

**THE REIFICATION OF LEGAL CONCEPTS:  
*MUSCHINSKI v DODDS***

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It seems to be a common feature of human behaviour that we shy away from even benign formalities and make informal arrangements about all aspects of our lives, including our property. Whatever the reason for our dislike of formality, be it ignorance, trust, carelessness or uncertainty, the problems resulting from such informality continue to arise in the courts. This informality has given rise to much litigation, much of which stems from disputes about land. In their struggle to find a fair compromise between the interests of all parties, the courts have recognised or created, a range of interests from constructive trusts to equities, from licences to leases. The range is such that it is often difficult to predict what interest a court will find in a particular situation.

The necessity or desirability of formal legal requirements for the transmission of title to land will not be considered here other than to note that, though the economic importance of land may have diminished over the centuries, land remains geographically unique as well as economically, socially and psychologically important. Consequently there is a very definite need for certainty of ownership and security of title and for legally sanctioned formalities which provide such security. However, the tendency to informality noted above also creates a need for flexibility in the transfer of land and sometimes this flexibility requires courts to enforce arrangements which fail to comply with the legal formalities. Many such arrangements give rise to legitimate expectations among honest citizens and should be enforced. The difficulty is to determine, on substantial grounds but without undue rigidity, both which arrangements should be enforced and the extent to which they should be enforced.

Without attempting an exhaustive classification of the situations in which arrangements for the disposition of land should be enforced, it would be

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helpful at this stage to give a few examples. The most obvious example of an arrangement which should be enforced is, when the relevant statutory formalities, relating to the transfer or creation of legal or equitable interests, in general law or Torrens title land, have been met.<sup>1</sup> Short of this, courts in equity have generally regarded transactions as giving rise to equitable interests where, for instance, (a) there has been a concluded arrangement, at least one of the parties has relied on the arrangement and it would be to that party's detriment if the arrangement were not enforced,<sup>2</sup> or (b) where there has been unconscionable behaviour on the part of the party who now seeks to avoid the arrangement.<sup>3</sup> These situations have been described in such general terms that it is often difficult to classify an instant case as falling within one or other of them.

When a court considers whether to enforce an informal arrangement concerning land, there are commonly two main aspects to its decision. One concerns whether the arrangement is or should be, effectual as between the parties to it. The second concerns the more difficult yet sometimes overlooked problem of whether the arrangement has or should have, any effect on the interests of third parties. This second issue may be relevant even when no third party interests are known to exist. The courts may find that the arrangements have created one or more of a variety of interests which are often assumed to be discrete and mutually exclusive. Yet, although the courts may have recognised these various interests in an attempt to find the fairest resolution, the result has in general been unsatisfactory. This stems partly from the very substantial difficulty, unlikely to be entirely eliminated, of deciding which is the fairest result for all parties possible within the law. One element of the confusion can however be eliminated. This arises from a technique of judicial reasoning which though it provides the appearance of certainty involves unwarranted assumptions as to the nature of the interests recognised. These assumptions are embedded in the language of the decision, in particular in the terms used to describe the interests created by informal arrangements.

The court's decision might be that an arrangement has created a contract, enforceable perhaps by virtue of the doctrine of part performance, or a constructive trust, an equity, a licence, an equitable charge or some other perhaps unspecified equitable interest. The differences in names are not whimsical; the name influences the consequences either for the parties to the arrangement or for third parties. Indeed it would be reasonable to assume

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1 For land under the general law, with few exceptions, a deed is necessary for the legal title to pass (Conveyancing Act 1919 (NSW) s23B) while, in most cases, the transfer of equitable interests must be in writing (s23C). Note however that the Act specifically preserves the law relating to part performance (s23E, s54A(2)) and enables a contract to be enforced even when not in writing, provided that there is a sufficient note or memorandum (s54A). For Torrens Title land, registration is required (Real Property Act 1900 (NSW), s41).

2 *E.g. Ogilvie v. Ryan* [1976] 2 NSWLR 504

3 *E.g. Crabb v. Arun* [1976] 1 Ch 197; [1975] 3 All ER 865.

that in any situation, the court's decision as to which interest has arisen is made within a context which includes these consequences. Nevertheless it often seems that the court has not considered consequences. Rather, the view has been taken that the task of the judge is to identify first the interest which has been created by a particular arrangement and only then and if necessary, to consider the consequences for third parties. As one example, a judge might find that a constructive trust has arisen from the conduct of the parties, from which it would follow that the beneficiary under this trust has an equitable interest enforceable against third parties on the usual terms. Where that enforcement would injure innocent third parties it becomes relevant to ask whether this is an unavoidable consequence? How much control do judges have over such issues? To what extent does their reasoning obscure the extent of that control?

