

PROPRIETARY REMEDIES AND THE ROLE OF INSOLVENCY

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I. INTRODUCTION

There are emerging three major proprietary remedies.¹ These three are remedial subrogation, remedial equitable liens and remedial constructive trusts.² These three constitute the proprietary aspects of the new law of remedies. However, the emergence of these three has been controversial. This is particularly true in an insolvency context. This article will be divided into three parts. The first briefly outlines the three main proprietary remedies. The second part examines attempts to banish these remedies. The third part examines the

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- 1 The problems of the unstable nature of property are well recognised. The circularity involved with property and remedies was clearly identified by Windeyer J in *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 at 34. See also K Gray, "Property in Thin Air" [1991] *CLJ* 253, as well as K Gray and S Gray, "The Idea of Property in Land", in Bright and Dewar (eds), *Land Law: Themes and Perspectives* (1998) 15, both of these pieces were cited by the High Court in *Yanner v Eaton* (1999) 168 ALR 1. But as R Meagher, W Gummow and J Lehane, *Equity Doctrines and Remedies*, Butterworths (3rd ed, 1992), p104 pointed out after discussing the earlier article by Gray, "the hard fact is that a large part of equitable doctrine operates by reference to a system of interests, some of which are 'proprietary' in character whilst others are not". Therefore, it is appropriate to discuss proprietary remedies, but the unstable nature of property must never be forgotten. Perhaps this unstable nature of property can be used so as to permit the 'tailorability' of these remedies. 'Tailorability' means the minor modification of a recognised remedy. This tailorability will be employed later in this article. The unstable nature of property also makes it difficult to deal with remedies, such as rescission, and to consistently clarify them as being proprietary or not. Some academics, for example A Burrows, *The Law of Restitution*, Butterworths (1993) p 34, refers to rescission as a proprietary remedy. The approach in this article is that generally rescission does not include property and so will not be considered a proprietary remedy.
- 2 Whether tracing may be considered to be a remedy is contentious, see and compare L Smith, *The Law of Tracing*, Oxford University Press (1997) and C Rotherham, "Restitution and Property Rites: Reason and Ritual in the Law of Proprietary Remedies" (2000) 1 *Theoretical Inquiries in Law* 205. The three remedies that are listed here are generally proprietary in nature. Other remedies which may demonstrate some proprietary characteristics include rescission, which A Burrows, note 1 *supra*, p 34 treats as a proprietary remedy. All this is simply proving the unstable nature of property and it may be linked to the tailorability of proprietary remedies.

consequences of the failure to banish these remedies and attempts to indicate how proprietary remedies may operate with regard to insolvency.

PART 1

II. SUBROGATION

To fully appreciate the rise of remedial subrogation it is necessary to appreciate *Boscawen v Bajwa*.

A. *Boscawen v Bajwa*

*Boscawen v Bajwa*³ is significant in that it lowered the requirements, and so extended the scope, for a party to achieve a 'proprietary' privileged position with regard to others. The case diverted attention from the issue of intention and highlighted the question of whether the claimant has done anything to forfeit the priority conferred by subrogation. In addition, it is important in that it recognised that subrogation is a not a right, but a remedy. Importantly, it did not hold that institutional and remedial subrogation are the same remedy. It is appropriate to note that Lord Hoffmann in the later decision of *Banque Financiere de la Cité v Parc (Battersea) Ltd*⁴ commended *Boscawen* as it "contains a valuable and illuminating analysis of the remedy of subrogation".⁵

Before discussing *Parc (Battersea)* the full remedial use of subrogation must be appreciated.

B. The Remedial Use of Subrogation

Dobbs, writing in an American context, has commented:

Subrogation, like lien, trust, and contract, may arise by express or implied-in-fact agreement of parties, in which case it is called conventional subrogation. Subrogation may also arise because it is imposed by courts to prevent unjust enrichment, in which case it is called legal or equitable subrogation.

Likewise Lord Diplock has stated:

[Subrogation] is a convenient way of describing a transfer of rights from one person to another, without assignment or assent of the person from whom the rights are transferred and which takes place by operation of law in a whole variety of widely different circumstances. Some rights by subrogation are contractual in their origin, as in the case of contracts of insurance. Others ... are in no way based on contract and appear to defeat classification,⁷ except as an empirical remedy to prevent a particular kind of unjust enrichment.

3 [1996] 1 WLR 328.

4 [1998] 2 WLR 475 ("*Parc (Battersea)*").

5 *Ibid* at 485.

6 D Dobbs, *Handbook on the Law of Remedies*, Vol 1 (2nd ed, 1993) p 604.

7 *Orakpo v Manson Investments Ltd* [1978] AC 95 at 104.

This has a very strong echo with the judgment of Young J in the New South Wales Supreme Court in *Re Trivan Pty Ltd*⁸ where his Honour held that subrogation "is really not a right, but a remedy, that is, it is a remedy which a court of equity will grant in order to prevent there being an unconscionable situation".⁹ Consistent with this observation is the judgment relating to the operation of subrogation delivered by the English Court of Appeal in *Boscawen v Bajwa*.¹⁰ In that case Millett LJ, with whom both Stuart-Smith and Waite LJJ agreed, held:

[s]ubrogation, therefore, is a remedy, not a cause of action ... It is available in a wide variety of different factual situations in which it is required in order to reverse the defendant's unjust enrichment.¹¹

This approach is entirely consistent with that adopted in the United States by s 162 of the *Restatement of the Law of Restitution* 1937. As Lord Hoffmann has noted:

the subject of subrogation is bedevilled by problems of terminology, and classification which is calculated to cause confusion.¹²

To avoid this confusion subrogation conveniently may be divided into institutional and remedial subrogation.

C. *Parc (Battersea)*

The nature and contours of remedial subrogation were examined very recently by the House of Lords. The facts of *Parc (Battersea)*¹³ can be set out in relatively narrow compass. At first instance Robert Walker J¹⁴ declared that Banque Financière de la Cité ("BFC") was entitled to be subrogated to the benefit of a charge over freehold property belonging to Parc (Battersea) Ltd (Parc). Most importantly, his Honour also held that an agreement postponing the priorities between two other entities, RTB and OOL, could be utilised by BFC. In effect, what this meant was that BFC could recover its money¹⁵ before OOL could recover the money lent by it. As Parc was insolvent this order of payment was extremely significant as there were insufficient funds to pay both BFC and OOL. This decision was overturned in the Court of Appeal, consisting of Beldam, Morritt and Mummery LJ. From this decision that BFC successfully appealed to the House of Lords.

The difficulty of this case lies not in deciding which party won the case, all five law lords decided it in favour of BFC, but in discerning the basis of that decision. The judgment that commanded most authority was given by Lord

8 (1996) 134 FLR 368.

9 *Ibid* at 372.

10 Note 3 *supra*.

11 *Ibid* at 335.

12 *Parc (Battersea)*, note 4 *supra* at 483.

13 *Ibid*.

14 Now in the Court of Appeal.

15 It had effectively lent DM \$30 million to Parc to repay part of another loan.

Hoffmann.¹⁶ Importantly, his Lordship began his judgment by explicitly referring to the remedy of subrogation as equitable.¹⁷ Lord Hoffmann divided subrogation into two categories.¹⁸ The first was agreement based subrogation,¹⁹ whilst the second arose by operation of law.²⁰ His Lordship utilised the divisions involved in remedial subrogation identified by Lord Keith of Kinkel in *Orakpo v Manson Investments Ltd.*²¹ The division between institutional and remedial subrogation is consistent with the division understood in America²² and Canada.²³ His Lordship correctly indicated that although the two varieties of subrogation are similar, they were “radically different institutions”²⁴ and there was a danger in transferring from one variety the requirements necessary for that variety of subrogation to the other. The example his Lordship utilised related to common intention. By citing *Chetwynd v Allen*,²⁵ *Butler v Rice*,²⁶ *Ghana Commercial Bank v Chandiram*,²⁷ *Paul v Speirway Ltd*²⁸ and *Boscawen v Bajwa*²⁹ Lord Hoffmann indicated that it was wrong to regard remedial subrogation as turning entirely upon the question of intention. His Lordship held that:

These cases seem to me to show that it is a mistake to regard the availability of subrogation as a remedy to prevent unjust enrichment as turning entirely upon the question of intention, whether common or unilateral. Such an analysis has inevitably to be propped up by presumptions which can verge upon outright fictions, more appropriate to a less developed legal system than we now have. I would venture to suggest that the reason why intention has played so prominent a part in earlier cases is because of the influence of cases on contractual subrogation.³⁰

The role of remedial subrogation was emphasised in the case. Remedial flexibility has been highlighted in recent years. The House of Lords decision in *Lord Napier and Ettrick v Hunter*³¹ provides a single example of this remedial flexibility. With regard to actions based upon the *Trade Practices Act 1974*

16 Lords Griffiths and Clyde agreed with Lord Hoffmann. The other judges in the case were Lords Steyn and Hutton.

17 *Parc (Battersea)*, note 4 *supra* at 480.

18 *Ibid* at 483. It is noteworthy that Lord Hutton, at 490, highlighted that unjust enrichment is but one element that gives rise to subrogation. It is interesting to speculate what are the other elements. Possibly, his Lordship was drawing a distinction between institutional and remedial subrogation.

19 Or institutional subrogation.

20 Or remedial subrogation.

21 Note 7 *supra* at 119. See also, C Mitchell, *The Law of Subrogation*, Oxford University Press (1994) refers to this variety of subrogation as reviving subrogation.

22 See the earlier quote from Dobbs, note 6 *supra*, p 604.

23 See P Maddaugh and J McCamus, *The Law of Restitution*, Canada Law Book Inc (1990) ch 8, particularly p 160 where the authors rely upon observations of Coyne JA in *Morrison v Canadian Surety Co* [1954] 4 DLR 736 at 757.

24 *Parc (Battersea)*, note 4 *supra* at 483.

