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THE RIGHTS AND WRONGS OF DISCRETIONARY REMEDIALISM

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Judicial decision-making should proceed according to abstract rules that define categories of similar cases. Rules provide a reasonable assurance that different judges will decide similar cases in a similar way. The notion that equitable remedies are at the discretion of the court, albeit a "weak" discretion, does not provide the same degree of assurance. An insistence upon rules need not be inconsistent with a separation of remedy questions from liability questions. A category of cases that attracts equitable intervention on a particular ground may embrace a number of discrete (but imperfectly defined) remedy categories, which correspond to different remedial requirements. What is often identified as discretion should be understood as an interpretative exercise whereby the boundaries between those categories (and, hence, the rules governing selection of remedy) are given a more precise definition.

I. INTRODUCTION

The matter of the role of judicial discretion in cases in which equitable remedies are sought has been, in recent years, the subject of a lively and protracted debate. The leading protagonist in the anti-discretion party has been Professor Peter Birks. Birks insists that choice of remedy is constrained by rules. The defenders of discretionary remedialism have included Professor Paul Finn, Patricia Loughlan, Simon Evans and David Wright.[1] It is important to appreciate that these defenders of discretionary remedialism insist that

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1 Leading contributions to the debate have been Patricia Loughlan, "No Right to the Remedy? An Analysis of Judicial Discretion in the Imposition of Equitable Remedies" (1989) 17 Melbourne University Law Review 132 [Loughlan]; Peter Birks, "Proprietary Rights as Remedies" in Peter Birks (ed.), *Frontiers of Liability (Volume 2)* (Oxford: Oxford University Press, 1994); Simon Gardner, "The Element of Discretion" in Peter Birks (ed.), *Frontiers of Liability (Volume 2)* (Oxford: Oxford University Press, 1994); Paul Finn, "Equitable

the choice of remedy in equity cases is constrained by legal standards, but they also insist (contrary to Birks) that there is a material difference between remedial discretion and rule-based decision-making. Loughlan and Evans have (in apparent deference to Ronald Dworkin) described remedial discretion as a "weak" discretion, in order to distinguish it from a "strong" discretion under which there would be a choice between several alternatives permitted by law.[2] Nevertheless, we should not underestimate the practical implications of what seems to be a relatively minor disagreement over how best to describe the process by which judges decide to award or withhold equitable remedies. The two understandings are premised upon different ideas about how the doctrine of precedent operates in relation to equitable remedial questions. If judges *understand* themselves to be applying a particular combination of recognised legal standards on a one-off basis (every case being *sui generis* as to the question of remedy) rather than applying rules that are determinative of the case at hand (the case being recognised as belonging to a category of cases that requires a specific type of remedial response), it will be more difficult for litigants to predict remedial outcomes accurately.

This article is written from a perspective that adheres to the proposition that judicial decision-making should, as far as possible, be subjected to abstract rules that define categories of similar cases. This proposition is taken to be the cornerstone of legal rationality. Rule-based decision making is the only means whereby we may be reasonably sure that decision-makers, who are situated in different places and times and who differ from one another in terms of their experiences and prejudices, will decide similar cases in a similar way. Deciding remedy questions by recourse to what is supposed to be a unique combination of factors, which are drawn from an agreed list of factors, does not offer the same assurance of consistency because, at the very least, the question of the relative weight of factors is left to individual decision-makers. There would seem to be no reason for distinguishing between questions as to a defendant's liability "in principle" and questions about the means of giving effect to that liability—that is, the

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Doctrine and Discretion in Remedies" in W.R. Cornish, R. Nolan, J. O'Sullivan, G. Virgo, *Restitution: Past, Present and Future* (Oxford: Hart Publishing, 1998) [Finn]; David Wright, *The Remedial Constructive Trust* (Sydney: Butterworths, 1998) [Wright, *The Remedial Constructive Trust*]; Peter Birks, "Three Kinds of Objection to Discretionary Remedialism" (2000) 29 Western Australian Law Review 1 [Birks, "Three Kinds of Objection"]; Peter Birks, "Rights, Wrongs and Remedies" (2000) 20 Oxford Journal of Legal Studies 1 [Birks, "Rights, Wrongs and Remedies"]; Simon Evans, "Defending Discretionary Remedialism" (2001) 23 Sydney Law Review 463 [Evans, "Defending Discretionary Remedialism"]; David Wright, "Wrong and Remedy: A Sticky Relationship" [2001] Singapore Journal of Legal Studies 300 [Wright, "Wrong and Remedy"].

2 Loughlan, *supra* note 1 at 133, Evans, "Defending Discretionary Remedialism", *supra* note 1 at 484.

"remedy" imposed by the court—because the practical significance to the litigants of the form of remedy may be as great as (or greater than) the finding on the question of liability. This is particularly so in relation to choices between personal and proprietary remedies, because the insolvency of a defendant may render a personal remedy of no value to a successful plaintiff.