In his analysis of meaning, C.I.Lewis<sup>4</sup> makes a number of distinctions which are useful in approaching these questions. He distinguishes between the following modes of meaning of any term;

- i. *denotation*, which is the class of all actual, existing things to which the term applies,
- ii. *comprehension*, which includes all possible or imaginable things to which the term applies,
- iii. *signification*, which refers to that property in things, existing or imaginable, which is necessary for the term to be correctly applied and whose absence indicates that the term has not been correctly applied.<sup>5</sup>

Terms which refer to tangible objects may have all these modes; for instance there are existing animals to which the term 'zebra' applies (denotation); we may be able to imagine a different strain of zebra not yet developed with pink stripes (comprehension); and we may regard the possession of a horse-like striped body as the signification of 'zebra'. Other terms may have less modes; for instance, the term 'unicorn'.<sup>6</sup> This term has no denotation (unicorns do not exist), though it does have comprehension (we can understand what is meant when someone refers to 'unicorns'). Its signification is an animal having a horse's body and a single horn. Thus a term can have comprehension without denotation. It may also be possible for a term to have comprehension and denotation without signification, as where a concept is too nebulous to have a defining characteristic.

It is a common assumption and in this writer's view, a fallacy (particularly common in relation to legal and political concepts such as those being considered here) to conclude that terms which have comprehension also have denotation. It is a fallacy because just as 'unicorn' is a creation of the

<sup>4</sup> *Analysis of Knowledge and Valuation*, 1946, 39.

<sup>5</sup> Lewis also distinguishes a fourth mode, not relevant for present purposes, a term's 'intension' which is "the conjunction of all other terms each of which must be applicable to anything to which the given term would be correctly applicable."

<sup>6</sup> See for example A. Brecht, *Political Theory*, 1959, 510.

human imagination, so too are notions such as property, trust and contract. These terms are certainly meaningful; they are short-hand terms which refer not to any entity but to our understanding about relationships between people which are the particular concern of the legal system.<sup>7</sup> However it is not uncommon to find courts, indeed lawyers in general, regarding the task in hand as being that of discovering whether the circumstances they are considering have created (say), a constructive trust or equity. The fallacy is usually referred to as 'reification', or sometimes as 'conceptualism', or 'misplaced concreteness'.<sup>8</sup>

Usually associated with reification of concepts is an essentialist mode of enquiry which assumes that judges must recognise interests in terms of their essential features.<sup>9</sup> When courts adopt this approach their dominant concern becomes to discover the defining characteristics of the interest under consideration. Judges then ask whether an interest is *really* an equity or an equitable interest, a licence or a lease, a tenancy at will or adverse possession, the answer depending on the presence of what are regarded as the defining characteristics. The implication is that in identifying the interest it is important to distinguish two similar but essentially different interests, much as one might distinguish between two species of animals.

While essentialism may or may not be a sensible form of enquiry in the natural sciences,<sup>10</sup> it clearly raises problems when applied to terms that have no denotation for the approach assumes denotation and sets the judge on a hunt for defining characteristics. It thus subtly redefines the basis of the judicial enterprise in a particular way, for if each of these legal concepts has defining or essential characteristics, then clearly it is the task of the court to discover whether such characteristic(s) can be discerned in the situation under review. Furthermore it implies that given those essential features the identification of one particular interest is inevitable, let the chips fall where they may. While it is possible, though in this writer's opinion unlikely and undesirable, that these terms might eventually become mutually exclusive, referring to remedies which do not overlap, presently we are a long way from that stage. The essentialist approach, the hunt for definition, is misconceived

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7 This claim is of course, very different from that of the logical positivists who claimed that any statement that could not be verified by sense experience was meaningless. See A.J. Ayer, *Language, Truth and Logic*, (2nd ed). 1946.

8 See F.A. Hayek, *The Counter-Revolution of Science*, 1954, 54, A.N. Whitehead, *Science and the Modern World*, 1925 and W.J. Goode and P.K. Hatt, *Methods in Social Research*, 1952.

9 For a discussion of this approach under the name of "methodological essentialism" see K.R. Popper, *The Open Society and Its Enemies*, (5th ed.) 1966 vol.1,31. Popper attributes what he sees as the "backwardness" of the social sciences to the fact that for the most part their problems are treated by essentialist methods.