25 [1899] 1 Ch 353.

26 [1910] 2 Ch 277.

27 [1960] AC 732.

28 [1976] Ch 220.

29 Note 3 *supra*.

30 *Parc (Battersea)*, note 4 *supra* at 485. Lord Hutton, at 492, expressly agreed with the comments of Lord Hoffmann concerning the role of intention.

31 [1993] AC 713 (“*Napier v Hunter*”).

(Cth), Mason J has referred to a “remedial smorgasbord”.³² Remedial flexibility was stressed in *Parc (Battersea)*. The limited nature of the priority achieved by BFC by subrogation, an aspect of remedial flexibility, was emphasised by Lord Hoffmann.³³

D. Remedial Subrogation and Remedial Equitable Liens

Parc (Battersea) stressed that for remedial subrogation to develop it must be formally separated from its dominating sibling, institutional subrogation. In *Parc (Battersea) Ltd*³⁴ Lord Hoffmann advocated the recognition of this separation. Like remedial equitable liens, remedial subrogation should be placed into works dealing with remedies, rather than works on securities which generally focus upon consensual arrangements.

There is also a connection between remedial subrogation and remedial equitable liens. An equitable lien is a charge imposed by equity against property that renders the property security for an obligation. To express it differently, the equitable lien is a secured equitable charge. Chief Justice Gibbs observed in *Hewett v Court*³⁵ that “[i]t would be difficult, if not impossible, to state a general principle which would cover the diversity of cases in which an equitable lien has been held to be created”. This is because there is a multitude of situations which give rise to an equitable lien. As Waters commented:

As a consequence, the list of equitable liens, an obligation imposed by case law, not originating in agreement, is something of a themeless rag-bag.³⁶

Bogert and Bogert have divided the equitable lien into two classes; the first is where the lien is the result of intention and the second class of equitable liens consists of equitable liens imposed by the court.³⁷ The parallels with the suggested divisions within subrogation are obvious. It would not be inappropriate to divide equitable liens into institutional and remedial equitable liens.

The remedial aspect of equitable liens was stressed by Isaacs J in *Davies v Littlejohn*³⁸ where his Honour stated equitable liens are “part of a scheme of equitable adjustment of mutual rights and obligations”.³⁹ A recent case decided by the House of Lords which involved the remedial lien, is the decision in *Napier v Hunter*.⁴⁰

32 *Akron v Iliffe* (1997) 143 ALR 457 at 469.

33 See, for example, *Parc (Battersea)*, note 4 *supra* at 488.

34 *Ibid* at 483.

35 (1983) 149 CLR 639 at 645.

36 D Waters, “Where is Equity Going? Remedying Unconscionable Conduct” (1988) 18 *UWALR* 3 at 24.

37 GG Bogert and GT Bogert, *The Law of Trusts and Trustees* (2nd ed, 1977), at 258-260. See also *Shirlaw v Taylor* (1991) 31 FCR 222 and *Re Biposo Pty Ltd [No 2]* (1995) 124 FLR 385.

38 (1923) 34 CLR 174.

39 *Ibid* at 185. Chief Justice Gibbs in *Hewett v Court*, note 35 *supra* at 645 held that this statement had application to all equitable liens.

40 Note 31 *supra*. It is important to note that this decision involved both subrogation and equitable liens. For a full discussion of *Napier v Hunter*, see C Mitchell, “Subrogation and Insurance Law: Proprietary Claims and Excess Clauses” [1993] *LMCLQ* 192, especially at 199-201.

III. EQUITABLE LIEN

A. *Napier v Hunter*

Members of a syndicate ("the stop loss insurers") had written stop loss policies for Lloyd's names ("the names"). The managing agent of the names negligently wrote large numbers of policies on behalf of the names in relation to asbestos claims without sufficient reinsurance cover. When there were claims against the insurance which had been written by the names, the names recovered money from the stop loss insurers. Subsequently the names sued their managing agent for damages in respect of the failure to obtain adequate reinsurance. This action gained the names £116m. The fund was held by the solicitors of the names. In restitutionary language, the stop loss insurers could be classified as restitutionary claimants and the names were unjustly enriched by their double recovery. The court was confronted with the issue of whether the stop loss insurers possessed a proprietary interest in the fund equivalent to the payments they had already made to the names under the policies of reinsurance. At first instance the stop loss insurers were unsuccessful. This result was not altered by the Court of Appeal and so the stop loss insurers appealed to the House of Lords.

The House of Lords allowed the appeal. In the course of this decision the various judges made important comments on the remedial nature of the equitable lien. Only one matter will be addressed here. It involved the choice of remedy. Lord Goff considered that the equitable lien was the most appropriate remedy. His Lordship stated that⁴¹ "since the constitution of the assured as trustee of such money may impose upon him obligations of too onerous a character (a point which troubled Saville J^[42] in the present case), I am very content that the equitable proprietary right of the insurer should be classified as a lien". In a similar vein Lord Templeman held that "the practical disadvantages [of ordering a constructive trust] would be fearsome. Fortunately equity is not so inflexible or powerless".⁴³ Lord Browne-Wilkinson held "In my judgment, this proprietary interest is adequately satisfied in the circumstances of subrogation under an insurance contract by granting the insurers a lien over the moneys recovered by the assured from the third party". Justice Gummow, in an important review of this case⁴⁴, stated that

[o]ne consequence of the speeches in [*Napier v Hunter*] may be the payment of greater attention to the equitable lien in those Commonwealth jurisdictions where there is a growing attachment to the so-called "remedial constructive trust".⁴⁵

This comment could have also easily recognised the possible use of remedial subrogation and suggested that the court should maintain a flexible approach to each situation that comes before it.

As has been noted, the equitable lien is a secured equitable charge. The effect of declaring an equitable lien is to give to the plaintiff a security interest in the

41 *Napier v Hunter*, note 31 *supra* at 744.

42 Who presided at the trial.

43 *Napier v Hunter*, note 31 *supra* at 744.

44 W Gummow, "Names and Equitable Liens" (1993) 109 *LQR* 159.

45 *Ibid* at 163.

property so that the plaintiff has a preferred claim against the property without entitling the plaintiff to ownership thereof.⁴⁶ Nor does an equitable lien confer a right to obtain possession of the property. If the property that is subject to an equitable lien is transferred to a third person who possesses notice of the equitable lien or who is a volunteer, the equitable lien may still be enforced.

The important English House of Lords decision of *Napier v Hunter*, dealing with the equitable lien, has already been mentioned. This case has also been employed in Australia by the High Court.

B. *Giumelli*

In *Giumelli v. Giumelli*,⁴⁷ the High Court allowed the appeal from the decision of the Full Court of Western Australia. In this case, the High Court recognised the use of the equitable lien as an alternative to the constructive trust.

The facts in this case are relatively straightforward. The parents, who were the appellants, had made three promises to their son, Robert, the respondent. He claimed that at least one of these promises constituted the basis of an estoppel. Robert, who was the respondent, left school at fifteen to work on his parents' farm. His parents persuaded him to stay on the farm by general assurances in his youth that he would receive part of the property for his underpaid labour. Upon his marriage his parents promised that, if he built a house at his own expense on the farm, it would be his. Subsequently, when he had the opportunity of outside employment, they told him they would do all they could to subdivide the farm and transfer some of it to him. He refused the outside employment. Later his marriage failed. Then he announced that he was going to remarry, his parents, who disapproved of this new marriage, told him to choose either this new marriage or the farm. He chose to get remarried and left the farm. Later he began court action to recover what had been promised to him. The High Court (in a joint judgment, Kirby J in a separate judgment agreeing) held that there was an estoppel based upon the promise regarding the non-pursued career path as it constituted detriment. The appeal primarily concerned the remedy for this estoppel. The Full Court had imposed a constructive trust. The appellants argued against this remedy upon two bases: the first concerned the available remedies, while the second concerned the Full Court's failure to examine all relevant considerations in determining the appropriate remedy.

The first argument relied on *Commonwealth v Verwayen*.⁴⁸ The appellants argued that in *Verwayen* Mason CJ, Toohey, Gaudron and McHugh JJ had held that the purpose of estoppel was to rectify detrimental reliance, rather than to make good the promise. The High Court rejected this argument and thus their decision in *Giumelli* explicitly has left this issue unresolved. The Court held that

46 J Dewar, "The Development of the Remedial Constructive Trust" (1982) 60 Can Bar Rev 265 at 277-8; W Fratcher and A Scott, *The Law of Trusts* Volume V, Little, Brown & Co (1989) p 331; *Restatement of Restitution* 1937 (US), s 161. Note also the view of Deane J in *Hewett v Court*, note 35 *supra* at 663 that "[t]hough called a lien, it is, in truth, a form of equitable charge over the subject property".

47 (1999) 161 ALR 473 ("*Giumelli*").

48 (1990) 170 CLR 394 ("*Verwayen*").

estoppel could lead to a remedy either reversing detrimental reliance or fulfilling the expectation.

The appellants' second argument against the imposition of a constructive trust was successful. The High Court held⁴⁹ that there were matters which the Full Court should have, but failed to, consider in awarding the remedy. In considering these matters the High Court held that the appropriate remedy was a secured monetary remedy (an equitable lien) and not a constructive trust.

In the *Giumelli* judgment the two most important features related to the process adopted by the Court. The first noteworthy feature of the judgment is that it clearly divided the case into two, interrelated parts; one on the finding of a legal obligation⁵⁰ which has been reached, while the second part focuses on selecting the appropriate remedy. The appropriate remedy will be partially determined by the nature of the obligation. The court's task of finding the appropriate remedy is facilitated by many recent decisions. The House of Lords in *Napier v. Hunter*⁵¹ employed the equitable lien as a remedy (in *Giumelli*⁵² the equitable lien was referred to as a "special and limited" form of constructive trust); and in *Parc (Battersea)*,⁵³ the House of Lords recognised remedial or non-consensual subrogation;⁵⁴ and the High Court in *Bathurst City Council v PWC Properties Pty Ltd*⁵⁵ recognised that the remedial constructive trust facilitated this search for the most appropriate remedy. What these decisions do is increase the range of remedies available. In this fashion, they represent the proprietary components of the new law of remedies. Primarily, *Giumelli* constitutes a decision concerning the second important feature of the case, which is that it recognised the role of the equitable lien as a remedy.