The author shares Birks's concern about the capacity of discretionary remedialism to undermine the rule of law and to create a condition of "rightlessness"[3]. An apparent lack of concern for rule generation is, from this perspective, a major flaw in the weak discretion thesis. Nevertheless, it is acknowledged that the idea of discretion as to remedies and the related concept of separation of remedy questions from liability questions are entrenched firmly in the thinking of equity lawyers. Courts frequently invoke the mantras that equitable remedial questions are a matter for the court's "discretion"[4] or "depend on the facts of the given case"[5] and that it is for the court to decide "in what way the equity can be satisfied".[6] One of the attractions of equity is that it contemplates a plurality of possible remedial responses to any particular category of events that attract equitable intervention, thus enabling the award of relief that is finely tuned to the circumstances of particular litigants. The purpose of this article is to propose a theory about how a legal system can preserve a high degree of subtle differentiation between different types of cases within the bounds of a decision-making methodology that places a high value upon predictability. The proposal of this theory will be followed by discussion of how that theory could be applied to the vexed issue of the availability of a constructive trust as a remedy.

II. Discretion Versus Rules—The Theories

A. *Discretionary Remedialism—"Weak" Discretion*

Loughlan (inspired by Dworkin) described the task of a court of equity as "ascertaining the relevant principles and, through an exercise of judgment, reaching a decision which is both generated and justified by an assessment of the relative weight and importance of those principles."[7] Loughlan described this approach as one of "weak discretion", thereby distinguishing

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3 Birks, "Rights, Wrongs and Remedies", *supra* note 1 at 23.

4 For example, *Australian Broadcasting Corporation v. Lenah Game Meats Pty Ltd* (2001) 76 A.L.J.R. 1 at 29, par. [138].

5 *Warman International Limited v. Dwyer* (1995) 182 C.L.R. 544 at 562.

6 *Plimmer v. Mayor of Wellington* (1884) 9 App. Cas. 699 at 714.

7 Loughlan, *supra* note 1 at 136–7. Loughlan quoted and relied upon a statement by Dworkin that "when principles intersect. . .one who must resolve the conflict has to take into account the

it from the application of a settled rule, on the one hand, and a "strong discretion" whereby the court has the power to choose between two or more equally correct outcomes, on the other hand.[8] Loughlan emphasised that the various individual factors merely incline the court in one direction or the other, rather than dictate a particular result.[9] Loughlan asserted that this process is identical to that which occurs (according to Dworkin) in every case in which no settled rule determines what the result ought to be. Every case in which the plaintiff claims an equitable remedy is said to be one of Dworkin's "hard cases".[10] While this process would seem to place real restraints on the court's discretion, the process would justify a decision only with respect to the particular set of facts before the court. The decision would lack precedent value. It does not possess what Dworkin and MacCormick have called the "forward-looking" element of judicial reasoning—that is, the idea that deciding a case upon a particular ground provides a ground for deciding future similar cases in the same way.[11] According to the weak discretion theory, decisions about equitable remedies are justified by a combination of legal standards but those decisions do not have the effect of generating rules for future cases.

Evans has reiterated Loughlan's argument and has criticised Birks on the basis that he "appears to conflate discretion with strong discretion and weak discretion with rules."[12] Evans distinguished between rule-based decision-making and weak discretion on the basis that the former is "acontextual", while the latter consists of "contextualised decision-making based on general standards."[13] Evans, like Loughlan, maintained that each decision would be justified by a unique combination of legal standards, as is appropriate to the case at hand. The extent to which the grounds for a decision could be universalised—that is, elevated to the status of a rule and applied directly to future cases of the same type—would be extremely limited. Evans referred to MacCormick's statement that discretion "makes for morally sensitive and morally nuanced law".[14] Evan's understanding of "discretion" is certainly consistent with that expressed by MacCormick—that is, the applicability of rules is "judgement-independent" while the applicability of the

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relative weight of each." Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth & Co, 1978 at 26) [Dworkin, *Taking Rights Seriously*].

8 *Ibid.* at 133.

9 *Ibid.* at 138.

10 *Ibid.* at 136.

11 Dworkin, *Taking Rights Seriously, supra* note 7 at 118, Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978) at 75 [MacCormick].

12 Evans, "Defending Discretionary Remedialism", *supra* note 1 at 484.

13 *Ibid.* at 485.

