at the present time is that "unjust enrichment" is a term commonly used to identify the notion underlying a variety of distinct categories of case in which the law has recognised an obligation on the part of a defendant to account for a benefit derived at the expense of a plaintiff.'[46]

*Muschinski v. Dodds* demonstrated a unanimous rejection of the most extreme conception of the constructive trust. Although agreed on this, the court showed differing judicial attitudes to the creative expansion of precedent. While Deane J.'s scholarly judgment demonstrated elasticity in extending analogies within the limits of fundamental principle, a numerical majority declined his approach. However, the subsequent decision in *Baumgartner v. Baumgartner*,[47] discussed below, indicated a more united liberal approach to the constructive trust by the Australian High Court.

While the decision in *Muschinski v. Dodds* provided no specific rulings on the still unsettled elements of the 'unconscionable conduct' constructive trust, not even the more conservative judgments provided any support, express or inferential, for the Fullagar restrictions. Accordingly, those issues continued to be determined by developments at state level. In Victoria, the most recent and authoritative Full Court decision of *Higgins v. Wingfield*[48] confirmed the process of 'single instance' retreat from *Thwaites v. Ryan*.

*Higgins v. Wingfield* was preceded by the unusual case of *Cooke v. Cooke*,[49]

[45] *Ibid.* 623.
[46] *Ibid.* 617.
[47] (1987) 62 A.L.J.R. 29.
[48] [1987] V.R. 689.
[49] [1987] V.R. 625.

a decision of Southwell J., which also applied the test of *Hohol v. Hohol* and isolated the restrictive *obiter* of Fullagar J. In *Cooke v. Cooke* the defendant held legal title to a residence which he provided for the female plaintiff, who bore him a child. The parties never lived together in a permanent *de facto* marriage relationship, but the wealthy defendant 'who wanted most of all a child of his own' indicated that he would provide for and support the plaintiff should she have the child, although 'he really didn't want marriage'.[50] The plaintiff did bear the defendant's child. The child ultimately took up residence with the father, and, on the subsequent decline of the defendant's finances, he denied that the plaintiff had an interest in the property. Southwell J. held, *inter alia*, that the relevant detriment was not established. The plaintiff claimed that she had contemplated an abortion but was deterred by the defendant's promises. His Honour noted that she had not finally determined upon a course of action, but even if she had, there were no apparent legal grounds for the abortion. Accordingly, it would be contrary to public policy to construe her conduct as detriment.[51]

In the context of his discussion of the necessary detriment, Southwell J. indicated that he would not define the case at hand as 'a marriage case' in the Fullagar sense. Presumably that was suggested by the absence of cohabitation and related social characteristics; however, there was clearly a relationship between the parties, who shared parenthood, although in an unusual context. By inference, then, his application of the *Hohol v. Hohol* test to circumstances formally identified as a 'non-marriage' case, indicated that Southwell J. did not endorse limitation of the new constructive trust to *de facto* marriage situations.

### *HIGGINS v. WINGFIELD*[52]

In *Higgins v. Wingfield* McGarvie and Marks JJ. (with whom Murray J. concurred) rejected a claim based upon a constructive trust. They nevertheless upheld the conceptual framework of *Gissing v. Gissing* reflected in the test of *Hohol v. Hohol*. McGarvie J. considered that neither Young C.J. nor Starke J. in *Thwaites v. Ryan* had concurred with Fullagar J.'s particular characterisation of the trust.[53] Both McGarvie and Marks JJ. accordingly held that it was necessary to establish not only a real common intention, but also real detriment. In this context, they considered that the detriment must be more than the mere disappointed expectation of the intended benefit. Rather, it must amount to a 'material disadvantage'.[54]

As *Higgins v. Wingfield* involved a *de facto* marriage and the relevant property was acquired at the time of forming a common intention, it was unnecessary to consider the need for those two factors directly. The conscious repudiation of Fullagar J.'s conception of the trust in favour of *Hohol v. Hohol* by inference negatives at least the latter. The case focused chiefly on the necessity for, and the nature of, detriment. This was because the defendant had contributed nothing