The thrust of the High Court's discussion was to identify some of the possible remedies, particularly as the remedy ordered by the Full Court was a constructive trust and the High Court held⁵⁶ that "the court should first decide whether, having regard to the issues in the litigation, there is an appropriate equitable remedy which falls short of the imposition of a trust". In support, the Court referred to *Bathurst*⁵⁷ and *Napier v Hunter*.⁵⁸

Following this discussion concerning the possible remedies available, the High Court began to search for the appropriate remedy. An extremely important factor in determining the appropriate remedy is the basis of the obligation that has been breached. Other factors which the High Court held⁵⁹ that the Full Court had failed to examine included other litigation between the parties, improvements to the property performed by others, and the impact upon relevant

49 *Giumelli*, note 47 *supra* at [49].

50 Or legal norm.

51 Note 31 *supra*.

52 *Giumelli*, note 47 *supra* at [31].

53 Note 4 *supra*.

54 D Wright, "The Rise of Non-Consensual Subrogation" [1999] 63 *Conv* 113.

55 (1998) 157 ALR 414 ("*Bathurst*").

56 *Ibid* at [10].

57 *Ibid* at 425-426.

58 Note 31 *supra* at 738, 744-745 and 752.

59 *Giumelli*, note 47 *supra* at [10] and [49].

third parties of ordering a constructive trust. This last is generally of paramount importance in insolvency matters, as is indicated by the High Court's reference to the observations of McLachlin J⁶⁰ in *Soulos v Korkontzilas*.⁶¹

Fundamentally in *Giumelli* the High Court adopted the following approach. First it looked at the obligation. Secondly, it examined the available remedies. The High Court then selected the appropriate remedy after examining various factors.

C. Understanding the Role of the Equitable Lien as a Proprietary Remedy.

As is obvious from both *Giumelli* and *Lord Napier* there is a strong connection between the constructive trust and the equitable lien. As has been noted previously, in an important review of a House of Lords' judgment, Gummow J has stated that:

[o]ne consequence of the speeches in [*Napier v Hunter*] may be the payment of greater attention to the equitable lien in those Commonwealth jurisdictions where there is a growing attachment to the so-called "remedial constructive trust".⁶²

As the High Court has recently held:

Before a constructive trust is imposed, the court should first decide whether, having regard to the issues in the litigation, there is an appropriate equitable remedy which falls short of the imposition of a trust.⁶³

However, while there has been great attention paid to the constructive trust, little attention has been paid to the equitable lien. Writing extra-judicially Gummow J has observed that "[t]he equitable lien has been somewhat a mysterious creature".⁶⁴ As a possible remedy this underexposure is unfortunate.

All this raises the issue of the connection between the constructive trust and the equitable lien. Canada and Australia provide the source of much learning upon the interaction of these two remedies.

In *Bathurst*⁶⁵ the High Court of Australia appeared to divide the constructive trust into two varieties. The first⁶⁶ involved situations where there is intent to transfer property but the transfer failed for want of compliance with legal formalities.⁶⁷ The second variety⁶⁸ of constructive trust which the High Court recognised was based on *Muschinski v Dodds*⁶⁹ and *Baumgartner v Baumgartner*.⁷⁰ It is imposed by the court irrespective of intention. In this way it may be suggested that there are two varieties of the constructive trust. Likewise the equitable lien demonstrates the dual characteristics of the constructive trust.

60 Who is now the Chief Justice of Canada.

61 [1997] 2 SCR 217 at 236, 241 and 243 ("*Soulos*").

62 W Gummow, note 44 *supra* at 163.

63 *Giumelli*, note 47 *supra* at [10].

64 W Gummow, note 44 *supra* at 162.

65 Note 55 *supra*.

66 Which may be called the institutional constructive trust.

67 The High Court discussed this variety of constructive trust in *Bathurst*, note 55 *supra* at [39].

68 Which may be referred to as the remedial constructive trust.

69 (1985) 160 CLR 583 ("*Muschinski*").

70 (1987) 164 CLR 137.

As was previously mentioned, in their work Bogert and Bogert perceived the equitable lien as falling into two main classes. According to the authors the first class is where the lien is the result of intention (the institutional equitable lien) and the second main class of equitable liens consists of equitable liens imposed by the court (the remedial equitable lien).⁷¹

IV. CONSTRUCTIVE TRUST⁷²

A. Bathurst

There has been much discussion of the remedial constructive trust.⁷³ *Bathurst* represents the most recent Australian judicial contribution to this issue. According to the *Local Government Act* 1993 (NSW) land vested in or under the control of a Council was “land subject to a trust for a public purpose” and was classified as “community land”. The practical consequence of this was that a Council could not freely deal with this land. The Bathurst City Council acquired land and intended to use it to provide a public car park. Later, the Council argued that this land was not “community land” as it was not “land subject to a trust for a public purpose”. As such, the Council argued it could be freely dealt with by it and called for expressions of interest in the purchase of this property. It was probable that the purchaser of this property would use it for purposes other than car parking. As a result of this PWC Properties Pty Ltd, who owned the adjacent commercial property which required car parking, brought proceedings for declarations that the site was “subject to a trust for car parking purposes”. PWC Properties Pty Ltd was successful in its action. The High Court agreed with the result of the New South Wales Court of Appeal and dismissed the appeal. Although it agreed with the result, the High Court explicitly disagreed with the Court of Appeal’s reasoning.⁷⁴ In a unanimous judgment,⁷⁵ the High Court dismissed the appeal by finding that at the commencement of the *Local Government Act* 1993 (NSW) the land was held by the Council subject to a trust for a public purpose, within the meaning of clause 6 of schedule 7 of the *Local Government Act* 1993 (NSW). This was not a “true trust”,⁷⁶ which has its roots in the private law of obligations. Rather it was a “statutory trust”. As such, this land could not be freely sold by the Council.

71 GG Bogert and GT Bogert, note 37 *supra*, pp 258-260. See also *Shirlaw v Taylor* (1991) 31 FCR 222 and *Re Biposo Pty Ltd [No 2]* (1995) 124 FLR 385.

72 This section will be concerned with the Australian caselaw relevant to this topic. The complicated arguments concerning the remedial constructive trust will not be repeated here. They are dealt with in detail in D Wright, *The Remedial Constructive Trust*, Butterworths (1998).

73 See *ibid* for details of this extensive discussion.

74 *Bathurst*, note 55 *supra* at [30].

75 The Court consisted of Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

76 A “true trust” is the usual form of trust and is the device known as a trust. The term “true trust” was employed by Megarry VC in *Tito v Waddell (No 2)* [1977] Ch 106 at 211.

For present purposes the High Court judgment has two main features. The first is a recognition of the remedial constructive trust.⁷⁷ The second point, and perhaps the most important, relates to the process of remedy selection. These features indicate the transformation underway in much of private law, particularly in trusts law and the law of remedies.

The first point that can be drawn from the High Court's decision regards the acceptance of the remedial constructive trust. The High Court in *Bathurst* explicitly accepted that there are two varieties of constructive trust, the institutional and the remedial. Further the High Court held that the remedial constructive trust exists in Australian law.⁷⁸

Bathurst demonstrated that there is a transformation in the law of remedies. The availability of various remedies is no longer completely predetermined in a mechanical way by the nature of the obligation. Frequently the courts are searching for the remedy which is the most appropriate or most just. A clear example of this relates to breach of confidence. The liability question and the remedy issue are separated.⁷⁹

PART 2

V. ATTEMPTS TO BANISH PROPRIETARY REMEDIES

There have been three main attempts to banish proprietary remedies.⁸⁰ The first involves the misreading of *Polly Peck (No 2)*⁸¹ and *Fortex Group Ltd v MacIntosh*,⁸² while the second involves preventing property being used as a remedy and the third attempt has been an explicit invoking of the insolvency spectre. These will be examined in turn.

VI. BY MISREPRESENTING POLLY PECK AND FORTEX

A. Introduction

In his recent articles entitled "The End of the Remedial Constructive Trust?"⁸³ and "The Law of Restitution at the End of an Epoch"⁸⁴ Professor Birks strongly

77 This second feature is comprised of two parts. One is the recognition of the available remedies, which include the constructive trust, while the second part involves remedy selection.

78 This division has been criticised at length, see D Wright, "The Statutory Trust, the Remedial Constructive Trust and Remedial Flexibility" (1999) 14 *Journal of Contract Law* 221.

79 See D Davies, "Restitution and Equitable Wrongs: An Australian Analogue" in Rose (ed), *Consensus ad Idem* (1996) 174.

80 These three main attempts are certainly not an exhaustive list of all the attempts to banish proprietary remedies. However, these constitute the main attempts. In addition, these attempts are obviously closely interrelated and they draw upon each other to a high degree.

81 [1998] 3 All ER 812 ("*Polly Peck*").

82 [1998] 3 NZLR 171 ("*Fortex*").

83 P Birks, "The End of the Remedial Constructive Trust?" (1998) 12 *TLI* 202.

suggested that the cases of *Polly Peck*⁸⁵ and *Fortex*⁸⁶ herald the demise of the remedial constructive trust.⁸⁷ Birks stated that “these cases can be interpreted, not merely as throwing cold water on remedial proprietary interests, but as killing them stone dead”.⁸⁸ At best, Birks’ pieces present an incorrect impression of the law in this area and his conclusion heralding the demise of this variety of trust has more to do with his longstanding opposition to the remedial constructive trust,⁸⁹ rather than to a close reading of the cases.