14 Neil MacCormick, "Discretion and Rights" (1989) 8 Law and Philosophy 23 at 36 (cited by Evans, "Defending Discretionary Remedialism", *supra* note 1 at 482).

standards associated with remedial discretion is "judgement-dependent".[15] Nevertheless, Evan's description of moral sensitivity and nuance as "an important aspiration" stands in contrast to MacCormick's guarded observation that too much discretion "can be corrosive of civic independence", while legal rights protect that independence "but at the price of being morally blunt instruments."[16] Evans believed that the problem of unpredictability of decision-making could be avoided so long as judges are candid about the reasons they use to justify awarding or withholding remedies in particular cases.[17]

Finn has stated a number of reasons for believing that the worst fears about the effect of remedial discretion upon predictability of decisions are unlikely to be realised.[18] Most of these reasons can be related to a single theme—that is, that the doctrinal justification for equitable intervention usually dictates the function of the remedy, even if it does not dictate the precise form of that remedy. Where a gift is voidable because the donee exerted undue influence over the donor, the function of the remedy ought to be to return the parties to their original positions. The intervention of equity is attracted by the donee's ill-gotten gain. Where it has become impossible to return the parties to their original positions, the court may make a monetary award to the donor. Finn suggested that this was an example of a "natural remedial hierarchy".[19] The approach to remedies under the Australian doctrine of equitable estoppel is another example of a remedial hierarchy. There is a remedial goal embedded in the characterisation of the species of unconscionable conduct that attracts the operation of the doctrine. The relevant unconscionable conduct is the estopped party's encouragement of the other party's exposure of itself to detriment. The doctrine is concerned with detriment prevention and reversal.[20] This does not rule out remedies

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15 *Ibid.* at 35.

16 *Ibid.* at 36.

17 Evans, "Defending Discretionary Remedialism", *supra* note 1 at 500. See also Simon Evans, "Property, Proprietary Remedies and Insolvency: Conceptualism or Candour?" (2000) 5 Deakin Law Review 31 at 44 [Evans, "Property"].

18 Finn, *supra* note 1 at 268–73.

19 *Ibid.* at 269; There was a hint of a similar idea in R.P. Austin, "The Melting Down of the Remedial Trust" (1988) University of New South Wales Law Journal 66 at 85 [Austin]. Austin spoke of the justification for imposing an obligation influencing the "shape" of the remedy (*e.g.* if the obligation is based on unjust enrichment, the remedy must be directed towards returning the defendant's enrichment to the plaintiff), although not necessarily whether it would need to be proprietary or personal.

20 *Waltons Stores (Interstate) Limited v. Maher* (1988) 164 C.L.R. 387 at 407–8 *per* Mason C.J. and Wilson J., at 423 *per* Brennan J. [*Waltons Stores*]; *The Commonwealth v. Verwayen* (1990) 170 C.L.R. 394 at 413 *per* Mason C.J., at 429 *per* Brennan J., at 454 *per* Dawson J., at 475–6 *per* Toohey J., at 504 *per* McHugh J. [*Verwayen*]. See also Michael Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Oxford: Hart Publishing, 1999) at 7.

other than compensatory monetary awards, but it limits those other remedies to situations in which they are necessary in order to achieve the remedial purpose of avoiding detriment to the party claiming the estoppel. A court will order the estopped party to fulfil the claimant's expectation only where it is necessary in order to prevent the claimant from suffering the detriment that arose from its reliance.[21] This is certainly one way, although not necessarily the only way, of making sense of the so-called "minimum equity" idea.[22]

Wright has also drawn attention to the connection between the ground for imposing an obligation upon the defendant and the function of the remedy. Wright said: "There is a connection between the wrong and the remedy. It is a 'sticky' relationship. That is, the wrong does not mechanically determine the remedy, nor are they completely separate. The legal obligation that has been breached does provide relevant information on the remedy that is awarded."[23] Wright's understanding of remedial discretion, like Finn's understanding, eschews strong discretion in favour of the notion of a "taxonomy based upon a loose and dynamic federation of remedies."[24] The ground for intervention is seen as narrowing the field rather than dictating the particular form of remedy. Therefore, choice of remedy still requires an exercise of judgment as to how certain standards apply in a particular factual context. The role of precedent is to identify the factors that are to be taken into account rather than to provide rules that dictate a result. Wright, in an earlier work, had insisted that discretionary remedialism (as made manifest in the remedial constructive trust) does not dispense with the doctrine of precedent,[25] but it is clear that Wright's conception of precedent in equity involves a trade-off between the need to define with certainty a

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21 As in *Waltons Stores, supra* note 20, *Giumelli v. Giumelli* (1999) 73 A.L.J.R. 547 and numerous other cases. The author has argued elsewhere that the fact that most claims of equitable estoppel have led to relief in the "expectation" measure is not a reason for saying that the doctrine is concerned with perfection of expectations, rather than compensation for reliance loss. See Darryn Jensen, "In Defence of the Reliance Theory of Equitable Estoppel" (2001) 22 Adelaide Law Review 157 at 170ff.