[50] *Ibid.* 626.
[51] *Ibid.*636.
[52] [1987] V.R. 689.
[53] *Ibid.* 692.
[54] *Ibid.* 695.

other than accompanying the now deceased male title-holder in the search for a residence, performing some trifling services and providing some household articles. Clearly, the deceased title-holder had intended to provide for her, but had failed to execute an appropriate will. Ironically, the claim in *Higgins v. Wingfield* fell into the probably rare category of cases which would succeed on the basis of the Fullagar conception of the trust, but which fail to conform to the criteria of the generally more liberal *Hohol v. Hohol* test. The claimant was unable to establish detriment in the relevant sense. The Property Law (Amendment) Act 1987 (Vic.) when proclaimed would, however, confer jurisdiction to adjust property rights in future cases such as *Higgins v. Wingfield*.

The general tenor of the decision in *Higgins v. Wingfield* conformed to the reasonably accommodating but essentially quite conservative conception of the constructive trust evolved from moderate precedents such as *Gissing v. Gissing*, *Hohol v. Hohol* and *Allen v. Snyder*. It stabilized a 'middle of the road' version of the new constructive trust for Victoria. This avoided the different potential evils of both the narrowest and broadest extremes, represented by *Thwaites v. Ryan* and the Denning interpretation respectively. The radical Denning notion of the trust was clearly rejected. Marks J. observed that 'it is important to emphasize that the courts have rejected any notion of acting according to general principles of "fairness" and reaffirmed that they are constrained to act strictly according to the rights I have mentioned'.[55]

Although the judgment registered a self-conscious election to follow *Hohol v. Hohol* rather than Fullagar J., that was in the context of considering detriment. There was little or no express treatment of the particular limitations introduced by *Thwaites v. Ryan*. It may be inferred that a rejection of the need for an independent agreement and a common intention existing at the time of acquiring the property is implicit in the general rejection of Fullagar J.'s conception of the trust. Certainly most precedents referred to by the Court in *Higgins v. Wingfield* do not impose those requirements. However, the Court's attitude to the trust's alleged restriction to matrimonial contexts is more elusive. It is perhaps surprising that such a significant issue was not unambiguously determined. Although accepting the label 'marriage cases', McGarvie J. in fact discussed 'the principles of what in this context are often called the "marriage cases".'[56] His Honour proceeded to endorse precedents, which although *de facto* marriage cases themselves, enunciated a more broadly applicable rationale of the trust. It is not possible to infer that McGarvie J. would limit the 'marriage case principles' to matrimonial contexts. Probably, he would consider that the principles developed in the 'marriage cases' could extend to cases which did not involve a marriage or a *de facto* marriage.

### *BAUMGARTNER v. BAUMGARTNER*[57]

Following *Higgins v. Wingfield's* apparent restoration of the moderate pre-*Thwaites v. Ryan* conception of the trust, the High Court in *Baumgartner v.*

[55] *Ibid.* 699.
[56] *Ibid.* 690.
[57] (1987) 62 A.L.J.R. 29.

*Baumgartner* embraced a concept of the trust wider and more flexible than any yet entertained by Australian courts.

The decision indicated that the specific pre-conditions established or suggested by Victorian judicial statements of the trust will be by-passed and subsumed by a broader over-arching concept.

*Baumgartner v. Baumgartner* involved a *de facto* couple who had pooled their earnings and resources during the course of the relationship. The male partner had purchased a property as sole legal title-holder, to serve as a future residence. The financial arrangements underlying the purchase were, broadly, that the *de facto* husband had first sold a unit solely owned by him. The mortgage on that unit had been reduced by repayments from the pooled fund, and repayments on the mortgage over the new property were also made from that pooled fund. On the dissolution of the relationship, the *de facto* wife claimed a beneficial interest in the new property.

