

## WHAT ARE THE DUTIES OF CONSTRUCTIVE TRUSTEES?

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*There is little discussion in either case law or academic commentary on the duties of constructive trustees. Largely, this is because both streams of discourse are primarily concerned with the circumstances in which constructive trusts are imposed, and the appropriateness of the label of 'trust' in such cases. Those questions are of fundamental importance, however the focus on them has led to the result that there is little clarity as to what being a constructive trustee involves at a practical level. This article seeks to answer that question in respect of each of the categories of constructive trust that are generally recognised in Australian law. It does so by examining the rationale of each of the duties of express trustees, and considering their applicability to each category of constructive trust in light of those rationales.*

### I INTRODUCTION

Constructive trusts tend to get a bad rap. The often heard criticism is that there is no unifying theory that can satisfactorily account for the myriad of circumstances in which constructive trusts are imposed.<sup>1</sup> Instead, we have inherited what Dr Edward Sykes called, over 75 years ago, 'a heterogenous collection of relationships to which the phrase "constructive trust" is loosely applied',<sup>2</sup> and then somewhat less charitably, 'a vague dust-heap for the reception of relationships which are difficult to classify or which are unwanted in other branches of the law'.<sup>3</sup> There is no shortage of such epithets in the commentary and case law: constructive trusts have been described as a 'mess',<sup>4</sup> a 'monster',<sup>5</sup> a 'kaleidoscope',<sup>6</sup> a 'taxonomical nightmare',<sup>7</sup> a 'fertile source of

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1 Cf Ying Khai Liew, *Rationalising Constructive Trusts* (Hart Publishing, 2017).

2 Edward I Sykes, 'The Doctrine of Constructive Trusts' (1941) 15 *Australian Law Journal* 171, 171.

3 *Ibid* 175.

4 *Imobilari Pty Ltd v Opes Prime Stockbroking Ltd* (2008) 252 ALR 41, 47 [18] (Finkelstein J).

5 John P Dawson, *Unjust Enrichment: A Comparative Analysis: A Series of Lectures Delivered under the Auspices of the Julius Rosenthal Foundation at Northwestern University School of Law, in April 1950* (William S Hein & Co, 1999) 30.

confusion’,<sup>8</sup> a ‘cluster of outcomes masquerading under [one] label’,<sup>9</sup> ‘a vague hinterland between the trust relationship and other relationships’<sup>10</sup> and a ‘rag-bag of instances having little in common’.<sup>11</sup>

Faced with such a disarray, the project of commentators in this area has been to impose order through taxonomy. That project is marked by great debates, such as whether constructive trusts belong more naturally to equity or to the law of restitution,<sup>12</sup> and to what extent constructive trusts are ‘remedial’ or ‘institutional’.<sup>13</sup> A large volume of the commentary is devoted to ascertaining the circumstances in which particular constructive trusts arise.

Rarely is the more prosaic question asked: ‘what are the duties of constructive trustees?’ As Professor Michael Bryan observed almost 20 years ago, ‘[t]he volume of writing on the duties of a constructive trustee does not approach the quantity, or quality, of literature on the circumstances giving rise to the imposition of a constructive trust’.<sup>14</sup> That is no longer true as far as quality goes, for a few excellent pieces on aspects of the topic have since been produced,<sup>15</sup> however in quantitative terms, the greater volume of commentary remains concerned with explaining when and why constructive trusts will be imposed, rather than the duties that attend their imposition.

This article aims to answer the practical question of what is involved in being made a constructive trustee, and to identify factors that might enable an assessment of which duties apply to which kinds of constructive trust. This task has never been undertaken in a systematic way in Australia.

6 G E Dal Pont, ‘Equity’s Chameleon: Unmasking the Constructive Trust’ (1997) 16 *Australian Bar Review* 47, 47.

7 Keith Mason, ‘Deconstructing Constructive Trusts in Australia’ (2010) 4 *Journal of Equity* 98, 98.

8 Sir Peter Millett, ‘Introduction’ in Ewan McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (Clarendon Press, 1992) 3.

9 Keith Mason, above n 7, 98.

10 Sykes, above n 2, 171.

11 R P Austin, ‘Constructive Trusts’ in P D Finn (ed), *Essays in Equity* (Law Book, 1985) 196, 196.

12 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 685 (Lord Goff of Chieveley). While this article takes an agnostic stance as to that ongoing controversy, it is of present relevance for two reasons. First, it may be observed that a good deal of academic writing on constructive trusts, some of which is discussed later in this article, has been animated by the position taken by jurists on the restitution debate. That does not impugn their analysis, but it does place it in context. Secondly, it is submitted that an examination of the *duties* of constructive trustees may help to shed some light on the broader debate, though as will shortly be explained, that is only an incidental purpose of this article.

13 See *Muschinski v Dodds* (1985) 160 CLR 583, 614 (Deane J). It is unnecessary however to wade into this area of discourse for the purpose of this article: it is sufficient for present purposes to note that the *declaration* of a constructive trust almost always follows a curial ascertainment of the rights and liabilities of the relevant parties. At the time of declaration, the court must intend the term ‘constructive trust’ to have some meaning, and that meaning is the subject of this article.

14 Michael Bryan, ‘Restitution Past, Present and Future – Essays in Honour of Gareth Jones’ (1999) 21 *Adelaide Law Review* 151, 155.

15 See especially Charles Mitchell and Stephen Watterson, ‘Remedies for Knowing Receipt’ in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 115; William Swadling, ‘The Fiction of the Constructive Trust’ (2011) 64 *Current Legal Problems* 399; Elise Bant and Michael Bryan, ‘Specific Restitution without Trusts’ (2012) 6 *Journal of Equity* 181.

There are two reasons why such an analysis is needed. The first is to provide practical guidance to constructive trustees (and to those who must deal with them) as to what their obligations are. While some guidance may appear on the face of the orders, some of the meaning may be implicit, in the same way that if a court declares a person to be a duly appointed express trustee, that order will not need to state all the duties that the newly declared trustee owes. Rather, these are sourced from the general law and apply automatically. The focus of this article is on the corresponding ‘automatic’ or ‘default’ duties of each category of constructive trust, as opposed to any further ‘optional’ or ‘ancillary’ duties that might be specifically ordered by a court in fashioning relief in a particular case.

The second reason why such an analysis is needed is because it may shed light on the question of whether some categories of constructive trust would best not be described as ‘trusts’ at all. That question is by no means purely academic. One area in which it has particular relevance is the application of trustee legislation to constructive trustees. Trustee legislation in every jurisdiction in Australia provides that a trust includes ‘constructive trusts’.<sup>16</sup> If that definition is understood to encompass all constructive trusts in the widest sense, it would lead to bizarre results: for instance, a thief as constructive trustee would in some jurisdictions be empowered by statute to sell the stolen property;<sup>17</sup> a constructive trustee of property acquired by fraudulent transactions set aside in equity would have a right to retire and appoint a replacement trustee;<sup>18</sup> and a person who knowingly receives funds obtained in breach of another person’s fiduciary duty would have a power to invest those funds in any form of investment.<sup>19</sup>

The improbability that such consequences were intended points to the need to consider the legislative intention in each State and Territory’s trustee legislation in defining trust to include ‘constructive trusts’, which in turn requires a critical examination of that label at general law.<sup>20</sup> Precisely this was done in the United Kingdom Supreme Court decision of *Williams v Central Bank of Nigeria*,<sup>21</sup> in which the Court held that the term ‘constructive trust’ in the *Trustee Act 1925* (UK) refers to those categories of constructive trust where a person has lawfully assumed fiduciary obligations in relation to trust property, but lacks a formal appointment (such as trustees de son tort), but not to those where the ‘trustee’ never assumed and never intended to assume the status of a trustee, but rather,

16 *Trustee Act 1925* (ACT) s 4; *Trustee Act 1925* (NSW) s 5 (definition of ‘trust’); *Trustee Act 1980* (NT) s 82 (definition of ‘trust’); *Trusts Act 1973* (Qld) s 5 (definition of ‘trust’); *Trustee Act 1936* (SA) s 4 (definition of ‘trust’); *Trustee Act 1898* (Tas) s 4 (definition of ‘trust’); *Trustee Act 1958* (Vic) s 3 (definition of ‘trust’); *Trustees Act 1962* (WA) s 6 (definition of ‘trust’).

17 *Trusts Act 1973* (Qld) s 32(1)(a); *Trustees Act 1962* (WA) s 27(1)(a).

18 *Trustee Act 1925* (ACT) s 6(4); *Trustee Act 1925* (NSW) s 6(4); *Trustee Act 1980* (NT) s 11; *Trusts Act 1973* (Qld) s 12(1); *Trustee Act 1936* (SA) s 14(1); *Trustee Act 1898* (Tas) s 13(1); *Trustee Act 1958* (Vic) s 41(1); *Trustees Act 1962* (WA) s 7(1).

19 *Trustee Act 1925* (ACT) s 14; *Trustee Act 1925* (NSW) s 14; *Trustee Act 1980* (NT) s 5; *Trusts Act 1973* (Qld) s 21; *Trustee Act 1936* (SA) s 6; *Trustee Act 1898* (Tas) s 6; *Trustee Act 1958* (Vic) s 5; *Trustees Act 1962* (WA) s 17.

20 See generally Elise Bant, ‘Constructive Trusts, Unconscionability and the Necessity for Working Criteria’ (2014) 8 *Journal of Equity* 259.

21 [2014] AC 1189.

exposed themselves to equitable remedies by virtue of their participation in the unlawful misapplication of trust assets.<sup>22</sup>

It is hoped that the analysis in this article will likewise aid in ascertaining the true ambit of the term ‘constructive trust’ in Australian statutes. To the extent that some categories of constructive trust are found to come with all the duties of express trustees, that circumstance may support their candidacy to be re-classified as express trusts. Conversely, to the extent that some categories of constructive trust come with so few duties that they are in substance no more than a mechanism for returning property to a person wronged, they may be suitable candidates for assimilation into the law of restitution. Those in the middle – neither amply nor sparingly endowed – should perhaps retain their present classification.

Part II of this article sets out the various approaches that have been propounded by courts and commentators as to what duties constructive trustees owe, and explains the approach adopted in this article for analysing whether a given duty might apply to particular constructive trusts. Part III provides an overview of the duties of express trustees and seeks to articulate the purpose that each of these duties serves. Part IV sets out the constructive trusts generally recognised in Australian law, asking for each category: ‘which duties might apply here?’ A table is provided summarising the answers proposed. Part V offers some concluding remarks.

## II ASCERTAINING THE DUTIES OF CONSTRUCTIVE TRUSTEES

### A Case Law

There is little precedent bearing directly on the duties of constructive trustees. The best-known pronouncement on the issue is the High Court’s description in *Giumelli v Giumelli* of the nature of a constructive trust that may be imposed where a proprietary estoppel is made out. Gleeson CJ, McHugh, Gummow and Callinan JJ held as follows:

The term ‘constructive trust’ is used in various senses when identifying a remedy provided by a court of equity. The trust institution usually involves both the holding of property by the trustee and a personal liability to account in a suit for breach of trust for the discharge of the trustee’s duties. However, some constructive trusts create or recognise no proprietary interest. Rather there is the imposition of a personal liability to account in the same manner as that of an express trustee. An example of a constructive trust in this sense is the imposition of personal liability upon one ‘who dishonestly procures or assists in a breach of trust or fiduciary obligation’ by a trustee or other fiduciary.

In the present case, the constructive trust is proprietary in nature. It attaches to the ... property. *Such a trust does not necessarily impose upon the holder of the legal title the various administrative duties and fiduciary obligations which attend the settlement of property to be held by a trustee upon an express trust for successive*

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22 Ibid 1197–8 [9] (Lord Sumption SCJ).

*interests*. Rather, the order made by the Full Court is akin to orders for conveyance ...<sup>23</sup>

That passage contained faint echoes of the judgment of Sir George Jessel MR some 120 years earlier in *Earl of Egmont v Smith*, a case concerning a vendor–purchaser constructive trustee, who was held to be ‘a trustee, no doubt, with peculiar duties and liabilities, for it is a fallacy to suppose that every trustee has the same duties and liabilities’.<sup>24</sup> Similarly in the Victorian decision of *Nolan v Collie*, it was held that while a vendor–purchaser constructive trust had come into existence, ‘it does not follow that every incident of a conventional trust flowed, nor that [the vendor] had all the rights and liabilities of conventional trustees’.<sup>25</sup>

Read in context, these statements must be understood as establishing no more than that the duties of constructive trustees are not necessarily the same as those of express trustees, rather than as purporting to make any kind of exhaustive statement of the duties involved in particular categories of constructive trust. Some authorities, however, have taken a more definitive stance, albeit only in relation to particular categories of constructive trust.

For instance, in the New South Wales decision of *Agusta Pty Ltd v Provident Capital Ltd*, Barrett JA (with whom Campbell JA and Sackville AJA agreed) said of a trustee de son tort that ‘its duties and liabilities, as well as its rights (including rights of indemnity), were the same as if it had been duly appointed’.<sup>26</sup> Here then is a suggestion that one category of constructive trust, that of the trustee de son tort, comes with all of the duties that are found in express trusts. The same conclusion was reached in the UK decision of *Williams v Central Bank of Nigeria*, where Lord Sumption SCJ said of trustees de son tort:

They are true trustees, and if the assets are not applied in accordance with the trust, equity will enforce the obligations that they have assumed by virtue of their status exactly as if they had been appointed by deed.<sup>27</sup>

By contrast, Lord Sumption SCJ held that a person made a constructive trustee for knowingly participating in a breach of fiduciary duty was not a ‘true’ trustee and was not subject to the duties of an express trustee:

No trust has been reposed in him. He does not have the powers or duties of a trustee, for example with regard to investment or management. His sole obligation of any practical significance is to restore the assets immediately.<sup>28</sup>

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23 (1999) 196 CLR 101, 112 [4]–[5] (emphasis added) (citations omitted).