10 There has been considerable debate among scientists and philosophers of science on this issue. See K.R. Popper, note 11, supra, 32, J. Stone, *Parallel processing in the Visual System*, 1983, 135.

and assumes a precision that does not exist. When a court sees its task as being to discover if, for instance, a constructive trust exists rather than being to decide if, in the light of past decisions it would be appropriate to impose a constructive trust, the enquiry is depersonalised. A court which views its role in this way can easily lose touch with important considerations of fairness and flexibility. This depersonalisation can of course be attractive to a court faced with a difficult decision. The illusion of discovery frees the court of the responsibility for the consequences of its decision; but the same illusion obscures the creative potential of the court's work.

Law is a metaphysical not a physical phenomenon and legal concepts are tools which ought to work for us rather than impose burdens. When courts reify these concepts they become enmeshed in nets of their own making and must perform Houdini-like feats to escape. Unfortunately the attempts to cut through the nets, even when successful, may damage the tools. While it may very often be the case that lawyers are not misled by their own rhetoric and commonly use such language only as a legal shorthand, they are more likely to avoid the essentialist pitfall if they have in mind an alternative approach. This is the instrumentalist approach.

There are many variants of instrumentalism in the philosophy of science but all have in common the notion that concepts and theories are to be judged not by their correspondence to reality but by their usefulness in analysis and explanation.<sup>11</sup> A good example of this emphasis on usefulness is quoted by Popper<sup>12</sup> who tells how Galileo's enthusiastic advocacy of the Copernican view of the universe brought him into conflict with the Church. Galileo was advised by Cardinal Bellarmino that problems raised by the Copernican view could be avoided if the view was put forward as a theoretical construct, useful to explain certain astronomical phenomena, rather than as a description of reality. Galileo refused, insisting, (at least until he was shown the rack), on the realism of the explanation. Since Galileo's rejection of instrumentalism its status as a *modus operandi* for the physical sciences has been controversial. While it is rejected by some scientists and their philosophers,<sup>13</sup> others would accept only an instrumentalist view of scientific knowledge.<sup>14</sup> Irrespective of this debate, there is still for most of us, a significant distinction between a descriptive body of knowledge, such as the natural sciences and a prescriptive tradition, such as law. Consequently, instrumentalism has much to recommend it as an approach to legal analysis. In particular the instrumentalist understanding of legal concepts contains a salutary reminder of who 'owns the game', the concepts or the community. It has the potential to eliminate much of the confusion in the area under

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11 See generally, A.F. Chalmers, *What Is This Thing Called Science*, 1976, Ch.10

12 K.P. Popper, "Three Views Concerning Human Knowledge", *Conjectures and Refutations: The Growth of Scientific Knowledge*, (4th ed.) 1972, 98.

13 *Ibid.*

14 P. Feyerabend, *Against Method*, 1978.

discussion. Before elaborating on the suggestion it is necessary to dispose of a more familiar controversy involving instrumentalism.

There is in jurisprudence a long-standing debate over the merits of two competing models of judicial decision making, instrumentalism and formalism. Instrumentalism in this context is said to be a means-end approach, “a technique of selecting appropriate means for given ends”,<sup>15</sup> concerned with effectiveness, expedition and social welfare. On the other hand, formalism is supposedly more concerned with the value-free elaboration of a body of doctrine by a process of deduction from settled rules. Generally the former has been more closely associated with a utilitarian ethic and the latter with a natural law perspective. The debate has had considerable influence on common law jurisprudence although its most usual locus has been in relation to the Constitution of the United States and its Bill of Rights.<sup>16</sup> However the distinction is based on a fiction as Julius Stone’s lifelong analysis of legal reasoning so powerfully demonstrated. Formalism in the strict sense is not just undesirable but impossible.<sup>17</sup> Disputed questions of law cannot be settled by the application of logic to rules laid down in precedent cases else they would not come before appellate courts.<sup>18</sup> This being so, the dichotomy of instrumentalism and formalism, as Lynda Sharpe Paine demonstrates, disappears. Paine suggests that the controversy is based on

a misconception of the nature of the relationships between reasons referring to principles or rules and reasons referring to consequences. Reasons of both types are essential to rational argument. The key to different outcomes lies in differences in the particular rules, principles, and consequences found to be relevant, and that depends in part on how the disputed issue is conceived. That is, contrasts in substantive values are more basic than the structure of the reasons offered.<sup>19</sup>

Essentialism has contributed much to the misconception to which Paine refers. The notion that judges are free (“obliged”, in Julius Stone’s terms) to make new law has caused disquiet because ‘freedom’ too has been reified and the absence of all restraint has been regarded as its essential characteristic, its

15 D.M. Trubeck, “Towards a Social Theory of Law: An Essay on the Study of Law and Development”, 82 *Yale L J* 1,19.

16 M.J. Horwitz, “The Emergence of an Instrumental Conception of Law”, *The Transformation of American Law 1780-1860*, 1977; W.E. Nelson, “The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America”, 87 *Harv L Rev* 513; Note, “Formalism, Legal Realism and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments” 90 *Harv L Rev* 945.