While a similar fact situation would often give rise to a *Hohol v. Hohol* type constructive trust, the claimant here had not established a common intention that she would acquire an interest. The male partner's contention that a shared interest in the property had been intended only if they ultimately married was accepted at first instance. On appeal to the Supreme Court of New South Wales, it was considered that in all the circumstances, the relevant common intention could be inferred.[58] The *de facto* husband appealed to the High Court asserting, *inter alia*, the impropriety of an appeal court ignoring a trial judge's view of witness credibility. His contention was accepted, but a constructive trust was nevertheless imposed.

Mason C.J., Wilson and Deane JJ., in a joint judgment, agreed that there was no 'common subjective intention'. However, they regarded such an intention as unnecessary to the establishment of the trust. Referring to the judgment of Mahoney J.A. in *Allen v. Snyder* and the judgment of Mason and Deane JJ. in *Muschinski v. Dodds*, their Honours adopted a broader statement of the constructive trust. In their view, 'the foundation for the imposition of a constructive trust in situations of the kind mentioned is that a refusal to recognise the existence of the equitable interest amounts to unconscionable conduct and that the trust is imposed as a remedy to circumvent that unconscionable conduct.'[59] Their Honours further relied on Deane J.'s statement in *Muschinski v. Dodds* that the constructive trust serves as a remedy which equity imposes regardless of actual or presumed agreement or intention in order 'to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle.'[60]

Having reaffirmed the traditional irrelevance of intention to the constructive trust, Mason C.J., Wilson and Deane JJ. considered that, given the pooling of resources in all the circumstances of the joint relationship and the property's acquisition, 'it would be unreal and artificial to say that the respondent intended

[58] *Baumgartner v. Baumgartner* [1985] 2 N.S.W.L.R. 406.
[59] *Baumgartner v. Baumgartner* (1987) 62 A.L.J.R. 29, 33.
[60] *Muschinski v. Dodds* (1985) 160 C.L.R. 583, 614.

to make a gift to the appellant of so much of her earnings as were applied in payment or mortgage instalments.'[61]

As her contributions were for the purpose of the joint relationship, the assertion by the *de facto* husband of his sole title 'amounts to unconscionable conduct which attracts the intervention of equity and the imposition of a constructive trust'.[62] The claimant's beneficial interest was assessed as a share reflecting the overall value of her contributions.

Gaudron and Toohey JJ. agreed with the orders. Gaudron J. pointed out that if the purchase had been made directly from the joint fund, a resulting trust in favour of the *de facto* wife would have arisen. Nevertheless, the joint fund had facilitated the acquisition of the property, and a gift was not intended. Accordingly, it was unconscionable to deny her a beneficial interest and 'that situation is properly remedied by the imposition of a constructive trust'.[63]

Toohey J., in a bold and searching judgment, not only endorsed the remedial application of the trust in the circumstances, but also advocated its extension to include situations of unjust enrichment. The relationship of unjust enrichment to unconscionable behaviour has been touched upon above. The factors do not necessarily co-exist. Toohey J., emphasizing the essentially remedial goal of the constructive trust, asked, 'is the imposition of a constructive trust as a remedy for unconscionable conduct any more "principled" than the imposition of such a trust in order to prevent unjust enrichment?'[64] He concluded that the prevention of unjust enrichment could be accommodated by the over-arching function of the trust. 'The notion of unjust enrichment, qualified in this way, is as much at ease with the authorities and is as capable of ready and certain application as is the notion of unconscionable conduct . . . the object of a constructive trust is to redress a position which otherwise leaves untouched a situation of unconscionable conduct or unjust enrichment.'[65]

## *CONCLUSION*

Australian judicial interpretation of the nature and function of the constructive trust is not conclusively settled.

Traditionally, the constructive trust functioned institutionally in Anglo-Australian law. It was imposed in a limited number of defined contexts. Its application was usually justified by the existence of special relationships or by analogy with an express trust. Because the trust was invoked only in restricted circumstances, its effectiveness as an instrument of equity was circumscribed. In the context of an indirect 'contribution' to a legal title-holder of land (who was not a fiduciary), it seemed that, in order to rely on a constructive trust, the contributor must establish either fraud or unconscionability in relation to inducing or acquiring the interest or benefits.