B. Misportrayal of the Judgments⁹⁰

In his articles, Birks presented an inaccurate portrayal. He did this not by misreading the cases but by placing undue emphasis upon aspects of the judgments that further his demise thesis. Although the pieces allegedly concerned cases from both New Zealand and England, the decision in *Fortex* does not serve his purpose of wanting to banish the remedial constructive trust. It needs to be noted that in *Fortex* the leading judgment of Gault, Keith and Tipping JJ gave support to this equitable remedy when their Honours held that “there may be occasions, in the present field [that is, insolvency] or others, when a proprietary remedy, such as the so-called remedial constructive trust, would be a useful weapon in equity’s armoury”.⁹¹

It is important to note that Birks gave most attention to Nourse LJ in *Polly Peck*. Not surprisingly this is the judge who provides the greatest support to Birks’ demise thesis. Unfortunately for Birks, he is only one judge out of the eight who heard these cases at their highest level. Lord Justice Mummery⁹² explicitly confined his comments to an insolvency context. There exists a major problem with Lord Justice Nourse’s judgment. Lord Justice Nourse agreed that the appeal should be allowed for the reasons given by Mummery LJ but added additional observations upon the remedial constructive trust.⁹³ It was these observations that Birks placed great importance upon to support his demise theory. However these obiter comments are detrimental to genuine argument

84 P Birks, “The Law of Restitution at the End of an Epoch” (1999) 28 *WALR* 13, especially at 54ff.

85 Note 81 *supra*.

86 Note 82 *supra*.

87 This will be referred to as the ‘demise theory’.

88 P Birks, “The Law of Restitution at the End of an Epoch”, note 84 *supra* at 57. This policy of only hinting that this is the impact of *Polly Peck* has changed in later writings by Professor Birks when he states clearly that *Polly Peck* does kill the remedial constructive trust completely, and not just in insolvency matters, in England. See P Birks, “Book Review: D Wright, *The Remedial Constructive Trust* (1998)” (1999) 115 *LQR* 681.

89 For example, P Birks, “Proprietary Rights as Remedies” in Birks (ed), *The Frontiers of Liability*, Vol 2 (1994).

90 See D Wright, “The Remedial Constructive in New Zealand” (1998) 4 *New Zealand Business Law Quarterly* 225, which discusses *Fortex*; and D Wright, “*Polly Peck* (No.2)-Getting it Right (Possibly) for the Wrong Reasons (Definitely)” (1998-1999) 9 *Kings College Law Journal* 140.

91 *Fortex*, note 82 *supra* at 179.

92 The other judge in *Polly Peck* who wrote a judgment.

93 It is important to note that the other judges in the case did not join with Nourse LJ.

against the very existence of the remedial constructive trust.⁹⁴ The primary flaw in Lord Justice Nourse's argument is contained in his statement⁹⁵ that "[y]ou cannot grant a proprietary right to A ... without taking some proprietary right away from B". With the greatest respect to Nourse LJ this is incorrect.⁹⁶ It is arguable that Lord Justice Nourse's comment might possibly be defensible if it was limited to insolvency matters. However his Lordship made it abundantly clear that he was referring to the general position and that his comments were not just limited to cases involving insolvency. As the remedial constructive trust involves equitable property, Lord Justice Nourse's observation will only be examined in this particular area of property law. The comment by Nourse LJ indicates that his Lordship fails to appreciate the wisdom of the comment of counsel in addressing the English Court of Appeal in *Re Holmden's Settlement Trusts*⁹⁷ that "it is a fallacy to talk of an [equitable] interest as if it were a piece of cheese". By his comment Nourse LJ indicated that he perceives property disputes as being a zero sum game. The flexibility of equitable property indicates why this is not accurate. Nourse LJ was betraying the fact that he was applying rigid and inappropriate concepts of property⁹⁸ to equitable remedies.⁹⁹

Even if *Polly Peck* is only examined for the narrower proposition that the remedial constructive trust has no role to play in insolvency, the importance of this decision to that issue is open to question upon several grounds. First, no particular section of the *Insolvency Act* 1986 (UK) was designated to this effect. It appears that these observations were based upon the combined effect of the sections of the Act. Interestingly, to support this conclusion Mummery LJ cited part of a sentence of Nicholls VC in *Re Paramount Airways Ltd*,¹⁰⁰ where it is stated that the Act constitutes an exhaustive code. In this way, Mummery LJ concluded that there was no prospect of the court granting a remedial constructive trust as this would be inconsistent with this code. This important consequence, that is, the banishment of the remedial constructive trust, is

94 This is because Nourse LJ, note 81 *supra* at 831, would extend the prohibition upon the remedial constructive trust operating in any commercial context.

95 *Polly Peck*, note 81 *supra* at 831.

96 It is interesting to speculate what Nourse LJ makes of the Privy Council decision in *Attorney-General for Hong Kong v Reid* [1994] AC 324 as this does not comply with his proprietary theory.

97 [1966] Ch 511 at 526.

98 These concepts are most often associated with common law ideas of property.

99 None of the preceding comments should be taken to indicate that the courts should adopt a completely *ad hoc* approach to employing equitable property and, in particular, the remedial constructive trust. Property should only be created cautiously. Birks, amongst many others, has alerted us to the need for caution when creating property. The cautious, evolutionary approach that is being advocated here is consistent with Lord Justice Millett's comment, in *Lonrho plc v Fayed (No 2)* [1991] 4 All ER 961 at 969, that "[e]quity will intervene by way of constructive trust, not only to compel the defendant to restore the plaintiff's property to him, but also to require the defendant to disgorge property which he should have acquired, if at all, for the plaintiff". In *Re Stephenson's Nominees* (1987) 76 ALR 485 at 501-502, Gummow J made a similar statement when his Honour held that a constructive trust "may be imposed upon a particular asset or assets not because of pre-existing property of the plaintiff has been followed in equity into those assets but because quite independently of such considerations it is, within accepted principle, unconscionable for the defendant to assert a beneficial title thereto to the denial of the plaintiff".

100 [1993] Ch 223 at 230.

premised on that part of one sentence. That part of one sentence, in an appeal that took three days to hear but judgment was delivered within a fortnight, did not have to directly consider the contention that the Insolvency Act 1986 (UK) constituted an exhaustive code. The comment of Nicholls VC was purely descriptive of a matter that was not directly in issue. With the greatest respect, it would seem very doubtful whether something as important as the presence or otherwise of the remedial constructive trust should be decided upon such flimsy grounds. Another point which questions the value of *Polly Peck* to the discussion of the banishment of proprietary remedies is the fact that it is an interlocutory appeal. A final point is that even if *Polly Peck* is correct, it does not apply where the insolvency legislation is different from the legislation that prevails in the United Kingdom. In these jurisdictions it is possible to argue that *Fortex* is more relevant.

C. Conclusion

Birks' articles on proprietary remedies are misleading. His 'demise theory' is not substantiated by *Fortex* and *Polly Peck*. Rather his articles consists of conclusions reached by misleading emphasis placed upon certain aspects of these cases and giving undue weight to the dicta of a lone judge out of a total of eight judicial figures.

VII. PROPERTY AS A REMEDY¹⁰¹

Birks has observed that property cannot be employed as a remedy, except when it is being returned to a party.¹⁰² He has argued that for a proprietary remedy, the claimant must be able to show an undestroyed proprietary base.¹⁰³ According to Birks "If he [the plaintiff] wishes to assert a right in rem in the surviving enrichment, the plaintiff must show that at the beginning of the story he had a proprietary right in the subject matter, and that nothing other than substitutions or intermixtures happened to deprive him of that right in rem".¹⁰⁴ To fully understand this attempt to banish proprietary remedies it is necessary to

101 It would be extremely easy to show that this attempt to banish proprietary remedies is not how the law currently operates. However, it will be assumed that this argument is confined to how the law should develop.

102 P Birks, "Proprietary Rights as Remedies", note 89 *supra*. He has repeated his view of property, which coincides with what is described here as the extreme form of the current property orthodoxy. For example, see P Birks, "Book Review: D Wright, *The Remedial Constructive Trust* (1998)", note 88 *supra*, particularly at 685-686. For a very powerful attack on the Birksean idea that property cannot be a remedy, see C Rotherham, note 2 *supra*.

103 This view was repeated in P Birks' most recent article upon the general concept of property "Property and Unjust Enrichment: Categorical Truths" [1997] *New Zealand Law Review* 623. Unfortunately he has not responded to the valid criticisms of his property view made by R Grantham and C Rickett, "Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity?" [1997] *New Zealand Law Review* 668.

104 P Birks, *An Introduction to the Law of Restitution*, Clarendon Press (1989) p 379. This approach is similar to A Burrows' idea "of the retention of the plaintiff's property", note 1 *supra*, ch 13.

briefly review the history of the concept of property, as well as its position in the legal system.

In the seventeenth and eighteenth centuries in England property protection was the primary aim of government.¹⁰⁵ The only body that could create or interfere with property was parliament. Fundamentally, this understanding of property had two consequences. It explained the separate roles of the courts and the parliament, and, secondly, it gave effect to the division between ownership and obligation.¹⁰⁶ It is important to realise that this still represents the extreme form of the current property orthodoxy.¹⁰⁷ From this understanding of property it is apparent why there are difficulties in awarding a remedial proprietary interest in the context of restitution for wrongs.¹⁰⁸ It needs to be noted that the extreme form of the current property orthodoxy is static,¹⁰⁹ as it fails to appreciate many aspects of modern property law.¹¹⁰ An important failing of the extreme form of the current property orthodoxy is that it does not appreciate the dynamic nature of property. It's dynamic nature is captured in the observation that

property may be better understood, both historically and legally, as the result of a balance struck between competing individual and collective goals, the private and the public interest.¹¹¹

This views property as being a variable bundle of rights, and the components of the bundle are determined by balancing differing goals. The law is extremely familiar with the division of property entailing certain features, while excluding other features associated with property. Property can be fragmented. It can be fragmented either by time¹¹² or interest,¹¹³ as well as the fragmentation between

105 For example, D Hume, *A Treatise of Human Nature*, University of Chicago Press (1978) p 491; and J Locke, *Two Treatises of Government, Book II*, University of Chicago Press (1988) at [123].