17 J. Stone, *The Province and Function of Law*, 1946; *Legal System and Lawyers’ Reasonings*, 1964; *Precedent and Law*, 1985.

18 Counsel in *Dahlia Ltd v. Yvonne*, reported in A.P. Herbert, *Uncommon Law*, (2nd ed) 1969, 314, relied on this point when he argued before the House of Lords, that costs in his client’s appeal should be borne by the Crown on the grounds that the the decision of the House was in the nature of an Act of God as it met the settled definition that “no reasonable man could have been expected to anticipate it”. Counsel elaborated that “no reasonable man can foresee a decision of the House of Lords, for otherwise no reasonable man would appeal to the House ..., only to lose his case.” (316). The House rejected the argument. Counsel was offered a position in the Home Office and was not heard of subsequently.

19 L.S. Paine, “Instrumentalism v. Formalism: Dissolving the Dichotomy”, 1978 *Wisc L R* 997, 998.

‘signification’. Yet ‘freedom’ is another term which, though it has comprehension, has no denotation. The appropriate question to ask when a person or activity is said to be ‘free’ is, “Free from what?”. The statement that judges are free from logical compulsion to apply particular rules in particular ways does not imply that they are free from all restraint. The matter really comes down to the perennial problem of how, in the absence of a binding precedent, a judge arrives at and justifies his decision. What role do the precedents play if they do not determine the decision in the instant case. Julius Stone gave a convincing account of how and why precedents do not bind, do not logically compel a particular conclusion. He was neither so explicit nor so detailed however about the extent of their influence in the absence of this logical compulsion. It is clear however that though precedents may not compel, they still have a considerable role to play. A judge does not make his decision in a vacuum and previous approaches to similar problems will combine with other factors, too numerous to mention here, to restrict the “leeways of choice”.<sup>20</sup> Commentators have emphasised different aspects of the restraint which they see affecting judges and have given varying weight to their influence on the development of the common law. Stone and Llewellyn have referred to “steadying factors”,<sup>21</sup> Dworkin to “principles”,<sup>22</sup> MacCormick to “coherence”,<sup>23</sup> Coper to “fidelity”<sup>24</sup> and Krygier to “tradition”.<sup>25</sup> Irrespective of emphasis, identification of these factors makes explicit a recognition that even judges consciously making law are not totally free from restraint. The alternative to logical certainty is not necessarily total chaos. An instrumentalist approach recognises that even where precedents do not bind they clearly influence and it allows a judge to take enlightened advantage of the wisdom of previous decisions. Where the subtlety of the instrumental approach is not fully appreciated, the essentialist approach is likely to be seen as the only safeguard against unbridled idiosyncrasy.

Signs of this tension between essentialism and instrumentalism can be seen in a recent case in which the High Court has had once again to consider claims based on informal agreements relating to land. In *Muschinski v. Dodds*,<sup>26</sup> a case remarkable for the variety of reasons given for judgment, the court considered the claim of Mrs Muschinski that she had the sole beneficial entitlement to land which she held as tenant in common with Mr Dodds. Mr Dodds and Mrs Muschinski had been living in Mrs Muschinski’s home in Ingleburn in a volatile de facto relationship for some years. In an attempt to overcome the difficulties in their relationship they decided to purchase land at Picton on which there was an old cottage. They planned to develop the

20 J. Stone, *Legal System and Lawyers’ Reasonings*, 1964, Ch. 7.

21 K. Llewellyn, *The Common Law Tradition*, 1960; J. Stone, Precedent and Law, note 16 supra, .

22 R. Dworkin, *Taking rights Seriously*, 1978, Ch.4.

23 N. MacCormick, *Legal Reasoning and Legal Theory*, 1978.

24 M. Coper, *Freedom of Interstate Trade under the Australian Constitution*, 1983.

25 M. Krygier, “Law As Tradition”, (1965) 5 *Law and Philosophy* 237.

26 (1985) 62 ALR 429

cottage as a craft shop and to build a prefabricated residence on the land. At the time of purchase Mr Dodds was awaiting the finalisation of his divorce settlement which he hoped would yield some money for him to contribute to the proposed venture. Until then it was agreed that Mrs Muschinski would finance the purchase from the proceeds of the sale of the Ingleburn home and that Mr Dodds would pay for the erection of the prefabricated home when his divorce was finalised. Before the home was built (or the alternative plan, for Mr Dodds to pay for the development of the existing cottage implemented), the couple's relationship foundered. At that stage Mrs Muschinski had contributed \$25,259.45 to the purchase and improvement of the property, Mr Dodds had contributed only \$2,549.77.