22 The English proprietary estoppel cases speak of a "minimum equity to do justice", but this does not appear to be conceived in terms of a remedial hierarchy organised around the aim of compensating the relying party for its reliance loss. See, for example, *Crabb v. Arun District Council* [1976] 1 Ch. 179 at 198 *per* Scarman L.J., *Pascoe v. Turner* [1979] 1 W.L.R. 431 at 438, *Gillett v. Holt* [2001] Ch. 210 at 237 *per* Robert Walker L.J. Gardner has suggested that, insofar as the remedial discretion in English proprietary estoppel is structured in terms of a particular remedial aim, that aim is the fulfilment of the relying party's expectation, although a court may resort to some other quantum, at least where fulfilment of the expectation would be "impracticable" (Simon Gardner, "Remedial Discretion in Proprietary Estoppel" (1999) Law Quarterly Review 438 at 465 [Gardner]).

23 Wright, "Wrong and Remedy", *supra* note 1 at 323.

24 *Ibid.* at 324.

25 Wright, *The Remedial Constructive Trust, supra* note 1 at 180, par. [5.38].

court's "jurisdiction" or "legitimacy" to award a remedy and the need to maintain flexibility as to remedial responses. The "jurisdiction" of a court refers, in this context, to the "core of principles which it *might* articulate."[26]

These advocates of discretionary remedialism are united in acknowledging that a court's power to grant or withhold an equitable remedy is subject to significant constraints. Courts should exercise their discretion according to the same standards that have been applied in previous cases. The remedial hierarchy idea, as espoused by Finn and, so it seems, by Wright, provides further constraint upon the choice of remedy by insisting that the ground for deciding in favour of the plaintiff informs the court as to the remedial work to be done and that the court should select the means of doing that remedial work that does not impose any greater burden upon the defendant than is strictly necessary to that end. This idea appears to have had some influence upon the approach of the High Court of Australia to certain types of equitable remedial questions.[27] Notwithstanding these constraints, those who are concerned about legal certainty ought to have reservations about discretionary remedialism. The fundamental problem, from this perspective, is that discretionary remedialism appears to deny that a court's synthesis of grounds for a decision, on the basis of the relevant standards, can generate a rule that binds courts in relation to future similar cases. While a court is bound to apply the same legal standards as were articulated in previous cases, that court's assessment of the relevance and weight of those standards in relation to any one case justifies its decision *in that case only*. Discretionary remedialism adopts a conception of precedent whereby standards bind but decisions do not.

B. *Birks—Remedies as Rights to a Legal Outcome*

Central to Birks's approach to remedies is a denial that there could be a plurality of permissible remedial responses in respect of any particular ground for legal intervention. Birks has distinguished the discretionary remedialists' use of the word "remedy" from several older uses of the word. While the older uses of the word describe a right to a concrete legal outcome, which follows from the plaintiff's successful plea of a recognised ground for legal intervention,[28] the discretionary remedialists use the word to describe a

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[26] *Ibid.* at 9, pars. [1.20]–[1.21] [emphasis added].

[27] For example, the use of a highly structured "minimum equity" idea in *Verwayen, supra* note 20, and the Court's *obiter dicta* at 585 in *Bathurst City Council v. PWC Properties Pty Limited* (1998) 195 C.L.R. 566 that it would be inappropriate to impose a constructive trust as a remedy without first considering "whether, having regard to the issues in the litigation, there are other means available to quell the controversy."

[28] Birks, "Rights, Wrongs, and Remedies", *supra* note 1 at 12–6.

right that is created by the court's order. The successful plea of the ground for legal intervention provides merely "a hope that the court will see fit to create a right".[29] The plaintiff does not, prior to the court's determination of the remedy question, have a right to anything apart from "the right to supplicate".[30]

The matter of whether questions of remedy can be separated from questions of liability is an important aspect of the disagreement between Birks and the discretionary remedialists. Birks has insisted that each of the categories of the taxonomy of legal causative events is aligned with a particular type of response. The plaintiff who can point to a recognised causative event can be said to have a *right* to the particular type of response that is aligned with that event. Each event has a limited range of "remedial potential", which is implicit in the characterisation of the causative event.[31] Birks has noted that causative events based upon wrongs have a much wider range of remedial potential than the other three types of causative events in his taxonomy—namely consent, unjust enrichment and "other events". While an unjust enrichment implies simply the restitution of the enrichment[32] and a contractual (*i.e.* consensual) obligation implies the enforcement of the contract or the award of its money equivalent, wrongs are not, as a matter of logic, limited to any one type of response:

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[29] *Ibid.* at 17.

[30] *Ibid.*

[31] Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 *Western Australian Law Review* 1 at 12 [Birks, "Equity in the Modern Law"].