106 This division had its most apparent application in *Lister v Stubbs* (1890) 45 Ch D 1, particularly in the judgment of Lindley LJ.

107 This explains K Gray's comment in "Property in Thin Air", note 1 *supra*, that "Proudhon got it all wrong. Property is not theft – it is fraud. Few other legal notions operate such gross or systematic deception". This article, as well as K Gray's later piece "The Idea of Property in Land", note 1 *supra*, has been cited by the High Court in *Yanner v Eaton*, note 1 *supra*.

108 P Birks, *An Introduction to the Law of Restitution*, note 104 *supra*, p 6.

109 Before an interest is designated property it must be "definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability": *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1248, per Lord Wilberforce, adopted by Mason J in *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342, and in *Sonenco (No 77) Pty Ltd v Silvia* (1989) 89 ALR 437 at 445, per Beaumont J and at 457, per Ryan and Gummow JJ. Generally if something is labelled property it will carry with it (a) the power to recover the property itself rather than simply compensation, (b) the ability to transfer it, (c) the continuance of remedies against third parties who may become involved with it, and (d) its place within the priorities rule. However, the circular nature of property, which obviously impacts upon proprietary remedies, is clearly indicated by Windeyer J in *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd*, note 1 *supra* at 34.

110 These failures are numerous. They include the inadequate explanation of cases deriving from *Keech v Sandford* (1728) 2 Eq Ca Abr 741; 22 ER 629, the permissible variation in the time that equitable property interests become operative, the increasing infringement by regulation of private property by the State and tracing via substitution.

111 T Bonyhady, "Property Rights" in T Bonyhady (ed), *Environmental Protection and Legal Change* (1992) at 44.

112 This involves the doctrine of estates.

113 This involves the doctrine of tenure.

legal and equitable ownership. Further, property can be owned by several people at the same moment. Any use of the concept of property being either a bundle of rights or a balance of competing interests introduces the idea of property as comprising a continuum, with the points along the property continuum representing answers to the question of how many rights are in any particular bundle.¹¹⁴ On this understanding, property is not portrayed as being monolithic. This non-monolithic view of property possesses an impressive history. For example, Blackstone distinguished between “absolute” and “qualified” property.¹¹⁵ This property continuum, developed by Gray,¹¹⁶ involves entitlements (or, put negatively, obligations). It is important to realise that within this spectrum of property Blackstone emphasised the entitlement aspect of property. The understanding of property as consisting of obligations,¹¹⁷ rather than entitlements, is consistent with the right of access. Importantly Macpherson¹¹⁸ has contrasted this right with the Blackstonian right to exclude. The contrary view of property as an entitlement, rather than an obligation, is consistent with this Blackstonian view. This Blackstonian view constitutes part of the moderate form of the current property orthodoxy. It is the tension between these two views that lies today at the heart of the debate concerning whether property is primarily a bundle of either entitlements or obligations. Obviously, property as entitlement is not consistent with the obligation continuum. The view of property as obligation accords precisely with equity’s position that all equitable concepts are either about obligations or remedies. As a general proposition, common law property evidences more of an entitlements nature,¹¹⁹ whereas equitable property demonstrates a predominance of an obligation nature. Gray has detailed¹²⁰ that frequently equitable property is being utilised as a means of guaranteeing rights of access. To express this idea slightly differently, equitable property is being employed as an obligation.

This all highlights an extremely important point relating to either the extreme or moderate form of current property orthodoxy. Fundamentally, the current property orthodoxy has a stronger relationship with common law property than with equitable property. It should be remembered that the three proprietary remedies that are being discussed are equitable in nature. Of course, this is not to suggest that common law and equitable property are completely distinct. Further

114 It needs to be recognised that property constitutes an extremely privileged form of obligation, and this may explain why various remedies have been ordered as a consequence of a breach of this obligation.

115 *Commentaries, Vol II*, Garland Publishing Inc (1978) pp 391-395. See also T Bonyhady, *The Law of the Countryside*, Professional Books (1987) ch 7.

116 See K Gray, “The Ambivalence of Property” in Prins (ed), *Threats Without Friends* (1994).

117 This expansive view of property may be portrayed as either involving a right of access or an obligation to grant access.

118 *The Political Theory of Possessive Individualism*, Oxford University Press (1964).

119 However, note should be taken of the extremely interesting article by G Samuel, “Property Notions in the Law of Obligations” (1994) 53 *CLJ* 524 where the author points out that the common law, in contrast to the civil system, has traditionally merged notions of property with obligations.

120 K Gray, “Equitable Property”, [1994] *CLJ* 157 at 171-2.

this is not to suggest that they have little or nothing in common.¹²¹ But it does recognise that equitable property differs in five important ways from its common law counterpart.

The first way that equitable property differs from its common law counterpart is that generally with trusts the legal title is vested in another, who owes equitable obligations with respect to that property in favour of the holder of the equitable estate.¹²² Secondly, although equitable property may be transferred like common law property may be, different formalities may be required for the disposition of such an interest than for common law property. Thirdly, equitable interests are treated differently where such interests may be registered. Fourthly, equitable property appears to be unstable. Equitable rights may be classified as property for some purposes but not for others. Finally and most importantly, equitable property may be lost if the legal property passes to a bona fide purchaser of the legal estate for value without notice of the equitable interest. The best way to understand equitable property is as a microcosm of equity itself. As equity is to supplement the common law, equitable property is to supplement common law property. It is to rectify any failings that concept may exhibit in the context of the case.¹²³

Equitable property derives from the imposition of obligations to deal with property in certain ways. In *Tulk v Moxhay*¹²⁴ Lord Cottenham spoke of obligations, not property. Equitable property is in a close relationship with obligations.¹²⁵ With equitable property, it is a nonsense to speak of confounding obligation and ownership.¹²⁶ They are merely two facets of the same idea.

121 Indeed, there has been continuous pressure for the integrated teaching of land law and equity, see, for example, W Swalding, "Teaching Property Law: An Integrated Approach" in Birks (ed), *Examining the Law Syllabus The Core* (1992).

122 D Waters, "The Role of the Trust Treatise in the 1990's" (1994) 59 *Missouri Law Review* 122 at 141 that "[t]he three certainties ... are not doctrinal axioms for a valid trust; they are administrative requirements only ... For the 1990's that division [of legal and beneficial title] is probably the one essential distinctive mark of a trust". However, Lord Browne-Wilkinson had another view of this division in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] 2 All ER 961 at 989 ("*Westdeutsche*"), where his Lordship stated:

The separation of title point

The [appellant's] submission, at its widest, is that if the legal title is in A but the equitable interest in B, A holds as trustee for B. Again I think this argument is fallacious. There are many cases where B enjoys rights which, in equity, are enforceable against the legal owner, A, without A being a trustee, for example an equitable right to redeem a mortgage, equitable easements, restrictive covenants, the right to rectification and an insurer's right by subrogation to receive damages subsequently recovered by the assured: *Lord Napier and Ettrick v Hunter* [1993] AC 713. Even in cases where the whole beneficial interest is vested in B and the bare legal interest is in A, A is not necessarily a trustee, for example where title to land is acquired by estoppel as against the legal owner; a mortgagee who has fully discharged his indebtedness enforces his right to recover the mortgaged property in a redemption action, not an action for breach of trust.

123 Not all equitable property is so dependant upon common law property. On occasion, equitable property constitutes the subject matter of a purely consensual commercial transaction.

124 (1848) 2 Ph 774; 41 ER 1143. This case established the doctrine of restrictive covenants.

125 It may be possible to understand equitable property as involving a misnomer. The use of the term 'property' may serve to confuse and this term has often produced backward thinking.

126 As P Birks has repeatedly done, see, for example, "Establishing A Proprietary Base" [1995] *RLR* 83.

Essentially, equitable property is simply a special form of obligation. With the recognition that property is only a bundle of rights, rather than the traditional absolute ownership, it is impossible to maintain the complete distinction between ownership and obligation. The recognition that property constitutes a bundle of rights has allowed the judiciary to consider the interests of third parties by a process of selecting only various components of that bundle. Professor Austin¹²⁷ has noted that "courts are sometimes (and increasingly) making orders which break up [the proprietary] bundle and are therefore rendering it possible to apply some trust consequences in a remedial solution which does not involve the entire trust bundle".¹²⁸ The nature of property as a bundle of rights may also assist courts to overcome their traditional reluctance to employ property remedies because of some notion that property is an absolute. In *Westdeutsche*¹²⁹ Lord Browne-Wilkinson indicated the attractiveness of being able to tailor remedial proprietary orders by holding that¹³⁰

the remedial constructive trust, if introduced into English law, may provide a more satisfactory road forward. The court by way of remedy might impose a constructive trust on a defendant who knowingly retains property of which the plaintiff has been unjustly deprived. Since the remedy can be tailored to the circumstances of the particular case, innocent third parties would not be prejudiced and restitutionary defences, such as change of position, are capable of being given effect. However, whether English law should follow the United States and Canada by adopting the remedial constructive trust will have to be decided in some future case when the point is directly in issue.¹³¹

The current property orthodoxy has limited application to equitable property.¹³² Frequently arguments against remedial equitable proprietary interests have been buttressed by inappropriate attempts to impose the current property orthodoxy upon equitable notions. Unfortunately, property is often presented as having normative force, whereas frequently it is simply a conclusion. As Cohen has noted, 'property' constitutes one of the "magic 'solving words' of traditional jurisprudence".¹³³ Historically, equity has consistently intervened by imposing upon common law property various obligations. Remedial equitable property simply maintains this approach.

127 Now a justice of the Supreme Court of New South Wales.

128 R Austin, "The Melting Down of the Remedial Trust" (1988) 11 *UNSWLJ* 66 at 67.

129 Note 122 *supra*.

130 *Ibid* at 999.