There had been some discussion between the parties as to legal ownership and on legal advice the property had been conveyed to them as tenants-in-common. However in the Equity Division of the Supreme Court of New South Wales Mrs Muschinski claimed a declaration that, by virtue of a resulting trust, she was the sole beneficial owner and that Mr Dodds held his interest in trust for her. This claim was dismissed by the Supreme Court, the Court of Appeal and finally by all five judges of the High Court. The presumption of a resulting trust was held to be rebutted by evidence that Mrs Muschinski intended Mr Dodds to have an immediate and unconditional interest in the property.

Nevertheless the High Court did not regard Mr Dodds as being entirely free from obligation. Clearly there was some understanding between the parties as to the contribution he was to make to their arrangements. Though the precise nature of that understanding and its legal consequences was not so clear. The court had a number of options. Assuming that Mrs Muschinski was entitled to relief of some kind, it had to decide if this was to be purely personal or alternatively whether Mrs. Muschinski had a proprietary claim of one sort or other.

A majority of the Court was of the opinion that, although there was no resulting trust, Mrs Muschinski's claim was secured by an interest in the land. While it is not surprising that Mrs Muschinski's claim was regarded as proprietary, it is by no means self-evident and it does immediately raise the problem of ranking her claim in relation to other claims which might exist over the land. This is an important consideration even where, as here, the court has no knowledge of any other claims. In the absence of such knowledge the court has to determine what will be fair even in unforeseen circumstances.

Counsel for Mrs Muschinski argued that the court had the right to create a constructive trust whenever the conduct of the legal owner made it equitable to do so. The response of the Chief Justice was unequivocal;

the view that the court can disregard legal and equitable rights and simply do what is fair is not supported in England.....and is contrary to established doctrine in Australia.<sup>27</sup>

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<sup>27</sup> Note 26 *supra*, 436.

Whatever might be the “ill-defined limits of the rules relating to constructive trusts”,<sup>28</sup> the fact that there was an actual intention that the parties should hold equal beneficial interests in the property was, for the Chief Justice, dispositive of the issue.<sup>29</sup> Brennan J, with Dawson J in agreement, came to the same conclusion on this point.<sup>30</sup> However unlike the Chief Justice he did not find any other source of relief for the plaintiff. Despite this Brennan J gave plaintiffs who find themselves in similar positions considerable cause for optimism by suggesting that Mrs Muschinski could have succeeded in a claim for compensation had this been argued. In Brennan J’s opinion the gift to Mr Dodds was made on condition that he fulfil his assurances that he would help Mrs Muschinski set up a craft business on the land, have a cottage built and pay for its erection from his divorce settlement and earnings. His Honour pointed out that conditions attached to gifts may be of two kinds, those which effect a forfeiture at common law and those which are enforceable in equity by a decree of specific performance or by an order for compensation. While the former creates a proprietary interest and thus security for the fulfilment of the condition, the latter gives rise only to a personal obligation enforceable in equity. Whether a condition creates a proprietary or a personal interest

depends upon the intention of the donor communicated to the donee at the time when the latter accepts the property, that is, the intention which the donee reasonably understands to be the donor intention from what the donor has said or done.<sup>31</sup>

The condition which attached to the gift under consideration was of the latter type and as Mrs Muschinski had claimed only a proprietary interest she could not succeed.

The approach of the Chief Justice was quite different. Although there was, in his view, no question of there being a constructive trust in this case, there could and should, he thought, be an equitable accounting between the parties. The fact that they had been joint purchasers under the contract of sale made them jointly and severally liable to pay the price, “with the consequence that, if one discharged more than his or her proper share [of the burden] he or she could call on the other for contribution.”<sup>32</sup>

Although this presumption could be rebutted by evidence that the parties had a contrary intention, there was no evidence of such an intention here. Thus, the Chief Justice concluded, Mrs Muschinski was entitled to contribution to the extent to which she had paid more than one-half of the

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<sup>28</sup> *Id.*, 437.

<sup>29</sup> *Id.*, 436-37.

<sup>30</sup> *Id.*, 443.