24 (1877) 6 Ch D 469, 475. See also *Byrnes v Kendle* (2011) 243 CLR 253, 292 [119] n 192 (Heydon and Crennan JJ).

25 (2003) 7 VR 287, 300 [34] (Ormiston JA). See also *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488, 504 (Kearney J).

26 [2012] NSWCA 26, [36].

27 [2014] AC 1189, 1197 [9].

28 *Ibid* 1208 [31].

In so holding, Lord Sumption SCJ endorsed the statement of Millett LJ in *Paragon Finance plc v D B Thakerar & Co* that constructive trustees of this category:

have no trust powers or duties; they cannot invest, sell or deal with the trust property; they cannot retire or appoint new trustees; they have no trust property in their possession or under their control, since they became accountable as constructive trustees only by parting with the trust property. They are in reality neither trustees nor fiduciaries, but merely wrongdoers.<sup>29</sup>

Beyond these excerpts, there is scant authority dealing squarely with the issue. So much might have been expected, as the primary concern of courts in constructive trust cases is more often with whether or not relief in the form of a constructive trust should be granted. The orders to give effect to that relief, and their juridical nature, are rarely the subject of substantial argument or extensive judicial consideration.

What is clear, however, is that the duties of a constructive trustee are not uniform for all categories of constructive trust. For a couple of categories only, there is authority to the effect that all, or none, of the duties of an express trustee are applicable. For other categories, there have been some narrower, non-exhaustive statements that a particular duty applies (these are discussed in Part IV where relevant). For most, though, the question is an open one, as some authorities have suggested.<sup>30</sup> It is therefore submitted that the question is one which is appropriate to be resolved by first principles, informed by the authorities such as they are.

## B Commentary

A number of commentators have embarked on exactly this kind of first principles analysis, arriving, however, at vastly different answers.

At one end of the spectrum is what might be called the minimalist view, which contends that a ‘constructive trust’ is just a label that is applied to what is in truth no more than an order that the defendant pay the claimant a sum of money or transfer particular property or rights.<sup>31</sup> William Swadling, who has championed this view, argues that only express trusts are genuine trusts, and that the language of ‘constructive trust’ should be jettisoned from the law, as has been done with the language of ‘implied contract’ in favour of unjust enrichment. At its most basic, Swadling argues, the phrase ‘express trust’ might be said to capture the idea of one person holding rights for another or for a purpose. That essential element, he contends, is not present where all that is in truth ordered is that a defendant make a payment or conveyance.<sup>32</sup> Even Swadling, though, does not contend that his analysis applies to *all* categories of presently recognised constructive trusts, as he argues that there are two categories of ‘constructive

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29 [1999] 1 All ER 400, 412.

30 [T]he decision does not require consideration of more difficult issues such as whether any positive duties of trusteeship arose’: *Great Investments Ltd v Warner* (2016) 243 FCR 516, 534 [74] (The Court). See also *Nicholson v Morgan [No 3]* (2013) 8 ASTLR 277, 291 [55] (Edelman J).

31 Swadling, above n 15, 405.

32 *Ibid* 400–4, 407–8.

trust' that are in fact express trusts misclassified: *Rochefoucauld v Boustead* trusts and secret trusts.<sup>33</sup>

The minimalist view was also espoused by Professor Austin Scott in his textbook *The Law of Trusts* in the following terms: 'In the case of an express trust the trustee ordinarily has active duties of management. In the case of a constructive trust, the duty is merely to surrender the property'.<sup>34</sup>

At the other end of the spectrum is the view that to treat constructive trusts as mere orders for payment or conveyance is to ignore what courts actually do, and explicitly tell us that they do, in cases involving constructive trusts.<sup>35</sup> The leading proponents of this view are Charles Mitchell and Stephen Watterson, who argue that while constructive trusts certainly do involve a 'core restorative duty', they can also come with 'additional, positive duties' over and above the duty to restore.<sup>36</sup> For example, in knowing recipient cases, Mitchell and Watterson argue that so long as the property is in the knowing recipient's custody, it is not inconsistent with the restorative duty for the constructive trustee to have a duty to get in the trust property, and even to invest it if it cannot be immediately restored (for example because the identity of the parties to whom restoration should be made has not yet been ascertained).<sup>37</sup> Mitchell and Watterson place significant reliance on *Evans v European Bank Ltd*,<sup>38</sup> in which the NSW Court of Appeal held those very duties to be applicable to the receiver of a company that had been involved in defrauding around 900 000 credit card account holders in the United States.<sup>39</sup> This case is discussed in more detail in Part IV(A)(2).

Most commentators take an intermediate stance, contending that the duties of constructive trustees vary according to the category of constructive trust in question (and indeed, the approaches canvassed above can fairly be described as 'intermediate' in the sense that both are qualified to some extent). For instance, the authors of *Ford and Lee: The Law of Trusts* put the matter thus:

The duties of a constructive trustee are defined by the purposes for which constructive trusteeship was imposed. It will often be the case that the sole duty of a constructive trustee is to convey the property held on trust to the beneficiary ... But constructive trustees are also subject to other duties, such as the duty to account and the duty to preserve trust property pending its surrender to the claimant. The duty to surrender may also include subsidiary obligations, such as to get in trust assets, although these obligations will be less extensive than the equivalent obligations imposed on trustees of express trusts since a constructive trustee by definition has not been chosen by a settlor to manage his wealth.<sup>40</sup>

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33 Ibid 416–18.

34 Austin Wakeman Scott, *The Law of Trusts* (Little, Brown and Company, 3<sup>rd</sup> ed, 1967) vol 5, 3415, cited with approval in *Westpac Banking Corporation v Ollis* [2008] NSWSC 281, [26] (Einstein J).

35 Mitchell and Watterson, above n 15, 129.

36 Ibid 138.

37 Ibid 138–42.

38 (2004) 61 NSWLR 75 ('*Evans*').

39 Ibid 107 [162] (Spigelman CJ).

40 Thomson Reuters, *Ford and Lee: The Law of Trusts* (at 1 March 2017) [22.080].

Similarly, the authors of *Jacobs' Law of Trusts in Australia* observe that the categories of constructive trusts:

are not uniform in the sense that the incidents of the trusts involved vary; in one category the obligation is to account for a profit, in another to hand over specific assets, in another to effect restitution for a loss.<sup>41</sup>

The shared conviction of those who ascribe to the 'intermediate' view is that the duties of constructive trustees vary from category to category. There is less commentary, however, as to precisely what the duties are in each category, and importantly, how the duties for particular categories of constructive trust are to be ascertained. A notable exception to that is Darryn Jensen, who suggests the following:

The normative justification for treating the relationship as analogous to an express trust might not justify imposing *all* of the consequences of express trusteeship upon the legal owner ... To minimise the risk of imposing too many or too few consequences, we need to conceptualise these trusts by analogy in positive terms – that is, we need to understand them in terms of the justifications which the law gives for the construction of those circumstances as trusts. When we perform this exercise, we find that 'constructive trust' is not a homogenous category of legal phenomena. Instead, we can observe a 'spectrum' of analogy in which the analogy with express trusts varies in content and strength. What particular obligations of trusteeship the defendant acquires varies according to the normative justification for the law's imposition of a remedy and, hence, the remedial work that is justified.<sup>42</sup>

This is an excellent starting point. Applying Jensen's heuristic, the first question becomes: 'why is the remedy of constructive trust imposed in this sort of case?' It could scarcely be doubted that the identification of the rationale of a given constructive trust is a necessary step in the task of ascertaining which duties might apply to it.

Elise Bant and Michael Bryan engage in exactly this kind of reasoning in their 2012 article 'Specific Restitution without Trusts'.<sup>43</sup> They take issue with Mitchell and Watterson's theory that constructive trustees are subject to positive duties such as to manage and invest trust property, on the basis that this will often be inconsistent with the rationale of a given constructive trust (taking delinquent fiduciaries as their example):

Much of the analysis supportive of positive duties for constructive trustees comes from the law relating to delinquent fiduciaries ... These need not, however, only be understood through the prism of express trust obligations. Indeed, one would be hard pressed to identify any circumstances in which a defaulting fiduciary would or should be impressed with management duties with respect to assets in her hands, as opposed to simply becoming subject to an immediate obligation to restore the asset to the plaintiff or his legal representative. Such a fiduciary is the last person who should be entrusted with managing trust assets in the best interests of the beneficiaries.<sup>44</sup>

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41 J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8<sup>th</sup> ed, 2016) 299 [13-02] ('*Jacobs*').

42 Darryn Jensen, 'A Typology of Trusts by Analogy' in Elise Bant and Michael Bryan (eds), *Principles of Proprietary Remedies* (Thomson Reuters, 2013) 55, 56 (emphasis in original) (citations omitted).

43 Bant and Bryan, above n 15.

44 Ibid 187. They apply the same approach to the question of the thief as constructive trustee at 189.



In such cases, Bant and Bryan argue, the better approach is to understand the constructive trust as ‘mere machinery for conveyance’, but with the court retaining the discretion to impose any ancillary conditions, grant any allowances, and make any consequential orders as appropriate to do the work that duties otherwise would.<sup>45</sup> *Evans*, they argue, can be understood as an application of this approach.<sup>46</sup>

Yet Bant and Bryan do not take an unwaveringly minimalist view. They accept that where constructive trusts involve a defendant who was intended, in some sense, to be a trustee, different considerations may justify the application of express trustee obligations (though Bant and Bryan doubt the correctness of the label ‘constructive trust’ in such circumstances, preferring to call these ‘express trusts’, and so in the ultimate analysis are not so far apart from Swadling).<sup>47</sup>

### C Summary: Case Law and Commentary

From the case law the following propositions therefore emerge:

- first, the duties of constructive trustees vary from category to category;
- secondly, in some cases, there is authority to the effect that certain duties do, or do not, apply;
- thirdly, those authorities do not cover the field, so that for most categories the question is at large, inviting a first principles analysis; and
- fourthly, a necessary step in engaging in the first principles analysis is to consider the rationale or normative justification for the category of constructive trust in question.

### D The Approach Taken in This Article

So far, the only test that has been mentioned for evaluating the applicability of a given duty to a particular constructive trust is to ask what is the rationale or normative justification for the *constructive trust*.

I suggest, however, that this is only one of the inquiries that needs to be made. The second, which is closely related, is to ask what is the rationale or normative justification for the *duty* that is sought to be applied.

Without that step, there is potential for the rationale of the constructive trust to overpower the analysis, and for the duties side of the question to receive too cursory a glance. In this article, the rationale of each of the generally recognised duties of express trustees is considered first (in Part III), and only then is the rationale of each category of constructive trust brought into the picture (in Part IV).

The method of analysis that will be adopted in this article is driven by these twin rationales. The method is to ask, for each prospective pairing of duty and constructive trust, what each of their rationales can tell us about whether the duty

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45 Ibid 189.

46 Ibid 187.

47 Ibid 181 n 1, 183 n 10, 191.

should apply. That is done by considering whether the rationale of the constructive trust is consistent with the rationale of the particular duty, or indeed whether it would be furthered by the imposition of that duty. Sometimes, this inquiry will yield a clear answer; sometimes, a range of possibilities. For each possible pairing of a duty with a constructive trust, one of three labels is sought to be given: 'included', 'excluded' or 'debatable'. A duty will be 'included' for a given category of constructive trust where there is undoubted authority to that effect or where the case for its inclusion is particularly strong. 'Excluded' has the converse definition. The remaining duties are 'debatable'.

There are some limitations to this approach. It cannot, and does not, purport to state conclusively whether each duty applies to each constructive trust. Further, the conclusions reached in this article as to which of the three labels should apply for each pairing of duty and constructive trust are ultimately matters of judgment on which minds may differ. That is to be embraced, as the primary aim of this article is to identify factors that might enable an assessment of which duties are appropriate to which kinds of constructive trust, rather than to have the final say on what the result of that assessment should be.

One final matter should be noted. Although no concluded view is expressed in this article on whether those duties labelled as 'debatable' should be treated as applicable or not, there is a significant reason to lean in favour of holding that they are *not*. It is well established that before a constructive trust is imposed, a 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.<sup>48</sup> If a particular category of constructive trust is held to be attended by a large number of duties, the result is that it will be seen as a more onerous remedy and will therefore be appropriate in fewer circumstances. By contrast, if the trust has only minimal duties, it will more often be seen as an available choice.<sup>49</sup>

Erring on the side of minimalism has the advantage that it preserves the constructive trust's remedial flexibility. Minimalism affords the court a discretion as to whether obligations corresponding to the duties of express trustees should be imposed on a defendant in the form of ancillary orders,<sup>50</sup> rather than having those duties apply automatically in circumstances where the court would not intend them to. Of course, to adopt this course is to require a certain degree of prescription from judges in spelling out precisely what obligations are intended to accompany the imposition of a constructive trust in each case, but this may be a small price to pay for the benefit of flexibility.

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48 *Giumelli v Giumelli* (1999) 196 CLR 101, 113 (Gleeson CJ, McHugh, Gummow and Callinan JJ); *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566, 585 [42] (The Court); *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1, 45–46 [128]–[129] (The Court).