[32] *Ibid.* at 14. In "The Law of Unjust Enrichment: A Millennial Resolution" [1999] Singapore Journal of Legal Studies 318, Birks acknowledged (at 321) that restitution was "multi-causal", in so far as it could be a response to either unjust enrichment or a wrong. Birks develops this argument further in "Unjust enrichment and wrongful enrichment" (2001) 79 Texas Law Review 1767 [Birks, "Unjust enrichment and wrongful enrichment"]. Virgo also advocates a multi-causal approach, although his series of events that trigger restitution differs from that of Birks (Graham Virgo, *The Principles of the Law of Restitution* (Oxford: Clarendon Press, 1999) at 7–8 [Virgo, *The Principles of the Law of Restitution*]). McInnes and Burrows have criticised Birks's revised position and have sought to defend the notion of "perfect quadration" between unjust enrichment and restitution. See Mitchell McInnes, "Restitution, Unjust Enrichment and the Perfect Quadration Thesis" [1999] Restitution Law Review 118 and Andrew Burrows, "Quadrating Restitution and Unjust Enrichment: A Matter of Principle?" [2000] Restitution Law Review 257. There is no need to enter into this debate for present purposes. The multi-causalist position taken by Birks is that restitution responds to multiple causative events, not just unjust enrichment (Birks, "Unjust enrichment and wrongful enrichment", *ibid.* at 1772). Birks has not retreated from the position that restitution is always the appropriate response to unjust enrichment. Virgo takes the same view, namely that "[w]henever it can be shown that the defendant has been unjustly enriched at the expense of the plaintiff then, by operation of law, the defendant will be obliged to restore to the plaintiff the value of the benefit which he or she has received." (Virgo, *The Principles of the Law of Restitution, ibid.*, at 49).

> The victim of a wrong can be given such remedial rights as the system thinks good. The victim of the wrong of battery or, for that matter, of the wrong of breach of contract, could be given the right both to be compensated in money and to be satisfied further by having the wrongdoer's ears cut off. The system has a choice.[33]

Nevertheless, where choice exists as a matter of logic, it is the system's choice and not that of the individual adjudicator. Where there is more than one legally possible response, a court's choice between those responses (*i.e.* its discretion) is "weak and rule-based".[34]

Birks has also noted that wrongs differ from the other events in the taxonomy of events on the basis that a wrong "naturally needs a remedy" and the other events in the taxonomy, from which rights spring independently of the determination of a court. The entitlement of one party to a contract to the other party's contractual performance, for example, cannot "without extreme artificiality" be called a remedy.[35] That party has a *right* that the other party perform its obligations. If that party is denied its right to performance, it can call upon a court to make an order that is aimed at restoring that right. The tendency of discretionary remedialists to speak of remedies for wrongs, rather than rights arising from events, breaks down the continuity between a particular kind of event and a right to a particular kind of response. They perceive everything to be a wrong, to which a court is able to respond in a variety of ways.

Beyond this central concern, Birks has offered several other arguments as to why discretionary remedialism should be seen as neither a correct analysis of current judicial practice nor a desirable model for future practice. One of these arguments is an argument from history. Observation of judicial practice suggests that, where there is a choice between different forms of relief, that choice is either dictated by the law (in the form of a rule) or left to the plaintiff (such as where the plaintiff has a right of election between an account of profits or compensation in respect of a breach of fiduciary duty).[36] Birks sought to bolster his argument that courts never have an unconstrained choice as to remedies by pointing to the fate of the conclusion in *Lister v. Stubbs*[37] that a fiduciary who receives a bribe was personally accountable to its principal but did not become a constructive trustee of the bribe. Birks thought that the Privy Council's insistence, in *Attorney-General for Hong*

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33 Birks, "Equity in the Modern Law", *supra* note 31 at 12.

34 Birks, "Rights, Wrongs and Remedies", *supra* note 1 at 24. See also Birks, "Three Kinds of Objections", *supra* note 1 at 13.

35 *Ibid.*

36 Birks, "Three Kinds of Objection", *supra* note 1 at 9–10; "Rights, Wrongs and Remedies", *supra* note 1 at 24.

37 (1890) 45 Ch.D. 1.