131 The tailorability of proprietary remedies is discussed in greater detail later in this article.

132 Historically, common law property and equitable property pursued different aims. The present role of equitable property includes acting as a right of access, see K Gray, "Equitable Property", note 120 *supra*.

133 F Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35 *Col L R* 809 at 820.

VIII. BY THE INVOCATION OF INSOLVENCY SPECTRE-GOODE'S ANALYSIS

A. Introduction

Numerous attempts have been made to resolve this issue of the relationship between the remedial constructive trust and insolvency. Various important approaches to this debate have been suggested by Goode,¹³⁴ Cope,¹³⁵ Oakley,¹³⁶ Paciocco,¹³⁷ Scott,¹³⁸ and Worthington.¹³⁹ Unfortunately, courts in different jurisdictions have approached this problem differently. This has made it difficult to make any general observations regarding this intersection. One area of apparent commonality between the jurisdictions which may be of assistance in understanding the intersection between the remedial constructive trust¹⁴⁰ and insolvency has been the recourse to the work of Professor Goode, who is a prime exponent of employing the insolvency spectre as a way of attempting to banish remedial proprietary ideas.

B. Goode's Analysis

Goode, by adopting an analysis premised upon the division between pure proprietary remedies and restitutionary proprietary remedies,¹⁴¹ has suggested that institutional and remedial constructive trusts are distinctive upon the basis of whether there is property present.¹⁴² An institutional constructive trust is founded

134 For example, R Goode, "The Right to Trace and Its Impact in Commercial Transactions" (1976) 92 *LQR* 360; "Ownership and Obligation in Commercial Transactions" (1987) 103 *LQR* 433; "Property and Unjust Enrichment" in A Burrows (ed), *Essays on the Law of Restitution* (1991) 215; and, "Proprietary Restitutionary Claims" in Cornish et al (eds), *Restitution: Past, Present and Future* (1998) 63.

135 M Cope, *Constructive Trusts*, Law Book Co (1992) and *Proprietary Claims and Remedies*, Federation Press (1997).

136 For example, A Oakley, *Constructive Trusts*, Sweet & Maxwell (3rd ed, 1997); "The Precise Effect of the Imposition of a Constructive Trust" in Goldstein (ed), *Equity and Contemporary Legal Developments* (1992) 427; *Parker and Mellows: The Modern Law of Trusts*, Sweet & Maxwell (6th ed, 1994) ch 8; and "Proprietary Claims and Their Priority in Insolvency" (1995) 54 *CLJ* 377 at 396-7, an article in which Oakley expressed admiration for the High Court's flexible approach in *Warman International v Dwyer* (1995) 182 *CLR* 544 to the award of remedies for breach of fiduciary duty.

137 P Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors" (1989) 68 *Can Bar Rev* 315.

138 C Scott, "The Remedial Constructive Trust in Commercial Transactions" [1993] *LMCLQ* 330.

139 S Worthington, *Proprietary Interests in Commercial Transactions*, Clarendon Press (1996).

140 The use of the remedial constructive trust here may be taken to represent the employment of all proprietary remedies.

141 For others who refer to this division, see R Goff and G Jones, *The Law of Restitution*, Sweet & Maxwell (4th ed, 1993) p 73 and P Birks, *An Introduction to the Law of Restitution*, note 104 *supra*, pp 15-16, 25, 49-73 and 87-93. See also P Birks, "Proprietary Rights as Remedies", note 89 *supra*.

142 This idea has had its major development in R Goode, "The Right to Trace and Its Impact in Commercial Transactions", note 134 *supra*; "Ownership and Obligation in Commercial Transactions", note 134 *supra*; and, "Property and Unjust Enrichment", note 134 *supra*. Substantially it was repeated in R Goode's recent essay "Proprietary Restitutionary Claims", note 134 *supra*.

upon the existence of a proprietary base,¹⁴³ whereas the remedial constructive trust is a remedy for a wrong. Importantly in the insolvency context, the remedial constructive trust only gives rise to a personal right to the transfer or delivery of an asset or to a charge or lien on it (called a right *ad rem*). The remedial constructive trust, according to Goode, does not confer any pre-existing 'proprietary' advantage upon claimants. In other words, his division entails that those who can claim only a remedial constructive trust will be defeated by the unsecured creditors. Access to this remedy is based upon "deemed agency gains". If there are no "deemed agency gains" and the activity should not have been undertaken at all, then the plaintiff is only entitled to a personal remedy. All this is based upon the division between institutional and remedial constructive trusts.

C. Shortcomings of Goode's Analysis

(i) Introduction

Goode's suggestion for a distinction between institutional and remedial constructive trusts is attractive in a superficial way but there are three fundamental problems with it. First, that Goode's thesis does not accurately reflect the law, the second relates to the property basis of Goode's thesis, while the third fundamental problem is that it does not reflect how the law should be.

(ii) *The Present State of the Law*¹⁴⁴

Before anything else, consideration must be given to the present state of law in the jurisdictions which have referred to Goode's analysis. In Canada, *Soulos*¹⁴⁵ explicitly referred to the writings of Goode. However, Goode's division into the constructive trust founded either on a proprietary base or as a remedy for a wrong stemming from deemed agency gains is not consistent with this Canadian division. However, it needs to be noted that Goode's approach *in name* was been adopted in *Soulos*, but not his analysis. At best, it is simply misleading to apply some of Goode's analysis, while ignoring other parts of it without explicitly stating so. In Australia, the law of restitution arguably does not involve this distinction. Glover has rejected this division in Australia.¹⁴⁶

An additional problem with Goode's thesis as it relates to the current state of the law involves consideration of Goode's two requirements for the institutional constructive trust. The first requirement is subtractive unjust enrichment and the second is the transfer to the defendant, which makes the defendant the plaintiff's

143 Goode's requirement of property for a true constructive trust is very similar to the requirement of Birks. However, Goode's approach is slightly narrower than the approach advocated by Birks in that Goode's analysis only applies where the plaintiff has a legal right to receive the intercepted benefit, rather than the mere expectation of receiving it.

144 This is where P Birks' article "The End of the Remedial Constructive Trust?" (1998) 12 *TLI* 202 should be relevant. Unfortunately, however, it is not relevant as it gives a misleading impression of what the law is. See D Wright, "Professor Birks and the Demise of the Remedial Constructive Trust" [1999] *RLR* 128.

145 Note 61 *supra*.

146 J Glover, "Equity and Restitution" in Parkinson (ed), *The Principles of Equity* (1996).

trustee. Taking these requirements in reverse order, it has been suggested¹⁴⁷ that the second requirement is unnecessary to Goode's thesis. Also the second requirement is question begging - in that part of Goode's answer is that there will be a trust when there is a trust. This circular reasoning places great stress upon the first requirement. That is, there must be property that has been taken from the plaintiff. Two comments can be made about this requirement. The first is that it does not reflect the law. Cases such as *Boardman v Phipps*¹⁴⁸ and *Attorney-General (Hong Kong) v Reid*¹⁴⁹ are the cases which immediately spring to mind but do not exhaust the list.¹⁵⁰ The second is much more important, as it involves the very concept of property itself.

(iii) Property

The second fundamental problem, related to property, actually is constituted by two problems. The first problem¹⁵¹ with Goode's thesis is that it incorporates a property based remedy, either being *in rem* or *ad rem*.¹⁵² The *ad rem* remedy advanced by Goode can be viewed in two ways. Either it is a compromised property remedy or, viewed another way, it is a special form of personal remedy. This confusion is not assisted by the fact that some of the cases involving the constructive trust also have involved remedies that are purely personal. The Canadian case of *LAC Minerals v International Corona Resources*¹⁵³ involved intensive consideration of whether the breach of duty produced a personal or property remedy.

Another problem with this is that it is completely dependant upon a static view of what constitutes property. It must be acknowledged that property is a construct; this is most apparent with equitable property. It is extremely dangerous to have any distinction based upon such a fluid concept. This is because the courts will be pressured to adopt a functional approach¹⁵⁴ to determining whether property exists or not. This involves the final problem and this is that courts are being subjected to greater pressure¹⁵⁵ to find property, which will then act as a gateway to relief. The ease with which equitable property may be created allows it to be readily employed in this functional way. The resort to the maxim that "equity considers as done that which ought to be

147 S Worthington, "Three Questions on Proprietary Restitutionary Claims" in Cornish et al (eds), *Restitution: Past, Present and Future* (1998) 81.

148 [1967] 2 AC 46.

149 [1994] 1 NZLR 1.

150 Constructive trusts following a breach of confidence are also examples of this point.

151 This is not a problem if Goode's analysis is rejected, as it can be considered to involve the notion of tailorability, which is discussed later in this article.

152 But K Barker, "Rescuing Remedialism in Unjust Enrichment Law: Why Remedies are Right" (1998) 57 *CLJ* 301 at 305 sees Goode as not discussing property, but a specific remedy. Goode refers to *ad rem* remedies as a personal order. This would seem to bring it extremely close to being a mandatory injunction. Frequently the remedial constructive trust is simply a variety of mandatory injunction.

153 (1989) 61 DLR (4th) 14.

154 A functional approach is one where the court decides a preliminary issue in a certain way, in order to reach a desired result. It can be understood as result based reasoning.

155 Amidst more costly litigation, which is generally not good for the size of the insolvent's estate.

done" in *Attorney-General for Hong Kong v Reid*¹⁵⁶ is a reflection of this pressure.

However if property is recognised as only being a factor, rather than a pre-requisite, which may indicate a proprietary remedy, then Goode's suggested division may be of some assistance in the court's determination whether or not to employ a proprietary remedy.