49 Sarah Worthington, 'Exposing Third-Party Liability in Equity: Lessons from the Limitation Rules' in Paul Davies and James Penner (eds), *Equity, Trusts and Commerce* (2017, Hart Publishing) 331, 340–1.

50 Bant and Bryan, above n 15, 189.

### III THE DUTIES OF EXPRESS TRUSTEES

This Part describes the various duties to which express trustees are subject.<sup>51</sup> For convenience of exposition, these have been grouped into four types: (1) duties relating to the instrument of trust; (2) duties relating to the trust property; (3) duties relating to the beneficiaries; and (4) duties of a fiduciary nature.

#### A Duties Relating to the Instrument of Trust

##### 1 *Duty to Become Acquainted with the Terms of the Trust*

The first duty of express trustees, according to *Jacobs*,<sup>51</sup> is ‘to become thoroughly acquainted with the terms of the trust and all documents, papers and deeds relating to or affecting the trust property as come into their possession and control’.<sup>52</sup> The rationale given for this duty is that it is necessary in order for trustees to ‘know precisely the nature and circumstances of the trust property’, and to ‘know exactly what they are required to do’ with it.<sup>53</sup>

In practice, this duty may be merely facultative in character given that trustees already have substantive duties to adhere to and carry out the terms of the trust and to exercise reasonable care.<sup>54</sup> Indeed, in the two cases often cited for the duty to become acquainted with the terms of the trust, the duty was mentioned not to visit liability on the trustees, but rather to absolve them. In the first, *Harvey v Olliver*, Kay J held that because it was the incoming trustees’ duty to see what the trust estate consisted of, their costs in doing so were properly incurred and they were therefore entitled to be reimbursed from the trust estate.<sup>55</sup> In the second, *Hallows v Lloyd*, the question was whether the incoming trustees were liable for acting in disregard of a settlement of which they had been unaware.<sup>56</sup> Kekewich J found for the trustees, on the basis that even if they had properly acquainted themselves with the terms of the trust, they would not have found anything giving them notice of the settlement.<sup>57</sup>

It is clear from the cases that the underlying rationale of the duty to become acquainted with the terms of the trust is to ensure that the trust is properly administered in accordance with its terms. More fundamentally, it can be said

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51 See Heydon and Leeming, above n 41, 324 [16-02].

52 Ibid 336 [17-01]. See also Lynton Tucker, Nicholas Le Poidevin and James Brightwell, *Lewin on Trusts* (Sweet & Maxwell, 19<sup>th</sup> ed, 2015) 568–9 [12-034]–[12-035].

53 Heydon and Leeming, above n 41, 336 [17-01].

54 The subsidiary role of this duty is also evident in the circumstance that where there is a suggestion that the trustees have failed to acquaint themselves with the terms of the trust, relief is more likely to be pursued through the lens of a claim that the trustees breached their duty to adhere to and carry out the terms of the trust: See, eg, *Turner v Turner* [1984] Ch 100; *Nestlé v National Westminster Bank plc* [1994] 1 All ER 118. In such cases, the duty to become acquainted with the terms of the trust will have little independent work to do.

55 *Harvey v Olliver* (1887) 57 LT 239, 241.

56 (1888) 39 Ch D 686.

57 Ibid 691.

that the duty is apt to ensure that precise effect is given to the intentions of the settlor.

It follows that this duty will be of limited relevance to constructive trusts, most of which (though not all) do not involve any trust documents. To the extent that there are ‘terms’ of a constructive trust, these are ordinarily embodied in the orders of the court. A duty to become acquainted with the terms of such an order would lack utility, given that the constructive trustee is bound in any event to comply with the orders in full once a copy has been personally served (if not earlier), on pain of being held in contempt.<sup>58</sup>

## 2 *Duty to Adhere To and Carry Out the Terms of the Trust*

The duty to adhere to and carry out the terms of the trust was described by the High Court in *Youyang Pty Ltd v Minter Ellison Morris Fletcher* as ‘[p]erhaps the most important duty’<sup>59</sup> that express trustees have. As *Jacobs*’ explains, the duty is positive and prescriptive, rather than negative and proscriptive, and it has a fiduciary character, because it arises from the trustee’s undertaking to carry out the wishes of the settlor as expressed in the instrument of trust.<sup>60</sup>

As the High Court confirmed in *Youyang*, the duty is precise and exacting, and defaulting trustees will be liable for any harm suffered by their beneficiaries, even for apparently minor deviations from the terms of the trust.<sup>61</sup> The trustees can be saved only if the beneficiaries suffer no harm as a result of the breach,<sup>62</sup> or if they can show that their actions would have been directed or permitted to be done had the trustees applied for court orders.<sup>63</sup>

The joint judgment in *Youyang* also shows that there is no meaningful distinction between breaching the duty to adhere to and carry out the terms of the trust, and simply breaching the trust itself, with the latter expression used liberally throughout the judgment.<sup>64</sup> Indeed, the root authority for this duty states it in terms of the trust itself being ‘always imperative, and ... obligatory upon the conscience of the party intrusted’.<sup>65</sup> It can be seen that the rationale for this duty is similar to that of the duty to become acquainted with the terms of the trust: it ensures that the trust is properly administered in accordance with its terms, and that the settlor’s intentions are thereby given effect.

As in the previous section, this duty is of limited practical utility in the context of constructive trusts, where the ‘trust instrument’ is a court order, except perhaps as an emphatic way of saying that court orders must be complied with. Legally, that result will obtain whether or not such a duty is articulated.

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58 See *Drummoyne Municipal Council v Lewis* [1974] 1 NSWLR 655.

59 (2003) 212 CLR 484, 498 [32] (The Court) (*‘Youyang’*).

60 Heydon and Leeming, above n 41, 338 [17-04].

61 (2003) 212 CLR 484, 498 [33] (The Court).

62 *Target Holdings Ltd v Redfern* [1996] 1 AC 421. Even then, whether this will be sufficient to exonerate them is contentious.

63 *Brown v Smith* (1878) 10 Ch D 377; *Matthews v Tyson* (1900) 21 LR (NSW) Eq 268.

64 See *Youyang* (2003) 212 CLR 484, 495 [17], [18], 499 [36], 502 [43], 508–9 [69] (The Court).

65 *A-G (UK) v Downing* (1767) Wilm 1, 23; 97 ER 1, 9 (Sir Wilmot).

Lastly in this regard, it may be observed that the duty to adhere to and carry out the terms of the trust includes a subsidiary duty: the duty ‘to pay and transfer the trust property and its income to the right persons’.<sup>66</sup> It is submitted that the latter is no more than a specific application of the former, the cases on the latter turning on whether or not various impugned distributions and transfers of property conformed with the terms of the trust as properly construed.<sup>67</sup> Yet as will be seen, this subsidiary duty to pay and transfer the trust property and its income to the right persons can assume central importance in the field of constructive trusts, and in some cases it may be the only duty of practical significance, as for example where a constructive trust can rightly be described as ‘merely a formula for giving restitutionary relief’.<sup>68</sup> Of course, where there is a court order expressly requiring transfer of the trust property, the obligation to transfer property comes from that order and need not be conceptualised in terms of trustee duties: it is only meaningful to speak in terms of duties where the orders impose a constructive trust with nothing more.

### 3 *Duty Not to Impeach the Validity of the Trust Instrument or the Title of the Beneficiary*

An express trustee has a duty not to impeach the validity of the trust instrument<sup>69</sup> or the title of the beneficiary,<sup>70</sup> provided the trust was accepted, or at least not disclaimed, at the time of his or her appointment.<sup>71</sup> The duty is not so absolute as to prevent trustees in all circumstances from asserting proprietary rights at odds with the trust instrument,<sup>72</sup> but it does prevent them from relying on doubts about validity as an excuse for avoiding the performance of their trustee obligations in the interim,<sup>73</sup> and it also prevents them from seeking to place the burden of establishing validity on the beneficiaries.<sup>74</sup>

The proviso that the trustee must not have disclaimed the trust at the outset is of critical importance to this duty, as one of its primary rationales is to hold trustees to the obligations they have voluntarily accepted. The importance of voluntary acceptance can be seen in a number of judicial statements of the duty, which speak in terms of a trustee who ‘knowingly and expressly acquires the

66 As to which, see Heydon and Leeming, above n 41, 368 [17-35].

67 See, eg, *Barratt v Wyatt* (1862) 30 Beav 442, 444; 54 ER 960, 961 (Sir Romilly MR); *Hilliard v Fulford* (1876) 4 Ch D 389, 393–4 (Jessel MR); *Re Hulkes* (1886) 33 Ch D 552, 557 (Chitty J).

68 *Williams v Central Bank of Nigeria* [2014] AC 1189, 1216 [70] (Lord Neuberger P), quoting *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400, 412 (Millett LJ).

69 *McGregor v McGregor [No 2]* [1919] NZLR 286.

70 *Devey v Thornton* (1851) 9 Hare 222; 68 ER 483; *Beddoes v Pugh* (1859) 26 Beav 407; 53 ER 955; *Newsome v Flowers* (1861) 30 Beav 461; 54 ER 968. See generally Heydon and Leeming, above n 41, 338 [17-03].

71 As to which, see Heydon and Leeming, above n 41, 312 [15-73]. This is sometimes also referred to as a ‘duty not to set up rights of others’: see Thomson Reuters, *Ford and Lee: The Law of Trusts* (at 25 June 2018) [9.22010].

72 *Allen v Roughley* (1955) 94 CLR 98, 107 (Dixon CJ).

73 *Devey v Thornton* (1851) 9 Hare 222, 232; 68 ER 483 (Sir Turner V-C), 487–8; *Beddoes v Pugh* (1859) 26 Beav 407, 416–7; 53 ER 955, 959 (Sir Romilly MR).

74 *Allen v Roughley* (1955) 94 CLR 98.

possession of property as a trustee',<sup>75</sup> 'acknowledge[s] the trust for a considerable time',<sup>76</sup> or 'agrees' to hold property on trust.<sup>77</sup>

Again, it is doubtful whether it is meaningful to speak of a duty not to impeach the validity of the 'trust instrument' in the context of constructive trusts (except perhaps for those categories of constructive trust that arise in connection with an already existing written instrument, such as in the cases of mutual wills or trustees de son tort). For most constructive trusts, the only written source of obligations is the court orders.<sup>78</sup> Those orders will be final and binding, except in the limited circumstances where they may be set aside, such as on appeal or in equity as a judgment fraudulently obtained.<sup>79</sup> There can hardly be any objection to a constructive trustee pursuing those avenues where appropriate. In any event, the duty is clearly inapposite to those categories of constructive trusts that involve no element of voluntary acceptance of trustee obligations on the part of the constructive trustee (ie, most categories).

## B Duties Relating to the Trust Property

### 1 Duty to Get In the Trust Property

As the High Court unanimously held in *CGU Insurance Ltd v One.Tel Ltd (in liq)*, '[o]ne obligation of a trustee which exists by virtue of the very office is the obligation to get the trust property in, protect it, and vindicate the rights attaching to it'.<sup>80</sup>

It is plain from the cases that the rationale of this duty is to ensure the realisation and protection of trust assets. For instance, in *Re Brogden; Billing v Brogden*, a case about a trustee who had neglected to call in a sum of money owed to the trust in a timely fashion, Fry LJ explained:

A trustee undoubtedly has a discretion as to the mode and manner, and very often as to the time in which and at which he shall carry his duty into effect. But his discretion is never an absolute one; it is always limited by the duty – the dominant duty, the guiding duty – of *recovering, securing*, and duly applying the trust fund.<sup>81</sup>

In similar vein, it has been said that the duty requires trustees to 'realize the trust estate',<sup>82</sup> to 'get the trust funds into their hands',<sup>83</sup> to 'obtain all the property that belongs to the trust',<sup>84</sup> to 'bring [the trust property] into their own personal custody',<sup>85</sup> and to 'preserve the trust fund under their own control'.<sup>86</sup>

75 *A-G (UK) v Munro* (1848) 2 De G & Sm 122, 163; 64 ER 55, 73 (Knight Bruce V-C).

76 *Newsome v Flowers* (1861) 30 Beav 461, 470; 54 ER 968, 972 (Sir Romilly MR).

77 *Van Rassel v Kroon* (1953) 87 CLR 298, 302 (Dixon CJ).

78 See further above n 13.

79 See generally *Clone Pty Ltd v Players Pty Ltd (in liq) (rec and mgr apptd)* (2018) 92 ALJR 399.

80 (2010) 242 CLR 174, 182 [36] (The Court); see also *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588, 605 [34] (Gaudron, McHugh, Gummow and Hayne JJ); *Fischer v Nemeske Pty Ltd* (2016) 257 CLR 615, 655 [111] (Gordon J).

81 (1888) 38 Ch D 546, 571 (emphasis added). See also at 554 (North J), 564 (Cotton LJ), 574 (Lopes LJ); *Partridge v Equity Trustees Executors and Agency Co Ltd* (1947) 75 CLR 149.

82 *Field v Field* [1894] 1 Ch 425, 429 (Kekewich J).

83 *Re Forest of Dean Coal Mining Co* (1878) 10 Ch D 450, 453 (Jessel MR).

84 *Young v Murphy* [1996] 1 VR 279, 282 (Brooking J).