[61] *Baumgartner v. Baumgartner* (1987) 62 A.L.J.R. 29, 34.
[62] *Ibid.*
[63] *Ibid.* 37.
[64] *Ibid.* 36.
[65] *Ibid.*

*Baumgartner v. Baumgartner* promises to transcend those established limitations. It resiles from the traditionally inflexible conception of constructive trusts, and signals the assumption of the characteristically American remedial function. The decision indicates that a constructive trust will be imposed as a remedy if the assertion of sole legal title is unconscionable, although the title-holder did not fraudulently or unconscionably induce contributions or benefits. The necessary element of unconscionability has been redefined, and creates an extended ambit.

Thus in *Muschinski v. Dodds* the defendant had not acquired title by unconscionable behaviour. In *Baumgartner v. Baumgartner*, the title-holder had not induced the claimant's financial contributions by the assurance of an interest. Nevertheless, a constructive trust was imposed by a liberal minority in *Muschinski v. Dodds*, and unanimously in *Baumgartner v. Baumgartner*. In both cases, the constructive trust operated to restore an indirect contribution whose legal status had not been defined by the parties.

If the relevant unconscionability lies in the assertion of title itself, the 'unconscionable conduct' constructive trust has assumed an extended remedial application. It will not be necessary to establish particular pre-conditions, such as the repudiation of a common intention to acquire an interest, provided that a 'refusal to recognise the existence of the equitable interest amounts to unconscionable conduct.'[66] In *Baumgartner v. Baumgartner* it was also acknowledged that 'general notions of fairness and justice are relevant to the traditional concept of unconscionable conduct.'[67]

Further, Toohey J. advocated recognition of the principle of unjust enrichment. Accordingly, the development by case law of a general action for unjust enrichment foreshadowed by Deane J. in *Muschinski v. Dodds* may have been initiated.

The new liberality indicated by the High Court does not amount to a dispensation to reformulate property rights according to notions of fairness. However, it does embody a theory of constructive trusts which transcends the piecemeal conceptual framework attacked by D. M. Waters. If the decision falls short of explicitly recognising the constructive trust as a general remedy, its implications suggest it.

What is the impact of *Baumgartner v. Baumgartner* upon developments at state level?

Prior to the decision, Victorian orthodoxy, exemplified by *Hohol v. Hohol* and *Higgins v. Wingfield*, had reflected the traditional institutional model, establishing core elements of non-imputed common intention, material detriment and fraud. Gratuitous restrictions relating to the time of acquisition and the existence of an independent agreement were expressly or inferentially rejected. The further restrictive requirement of a marital relationship also seemed unlikely. However, Victorian developments generally did not disturb the conventional theory of constructive trusts. Rather, they identified the criteria necessary to establish unconscionability within a particular, developing species of constructive trust.

[66] *Ibid.* 33.
[67] *Ibid.* 34.

*Baumgartner v. Baumgartner* clearly establishes that a common intention to acquire an interest is no longer a necessary pre-condition for the imposition of the new constructive trust. However, both *Baumgartner v. Baumgartner* and *Muschinski v. Dodds* involved obvious material contributions by the claimant which were too indirect to be reclaimed by a resulting trust. In other instances, a claimant may have suffered only an ill-defined detriment, such as the gratuitous provision of personal services to the title-holder, or the foregoing of alternative opportunities. In such cases, it would still be helpful, though not essential, to demonstrate that the detriment was suffered in reliance upon a common intention to acquire a property interest. This would counter any likelihood that a gift was intended, and would assist in establishing that the subsequent denial of a beneficial interest was unconscionable. Where, in the absence of a common intention, a party has suffered detriment rather than providing an ascertainable contribution, there is no theoretical obstacle to the imposition of the constructive trust approved in *Baumgartner v. Baumgartner*. However, people frequently perform services and suffer detriment for others. Such altruistic activities will not always justify a claim to an equitable interest in property.