(iv) *Goode's Theory Does Not Correctly Indicate How the Law Should Develop*

The problems with relying upon property as the basis for a distinction between the two varieties have been discussed.¹⁵⁷ Only with restitution for unjust enrichment is the institutional constructive trust available. In Goode's theory regarding restitution for wrongs there is also a difference between where there are "deemed agency gains" and where there is not a "deemed agency gain" and the activity should not have been undertaken at all. Therefore Goode proposes two varieties of restitution, one being restitution for unjust enrichment and the second being restitution for wrongs. These two varieties of restitution produce a tri-partite remedial categorisation. The first problem is with regard to these two varieties of restitution.

As has been said these two varieties of restitution produce three different remedial responses. The first variety leads to the institutional constructive trust, whilst the second produces either the remedial constructive trust or only a personal remedy. Therefore, the distinction between the two varieties of restitution is critical. Unfortunately the difference in the remedial responses cannot withstand much attention. Sir Peter Millett has criticised the distinctions drawn by Goode as being impractical.¹⁵⁸ Also the different remedial responses are founded upon the presence of property. The unstable nature of property has already been discussed. There are even more problems with the two remedial responses to restitution for wrongs. The first point is to ask why there should be a remedial difference between these two forms of restitution for wrongs. Certainly Goode's thesis does not provide a satisfactory basis for this differentiated remedial response. Goode defends himself strongly on the issue of why there is a differentiated remedial response. Worthington has pointed out his error in this area. It consists of Goode looking for a rationale for his differentiated remedial response upon the basis of what the fiduciary has received following the breach of the fiduciary duty.¹⁵⁹ The problem that is pointed out by Worthington is that Goode is focussing upon the wrong thing with his defence. The relevant matter is the breach. As she points out, in neither case has the plaintiff lost any property or given any value.¹⁶⁰

156 [1994] 1 AC 324. Also S Worthington, *Proprietary Interests In Commercial Transactions*, note 139 *supra* relies upon this maxim extremely heavily.

157 See particularly note 1 *supra*.

158 Sir P Millett, "Remedies: The Error in *Lister v Stubbs*" in Birks (ed), *The Frontiers of Liability, Vol 1* (1994) 51 at 55-56.

159 S Worthington, "Three Questions on Proprietary Restitutionary Claims", note 147 *supra* at 85.

160 *Ibid* at 85.

The second problem with this division is that it separates the situations where there are "deemed agency gains" from the situation where there is not a "deemed agency gain" and the activity should not have been undertaken at all. This division cannot be sustained. Obviously it places great pressure upon the concept of "deemed agency gains". There will be even greater pressure as "deemed agency gains" is the gateway to a remedial response superior to the other variety of restitution for wrongs.

D. Conclusion

Although it appears that Goode's thesis provides a common thread throughout the cases upon the remedial constructive trust, upon close examination this is not so. But this does not mean that his theory should be completely abandoned. It still has some limited role to play with the constructive trust. A larger stage is required for a consideration of the remedial constructive trust and insolvency.

IX. GENERAL CONCLUSIONS ON ATTEMPTS TO BANISH PROPRIETARY REMEDIES

After examining the three main arguments in favour of banishing proprietary remedies it can be concluded that such attempts have not been successful. Obviously property should not be created on an ad hoc basis. A cautionary, evolutionary approach to the employment of proprietary remedies is essential. Further, these attempts have been successful in alerting the various jurisdictions to the importance of proprietary remedies in an insolvency context. This is extremely significant because when awarding a proprietary remedy, a court should be disposed to take account of the insolvency context of the case, this factor bearing on the range and appropriateness of the remedy. This appreciation of the context is all part of the new law of remedies.

X. THE NEW LAW OF REMEDIES

A. Disassociation of Liability and Remedy¹⁶¹

Perhaps the most important aspect of *Bathurst*¹⁶² relates to the High Court's observations concerning remedy selection. The High Court rejected the idea of some variety of direct link between the right¹⁶³ and remedy. What the High Court was endorsing was a separation of right and remedy.¹⁶⁴ This disassociation of liability¹⁶⁵ from remedy permits an explicit examination of the spectrum of

161 This disassociation is happening in many other jurisdictions, for example, see *Cadbury Schweppes Inc v FBI Foods Ltd* (1999) 167 DLR (4th) 577. This case is noted by A Abdullah and T Hang in "To Make the Remedy Fit The Wrong" (1999) 115 *LQR* 376.

162 Note 55 *supra*.

163 Or obligation.

164 *Bathurst*, note 55 *supra* at [42].

165 Liability is simply the breach of a right or obligation.

remedies that are available and requires a discussion of the appropriateness of one remedial response over another. This leads to a discussion of the nature of rights and remedies, as well as the relationship between remedies. The remedial constructive trust, as recognised by the High Court in *Bathurst*, thus plays a vital role in the continuing evolution of the law of remedies. Justice Deane in *Muschinski* held that

... the constructive trust has not outgrown its formative stage as an equitable remedy and should still be seen as constituting an *in personam* remedy attaching to property which may be moulded and adjusted to give effect to the application and inter-play of equitable principles in the circumstances of the particular case.¹⁶⁶

B. Remedy Selection

(i) Other Proprietary Remedies Available¹⁶⁷

It would be incorrect to assume that gaining an entitlement to an equitable proprietary remedy automatically results in an order for a constructive trust. Once it has been decided that there is an entitlement to an equitable proprietary remedy, the next question is how to decide which particular proprietary remedy is appropriate. According to the High Court in *Bathurst* the difference between Deane J and Gibbs CJ in *Muschinski* concerned the appropriate remedy to award in the case.¹⁶⁸ In *Sorochan v Sorochan*¹⁶⁹ Dickson CJC emphasised that the constructive trust constitutes only one judicially imposed remedy.¹⁷⁰ Professor Austin has stated that the constructive “trust arises, if at all at the end of the analysis rather than at the beginning and is treated as one of the variety of remedial choices”.¹⁷¹ The United States has consistently adopted a remedial approach to the constructive trust.¹⁷² There are other equitable proprietary remedies which may be ordered in preference to the constructive trust. The three main remedial proprietary remedies available in Canada and the United States are the constructive trust, the equitable lien and subrogation.

Justice Gummow has correctly observed that “the modern fascination with the constructive trust as a remedial device tends to obscure the range of proprietary remedies”.¹⁷³ Recent caselaw upon subrogation¹⁷⁴ and equitable liens¹⁷⁵ indicates their remedial nature.

166 Note 69 *supra* at 615. See also *Westdeutsche*, note 122 *supra*.

167 The term ‘proprietary remedies’ is employed here to include those remedies used to sustain a proprietary interest. For this reason it is appropriate to refer to subrogation as a proprietary remedy. This is the approach to proprietary remedies adopted by W Gummow, “Unjust Enrichment, Restitution and Proprietary Remedies” in Finn (ed), *Essays on Restitution* (1990) 47 at 73. It needs to be acknowledged that with equity’s flexibility towards property, designating a particular remedy as proprietary is of convenience only.

168 *Bathurst*, note 55 *supra* at [42].

169 (1986) 29 DLR (4th) 1.

170 *Ibid* at 7.

171 R Austin, note 128 *supra* at 75.

172 For example, W Fratcher and A Scott, *The Law of Trusts, Vol V*, Little Brown (4th ed, 1987). This work was quoted in the New South Court of Appeal’s decision in this case.

173 W Gummow, “Unjust Enrichment, Restitution and Proprietary Remedies”, note 167 *supra* at 85.

In extra-judicial writing, Gummow J has observed that “[t]he equitable lien has been somewhat a mysterious creature”.¹⁷⁶ It is important to remember that Gibbs CJ ordered an equitable charge in *Muschinski*, whereas Mason and Deane JJ awarded a constructive trust. The flexibility to award the appropriate remedy was being stressed in that case.

As has been noted, Gummow J, in an important review of *Napier v Hunter*,¹⁷⁷ stated that:

[o]ne consequence of the speeches in [*Napier v Hunter*] may be the payment of greater attention to the equitable lien in those Commonwealth jurisdictions where there is a growing attachment to the so-called “remedial constructive trust”.

This thinking is also evident in the High Court’s decision in *Bathurst* where the court held that:

An equitable remedy which falls short of the imposition of a trust may assist in avoiding a result whereby the plaintiff gains a beneficial proprietary interest which gives an unfair priority over equally deserving creditors of the defendant.¹⁷⁸

This quotation also raises the difficult topic of factors indicating why one remedy should be selected instead of another.

(ii) *Choosing Between Remedies*

It should be noted that there is a connection between the obligation and remedy, and the doctrine of precedent still operates with regard to the law of remedies. However, the recognition is overdue that the most appropriate remedy should be employed to address the problem generated by the breach of the obligation.¹⁸⁰ Thus, a remedy continuum is being constructed.¹⁸¹ It is prudent to note that one extremely important factor to determine the remedy will be the context in which the breach of obligation occurred. In this context, it is noteworthy to remember that the High Court has recently stated that “the cardinal principle of equity [is] that the remedy must be fashioned to fit the nature of the case and the particular facts”.¹⁸²

174 For example, *Ledingham v Ontario Hospital Services Commission* [1975] 1 SCR 332 at 337-338; *Re Trivan Pty Ltd*, note 8 *supra* at 372; *Boscawen v Bajwa*, note 3 *supra* at 335; *Parc (Battersea)*, note 4 *supra*.

175 For example, *Davies v Littlejohn*, note 38 *supra* at 185, *International Corona Resources Ltd v LAC Minerals Ltd* (1987) 44 DLR (4th) 592 (this judgment was affirmed on this point by the Supreme Court in *LAC Minerals v International Corona Resources*, note 153 *supra*) and *Napier v Hunter*, note 31 *supra*.

176 W Gummow, “Names and Equitable Liens”, note 44 *supra* at 162.

177 Note 31 *supra*.

178 W Gummow, “Names and Equitable Liens”, note 44 *supra* at 163.

179 *Bathurst*, note 55 *supra* at [42].