85 Tucker, Le Poidevin and Brightwell, above n 52, 1516 [34-015].

The extent to which the duty to get in trust property might apply to constructive trustees is highly debatable. An immediate problem with transposing this duty to constructive trusts is that getting in the trust property often requires legal authority on the part of the trustee,<sup>87</sup> for instance when a trustee calls upon repayment of a debt which is owed to the trust, or commences proceedings to realise a chose in action in his or her capacity as trustee. While an express trustee will be clothed with full authority to engage in such actions, many kinds of constructive trustee will not. Further, where a constructive trust is imposed on the basis of some wrongdoing on the part of the constructive trustee, it may seriously be doubted whether that person is an appropriate candidate to perform enforcement functions on behalf of the beneficiaries he or she has wronged.

However, the indicators are not all one way: constructive trusts sometimes arise where a trust was in fact intended, and sometimes it may be possible to get in the trust property without any need to rely on a legal right. The applicability of the duty should be determined on a category-by-category basis, as is done in Part IV below.

## 2 *Duty to Invest Trust Property*

While the duty to invest trust property is of centuries' longstanding, its underlying rationale is rarely made explicit in the cases. In *Byrnes v Kendle*, the existence of the duty was affirmed in each of the three judgments of the Court,<sup>88</sup> with Heydon and Crennan JJ providing the fullest account:

[I]t is the duty of the trustee to invest the trust property subject to the limits permitted by the legislation in force under the proper law of the trust and subject to any limits stated in the trust document. If there are no limits of that kind, a trustee who receives a trust asset, like an executor of a deceased estate, must 'lay it out for the benefit of the estate'. That is, it is the duty of a trustee to obtain income from the trust property if it is capable of yielding an income.<sup>89</sup>

That paragraph footnoted a number of 19<sup>th</sup> century English cases (and two Australian ones). Invariably, those cases (and indeed many of the cases they in turn cite) take the existence of the duty as an accepted fact, offering no explanation as to why equity imposes it in the first place. A stunning example is the two-sentence report of *Stafford v Fiddon*, which states:

At the end of two years after the testator's death the executor had in his hands a sum of £655, which had been retained by him uninvested without any necessity for a year and a half. The Master of the Rolls (Sir John Romilly) decided that the executor ought to be charged with interest on this balance.<sup>90</sup>

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86 *Wyman v Paterson* [1900] AC 271, 288 (Lord Davey).

87 Indeed, the duty is often mentioned in collocation with the trustee's *right* to discharge it: *Tiger v Barclays Bank Ltd* [1951] 2 KB 556, 559 (Finmore J); *Young v Murphy* [1996] 1 VR 279, 282, 284 (Brooking J); *CGU Insurance Ltd v One.Tel Ltd (in liq)* (2010) 242 CLR 174, 182 [36] (The Court).

88 (2011) 243 CLR 253, 265 n 64 (French CJ), 277 [67] (Gummow and Hayne JJ), 291–2 [119] (Heydon and Crennan JJ).

89 *Ibid* 291–2 [119] (citations omitted).

90 (1857) 23 Beav 386, 386; 53 ER 151, 151–2.

The authorities on this duty are sparse; and we should expect no greater certainty than that of which the subject matter admits. At the very least, however, the early cases do evince a general concern that property capable of being put to productive use should not be allowed to lie fallow, and that it is a dereliction of duty to the beneficiaries if that occurs.<sup>91</sup> The standard measure of relief in those cases was an order that the defaulting trustee or executor pay the amount of interest that the property could have been expected to produce had it been properly invested.

Whether the duty to invest trust property can be traced to the labour theory of property, or perhaps to some more specific view predicated on the personal undertaking by the trustee or the dependence of the beneficiaries, is not clear. That being so, it would be unwise to make any universal conclusion as to whether the duty might be applicable to constructive trusts. Rather, as with the duty to get in trust property, its applicability is best determined on a category-by-category basis. And in doing so, it should be borne in mind that the rationale of the duty need not be the controlling consideration in any event: rather, if the duty is a good ‘fit’ with the category of constructive trust in question, for example because it would advance its purpose, it may be arguable that it applies. As Sir Anthony Mason wrote extra-judicially, ‘[r]ules can transcend both their origins and their history and they can serve more than one purpose’.<sup>92</sup>

As with the duty to get in the trust property, the need for legal authority to comply with the duty, and the appropriateness of conferring the duty on a wrongdoer, will be important factors in the ultimate analysis. A further important consideration will be the question of duration: it is hard to see how a duty to invest can be appropriate where a constructive trust is designed to last only for a short period of time, for instance in order to facilitate a conveyance of property.

## C Duties Relating to the Beneficiaries

### 1 Duty to Act Impartially Between the Beneficiaries

The duty to act impartially between beneficiaries was explained by Megarry V-C in *Cowan v Scargill* in the following terms:

The starting point is the duty of trustees to exercise their powers in the best interests of the present and future beneficiaries of the trust, holding the scales impartially between different classes of beneficiaries.<sup>93</sup>

As with a number of the duties discussed in this article, it is perhaps easier to see *what* this duty requires than *why* it requires it.

What it requires is that trustees act even-handedly, and with due consideration to the beneficiaries as a whole, when exercising discretionary

91 *Rocke v Hart* (1805) 11 Ves Jr 58, 60–61; 32 ER 1009, 1010 (Sir Grant MR); *Holland v Hughes* (1809) 16 Ves Jr 111, 114; 33 ER 926, 927 (Sir Grant MR); *Moyle v Moyle* (1831) 2 Russ & My 710, 715; 39 ER 565, 567 (Brougham LC); *Earl of Egmont v Smith* (1877) 6 Ch D 469, 475–6 (Jessel MR).

92 Anthony Mason, ‘Fusion’ in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 11, 14.

93 [1985] Ch 270, 286–7.



powers conferred upon them under the trust.<sup>94</sup> It has been suggested that the duty requires beneficiaries to be treated equitably, rather than equally.<sup>95</sup> The duty has been said to apply to the exercise of discretionary powers of management and investment of the trust property,<sup>96</sup> but not to a discretionary power to choose which beneficiaries, or which classes of beneficiaries, should be the recipients of trust benefits, as such a power necessarily entitles a trustee to choose and to prefer some beneficiaries over others.<sup>97</sup> However, even in the latter case the trustee will be required to exercise the power in good faith for the purpose for which it was given,<sup>98</sup> and not to take into account irrelevant, irrational or improper factors in doing so.<sup>99</sup>

The indications as to why the duty exists, such as they are, point in a number of directions. Suggested rationales include: that the duty is practically necessary to give efficacy to the system of trusts generally;<sup>100</sup> that it serves to ensure fulfilment of the settlor's intentions;<sup>101</sup> that it is an aspect of the trustee's fiduciary responsibility;<sup>102</sup> and that it is no more than a specific manifestation of the general rule that a person entrusted with a discretionary power must exercise it solely for the purpose for which it is given.<sup>103</sup>

Because the explanations for this duty are varied, its rationale will be a less weighty factor than usual in considering the categories of constructive trust to which the duty might apply. However, two points may be taken away. First, this duty is clearly predicated on there being reposed in the trustee a discretionary power capable of affecting the beneficiaries' interests. Where a constructive trustee has no such power, the duty will be of little utility. Secondly, whatever the rationale, it is clear that this duty is apt to protect the interests of those beneficiaries against whom the trustee would prefer to discriminate. Where such protection is considered desirable in the context of constructive trusts, the duty may well be of use.

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94 See *Re Tempest* (1866) LR 1 Ch App 485, 487–8 (Sir Turner LJ); *Re Sandys; Union of London and Smiths Bank v Litchfield* [1916] 1 Ch 511, 515 (Sargant J); *Re Charteris; Charteris v Biddulph* [1917] 2 Ch 379, 399 (Warrington LJ).

95 Thomson Reuters, *Ford and Lee: The Law of Trusts* (at 25 June 2018) [9.710]. See, to similar effect, *Nestlé v National Westminster Bank plc* (Unreported, Chancery Division, Hoffman J, 29 June 1988) 4–5, quoted in *Re Mulligan (deceased)* [1998] 1 NZLR 481, 501 (Panckhurst J).

96 *Re Charteris; Charteris v Biddulph* [1917] 2 Ch 379; *Cowan v Scargill* [1985] Ch 270; [1984] 2 All ER 750.

97 *Edge v Pensions Ombudsman* [1988] Ch 512, 533; [1998] 2 All ER 547, 567 (Sir Scott V-C).

98 *Armitage v Nurse* [1998] Ch 241, 253–4 (Millett LJ); *Rankine v Rankine* [1998] QSC 48; *Hancock v Rinehart* (2015) 106 ACSR 207, 223–4 [57] (Brereton J); *Crossman v Sheahan* (2016) 115 ACSR 130, 189–91 [288]–[303] (Ward JA).

99 *Edge v Pensions Ombudsman* [1988] Ch 512, 533 (Sir Scott V-C).

100 *Knox v Mackinnon* (1888) 13 App Cas 753, 768 (Lord Macnaghten).

101 *Tanti v Carlson* [1948] VLR 401, 405 (Herring CJ).

102 *Re Stewart* [2003] 1 NZLR 809, 816 [25] (Laurenson J).

103 *Edge v Pensions Ombudsman* [2000] Ch 602, 627 (The Court).

## 2 *Duty to Keep and Render Proper Accounts*

The expression ‘duty to account’ has more than one possible meaning in the trust context. As Gummow and Hayne JJ explained in *Byrnes v Kendle*, there are several senses in which the term ‘duty to account’ may be used, namely, (i) a duty to keep records, (ii) a duty to report to the beneficiaries or to the court concerning the administration of the trust, and (iii) a duty to pay amounts the trustee is obliged to pay to the beneficiaries.<sup>104</sup>

Context will usually illuminate which sense is intended. The ‘duty to keep and render accounts’<sup>105</sup> is a composite of the first two senses described by Gummow and Hayne JJ, while a duty to account in the third sense is simply another way of describing a trustee’s duty to make payments to beneficiaries.<sup>106</sup>

Happily, the duty to keep and render proper accounts does have a clear rationale: to ensure that accurate information about the administration of the trust is ready to be provided to those entitled to demand it. In nearly every case where this duty is described, it is justified by reference to the potential that a beneficiary might demand an account from the trustee.<sup>107</sup>

In the constructive trust context, the duty to keep and render proper accounts, like the duty to invest, can have little work to do where the constructive trust in question is of a kind that will only be short-lived. In such a case, there is no occasion for the constructive trustee to take on a record-keeping role. On the other hand, the duty may serve a forensic purpose when applied to a retrospective examination of how trust property has been used and where it is, for example, when a delinquent fiduciary is called upon to account for a profit made in breach of duty. While an order ‘to account’ in such a case refers primarily to the requirement to pay over the wrongly obtained profits (that is, accounting in the third sense used in *Byrnes v Kendle*), the trustee will first be required to render an account of what those profits were (that is, accounting in the second sense). As elsewhere, a category-by-category approach will be applied for this duty, which, for the sake of clarity, will be split into its three distinct senses in that analysis.

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104 (2011) 243 CLR 253, 270 [42].

105 See, Heydon and Leeming, above n 41, 348–9 [17-13]–[17-14]. See also *Hancock v Rinehart* (2015) 13 ASTLR 188 [339]; 106 ACSR 207, 291 [339] (Brereton J).

106 On the ‘duty to pay and transfer the trust property and its income to the right persons’, see further Part III(A)(2) above.

107 See *Freeman v Fairlie* (1817) 3 Mer 29, 43; 36 ER 12, 17 (Scott LC); *Pearse v Green* (1819) 1 Jac & W 135, 140; 37 ER 327, 329 (Sir Plumer MR); *Burrows v Walls* (1855) 5 De G M & G 233, 249 (Lord Cranworth LC); 43 ER 859, 866; *Kemp v Burn* (1863) 4 Giff 348, 349; 66 ER 740, 740 (Sir Stuart V-C); *Low v Bouverie* [1891] 3 Ch 82, 99 (Lindley LJ); *Manning v Federal Commissioner of Taxation* (1928) 40 CLR 506, 509 (Knox CJ); *Re Craig* (1952) 52 SR (NSW) 265, 267 (Roper J); *Waterhouse v Waterhouse* (1998) 46 NSWLR 449, 494 (Windeyer J); *Armitage v Nurse* [1998] Ch 241, 261 (Millett LJ); *Hancock v Rinehart* (2015) 13 ASTLR 188 [339]; 106 ACSR 207, 291 [339] (Brereton J).

## D Duties of a Fiduciary Character

### 1 *Duty Not to Deal with the Trust Property for Personal Benefit or Otherwise to Profit by the Trust*

The duty not to deal with the trust property for personal benefit or otherwise to profit by the trust is the quintessential fiduciary duty.<sup>108</sup> As a unanimous High Court explained in *Warman International Ltd v Dwyer*, the duty exists ‘to preclude the fiduciary from being swayed by considerations of personal interest and from accordingly misusing the fiduciary position for personal advantage’.<sup>109</sup>

As with the earlier fiduciary duties, the applicability of this duty to constructive trusts will need to be worked out on a category-by-category basis. To the extent that, without the duty, a wrongdoer who has been made a constructive trustee may be able to cheat the beneficiaries for a second time, the duty may serve a purpose. The rationale for its imposition would be more to do with preventing the constructive trustee from misusing the position (to the extent that the ‘position’ even affords such an opportunity), and less to do with precluding the fiduciary from ‘being swayed by considerations of personal interest’ (for in the case of wrongdoers made into constructive trustees, it is obedience, rather than loyalty, that is demanded).<sup>110</sup>

### 2 *Duty to Exercise Reasonable Care*

Whether a trustee’s duty to exercise reasonable care is fiduciary in character is a controversial question.<sup>111</sup> Without attempting to resolve that question here, it is possible to say at least that, as a matter of Australian law, the question remains open, as the authorities indicating that the duty may *not* be fiduciary are largely from other jurisdictions<sup>112</sup> or have arisen in the context of duties owed by persons other than trustees:<sup>113</sup> and indeed there is Australian authority pointing in the

108 See *Keech v Sandford* (1726) 2 Eq Cas Abr 741; 25 ER 223 (Scott LC); *Parker v McKenna* (1874) LR 10 Ch App 96, 124 (Sir James LJ); *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 470 (Higgins J).