<sup>31</sup> *Id.*, 445.

<sup>32</sup> *Id.*, 437 and the authorities cited there by the Chief Justice. In comparison with the views of Brennan J, discussed *supra*, it is interesting to note that Gibbs CJ was not deterred from this conclusion by the fact that, like the claim for compensation, the point had not been argued in either the Supreme Court or the High Court although according to the Chief Justice, suggestions to this effect had been made from the High Court bench during argument (439). In contrast, Deane J thought that the absence of argument on the point eliminated contribution as an appropriate basis for relief (453).

purchase price and that the amount should be secured by an equitable charge upon the half interest of Mr Dodds.

The other members of the majority, Mason and Deane JJ reasoned differently, although to the same end. Deane J, with whom Mason J agreed, thought that although “no relief [was] available to Mrs Muschinski on the grounds of breach of express or implied agreement or of express or implied trust”,<sup>33</sup> the facts could support a constructive trust based on the collapse of the joint venture of the parties and the failure of their personal relationship. In these circumstances Deane J thought that each party was “entitled to insist upon realization of the asset, repayment of her or his contribution and distribution of any surplus” and that the property should be held subject to a trust to that effect.<sup>34</sup> However Deane J was quite specific that “lest the legitimate claims of third parties be adversely affected,” the trust should date only from the date of publication of the Court’s reasons for judgment. So in the end, the plaintiff succeeded, even though a majority of the judges thought that there was no resulting trust no constructive trust and no right to contribution or compensation.

Such diametrically opposed views particularly as to the existence of a constructive trust (in a case where there was considerable agreement as to the merits), suggests that the members of the Court have very different understandings of the nature of such trusts. Why did a majority of the Court think that there was no constructive trust here? Is there a substantial rather than a merely nominal difference between the conclusion of the Chief Justice that Mr Dodds’ obligation to pay half of the purchase price was supported by an equitable charge, and that of Deane J that it created a constructive trust? Clearly the role of intention is crucial to these different conclusions. As far as Gibbs CJ was concerned the absence of intention was fatal to the existence of a constructive trust though it was not necessary for equitable intervention in the form of a right to contribution. In the latter case intention would only be relevant if there was evidence of an actual (not imputed) intention to waive the right. On the other hand, while Deane J agreed that the parties intended their shares to be equal, he did not see this as excluding the imposition of a constructive trust.

As indicated above, Brennan J agreed with the Chief Justice on the necessity of intention for constructive trusts and would also impose the same requirement for compensation. His Honour was adamant that the question of intention,

must be answered as a matter of fact by reference to what the parties said and did when, or before, the property was purchased. The inference to be drawn from what the parties said and did is unaffected by the existence of equitable principles unknown to the parties at the time....The inference of fact must be drawn from the slender evidentiary material available.<sup>35</sup>

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33 *Id.*, 449.

34 *Id.*, 458.

35 *Id.*, 445.

Although not new this debate over intention in relation to constructive trusts is puzzling. Traditionally constructive trusts have been imposed irrespective of intention to prevent the legal owner of property from benefiting from his unconscionable or fraudulent behaviour.<sup>36</sup> However a number of recent cases have cast doubt on this description. The seminal case is *Allen v. Snyder*<sup>37</sup> in which the New South Wales Court of Appeal refused to impose a constructive trust on the legal owner of property in favour of his de facto wife. The Court disclaimed the power to vary property rights merely in accordance with considerations of fairness.<sup>38</sup> Where there is not sufficient evidence of an intention, common to both parties, that the plaintiff should have a beneficial interest, a contribution to the acquisition, maintenance or improvement of the property will not according to *Allen v. Snyder* support a constructive trust. However this insistence that, irrespective of fairness, courts cannot impose a constructive trust if the parties did not themselves intend the plaintiff to have a proprietary interest, is to make intention an essential characteristic of a constructive trust. The approach has several disadvantages. Firstly, it seems to overlook the only reason why intention should be important for the grant of a remedy which traditionally has not relied on intention. It is the proved intention which leads us to characterise the subsequent behaviour as unfair. The court is asked to enforce an incomplete gift on the grounds that the plaintiff's contribution has been such that it would be unfair not to require the now reluctant defendant to complete the gift. It is the plaintiff's contribution which outweighs the usual judicial reluctance to enforce an incomplete gift and compels recognition of a position somewhere between a pure gift and a contract. In this situation the claimed unfairness in not completing the gift clearly depends upon there having been an intention to make a gift in the first place. However this does not rule out the possibility that there can be other reasons for regarding behaviour as inequitable. Secondly, it is inevitable that a rule which tells judges that they cannot provide relief in unfair situations will force them to find other bases for imposing equitable solutions.<sup>39</sup> The result is the creation of unnecessary categories and the blurring of useful distinctions.<sup>40</sup>