Kong v. Reid,[38] that *Lister v. Stubbs* was decided incorrectly (and that the defendant, Reid, was a constructive trustee for the plaintiff of property purchased using the bribe money) was incompatible with the notion that the choice of remedy in the earlier case was the product of discretion.[39]

Another of Birks's arguments focuses upon the possibility that outcomes of disputes will be less predictable under a discretionary regime. Birks said that "the value in issue and the value likely to be recovered" lie at the centre of any calculation as to the risk of commencing or settling proceedings.[40] Birks feared that litigants would be left guessing as to the possible range of outcomes in their matter and that this uncertainty may either deter them from litigating or persuade them to accept an "unjust settlement".[41] Since proprietary relief is of much greater value than personal relief in cases where the defendant is impecunious, it is highly desirable that a court's decision on that question should be reasonably predictable. Birks thought that leaving decisions of this nature to the discretion of courts would have serious consequences for the dignity of the citizen in the face of the law. Too much judicial discretion would convert citizens from rights-bearers to "child-like supplicants".[42]

A related concern is the need to preserve the rule of law. Birks stated the argument eloquently:

> The whole point of the rule of law is to ensure that power which cannot be put under the law should be accountable to the electorate and that, for the rest, we all live under the law, not under the wills and whims of a person or a group of people. The blessings of this commitment have been overlooked by the discretionary remedialists, who suddenly suppose that the judges should be the one group answerable only to God.[43]

As rules are replaced by judges' assessments of individual cases, the risk that like cases will not be decided alike increases. Birks commented upon the peculiarity of placing so much faith in the instincts of individual judges at a time when societies have become pluralistic. A result dictated by rules can be acceptable to everyone, but it is very unlikely that a result based upon a single judge's instinct can be.[44]

Birks, in all of these arguments, stated a preference for legal certainty. Birks perceived the evil associated with the unpredictability of curial responses to be a matter of grave concern. He was not prepared to purchase

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38 [1994] 1 A.C. 324.
39 Birks, "Three Kinds of Objection", *supra* note 1 at 10.
40 *Ibid.* at 14.
41 Birks, "Rights, Wrongs and Remedies", *supra* note 1 at 23.
42 *Ibid.*
43 Birks, "Three Kinds of Objection", *supra* note 1 at 15.
44 *Ibid.* at 16. See also Birks, "Rights, Wrongs and Remedies", *supra* note 1 at 23–4.

more sensitivity to the facts of individual cases at the cost of legal certainty. Birks has tended to magnify the difference between his position and discretionary remedialism. Evans's criticism of Birks that he "appears to conflate discretion with strong discretion and weak discretion with rules"[45] is not completely unjustified. Advocates of the weak discretion thesis would not accept that the overturning on appeal of a choice of remedy decision necessarily points to the existence of a rule governing the choice of remedy. They insist that remedial discretion is constrained by standards, so they do not deny that it is possible for remedial discretions to be exercised incorrectly and to be in need of correction by an appellate court. The discretionary remedialists do not forsake the rule of law in favour of personalised decision-making. Nevertheless, they appear to turn their backs upon a means whereby the rule of law is maintained and extended—that is, the generation of rules governing remedial choice. This appears to be the core of the disagreement between Birks and the discretionary remedialists. Discretionary remedialists are sanguine about the prospect of weak discretion being a permanent feature of the resolution of particular remedial questions. Birks objects to any form of discretion that is not "on its way to [being] a weak, rule-based discretion."[46]

C. *A Third Way?—A Remedial Hierarchy Governed by Rules*

I. *The Proposal*

An approach to equitable remedies that insists upon a plurality of possible remedial responses to an event (and, consequently, separates the remedy question from the liability question) would be less objectionable, from the perspective of concern for legal certainty, if the particular combination of legal standards relevant to each case could be seen as generating rules for future cases of the same type. This intermediate approach rejects the notion that choice of remedy decisions constitute a permanent category of "hard cases". The apparent discretionary character of these decisions would be regarded as being symptomatic of a process whereby rules are discovered rather than a process that is altogether distinct from rule-based decision making. A particular form of remedy would be "appropriate" in a particular case because the case belongs to a *category* of cases and the law demands that *all* cases in that category be treated *in the same way*. We would not speak of a "remedy continuum", as Wright has,[47] but of discrete categories of cases ("remedy categories") within the larger category of cases that attracts the

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45 Evans, "Defending Discretionary Remedialism", *supra* note 1 at 484.

46 Birks, "Three Kinds of Objection", *supra* note 1 at 13.

47 Wright, *The Remedial Constructive Trust, supra* note 1 at 281–2, pars. [9.4] and [9.6].

operation of a particular equitable doctrine ("liability category"). The close relationship between grounds for imposing obligations upon a defendant and a particular type of remedial work that has to be done (which has been acknowledged by Finn and, latterly, by Wright) leads naturally to a supposition that there is a continuity between each liability category and one of a number of distinct remedial hierarchies, each of which corresponds with a definite remedial goal, such as "compensation for loss", "disgorgement of gains" or "fulfilment of expectations".[48] A hierarchy of punitive remedies is also conceivable, but the extent to which punitive remedies are available in equity is far from settled.[49]

The key distinction between this theory and discretionary remedialism is that this theory insists that each liability category is divided into further discrete categories of cases. Courts have an obligation to search for reasons for deciding whether to place the case in one category or another. Particular categorisation issues might be "hard cases" in the short term, so there will be a need for judges to exercise care in ascertaining what rules are applicable to the case at hand. Insofar as that process may be described as discretion, it corresponds with what Gardner has called "background discretion"—that is, the discretion that is "necessarily embedded in (probably amongst other things) the business of determining the relevant facts, and interpreting the terms of the applicable rules."[50] This type of discretion is not an alternative to rule-based decision making. It is an essential part of the process whereby the applicable rules are discovered.