109 (1995) 182 CLR 544, 557–8 (citations omitted). As a side note, it can be observed that the ‘duty to act gratuitously’ is simply a specific illustration of this general duty, and the two are sufficiently closely related that it is difficult to think of categories of constructive trust where one but not the other will apply: see further Heydon and Leeming, above n 41, 371–2 [17-39].

110 *Chan v Zacharia* (1984) 154 CLR 178, 198 (Deane J).

111 Heydon and Leeming, above n 41, 356 [17-18].

112 See, eg, *Girardet v Crease & Co* (1987) 11 BCLR (2d) 361, 362 (Southin J); *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, 597 (Sopinka J); *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 155, 205 (Lord Browne-Wilkinson); *Bristol & West Building Society v Mothew* [1998] Ch 1, 17 (Millet J); *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, 681 (Gault J); *Hilton v Barker Booth & Eastwood* [2005] 1 All ER 651, 660 [29] (Lord Scott); *Base Metal Trading Ltd v Shamurin* [2004] EWCA Civ 1316.

113 See, eg, *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, 237–8 (Ipp J) (relating to company directors).

opposite direction.<sup>114</sup> Further, compelling arguments have been made elsewhere as to why the duty is properly characterised as fiduciary.<sup>115</sup>

Another reason to group this duty with other ‘duties of a fiduciary character’ is that the cases articulating the content of the duty strongly suggest that its rationale from the start has been to fulfil the expectations that the trustee had in reposing confidence in the trustee.<sup>116</sup> In an early authority on the duty, *Clough v Bond*, Cottenham LC explained that if it is breached, the trustee ‘will be liable to make [the loss] good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive’.<sup>117</sup> That statement tends to dispel two possible alternative explanations for the duty: first, that it is akin to the duty of care in negligence, which is predicated on the foreseeability of the harm suffered; and second, that the duty is designed to redress intentional wrongdoing. Indeed, by excluding the possibility of a defence of bona fides, this dictum is directly at odds with the alternative theory which asserts that the duty is not fiduciary because a ‘servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty’.<sup>118</sup>

Lastly, the fiduciary theme is then seen in most of the early cases, which explain the duty by reference to distinctly fiduciary circumstances: in particular, that confidence was reposed in the trustee to manage the affairs of the trust,<sup>119</sup> and that the trustee undertook, and thereby came under a responsibility, to manage the trust estate with reasonable care.<sup>120</sup>

The question of whether this duty should apply to constructive trustees is not without difficulty. One reason for the difficulty is the uncertainty as to whether constructive trustees are themselves fiduciaries. At least in cases where a constructive trust is imposed to vindicate an actual, but unperfected, intention to create an express trust (as with secret trusts, for instance), it is a short step to conclude that the constructive trustee is no less a fiduciary than an express trustee is. By contrast, where constructive trusts are imposed as a remedial response to wrongdoing, it is far more difficult to conclude that the trustee is a

114 See, eg, *Youyang* (2003) 212 CLR 484, 500 [38]–[39] (The Court); *Maguire v Makaronis* (1997) 188 CLR 449, 468, 470, 474 (Brennan CJ, Gaudron, McHugh and Gummow JJ); *Charlton v Baber* (2003) 47 ACSR 31, 44 [49] (Barrett J).

115 For example, that the duty is an objective one, that a trustee in breach of it must personally make good any loss and pay interest, and that the duty is not one that cannot admit of any competing self-interest of the trustee: Antony Goldfinch, ‘Trustee’s Duty to Exercise Reasonable Care: Fiduciary Duty?’ (2004) 78 *Australian Law Journal* 678. See also Denis S K Ong, *Trusts Law in Australia* (Federation Press, 4<sup>th</sup> ed, 2012) 235; J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5<sup>th</sup> ed, 2015) 200–10 [5-325]–[5-375].

116 See J D Heydon, ‘Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?’ in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 185, 217.

117 (1838) 3 My & Cr 490, 496; 40 ER 1016, 1018.

118 *Bristol & West Building Society v Mothew* [1998] Ch 1, 18 (Millett LJ).

119 *Re Speight; Speight v Gaunt* (1883) 22 Ch D 727, 762 (Bowen LJ); *Speight v Gaunt* (1883) 9 App Cas 1, 29 (Lord FitzGerald).

120 *Re Whiteley; Whiteley v Learoyd* (1886) 33 Ch D 347, 350 (Cotton LJ); *White v Jones* [1995] 2 AC 207, 271 (Lord Browne-Wilkinson).

fiduciary.<sup>121</sup> Where is the undertaking to act in the best interests of the beneficiaries?<sup>122</sup> There is none: the trustee is a reluctant participant in a regime imposed by order of the court. Where is the trust and confidence reposed in the trustee? There is none: indeed, the circumstances leading to the imposition of the constructive trust often involve proven *untrustworthiness*. Even accepting Finn's famous statement that a person is not subject to fiduciary obligations 'because he is a fiduciary ... [i]t is because a particular rule applies to him that he is a fiduciary ... for its purposes',<sup>123</sup> the discovery of this duty in the hands of a constructive trustee would not suffice to render him or her a fiduciary where nothing like a voluntary assumption of responsibility on behalf of the beneficiaries has taken place.

However, that is not necessarily the end of the analysis. Simply because a duty was devised for fiduciaries is not a compelling reason to rule out its availability in non-fiduciary contexts. Again, the historical origins of a rule need not rigidly preclude its expansion to new contexts by analogy.<sup>124</sup> But importantly, the duty would be operating in a different way in that new context, and would no longer be a 'fiduciary' duty. For example, it would be open for a court to hold that where a constructive trustee in the *Baumgartner v Baumgartner*<sup>125</sup> sense is to be entrusted with sole possession of the property for a significant period of time (which might occur, for instance, where the parties jointly submitted that the property should not be sold), the trustee should exercise reasonable care in maintaining the property during that time and should not allow it to fall into disrepair. But if the Court so held, the basis for that duty would have nothing to do with a fiduciary undertaking, as there would be none.<sup>126</sup> Instead, the basis of the duty might be, for example, the desirability that this category of constructive trustees not be given free rein to manage the property negligently where the beneficiaries are vulnerable to the consequences of such negligence.

A final point to be made is that the duty operates to qualify the manner in which an express trustee must perform his or her functions under the trust. The cases in which the duty has been applied presuppose that the trustee has some such functions. Returning to constructive trusts, the applicability of a duty to

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121 See Lionel Smith, 'Constructive Fiduciaries?' in Peter Birks (ed), *Privacy and Loyalty* (Clarendon Press, 1997) 249, 262–7; Sir Peter Millett, 'Restitution and Constructive Trusts' in W R Cornish et al (eds), *Restitution: Past, Present and Future – Essays in Honour of Gareth Jones* (Hart Publishing, 1998) 199, 205; Lionel Smith, 'Transfers' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing, 2004) 111, 136–7.

122 As to the requirement for a voluntary undertaking, see James Edelman, 'When Do Fiduciary Duties Arise' (2010) 126 *Law Quarterly Review* 302; P A Keane, 'The 2009 W A Lee Lecture in Equity: The Conscience of Equity' (2010) 84 *Australian Law Journal* 92; James Edelman, 'The Importance of the Fiduciary Undertaking' (2013) 7 *Journal of Equity* 128. Cf *Wambo Coal Pty Ltd v Ariff* (2007) 63 ACSR 429, 442 [64] (White J). However, this requirement has not yet been authoritatively endorsed as a matter of Australian law.

123 P D Finn, *Fiduciary Obligations* (Law Book, 1977) 2.

124 Anthony Mason, above n 92.

125 (1987) 164 CLR 137.

126 Edelman, 'The Importance of the Fiduciary Undertaking', above n 122, 130.

exercise reasonable care will be tested against the (often limited) functions that the constructive trustee has to perform.

### 3 *Duty Not to Delegate Duties or Powers*

The duty not to delegate duties or powers<sup>127</sup> is closely related to the duty to exercise reasonable care, and indeed they share some common authorities.<sup>128</sup> Unsurprisingly then, it has a similarly fiduciary rationale: that a trustee should not be permitted to delegate a function that trust and confidence was placed in the trustee to perform.<sup>129</sup>

The trust and confidence personally reposed in the trustee explains why one trustee cannot even delegate the administration of the trust to a co-trustee.<sup>130</sup> It also explains the distinction between functions that involve decision-making or the exercise of a discretion (which, being the very thing the trustee was entrusted to do, cannot be delegated)<sup>131</sup> and functions that simply carry into effect a decision made by the trustee (which, subject to certain rules, can be carried out ‘by other hands’).<sup>132</sup>

As to whether this duty should apply to constructive trustees, the considerations mentioned above regarding the fiduciary status apply with equal force here. However, the case for this duty to play a large role in the constructive trust context is weaker still, at least for those constructive trustees whose functions are entirely non-discretionary and can be carried out by other hands.

## IV THE DUTIES OF CONSTRUCTIVE TRUSTEES

This Part considers each of the categories of constructive trust that are generally recognised in Australian law, albeit that commentators have argued that some should be re-categorised or discarded entirely.<sup>133</sup> The aim of this Part is to ask, in light of the analysis in the preceding section, which duties might be applicable to each.

127 It should be noted that the content, and sometimes even the existence, of this duty has been significantly modified by trustee legislation in every jurisdiction in Australia, see Heydon and Leeming, above n 41, 360–5 [17-24]–[17-31]. This again highlights the need to have a clear appreciation of what is encompassed by the term ‘constructive trust’ in each statute, as the resolution of that issue will determine how far those statutory modifications affect constructive trustees.

128 *Clough v Bond* (1838) 3 My & Cr 490, 496–7; 40 ER 1016, 1018 (Cottenham LC); *Speight v Gaunt* (1883) 9 App Cas 1, 5 (Earl of Selborne LC).

129 *Speight v Gaunt* (1883) 9 App Cas 1, 29 (Lord FitzGerald).

130 *Re Flower and Metropolitan Board of Works* (1884) 27 Ch D 592, 596 (Kay J).

131 *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705, 717 (Walker J).

132 *Buckby v Speed* [1959] Qld R 30, 35 (Philp J). See also *Ex parte Belchier* (1754) Amb 218, 219; 27 ER 144, 145 (Lord Hardwicke LC); *Clough v Bond* (1838) 3 My & Cr 490, 497; 40 ER 1016, 1018 (Cottenham LC); *Speight v Gaunt* (1883) 9 App Cas 1, 4 (Earl of Selborne LC). See further Heydon and Leeming, above n 41, 359–60 [17-23].

133 See, eg, M J R Crawford, ‘Theft, Trust and Property Rights: Is Equity’s Cure Worse than the Disease?’ (2014) 8 *Journal of Equity* 338.

There are a number of ways to group categories of constructive trusts. Again, for convenience of exposition, this article deals with them in four groups: (1) constructive trusts involving a breach of fiduciary duty, (2) constructive trusts involving some other wrongdoing, (3) constructive trusts giving effect to an intention to create an express trust, and (4) constructive trusts giving effect to some other intention.

## A Constructive Trusts Involving a Breach of Fiduciary Duty

### 1 *Where a Fiduciary Makes a Gain in Breach of Fiduciary Duty*

Where a fiduciary makes an unauthorised personal gain in breach of fiduciary duty, a constructive trust may be imposed over the gain, or its traceable proceeds, in favour of the fiduciary's principal.<sup>134</sup> It would appear that such an errant fiduciary has but one duty: 'to account as a constructive trustee for any benefit or gain that he has received in seeking to obtain [the gain] for himself in disregard of his position'.<sup>135</sup> For example, in *Ardlethan Options Ltd v Easdown*, the High Court endorsed an order made by the Supreme Court of NSW that the errant fiduciary in that case pay his principal the moneys and the value of the property representing the unauthorised gain.<sup>136</sup>

In such a case, the constructive trust exists for the sole purpose of getting the unauthorised gain into the hands of the principal as expeditiously as possible. The constructive trustee has a positive duty to account for the gain.<sup>137</sup> There is no occasion for any ongoing duties to manage trust property, nor would a delinquent fiduciary be a suitable repository of such functions. Nor would it be meaningful to say that the delinquent fiduciary becomes subject to fiduciary duties by virtue of the office of constructive trustee, over and above the fiduciary duties that already exist by virtue of the pre-existing fiduciary relationship and which the constructive trust is imposed to vindicate.<sup>138</sup> Indeed, once the terms of the constructive trust have been fully complied with, the trustee will be at liberty to act in his or her own personal interest, for example by competing with the business formerly the subject of the trust.<sup>139</sup>

It would therefore appear that where a constructive trust is imposed on a fiduciary over an unauthorised personal gain made in breach of fiduciary duty, the only duty of the constructive trustee is to account to the principal for the gain.

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134 *Furs Ltd v Tomkies* (1936) 54 CLR 583, 592 (Latham CJ and Rich, Dixon and Evatt JJ); *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342, 350 (The Court); *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 107–10 (Mason J); *Chan v Zacharia* (1984) 154 CLR 178, 198–9 (Deane J); Heydon, Leeming and Turner, above n 115, 189–90 [5-275]; Liew, *Rationalising Constructive Trusts*, above n 1, 213.