In *Muschinski v. Dodds*, Deane J provided an analysis of constructive trusts which cuts through this confusion. His Honour thought that the situation raised the familiar question of whether a constructive trust is an institution or remedy. Though constructive trusts have much in common with express and

36 *Brown v. Litton* (1711) 1 P Wms 140; 24 ER 329; *Keech v. Sandford* (1726) Sel Cas Ch 61; 25 ER 223.

37 [1977] 2 NSWLR 685.

38 *Id.*, per Glass JA 690

39 *Morris v. Morris* [1982] 1 NSWLR 61; *Baumgartner v. Baumgartner* [1985] 2 NSWLR 406.

40 A pertinent example is the distinction between imputed and inferred intention, drawn in *Allen v. Snyder*. Glass JA insisted that only the latter was sufficient for a constructive trust but allowed that it might be inferred from conduct even if "it has not been the subject of any express communication between the parties." (691). The distinction may be maintainable in theory, but it is hard to see how a judge could know, let alone demonstrate to anyone else, that he has identified an actual intention existing in the minds of the parties rather than the intention which, being consistent with their acts, they might have had if they had thought about the matter.

implied trusts, *e.g.* subject matter, trustee and beneficiary, the rationale is different. Whereas the latter are usually explained with reference to intention, constructive trusts are predominantly remedial, imposed irrespective of intention. Nevertheless,

If “institution” is understood as connoting a relationship which arises and exists under the law independent of any order of a court, and “remedy” is defined as referring to the actual establishment of a relationship by such an order, the catchwords of “institution” and “remedy” do serve the function of highlighting a conceptual problem that persists about the true nature of a constructive trust.<sup>41</sup>

Though Deane J was not specific on the point, the conceptual problem to which he refers seems to be that identified above, the problem of reification and essentialism. The constructive trust is a remedy that a court may impose prospectively or retrospectively. In some circumstances, it is so predictable that a constructive trust will be imposed retrospectively that lawyers are entitled to proceed, and habitually do so proceed, on the basis that there *is* a constructive trust, just as they habitually anticipate the specific enforcement of some contracts or the recognition of rights arising under express trusts by saying that there *is* a contract, or there is an express trust. In such a case it makes some sense to speak of the constructive trust as if it had been created by the acts of the parties and existed independently of any judicial determination and it is tempting to conceptualise it as a ‘real’ entity, existing perhaps under the auspices of equity but dating inexorably from the time of the actions which created it. It is easy for a judge to slip from this view to an assumption that the ramifications of the existence of a constructive trust are beyond the court’s control, for if the trust arises from and has existed since, the time of the relevant actions, its existence may threaten the interests of third parties even when the court perceives that this would be neither fair nor equitable. But if one avoids the dual traps of reification and essentialism and regards the constructive trust as a tool then it can be used without fear of unintended consequences. As Deane J went on to say,

In this country at least, the constructive trust has not outgrown its formative stages 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. In particular, where competing common law or equitable claims are or may be involved, a declaration of constructive trust by way of remedy can properly be so framed that the consequences of its imposition are operative only from the date of judgment or formal court order or some other specified date.<sup>42</sup>

This approach is so eminently sensible that one wonders why the instrumental approach to constructive trusts is not more common. The answer seems to be the fear that one avoids the Scylla of unintended consequences only at the risk of foundering on the Charybdis of unfettered judicial discretion. It is a common fallacy both to believe that certainty *must* be possible because the only alternative to it is chaos. Yet recognition of the

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41 *Id.*, 451.

42 *Id.*, 451.

courts' ability to tailor constructive trusts to the requirements of the individual case does not mean, as Deane J was quick to point out, that the constructive trust is "a medium for the indulgence of idiosyncratic notions of fairness and justice". Gibbs CJ agreed in substance but the form of his agreement is instructive. Whereas Deane J thought that constructive trusts could only be imposed according to established equitable principles or by the "the legitimate processes of legal reasoning, by analogy, induction and deduction...", the Chief Justice in the comment quoted above<sup>43</sup> seems to suggest that in some circumstances equitable rights exist whose existence is an obstacle to 'doing what is fair' and whose existence the court cannot disregard. The reference seems to be to Mr Dodds' beneficial interest which the court cannot encumber with a constructive trust because both parties intended him to have a beneficial interest equal to that of Mrs Muschinski. Yet the equitable charge is also an encumbrance and would be preferable to a constructive trust in this situation, only if one holds the essentialist view that a constructive trust must date from the conduct which fulfilled the necessary conditions. According to that approach the constructive trust, when it arises, makes the beneficiary a part owner of the land in equity. It would follow that rights of third parties whose interests were acquired after that date may be affected by the trust. It would also follow that any increase in the value of the land would result in an increase in the value of the beneficial interest.