II. *Hard Cases and the Adjudication Theorists*

This theory takes issue with Loughlan's use of Dworkin's "rights thesis" in the discretionary remedialist cause. Dworkin, when he suggested that

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[48] This seems to be a much used and relatively uncontroversial classification. The same classification is embodied in Elias's three "aims of the law", which he described as "reparation", "restitution" and "perfection". See G. Elias, *Explaining Constructive Trusts* (Oxford: Clarendon Press, 1990) at 4.

[49] Some Australian commentators have suggested that punitive damages are a possible remedy in equity cases—see John Glover, *Commercial Equity: Fiduciary Relationships* (Sydney: Butterworths, 1995) at 271–2 and I.C.F. Spry, *The Principles of Equitable Remedies*, 6th ed. (Sydney: L.B.C. Information Services, 2001) at 636. The New South Wales Court of Appeal, in *Harris v. Digital Pulse Pty Ltd* [2003] N.S.W.C.A. 10, rejected the idea of awarding punitive damages in breach of fiduciary duty cases. Punitive damages awards have been made in equity cases in some United States jurisdictions—see *International Bankers Life Insurance Co v. Holloway* (1963) 368 S.W. 2d. 567 (Supreme Court of Texas) and *White v. Ruditys* (1983) 343 N.W. 2d. 421 (Wisconsin Court of Appeals)—and in New Zealand: see *Cook v. Evatt (No. 2)* [1992] 1 N.Z.L.R. 676 (for breach of fiduciary duty) and *Aquaculture Corporation v. New Zealand Green Mussel Co. Ltd.* [1990] 3 N.Z.L.R. 299 (for misuse of confidential information).

[50] Gardner, *supra* note 22 at 442.

the law does not consist solely of rules, was not suggesting (as Loughlan appears to believe[51]) that the legal order includes some spaces that are permanently rule-free. Dworkin's project, in *Taking Rights Seriously*[52] and *Law's Empire*,[53] was concerned with describing a process whereby those spaces are gradually filled by rules. Dworkin's "hard cases" are cases in which "no settled rule disposes of the case."[54] The problem of hard cases can be a product of uncertainty as to the meaning of established rules or of uncertainty as to whether an earlier decision states a rule at all.[55] Judges confronted by hard cases exercise discretion, in so far as they "exercise initiative and judgment beyond the application of a settled rule."[56] That does not mean that each hard case is a case decided on its own facts. Each hard case would form part of a continuous narrative about the development of an area of law:

> [J]udges seem agreed that earlier decisions do contribute to the formulation of new and controversial rules in some way other than by interpretation; they are agreed that earlier decisions have gravitational force even when they disagree about what that force is. ... [A judge] will always try to connect the justification he provides for an original decision with decisions that other judges or officials have taken in the past.[57]

Dworkin argued that the "gravitational force" of the decision of an earlier court was to be explained by appealing to "the fairness of treating like cases alike".[58] The reasons of principle upon which a court relies in justifying a decision in a particular case call upon future courts to decide whether or not those reasons appear also in the cases before them. If they do, the later courts are *bound* to decide the case in the same way as the earlier case was decided. Legal standards which do not, of themselves, dictate any particular result, can combine to constitute a reason for deciding a case in a particular way and that reason is capable of dictating a result in other similar cases. It can be said that there is a rule governing those cases, notwithstanding that the rule has never be reduced to a definitive verbal formula or that judges may have to exercise judgment about whether a verbal formula presented to them is a true representation of the rule and whether the rule applies to the

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51 Loughlan, *supra* note 1 at 136.
52 Dworkin, *Taking Rights Seriously, supra* note 7.
53 Ronald Dworkin, *Law's Empire* (London: Fontana, 1986) [Dworkin, *Law's Empire*].
54 Dworkin, *Taking Rights Seriously, supra* note 7 at 81.
55 *Ibid.* at 112.
56 *Ibid.* at 69.
57 *Ibid.* at 112.
58 *Ibid.* at 113.

case at hand. Dworkin emphasised that "the force of a precedent escapes the language of its opinion."[59]