135 *Chan v Zacharia* (1984) 154 CLR 178, 206 (Dawson J).

136 (1915) 20 CLR 285, 287.

137 See, eg, *Furs Ltd v Tomkies* (1935) 54 CLR 583, 592 (Latham CJ), 598–9 (Rich, Dixon and Evatt JJ), 600 (Starke J); *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 556–62 (The Court); Heydon, Leeming and Turner, above n 115, 186–9 [5-270].

138 *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488, 504 (Kearney J).

139 *Ibid.*

However, one further duty is at least debatable: the duty to exercise reasonable care. Suppose a defaulting fiduciary uses an unauthorised personal gain made in breach of fiduciary duty to purchase an expensive painting for himself. A constructive trust is imposed over the painting, requiring him to surrender it to his principal. He negligently decides to send the painting to the principal by bike courier, and it is damaged en route. Why should he not be held liable to the principal for the loss caused by his failure to exercise reasonable care in performing the core restorative duty of his constructive trust? As Mitchell and Watterson have argued in respect of knowing recipients to a fiduciary breach, it would be a small step for equity to hold that such a constructive trustee has a duty to take care of the property and to safeguard it from loss or damage by third parties, given that such duties are readily implied at law on bailees and other persons with possessory rights.<sup>140</sup>

## 2 *Third Party Accessorial Liability in Equity*

Accepting that the core duty of a fiduciary who makes a gain in breach of fiduciary duty is to account to the principal, it follows that the duties of a knowing participant<sup>141</sup> in respect of the same breach can rise no higher. As Lord Selborne LC said in *Barnes v Addy*, what occurs in such cases is that ‘that responsibility’ that a trustee has in respect of the breach of duty is ‘*extended*’ – not increased – ‘in equity to others who are not properly trustees’.<sup>142</sup> It would be anomalous if the duties of knowing participants as constructive trustees were more onerous than those of the defaulting fiduciaries themselves, who, unlike the knowing participants, were subject to pre-existing fiduciary duties.<sup>143</sup>

In respect of knowing recipients, it is submitted that, as Lord Sumption JSC held in *Williams v Central Bank of Nigeria*, the ‘sole obligation of any practical significance is to restore the assets immediately’.<sup>144</sup> A fortiori, a knowing assistant, who receives no trust property but is made liable *as constructive trustee* to restore the trust or account for any profits made in breach of it,<sup>145</sup> will have no trust duties other than the duty to account, as the High Court held in *Giumelli v*

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140 Mitchell and Watterson, above n 15, 139.

141 The expression ‘knowing participant’ is used in this article to encompass both ‘knowing assistants’ and ‘knowing recipients’ in the sense used in *Barnes v Addy* (1874) LR 9 Ch App 244, as well as those who induce or procure a breach of fiduciary duty (see *Eaves v Hickson* (1861) 54 ER 870). Whether *Eaves v Hickson* participants ought to be understood as liable in a principal or an accessorial sense is not presently material, as I have reached the conclusion that the duties that attach to constructive trustees of either category are the same. See further *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609, 627–8 [79]–[81] (Leeming JA).

142 (1874) LR 9 Ch App 244, 251–2 (emphasis added).

143 Of course, the view that the duties of the principal and accessory may be the same does not mean that they will be equally onerous. If, for instance, trust property ends up in the hands of the accessory but not the principal, the accessory’s duties will self-evidently be more onerous to the extent that those duties relate to dealing with the property.

144 [2014] AC 1189, 1208 [31]. See also *Arthur v A-G of the Turks & Caicos Islands* [2012] All ER (D) 164. It may be noted that whether even this duty is automatically implied as a matter of Australian law is a contentious issue.

145 As to the availability of account of profits against dishonest assisters, see *Novoship (UK) Ltd v Mikhaylyuk* [2015] QB 499.



*Giumelli*.<sup>146</sup> Again, however, the case for a duty to exercise reasonable care to apply to this category is at least arguable, in order to provide the beneficiaries with a remedy where an accessorial constructive trustee negligently damages property to which the trust attaches before accounting to the principal.

Mitchell and Watterson, however, go much further, arguing that knowing recipients may also be subject to the duty to invest trust property, the duty to get in trust property, and fiduciary duties.<sup>147</sup> It is submitted that this a step too far, as Bant and Bryan<sup>148</sup> and Swadling<sup>149</sup> have argued. The case on which Mitchell and Watterson rely in support of their view is *Evans*. In that case, a company had knowingly received US\$7.5 million from hundreds of thousands of defrauded credit card holders in the United States, for whom it became a constructive trustee. A receiver was subsequently appointed to the company, and sought to get in the trust property, which the NSW Court of Appeal held it was his duty to do.<sup>150</sup> As the identity of all the defrauded credit card holders was not yet able to be ascertained, the Court also held that it was his duty to properly invest the trust fund by placing it in an interest bearing account.<sup>151</sup>

*Evans* can be distinguished for three reasons. First, the fact that the beneficiaries could not be identified immediately takes this case outside the mainstream. As Mitchell and Watterson acknowledge, in most cases a knowing recipient cannot owe a duty to invest the misapplied trust property, as this would be inconsistent with the immediate restorative duty.<sup>152</sup> Secondly, the company in *Evans* was not in truth a knowing recipient in the *Barnes v Addy* sense, as there was no breach of fiduciary duty.<sup>153</sup> Thirdly, and more fundamentally, it was the receiver standing in the constructive trustee's shoes, rather than the constructive trustee itself, that was fixed with the duties. While it may readily be accepted that it is appropriate to impose these duties on a receiver, whose very function is to receive and realise property for the purpose of paying creditors, it is far from clear that any of these duties could be appropriate in the hands of a person who knowingly participated in a fraud. Indeed, where no receiver has been appointed but a delay between the imposition of the constructive trust and the return of the trust assets to the beneficiaries is unavoidable, the more appropriate course will likely be for the court to appoint a third-party trustee to hold and manage the assets in the interim, rather than give that responsibility to the constructive trustee.

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146 (1999) 196 CLR 101, 112 [4] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

147 Mitchell and Watterson, above n 15, 138–44.

148 Bant and Bryan, above n 15, 186–7.

149 Swadling, above n 15, 410–11.

150 *Evans* (2004) 61 NSWLR 75, 100 [116] (Spigelman CJ).

151 *Ibid* 107 [162] (Spigelman CJ).

152 Mitchell and Watterson, above n 15, 139.

153 (2004) 61 NSWLR 75. As to the requirement for there to be a breach of trust, or at least of fiduciary duty, see *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 141 [113], 159 [160] (The Court).

## B Constructive Trusts Involving Some Other Wrongdoing

### 1 *Where Property Acquired by Criminal Means*

A constructive trust may be imposed over criminally-acquired assets and their traceable proceeds, at least for certain crimes, such as where money is stolen<sup>154</sup> or obtained by fraud,<sup>155</sup> or where a joint tenant of property acquires absolute ownership by murdering the other joint tenant.<sup>156</sup> The remedial aim of the constructive trust in such cases is relevantly identical to that of constructive trusts imposed following a breach of fiduciary duty: to return the assets or their traceable proceeds to the victim as expeditiously as possible. The arguments made above as to why no active duties beyond the core restorative duty should be imposed apply with equal force here, and indeed with greater force where the seriousness of the crime is greater than that of the fiduciary breach. Similarly, the argument that the duty to exercise reasonable care should be included applies with equal force here.

### 2 *Where Transaction Liable to Be Set Aside in Equity because of Wrongdoing*

There are a variety of situations in which equity will set aside a transaction. These situations can be differentiated from one another by reference to whether the transaction in question is in the form of a contract, a gift, a payment, and so on. More relevantly for present purposes, they can also be differentiated by reference to whether the intervention of equity depends upon the existence of wrongdoing on the part of the defendant. Those situations involving wrongdoing are considered under this heading; the balance is considered in Part IV(D)(7) below.

Equity may intervene to set aside a transaction, or deny a defendant the right to assert an absolute interest in property, because of some vitiating factor in the manner in which the transaction was procured or the interest acquired, such as the existence of fraud, undue influence or unconscionable conduct.<sup>157</sup> Well-known examples include where property is acquired by the defendant subject to an agreement that the plaintiff would have a beneficial interest, which the defendant then fraudulently seeks to deny,<sup>158</sup> or where a disposition or transaction that equity regards as improperly procured is rescinded at the instance of the plaintiff.<sup>159</sup>

154 *Black v S Freedman & Co* (1910) 12 CLR 105; *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230.

155 *Evans* (2004) 61 NSWLR 75.

156 *Rasmanis v Jurewitsch* [1970] 1 NSWLR 650.

157 See Heydon and Leeming, above n 41, 266–8 [13–41]; Heydon, Leeming and Turner, above n 115, chs 12–16.

158 *Pallant v Morgan* [1953] Ch 43; *Last v Rosenfeld* [1972] 2 NSWLR 923; *Carson v Wood* (1994) 34 NSWLR 9.

159 *The Homeward Bound Gold Mining Co NL v McPherson* (1897) 17 NSWLR (Eq) 281; *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143, 153 (McLelland AJA); *Hancock Family Memorial Foundation Ltd v Porteous* (2000) 22 WAR 198, 214 [184] (The Court); *Orix Australia Corporation Ltd v Moody Kiddell & Partners Pty Ltd* [2005] NSWSC 1209.

Once again, the remedial aim of a constructive trust imposed in such situations must be to restore the plaintiff to her original position.<sup>160</sup> As for other categories premised on the wrongdoing of the defendant, there is little sense in imposing active duties beyond the core restorative duty. And as elsewhere, the duty to exercise reasonable care should arguably be imposed while the trust assets remain in the hands of the constructive trustee.

### 3 *Trustees de Son Tort*

Trustees de son tort are a special case. The standard definition of a trustee de son tort is a person who, ‘not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee’.<sup>161</sup> As a minimum, this intermeddling must involve the receiving or the taking control of trust property for the benefit of others.<sup>162</sup> It has been said that ‘the control test assumes that the party exercising control can, in a practical sense, exercise discretion in the administration of a trust’, and that ‘equitable liability as a trustee de son tort will not be imposed in the absence of such a discretion’.<sup>163</sup> The trustee de son tort must intend to assume the role of trustee,<sup>164</sup> although it is not necessary that there be any dishonest conduct, as can be seen when a person who mistakenly thought he had been appointed a new trustee is made a trustee de son tort.<sup>165</sup> Where a person is made a trustee de son tort, he becomes accountable for the trust property on the same basis and to the same extent as an express trustee, and cannot escape liability by asserting that he was never appointed.<sup>166</sup>

What duties accompany this category of constructive trust is an open question. Professor Austin has argued that a trustee de son tort should be understood to have all the authority and powers, as well as the duties and liabilities, of an express trustee.<sup>167</sup> Certainly the case for the fiduciary duties is unimpeachable: as a trustee de son tort in fact undertakes to act as such, there is no good reason why those duties should not attach.

As for the remaining duties, it can be accepted that the trustee de son tort should be burdened with them at least to the extent that his control of trust property affords an opportunity for their application. So, for example, where a trustee de son tort has assumed control over an investment held on trust, such that he is in a practical sense able to exercise some discretion in relation to that investment, that discretion should be qualified by all the duties owed by express trustees. But, and here the argument diverges from Austin’s, it is difficult to see

160 See, eg, *The Homeward Bound Gold Mining Co NL v McPherson* (1897) 17 NSWLR (Eq) 281, 323; *Last v Rosenfeld* [1972] 2 NSWLR 923, 937 (Hope J).

161 *Mara v Browne* [1896] 1 Ch 199, 209 (Smith LJ). See also *James v Williams* [2000] Ch 1.

162 *Re Barney; Barney v Barney* [1892] 2 Ch 265; *Nolan v Nolan* [2004] VSCA 109 [29] (Ormiston JA).

163 Thomson Reuters, *Ford and Lee: The Law of Trusts* (at 1 March 2017) [22.10820].

164 *Nolan v Nolan* [2004] VSCA 109 [29] (Ormiston JA).

165 *Life Association of Scotland v Siddal* (1861) 3 De G F & J 58; 45 ER 800.

166 *Rackham v Siddall* (1848) 16 Sim 297; 60 ER 888; *Rackham v Siddall* (1850) 1 Mac & G 607; 41 ER 1400; *Pearce v Pearce* (1856) 25 LJ Ch 893; 52 ER 1103.

167 Austin, above n 11, 207, 211.

why a trustee de son tort should gain *new* authority and powers by reason of the constructive trust. For example, if a person has gained control over a fraction over the trust property, and made a trustee de son tort with respect thereto, why should he then be given legal authority to ‘get in’ all the remaining trust property, over which he did not gain control? After all, a trustee de son tort (meaning ‘wrong’) remains, at all times, an unauthorised trustee.

It should therefore follow that the only authority and powers that a trustee de son tort has in respect of the trust are those that he gained in a practical sense by reason of his intermeddling, and that in respect of *that* authority and *those* powers, he owes all the duties that he would were he to have been validly appointed.