This difficulty is avoided if one takes an instrumental approach as does Deane J and recognises that the constructive trust is a remedial device controlled by the courts. The interests of justice will be better served the more courts recognise that control and avoid the rigidity imposed by an essentialist approach. They can then concentrate on finding a just solution to the dispute, free from the distraction of unnecessary categories. The elimination of these superfluous categories would add to the law's clarity, if not its certainty.

For the reasons outlined above, as far as arrangements relating to land are concerned, the rigidity and complexity of the essentialist approach have most often caused difficulty where the interests of third parties are either directly involved or are in the contemplation of the courts. The difficult distinction between equities and equitable interests is a good illustration.<sup>44</sup> A great deal has been written on this subject and it is not intended to traverse ground already covered. However one point warrants emphasis. The distinction between equities and equitable interests, and between equities which are proprietary and those which are not, can depend only upon the courts' assessment of the appropriate remedy for the particular circumstances and the extent to which previous cases justify the anticipation of judicial opinion.

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43 Note 27, *supra*.

44 The distinction between leases and licences poses similar problems (see *Radaich v. Smith* 101 CLR 209, *Isaac v. Hotel de Paris* [1960] 1 All ER 348 and *Street v. Mounford* [1985] All ER 289) as does the question of whether contractual licences are proprietary or, from another perspective, revocable (see *Cowell v. Rosehill Racecourse Co Ltd* 56 CLR 605 and *Graham H Roberts Pty Ltd v. Maurbeth Investments Pty Ltd* [1974] 1 NSWLR 93).

Neave and Weinberg in their analysis of the function of equities distinguish between “defined” and “undefined” equities.<sup>45</sup> Defined equities are those imposed in situations where there is “no doubt about the plaintiff’s entitlement to a remedy..” and where “..[t]he enforcement of A’s right against B is no more discretionary than is the right of a purchaser of land to assert his estate contract interest against the vendor.”<sup>46</sup>

Undefined equities are those at an earlier stage of development where the use of the term, ‘equity’ means no more than that the court decided to give the plaintiff a remedy against the defendant and

the case was not clearly covered by existing contractual, or tortious principles, and the interest asserted did not fall within a traditionally defined category of proprietary interest.<sup>47</sup>

The point is similar to that made above in relation to constructive trusts, some of which seem to be beyond, and some within, the discretion of the court. A statement that a defined equity ‘exists’ can be seen merely as a sensible recognition of previous decisions. By definition this guidance is not available where ‘undefined’ equities are concerned. However the question of whether the interest so recognised is binding on third parties would follow inevitably from this characterisation only if the courts, as a matter of policy, had used the term with perfect consistency to indicate a finding on this matter. Given that some ‘equities’ are undoubtedly proprietary and some undoubtedly are not, then the question cannot be resolved by identifying an interest as an equity, but only by posing the further question of what in all the circumstances, should be the ambit of the relief granted. The answer for lawyers seeking to advise their clients will be found not in the nomenclature adopted but in a analysis of the respective merits of the parties to the litigation and any third parties which the court may have in contemplation. This task would be easier and the advice better if courts were to follow the example set by Deane J in *Muschinski v. Dodds* and adopt an explicitly instrumental approach.

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45 For a comprehensive and useful discussion of this point and of equities in general see M. Neave and M. Weinberg “The Nature and Function of Equities”, (1979) 6 *U Tas LR* 24, 115.

46 *Id.*, 26. The right of a vendor who is fraudulently induced by the purchaser to convey land is given as an example of a defined equity. As the authors point out, the existence of that right as “some kind of proprietary interest has never been in question” although the extent of the proprietary has been a matter of controversy. See *Latec Investments Ltd v. Hotel Terrigal Pty Ltd (in liq)* 113 CLR 265

47 *Ibid.* The ‘equity of acquiescence’ (*Inwards v. Baker* [1965] 2 QB 29) and the ‘equity of confidence’ (*Prince Albert v. Strange* 64 ER 293; *Argyll v. Argyll* [1965] 1 ALL ER 611) are cited as examples of undefined equities.