Repudiation of a common intention which induced benefits is an indication that a constructive trust *would* be appropriate. Thus, although the criteria set out in *Hohol v. Hohol* have lost their mandatory force in the light of a wider formulation, they will remain relevant to determining unconscionability. They provide a particular manifestation of unconscionable conduct, without limiting the broader concept. Particularly where one party has assumed a housekeeper role for a title-holder, the *Hohol v. Hohol* conditions will retain significance.

*Baumgartner v. Baumgartner* suggests that the constructive trust will assume a wider restitutionary role. However, many aspects remain unresolved, and the trust's valid function is likely to continue to provoke controversy. Further, settled methods of calculating the extent of an interest based on the trust have not yet stabilized, and judges must reach conclusions with little firm guidance. In cases such as *Baumgartner v. Baumgartner*, an interest reflecting the value of the actual contribution is indicated. The *Hohol v. Hohol* variety of the trust creates more problems. It is not clear at what point the trust will arise. Must the claimant totally fulfil the conditions on which the common intention was based in order to gain any interest? Or will a partial performance of the contemplated services support the acquisition of a partial interest? Moreover, the *Hohol v. Hohol* model contemplates a common intention to acquire an interest in return for a detriment which may bear no proportion to that interest. However, an overriding requirement of unconscionability or fraud indicates that a trifling contribution may be compensable by factors such as free accommodation, without invoking the trust. Nevertheless, a disproportion between the material contribution and the intended benefit has not precluded the imposition of the trust, although the notional excess may be treated as a voluntary settlement in the context of bankruptcy.[68] While such an approach may initially seem inconsistent, it reconciles the interests of third parties to the equitable role of the trust. Together with the judicial discretion

[68] *Re Densham* [1975] 1 W.L.R. 1519.

to impose the trust at the date of hearing or otherwise, emphasised by Deane J. in *Muschinski v. Dodds*, it contributes to the protection of third parties and counters opposition to the flexible role of the new trust based on a perceived threat to their rights. The discretion also obviates the possibility of undue hardship for prospective 'trustees' who have not retained the relevant property.

Those who oppose the further extension of the constructive trust and its incorporation of the principle of unjust enrichment would argue that the *Hohol v. Hohol* conception, liberally interpreted, maintained a nice balance between equity and certainty. It reduced instances of irremediable unjust enrichment and obviated the rigidities of the Statute of Frauds and the associated doctrine of part-performance. In the absence of specific legislation, it also provided timely equity in *de facto* spouse and family contexts.

Accordingly, it might be inferred that the need for further expansion and the introduction of a general action of unjust enrichment has been reduced by the increase and expansion of the relevant discrete causes of action. A parallel could be drawn with the rejection of a general tort of unfair competition in the context of the growth of constituent intellectual property regimes and actions.[69]

In the view of the present writer, however, the advantages secured by the traditional Anglo-Australian shyness of broad general principles may be overestimated. The maintenance of certainty is a frequently-cited reason for their rejection. However, as the development of the new constructive trust itself has shown, uncertainty is inevitably generated by new social problems demanding legal resolution, as judge-made law responds on an *ad hoc* basis. The avoidance of general principles cannot obviate uncertainty. It does encourage anomalous or irrational results, as equally meritorious claimants may succeed or fail depending on the classification of their case.

The interests of third parties have also been stressed as reasons to avoid the American function of the trust, but the demonstrated potential of the courts to develop safeguards adequately answers such concerns.

While unequivocal recognition of the constructive trust as a comprehensive remedy in the context of unconscionability and unjust enrichment has not yet been achieved, its ultimate assumption of that role has been accelerated. Supported by similarly expansive developments in related areas, such as the recent High Court endorsement of unjust enrichment, rather than implied contract, as the basis of *quantum meruit*,[70] the current Australian interpretation of the constructive trust indicates a consistent growth towards a rational and comprehensive law of restitution.

69 *Moorgate Tobacco Co. Ltd v. Phillip Morris Ltd [No. 2]* (1984) 156 C.L.R. 414.
70 *Pavey & Mathews Pty Ltd v. Paul* (1987) 162 C.L.R. 221.