## C Constructive Trusts Giving Effect to an Intention to Create an Express Trust

### 1 Secret Trusts

A concise and authoritative statement of the essential elements of a secret trust was given by Viscount Sumner in *Blackwell v Blackwell*:

The necessary elements, on which the question turns, are intention, communication, and acquiescence. The testator intends his absolute gift to be employed as he and not as the donee desires; he tells the proposed donee of this intention and, either by express promise or by the tacit promise, which is signified by acquiescence, the proposed donee encourages him to bequeath the money in the faith that his intentions will be carried out.<sup>168</sup>

It can therefore be seen that an essential feature of secret trusts is that the recipient of property undertakes to receive it as a trustee for the benefit of others. The trustee may not subsequently deny the existence of the trust nor attempt to suppress the evidence of it.<sup>169</sup>

To the extent that it is accepted that a secret trust is indeed a constructive trust and not an express trust, the only reason it falls short of the latter label is because of the trust’s non-compliance with statutory requirements for the creation of an express trust. In all other respects, however, it fully resembles an express trust, and must come with the full panoply of duties of an express trustee.<sup>170</sup> As to those duties requiring authority on the part of the trustee, the testator in fact intends to confer such authority. As to fiduciary duties, the trustee has given an undertaking to act in the best interests of the beneficiaries. Even the duties relating to the ‘instrument’ of trust can have work to do, as terms of the secret trust may have been reduced to writing in a letter given to the intended trustee, though not recorded in the will.

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168 [1929] AC 318, 334 (Viscount Sumner). See further *Voges v Monaghan* (1954) 94 CLR 231, 233 (Dixon CJ), 240 (Fullagar and Kitto JJ).

169 *Blackwell v Blackwell* [1929] AC 318, 329 (Lord Buckmaster).

170 See Bant and Bryan, above n 15, 183 n 10; Swadling, above n 15, 417–18.

## 2 *Rochefoucauld v Boustead Trusts*

It has been said, rightly, that *Rochefoucauld v Boustead* trusts are ‘closely analogous’ to secret trusts,<sup>171</sup> the key difference being that that the former arise in an inter vivos context, and the latter in a testamentary context. The trusts share a common rationale.<sup>172</sup> The classic statement of the *Rochefoucauld v Boustead* trust, given in its foundational case, is that ‘it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself’.<sup>173</sup>

Critical here, as with a secret trust, is the circumstance that the parties reach an ‘informal pre-acquisition agreement’ whereby the intended trustee promises to hold an interest in the acquired property on trust,<sup>174</sup> which the owner relies upon in subsequently conveying the property.<sup>175</sup> In such circumstances, equity will not permit the intended trustee to set up the absolute character of the conveyance for the purpose of defeating the beneficial interest.<sup>176</sup> Putting to one side the ongoing debate as to whether this trust is express, resulting or constructive,<sup>177</sup> in whichever case the full set of duties must apply, as it was always intended that a trust be created.

### D Constructive Trusts Giving Effect to Some Other Intention

#### 1 *Mutual Wills*

In a typical mutual wills case, two people (often spouses) come to an agreement that the first to die will leave her property to the survivor, who in turn promises to leave whatever is left at his death to one or more ultimate beneficiaries. Provided the mutual wills remain unrevoked when the first spouse dies, the survivor will be prevented in equity from subsequently making a new testamentary disposition at odds with the agreed position recorded in the mutual wills. The terms of the constructive trust will be those of the will which the survivor undertook would be his last will.<sup>178</sup>

As in the case of secret trusts and *Rochefoucauld v Boustead* trusts, a constructive trust imposed to give effect to mutual wills is triggered by promise and reliance.<sup>179</sup> The result is to reduce the survivor to something less than an absolute owner,<sup>180</sup> however this is not to assimilate the position of the survivor to that of an express trustee, as the survivor is entitled during his lifetime to the full

171 T G Youdan, ‘Formalities for Trusts of Land, and the Doctrine in *Rochefoucauld v Boustead*’ (1984) 43 *Cambridge Law Journal* 306, 327. See also at 323–4, 334–6.

172 Liew, *Rationalising Constructive Trusts*, above n 1, 94. That is, both ‘arise in response to the elements of promise and reliance’.

173 *Rochefoucauld v Boustead* [1897] 1 Ch 196, 206 (The Court).

174 Liew, *Rationalising Constructive Trusts*, above n 1, 47–8.

175 *Ibid* 50.

176 Heydon and Leeming, above n 41, 82 [7–10].

177 See *Ibid* 82 [7–12]; Liew, *Rationalising Constructive Trusts*, above n 1, 64–72.

178 *Birmingham v Renfrew* (1937) 57 CLR 666, 682–3 (Dixon J).

179 Ying Khai Liew, ‘The Ambit of the Mutual Wills Doctrine’ (2016) 132 *Law Quarterly Review* 664.

180 *Barns v Barns* (2003) 214 CLR 169, 225–6 [163] (Callinan J), quoting R P Meagher and W M C Gummow, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 6<sup>th</sup> ed, 1997) 343–4 [1342].

benefit of his property and the property received under his spouse's will.<sup>181</sup> As Dixon J explained, 'the object of the transaction is to put the survivor in a position to enjoy for his own benefit the full ownership so that, for instance, he may convert it and expend the proceeds if he choose'.<sup>182</sup>

Such rights of full enjoyment preclude the operation of fiduciary duties of self-abnegation. They also preclude the imposition of positive duties of management, such as to invest trust property and to maintain accounts. They may even preclude the duty to exercise reasonable care, on the basis that this would be inconsistent with the survivor's absolute right to enjoy the property as he sees fit during his lifetime, but much will depend on what the terms of the will expressly and impliedly require.

It is submitted that the core duty of this category of constructive trust is the duty not to impeach the trust instrument, for instance, by attempting to make an inconsistent will. The circumstance that the terms of the trust are embodied in a written will also necessarily entail duties to become acquainted with the terms of the trust and to adhere to them. Beyond that, provided the trustee acts in good faith (refraining from making gifts and settlements calculated to defeat the intention of the agreement),<sup>183</sup> he will be at liberty to deal with the property as he sees fit.

## 2 Vendor–Purchaser Constructive Trusts

There is some doubt as to whether this category of constructive trust<sup>184</sup> remains good law in Australia in light of the High Court's evident endorsement in *Tanwar Enterprises Pty Ltd v Cauchi* of the proposition that 'it is both inaccurate and misleading to speak of the unpaid vendor under an uncompleted contract as a trustee for the purchaser'.<sup>185</sup> A number of authorities since *Tanwar* have treated it as discarding the notion of a constructive trust in such cases,<sup>186</sup> with the purchaser's interest 'better understood as an equitable right to performance commensurate with the terms of the contract, and not a trust'.<sup>187</sup> However that view has not yet commanded universal assent,<sup>188</sup> and as explained in the Introduction, accepting for the sake of argument that the language of constructive trust is appropriate to them, borderline categories are examined in this article.

181 Two possible qualifications to that are that the survivor must not deliberately dispose of the property in his lifetime in order to avoid the terms of the agreement, and must not use the property in a way that is inconsistent with what those terms expressly or impliedly require, see further *Flocas v Carlson* (2015) 15 ASTLR 192, 243 [192] (McMillan J).

182 *Birmingham v Renfrew* (1937) 57 CLR 666, 689.

183 *Ibid.*

184 Which finds its expression in *Lysaght v Edwards* (1876) 2 Ch D 499.

185 (2003) 217 CLR 315, 332 [53] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ) ('*Tanwar*'), quoting *Kern Corporation Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164, 192 (Deane J).

186 See, eg, *Brady King Pty Ltd v Federal Commissioner of Taxation* (2008) 168 FCR 558, 563 [28] (The Court); *Mercier Rouse Street Pty Ltd v Burness* [2015] VSCA 8, [79]–[86] (Santamaria JA); *Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 6]* [2015] FCA 825, [987] (Edelman J).

187 *Westpac Banking Corporation v Queensland* (2016) 11 BFRA 121, 125 [13] (Edelman J).

188 See *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* (2012) 45 WAR 29, 59 [129] (McLure P).

What *Tanwar* unequivocally holds is that the interest of the purchaser is commensurate with the availability of specific performance.<sup>189</sup> The availability of that remedy will depend upon a number of factors, including the purchaser's own performance and the contract not being rescinded.<sup>190</sup> The content of the remedy will depend upon the terms of the contract. If the constructive trust analogy is to be retained here, it would at least have to follow from *Tanwar* that the scope of the vendor's duties as constructive trustee cannot exceed those contractual obligations of the vendor that are amenable to the remedy of specific performance.

It has been said that the rationale of this category of constructive trust is to protect each party's 'performance interest', that is, 'the interest that the vendor and purchaser each have in the due performance of the contract'.<sup>191</sup> The trust has been said to put the parties in as close as possible a position as they would have been had the contract been performed,<sup>192</sup> and to reduce the purchaser's vulnerability arising from the fact that transactions relating to land typically progress slowly.<sup>193</sup>

If that is right, then the duties of the vendor as constructive trustee should be limited to those which are necessary to achieve those ends. Clearly, the duty to account in the sense of conveying the property is included, this being an express obligation imposed on the vendor under the contract of sale. Prior to completion, it is arguable, and there is authority for the proposition, that there also exists a duty to exercise reasonable care in preserving the property at the state that it was in on exchange of contracts.<sup>194</sup> However, the difficulty with this duty is in squaring it with *Tanwar*, as it is not apparent that specific performance would be available to compel the vendor to exercise reasonable care in preserving the property: at least in the absence of such a term, express or implied, in the contract.

Beyond these, no other duties seem appropriate: the vendor is by no means a fiduciary, has no account-keeping functions nor investment functions (beyond keeping the property in the state of productiveness that it was in when the contract was signed), and is not bound by any 'instrument' of trust.

### 3 *Agreements for Value to Assign Future Property for Value*

A constructive trust will arise where parties enter into an agreement whereby A gives valuable consideration, in exchange for which B promises to assign

189 (2003) 217 CLR 315, 332–3 [53] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

190 See *Jerome v Kelly (Inspector of Taxes)* [2004] 1 WLR 1409, 1419–20 [32] (Lord Walker).

191 P G Turner, 'Understanding the Constructive Trust between Vendor and Purchaser' (2012) 128 *Law Quarterly Review* 582, 601.

192 *Ibid* 602.

193 Simon Gardner, *An Introduction to the Law of Trusts* (Oxford University Press, 3<sup>rd</sup> ed, 2011) 326–7.

194 See *Lysaght v Edwards* (1876) 2 Ch D 499, 507 (Jessel MR); *Earl of Egmont v Smith* (1877) 6 Ch D 469, 475–6 (Jessel MR); *Clarke v Ramuz* (1891) LR 2 QB 456, 459–60 (Lord Coleridge CJ); *Cumberland Consolidated Holdings Ltd v Ireland* [1946] 1 KB 264, 269 (Lord Greene MR); *Ping v Pearce Paradise Pty Ltd* (1982) 2 BPR 97125; *Lukies v Ripley* (1994) 6 BPR 97477, 4 (Young J); *Alexus Pty Ltd v Pont Holdings Pty Ltd* (2000) 10 BPR 97848, 18 374 [24] (Young J).

property which, though not in existence at the time the agreement is made, will later come into existence and into B's possession. When the property comes into B's possession, B becomes trustee of it for A.<sup>195</sup>

This category of constructive trust strongly resembles the vendor–purchaser constructive trust, the primary point of difference being whether the property exists at the time the agreement is made.<sup>196</sup> At least as far as trustee duties are concerned, there is little to distinguish the two once the constructive trustee is in possession of the trust property. The present trust exists to vest beneficial ownership immediately in the assignee (to the exclusion of third parties) and to require the assignor to convey the property to the assignee. No further trustee duties are apposite, except possibly, as elsewhere, the duty to exercise reasonable care with the property while it is in the trustee's possession.

#### 4 Mortgagee Constructive Trusts

Where a mortgagee has exercised a power of sale and satisfied its debt from the proceeds of that sale, a constructive trust in favour of the mortgagor (and all subsequent encumbrancers in order of priority) will be imposed over what remains of the proceeds.<sup>197</sup> Although no express trust is intended, the authorities indicate that this category of constructive trust has more of the incidents of an express trust than might be supposed. In *Charles v Jones*, in a passage since adopted by a unanimous High Court in *Bofinger*,<sup>198</sup> Kay J held that:

The duty of this mortgagee was at least to set this money apart in such a way as to be fruitful for the benefit of the persons beneficially entitled to it. To that extent and in that manner he was, according to my understanding of the law, in a fiduciary relation to the persons entitled to the money.<sup>199</sup>

In *Bofinger*, the High Court left open the question of whether a mortgagee as constructive trustee is saddled with the 'burdensome administration and investment duties' of an express trust.<sup>200</sup> The Court held that as at the date that the mortgagee's debt had been satisfied from the proceeds of sale (the date at which the constructive trust came into existence), the mortgagee was obliged to account to the mortgagor for the surplus moneys, *and*, not to undertake or perform any competing arrangement in that respect without prior release from the mortgagor. It was said that these obligations were fiduciary in character.<sup>201</sup> The fiduciary undertaking is somewhat elusive. No explanation is given in the judgment for why the mortgagee constructive trustee is a fiduciary, apart from the reference in *Charles v Jones* cited above. That case in turn cited *Quarrell v*

195 *Re Lind; Industrials Finance Syndicate Ltd v Lind* [1915] 2 Ch 345, 360 (Swinfen Eady LJ); *Palette Shoes Pty Ltd (in liq) v Krohn* (1937) 58 CLR 1, 27 (Dixon J).

196 Indeed, it has been argued that the two doctrines should be merged on the basis that in both, 'constructive trusts arise to replicate the parties' rights and duties, arising out of their primary contractual relationship, if and when the subject-matter exists in B's hands': Liew, *Rationalising Constructive Trusts*, above n 1, 186–7. See further 179–88.

197 *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 ('*Bofinger*').

198 *Ibid* 287–8 [35].