180 The consequences of the introduction by ss 51AA, AB and AC of the *Trade Practices Act* 1974 (Cth) restating notions of common law unconscionability, which, if nothing else, makes available a full range of statutory remedies. This unusual fusion of statute and equity may produce extremely interesting results. Such an approach may also produce something akin to the remedies continuum.

181 See D Wright, *The Remedial Constructive Trust*, note 72 *supra*, for a detailed discussion of the construction of the remedies continuum.

182 *Warman International Ltd v Dwyer*, note 136 *supra*.

In *The Remedial Constructive Trust*¹⁸³ a list of factors to be considered in selecting the appropriate remedy is outlined. One of the most important factors is context. This is particularly so regarding the availability of the remedial constructive trust in an insolvency. The High Court in *Bathurst* recognised this problem of granting a "proprietary interest which gives an unfair priority over equally deserving creditors of the defendant".¹⁸⁴ It is interesting to speculate what renders a particular creditor "equally deserving" or, to express the same point differently, what makes another creditor undeserving? This consideration referred to by the High Court coincides with the fourth point discussed by McLachlin J in *Soulos*.¹⁸⁵

In exercising this remedial flexibility the context is extremely important. For example, the question might be: did the breach occur in a domestic property dispute or a commercial context? This possibility of adopting a contextual analysis was recognised by the High Court in *Bathurst*.

PART 3

XI. INSOLVENCY-A FACTOR TO BE CONSIDERED IN THE AWARDING OF PROPRIETARY REMEDIES

It is apparent that three proprietary remedies are beginning to disclose themselves. These three are remedial subrogation, remedial equitable liens and remedial constructive trusts. There have been some attempts to banish these remedies (predominantly the remedial constructive trust). The first attempt involved the misportrayal of *Polly Peck* and *Fortex*, while the second urged that correct notions of property did not translate to property being a remedy. The third main attempt to banish proprietary remedies involved invoking of the insolvency spectre. Although all of these attempts contain problems, Goode's thesis should not be completely ignored nor abandoned.¹⁸⁶ It does have a limited role to play when determining when a proprietary remedy should be awarded. The New Zealand Court of Appeal in *Fortex*, stressing the insolvency context of the case, clearly indicated that the remedial constructive trust may have a role to play, at the very least, in insolvency. Stress was also placed upon the commercial context of the decision in *Westdeutsche* by Lords Goff¹⁸⁷ and Browne-Wilkinson.¹⁸⁸ It is certainly possible to appreciate the decision in *Re Goldcorp Exchange*¹⁸⁹ as simply the Privy Council showing greater concern for the

183 Note 72 *supra*, ch 5.

184 *Bathurst*, note 55 *supra* at [42].

185 Note 61 *supra* at 236, 241 and 243.

186 The other two main arguments are also helpful in that they certainly stress that the employment of proprietary remedies must be undertaken upon a cautious, evolutionary basis.

187 Note 122 *supra* at 689.

188 *Ibid* at 702-4.

189 [1995] 1 AC 74.

insolvency context of the case.¹⁹⁰ In that case the Privy Council held that "...remedial restitutionary rights [such as the remedial constructive trust] may prove in the future to be a valuable instrument of justice".¹⁹¹

As has been observed, the most important aspect of *Bathurst* relates to the High Court's observations concerning remedy selection. In that case the High Court rejected the concept of some variety of direct link between right and remedy. What the High Court was endorsing in *Bathurst* was a separation of right and remedy. It would be incorrect to assume that gaining an entitlement to a remedy automatically results in a constructive trust. Once it is decided that a property remedy is necessary, the next question is how to decide which particular property remedy is appropriate. Context is obviously extremely important to the award of equitable remedies. Santow J explicitly recognised this fact in *Woodson (Sales) Pty Ltd v Woodson (Australia) Pty Ltd* where his Honour held

Remedies of equity, flexibly applied in a modern commercial context, must be adapted to commercial realities. Thus, for example, relief which is appropriate to dealing with breaches of traditional family settlements may require adjustment in a commercial setting, necessarily rendering equitable relief inappropriate. Rather it recognises there may be wholly different circumstances and expectations. Such an adaptation of equitable relief removes much of the objection to equity's intrusion into commercial dealings, so long too as that intrusion remains principled rather than unpredictable.¹⁹²

Insolvency, thus, may have an extremely important bearing on what proprietary remedy is awarded. This method would seem to be a way to lessen the negative impact of a proprietary award. In an attempt to minimise the adverse consequences the Court may award an equitable lien rather than a constructive trust. Further, the proprietary remedies can be tailored.

The 'tailorability',¹⁹³ of proprietary remedies is vital to property's role as a remedy. In a way, Goode's *in rem* and *ad rem* constructive trusts may simply be considered to be an example of this flexibility.¹⁹⁴ The flexibility of the commencement date of the constructive trust is also evidence of its tailorability. The tailorability of subrogation was also demonstrated in *Parc (Battersea)*.¹⁹⁵ The same is true with the equitable lien. English¹⁹⁶ and Canadian¹⁹⁷ cases involving equitable liens have permitted proportional claims against surplus value of the sold asset exceeding the amount of the defendant's claim. However, an equitable lien will be ordered, but without such generous features, where the claimant has engaged in some relevant wrongdoing. The versatility of the

190 P Finn, "Equitable Doctrine and Discretion in Remedies" in Cornish et al (eds), *Restitution Past, Present and Future* (1998) 251 at 264 provides another interpretation of this decision.

191 Note 189 *supra* at 104.

192 (1996) 7 BPR 14,685 at 14,709.

193 See note 1 *supra*.

194 Most likely in a way completely unintended by Professor Goode.

195 On this point, see C Mitchell "Subrogation, Unjust Enrichment and Flexibility" [1998] *RLR* 144 at 148-149. The effect of this tailorability may be to limit the general nature of the 'propriety' of this remedy.

196 *Hussey v Palmer* [1972] 1 WLR 1286 and *Re Tilley's Will Trusts* [1967] Ch 1179.

197 *BC Teachers' Credit Union v Betterly* (1975) 61 DLR (3d) 755 and *Benjamins v Chartered Trust Co* (1965) 49 DLR (2nd) 1.

equitable lien has been demonstrated in *International Corona Resources Ltd v LAC Minerals Ltd*.¹⁹⁸ There, the Ontario Court of Appeal ruled that despite the fact that the defendant held the property on constructive trust for the plaintiff, the defendant was entitled to an equitable lien related to the costs it had incurred in improving the land. The court so held “in light of the reality that the expenditure made by [the defendant] to make the property productive inevitably would have been required on the part of [the plaintiff] had there been no breach of the constructive trust.”¹⁹⁹ In granting the constructive trust, the court held that it possessed the power to “relieve the constructive trustee from full liability where to refrain from doing so would, in all the circumstances, be inequitable.”²⁰⁰

In America, Laycock,²⁰¹ echoing the sentiments of Dobbs,²⁰² observed that the lien is an order imposed by the court in circumstances similar to those of a constructive trust.²⁰³ In addition, there are cases which show some flexibility in the nature and extent of an equitable lien. In *Re Erie Trust Co*²⁰⁴ the order of an equitable lien was limited to the amount of “actual losses” suffered by a plaintiff due to the fact that the defendant was insolvent. The Court was prepared to limit the amount although misappropriated funds had been used to acquire property that had appreciated. The imposition of a constructive trust would lead to the plaintiff capturing the gains. In the case of an insolvent defendant this would lead to fewer funds being available to unsecured creditors. *Robinson v Robinson*²⁰⁵ held that the lien is a remedy and not a property right in that one could not get a lien to secure other debts.²⁰⁶ The case also supports the view that the equitable lien can be used to limit the claim of a plaintiff to the amount of their actual loss.

The tailorability of the equitable lien can be clearly seen in *Jones v Sacramento Savings & Loan Association*.²⁰⁷ One of the most important features of the equitable lien is the ability to foreclose upon the property and recover the money due from those funds. However, in *Jones v Sacramento Savings & Loan Association*, where neither party was very culpable, the court tailored the equitable lien, so it did not have this foreclosure feature. This feature was missing in order to avoid “undue hardship” to the party that owned the

198 Note 171 *supra*. The Ontario Court of Appeal’s judgment was affirmed on this point by the Supreme Court in *LAC Minerals v International Corona Resources*, note 153 *supra*.

199 *Ibid* at 661.

200 *Ibid*.

201 D Laycock, *Modern American Remedies Cases and Materials*, Little Brown (2nd ed, 1994).

202 D Dobbs, note 6 *supra*.

203 Note 201 *supra*, p 582.

204 191A 613 (Pa 1937).

205 429 NE 2d 183 (Ill App 1981).

206 Here the debts due to an estranged wife for maintenance were supposedly secured through the imposition of a lien over a husband’s award in a proprietary estoppel case. The plaintiff, the estranged wife, was also awarded equitable relief in the same proprietary estoppel suit as the husband, the lien was imposed for debts other than those that arose in the present circumstances. This was held to be invalid.

207 56 Cal Rptr 741 (Cal App 1967).

property.²⁰⁸ Tailorability of proprietary remedies is essential to their usefulness as remedies.

PART 4

XII. CONCLUSION

Recent decisions by the superior courts in various Commonwealth jurisdictions have indicated the emergence of three major proprietary remedies. These three are remedial subrogation, the remedial equitable lien and the remedial constructive trust. Not surprisingly, the emergence of these proprietary remedies has not been universally welcomed. There have been vigorous attempts to banish proprietary remedies. This uneasy reception has been particularly noticeable in cases involving insolvency. However, the cases cited here indicate that these attempts at banishment have been unsuccessful and there is no prohibition on the use of proprietary remedies in an insolvency context.

The emergence of these proprietary remedies is a significant development in the new law of remedies where the search is for the most appropriate remedy. One important factor in determining the appropriate remedy is whether or not insolvency is involved in the case. The concept of 'tailorability' in regards to proprietary remedies is very significant in increasing the utility of proprietary remedies in the insolvency context.

208 *Ibid* at 747.