199 (1887) 35 Ch D 544, 550.

200 (2009) 239 CLR 269, 289 [44]–[45].

201 *Ibid* 290 [49].



*Beckford*, which although containing no use of the word ‘fiduciary’, does contain this illuminating passage:

If the mortgagee has chosen to take possession and help himself, he becomes then a bailiff, without salary, and the mortgagee is accountable for the profits, which are applicable in the first instance to pay the principal and interest of his debt, and all other allowances, to a mortgagee; but he is bound to be an accounting party, taking the estate in possession upon the principle, and upon the obligation, to account with the mortgagor for all the rents he receives. He is bound to keep the account, and to be ready with it, to apply it regularly to pay his principal and interest, and to be ready to surrender up the pledge as soon as it has answered its purpose.<sup>202</sup>

One possible explanation, then, is that the fiduciary undertaking consists in the mortgagee’s decision to exercise its power of sale while cognisant of the responsibilities that that decision entails. That is a preferable explanation to suggesting that the mortgagee is a fiduciary merely by virtue of being a constructive trustee, for as we have seen, many people are made constructive trustees by their wrongdoing, and to affix all such people with the label of fiduciary would be to significantly dilute the concept, which has the notion of an undertaking to act in the best interests of the beneficiaries at its heart.

It is submitted that the combined effect of these authorities is that this category of constructive trustee is duty-bound at least to account to the beneficiaries for the balance of the proceeds (in the sense of paying them the balance once its debt is satisfied), to not profit from the trust (and, possibly, further fiduciary duties), and, on the assumption that the beneficiaries cannot immediately be found,<sup>203</sup> to invest the trust funds until they can. Beyond that, there is little more that can be transposed: it makes no sense to speak in this context of the duty to get in trust property (as the constructive trust is predicated upon the proceeds already being in the mortgagee’s hands), nor of duties relating to the instrument of trust, to decision-making or to record-keeping.

## 5 *Proprietary Estoppel*

Where a person has been encouraged by a property owner to detrimentally alter her position in the expectation that she would obtain a proprietary interest,<sup>204</sup> or where the property owner stood by while the person acted to her detriment on the basis of a mistaken expectation to that effect and did nothing to disabuse her of it,<sup>205</sup> equity will intervene to prevent her suffering harm by reason of her detrimental reliance.<sup>206</sup>

The relief which is necessary is usually that which reflects the value of the promise.<sup>207</sup> Whether departure from that position is warranted can depend upon a number of factors, such as whether proprietary relief will cause injustice to third

202 (1816) 1 Madd 269, 278; 56 ER 100, 103 (Sir Plumer V-C).

203 See *Charles v Jones* (1887) 35 Ch D 544, 549–50 (Kay J).

204 *Dillwyn v Llewelyn* (1862) 4 De G F & J 517; 45 ER 1285.

205 *Ramsden v Dyson* (1866) LR 1 HL 129.

206 *Sidhu v Van Dyke* (2014) 251 CLR 505, 522–3 [58] (French CJ, Kiefel, Bell and Keane JJ).

207 *Ibid* 530 [85] (French CJ, Kiefel, Bell and Keane JJ). See also *Ashton v Pratt* (2015) 88 NSWLR 281, 307 (Bathurst CJ).

parties,<sup>208</sup> and whether the plaintiff's detriment is of a 'relatively small, readily quantifiable monetary outlay' which can be remedied by way of reimbursement.<sup>209</sup>

Provided that a constructive trust is the appropriate remedy, it remains to consider what the incidents of such a trust are. An important intermediate question is 'when does the trust arise?' If it arises only at the stage that the promise is due to be performed, in order to effect an immediate transfer of the property to the plaintiff, then the constructive trust is functionally similar to the wrongdoing-based constructive trusts, serving only to facilitate conveyance.<sup>210</sup> If the trust arises some months or years before the promise is due to be performed, then clearly more may be required on the part of the constructive trustee in terms of maintaining the property in the intervening period.

It is now well established that the constructive trust arises at the time of the plaintiff's detrimental reliance. Most recently, in *McNab v Graham*, a unanimous Victorian Court of Appeal held that the date that the constructive trust comes into existence is the date when the detrimental reliance renders it unconscionable to depart from the promise.<sup>211</sup> In that case, the promisees worked the property for a period of 42 years, on the faith of a promise that the owner would leave the property to them in his will. He died without doing so, and the promisees brought a claim against his executor. The primary judge held, and the Court of Appeal affirmed, that the promisor held the property on trust for the promisees during his lifetime, starting from the moment that there was reliance upon the promise which rendered it unconscionable for him to depart from the representation.<sup>212</sup>

In such circumstances, it is arguable that a constructive trust of this nature at least entails those duties which are necessary to ensure that the promisees receive the benefit of the promise when it becomes due to be performed. These would be, at least, the duties to exercise reasonable care in maintaining the property over the years and the duty to account (in the sense of transferring the property) to the promisees when the promise becomes due to be performed. It might conceivably even entail the duty to 'invest' in the loose sense of keeping the trust property productive (or to put it negatively, not to let the property lie fallow). The extent to which the legal owner may otherwise use the property for his own benefit before the promise falls due to be performed is an open question.<sup>213</sup>

By contrast, where the constructive trust is declared by the court after the promise has fallen due to be performed, it may in substance be merely 'akin to orders for conveyance'.<sup>214</sup> The point is that timing plays a critical role in

208 *Giumelli v Giumelli* (1999) 196 CLR 101, 125 [49]–[50] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

209 *Sidhu v Van Dyke* (2014) 251 CLR 505, 529–30 [84] (French CJ, Kiefel, Bell and Keane JJ).

210 *Giumelli v Giumelli* (1999) 196 CLR 101, 112 [5] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

211 [2017] VSCA 352, [3]–[6], [108]. See also *Secretary, Department of Social Security v Agnew* (2000) 96 FCR 357, 365 [18] (The Court); *Webster v Ashcroft* [2012] 1 WLR 1309; *Walden v Atkins* [2013] BPIR 943. See further K R Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell, 2<sup>nd</sup> ed, 2016) 190–1 [11-014].

212 [2017] VSCA 352, [54], [114(2)], [133].

213 As to which, see the obiter remarks of Lord Scott in *Thorner v Major* [2009] UKHL 18, [19].

214 *Giumelli v Giumelli* (1999) 196 CLR 101, 112 [5] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

ascertaining how much equity will require of a promisor whom it declares to be a constructive trustee.

## 6 Domestic Joint Endeavour

The domestic joint endeavour constructive trust, commonly associated with the High Court's decisions in *Muschinski v Dodds*<sup>215</sup> and *Baumgartner v Baumgartner*,<sup>216</sup> is the most adaptable of all the constructive trusts discussed in this article. The constructive trust may be imposed where

the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it.<sup>217</sup>

Constructive trusts in this category have a predominantly remedial character<sup>218</sup> and can be moulded<sup>219</sup> and fashioned<sup>220</sup> by the court so that the trust represents, or reflects the availability of, equitable relief in the particular circumstances.<sup>221</sup> It is for the court 'to determine the terms of [the] constructive trust',<sup>222</sup> the date at which the constructive trust comes into existence (whether at the time of the court order or before),<sup>223</sup> and the appropriate share of trust property to be allocated to each party.<sup>224</sup> Given the flexibility of this remedy, it would be desirable that courts imposing it explicitly state the duties that attend the trust. However, where this is not done, it is submitted that the following conditions might apply.

Similarly to other categories of constructive trust already discussed, the domestic joint venture constructive trust can, in some cases, be no more than a vehicle for the realisation of the asset and the repayment to each party of his or her respective contributions.<sup>225</sup> Where that occurs, the only relevant duty is to account to the beneficiaries in the sense of conveying the property to them.

But, consistently with the flexibility of this remedy, it is by no means *necessary* that the imposition of this kind of constructive trust must be only for the purpose of immediately realising the asset and dividing the proceeds between the parties. The parties may well agree that if a constructive trust is to be imposed, the trust should subsist for a period of time. For example, where the property the subject of the constructive trust is a matrimonial home, but the

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215 (1985) 160 CLR 583.

216 (1987) 164 CLR 137.

217 *Muschinski v Dodds* (1985) 160 CLR 583, 620 (Deane J); *Baumgartner v Baumgartner* (1987) 164 CLR 137, 148 (Mason CJ, Wilson and Deane JJ), quoting *Muschinski v Dodds* (1985) 160 CLR 583, 620 (Deane J).

218 *Muschinski v Dodds* (1985) 160 CLR 583, 615 (Deane J).

219 *Ibid.*

220 *Baumgartner v Baumgartner* (1987) 164 CLR 137, 156 (Gaudron J).

221 *Muschinski v Dodds* (1985) 160 CLR 583, 615 (Deane J).

222 *Baumgartner v Baumgartner* (1987) 164 CLR 137, 149 (Mason CJ, Wilson and Deane JJ).

223 *Muschinski v Dodds* (1985) 160 CLR 583, 615 (Deane J).

224 *Baumgartner v Baumgartner* (1987) 164 CLR 137, 150–1 (Mason CJ, Wilson and Deane JJ).

225 *Muschinski v Dodds* (1985) 160 CLR 583, 623 (Deane J).

market is in decline, it may well be the case that neither party would wish the property to be sold until the market improves. The court could in that case order that the constructive trust remain in effect until either party seeks the realisation of the asset. In such a case, the kinds of duties discussed above for those categories of constructive trust intended to endure for a long period would arguably be applicable: in particular, the duties to exercise reasonable care, the duties to invest trust property (in the sense of keeping it productive), and as always, the duty to account in the sense of transferring the property at the appropriate time.

### **7 *Constructive Trusts Arising where a Transaction Is Set Aside Otherwise than because of Wrongdoing***

In Part IV(B)(2), I considered the category of constructive trusts arising where a transaction is liable to be set aside in equity because of wrongdoing. However, as mentioned there, equity will also intervene to set aside a transaction in a variety of situations involving no wrongdoing at all. This includes transactions involving certain species of mistake,<sup>226</sup> innocent misrepresentations,<sup>227</sup> and unjust enrichment.<sup>228</sup>

Given the variety of circumstances that come under this umbrella, it is difficult to generalise about the remedial goals of a constructive trust so imposed. While in most cases the primary remedial goal sought to be achieved by the constructive trust will likely be to get the trust property into the hands of the plaintiff as expeditiously as possible, in some cases, it may be appropriate for the property to be held by the constructive trustee for a longer period of time. This may occur, for example, where the imposition of a constructive trust is designed to reflect the arrangement that parties in fact intended to effect.<sup>229</sup> If the constructive trusteeship is to persist for some time, it becomes difficult to categorically exclude the full complement of duties of express trustees. For these reasons, although it is probable that in *most* cases, these constructive trusts will closely resemble wrongdoing-based constructive trusts, the diverse nature of this category precludes any definitive conclusions about duties.

## **E Conclusion on Duties**

In summary, it is submitted that the duties that attend each category of constructive trust are as summarised in the table below. These are of course my own conclusions, and they are entirely debatable. It is hoped that their articulation will invite, rather than quell, such debate.

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226 See, eg, *Wambo Coal Pty Ltd v Ariff* (2007) 63 ACSR 429.

227 See, eg, *Redgrave v Hurd* (1881) 20 Ch D 1.

228 See, eg, *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105.

229 *Carson v Wood* (1994) 34 NSWLR 9.

Figure 1: Summary of Duties

		✓		
<b>FIDUCIARY BREACH</b>	Fiduciary as Constructive Trustee			
	Accessory as Constructive Trustee			
<b>OTHER WRONGDOING</b>	Where Property Acquired Criminally			
	Transaction Set Aside (Wrongdoing)			
	Trustees de Son Tort			
	Secret Trusts			
<b>WHERE TRUST INTENDED</b>	<i>Rochefoucauld v Boustead</i> Trusts			
	Mutual Wills			
<b>OTHER INTENTION</b>	Vendor–Purchaser Constructive Trusts			
	Future Property Constructive Trusts			
	Mortgage Constructive Trusts			
	Proprietary Estoppel			
	Domestic Joint Endeavours			
	Transaction Set Aside (Innocently)			
<b>DUTIES RELATING TO INSTRUMENT OF TRUST</b>	Not Impeach Trust Instrument			
	Adhere To and Carry Out Terms of Trust			
	Become Acquainted with Terms of Trust			
<b>DUTIES RELATING TO TRUST PROPERTY</b>	Invest Trust Funds			
	Get In Trust Property			
<b>DUTES RELATING TO BENEFICIARIES</b>	Account: Pay or Transfer Property to Beneficiaries			
	Account: Report to the Beneficiaries or Court			
	Account: Keep Records			
	Act Impartially between Beneficiaries			
<b>FIDUCIARY DUTIES</b>	Not Profit from Trust			
	Not Delegate Duties or Powers			
	Exercise Reasonable Care			

## V CONCLUSION

The duties of constructive trustees are rarely the subject of sustained analysis in either case law or academic commentary. The aim of this article has been to offer an exposition of these duties on a category-by-category basis. This has been done by seeking to identify the rationale of each duty of *express* trustees, and then using those rationales to inform an analysis of which duties might apply to each category of constructive trust.

The conclusion is that the position may be more nuanced than first thought. Factors such as what remedial purpose the constructive trust serves, how long it is intended to endure, whether any authority has been conferred on the trustee to make decisions affecting trust property and beneficiaries, and whether the trustee made any undertaking to act as such, can each play a decisive role in determining which duties might apply. The landscape remains as messy as it was, but hopefully not as vague.