Dworkin acknowledged the possibility of "mistakes" in adjudication, which will not bind later courts.[60] These mistakes would be identified by testing their consistency with the "scheme of principle" that justifies the entire body of the law.[61] This drives the requirement for consistency to its utmost bounds. Dworkin's descriptions of the law have included metaphors such as "the seamless web"[62] and a "chain novel" in which the authors take seriously the aim of creating a "single unified novel".[63] The body of the law is massive and judges are only human, so it can be expected that the legal practice of a community will display some inconsistencies. Judges must attempt to resolve these by referring to what they perceive to be a valid theory about the coherence of the community's legal practice. Dworkin was, at the same time, conscious of the need for judicial humility in the face of this task:

> No mortal judge can or should try to articulate his instinctive working theory so far, or make that theory so concrete and detailed, that no further thought will be necessary case by case. He must treat any general principles or rules of thumb he has followed in the past as provisional and stand ready to abandon these in favour of more sophisticated analysis when the occasion demands.[64]

The judgment that judges exercise here is judgment about what the law demands of them in the present case and all future cases of the same type. Dworkin's appeal to the existence of legal standards other than rules and to the need for judgment is not an admission that cases are sometimes decided on their own facts.

This understanding of Dworkin's thesis harmonises with the views of others who have considered the challenge posed by hard cases. MacCormick has denied that cases might ever be decided on their own facts. A court's decision to decide a case in a particular way is justified only where its reasons for doing so are *universalizable*, by which he meant that the reason for a decision in a particular case translates into a reason for deciding all cases of that type in the same way.[65] The fact that a court states its reasons for a decision in terms of the facts of the particular case does not contravene the

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59 *Ibid.*

60 *Ibid.* at 119.

61 *Ibid.* at 122.

62 *Ibid.* at 115.

63 Dworkin, *Law's Empire, supra* note 53 at 229.

64 *Ibid.* at 257–8.

65 MacCormick, *supra* note 11 at 78–9; MacCormick, referring to *Ealing London Borough Council v. Race Relations Board* [1972] A.C. 342, said that the House of Lords could not

universalizability requirement because the answer to the universal question may be implicit in the answer to the particular question.[66] Furthermore, MacCormick rejected categorically the notion that equity cases were different to common law cases in this respect.[67] Hayek's discussion of hard cases contains an even more explicit insistence that these cases are decided on the basis of rules:

> Experience will often prove that in new situations rules which have come to be accepted lead to conflicting expectations. Yet although in such situations there will be no known rule to guide him, the judge will still not be free to decide in any manner he likes. If the decision cannot be logically deduced from recognized rules, it still must be consistent with the existing body of such rules in the sense that it serves the same order of actions as these rules.[68]

A court that departs from an existing rule or precedent is not doing so on the basis of a judgment that the application of the rule or precedent to the particular will "cause hardship" or that "any other consequence in the particular instance would be undesirable", but because "the rules have proved insufficient to prevent conflicts".[69] The maintenance of the legal order that the judges serve requires that the spaces in the body of rules be filled with rules that are consistent with the rest of the body.

It is important to appreciate that this theory of hard cases does not insist that the content of the law is fixed for all time. The theory is not at odds with equity's mission to tackle what Wright has called the "ill-effects of permanent classifications".[70] Dworkin did not dispense with categories, but merely emphasised their provisionality.[71] Hayek, in insisting that judges may serve a rule-based order only, acknowledged the need for judges to create new rules (and hence, to revise existing categories) from time to time.[72] This theory recognises that the categories of cases, which rule-based decision making necessarily generates, are each based upon a provisional explanation about how those cases are similar to one another and different from other types of cases. These explanations are subject to revision and categories may, consequently, expand or contract or be abandoned altogether.

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find that the Ealing Council was discriminating unlawfully "without committing itself to the view that anyone else who discriminates on the same ground . . . is discriminating unlawfully."

66 *Ibid.* at 84.

67 *Ibid.* at 97–9.

68 F.A. Hayek, *Law Legislation and Liberty, Volume 1, Rules and Order* (London: Routledge & Kegan Paul, 1973) at 115–6 [Hayek].

69 *Ibid.* at 116.

70 Wright, *The Remedial Constructive Trust, supra* note 1 at 281, par. [9.4].

71 Dworkin, *Law's Empire, supra* note 53 at 252.

72 Hayek, *supra* note 68 at 119.

Birks has expressed a similar attitude towards categories:

> Sensitivity and flexibility are properties of the whole law. These are the qualities which make for the gradual development of the law to match changing circumstances. But it must be a development on the margins of a stable system, the stability of which depends in large measure on careful analytical method within a sound taxonomy kept continually under review.[73]

Judges will often have to make difficult choices that do not appear to be governed by known rules but, if we really believe that like cases ought to be decided alike, then we ought to insist that every exercise of judicial discretion be taken to generate a reason for deciding the present case and future similar cases in a particular way. Judicial discretion, properly understood, is "background" discretion. It is concerned with the progressive diminution of the rule-free spaces in the community's legal order. This necessarily involves the progressive, piecemeal revision of the known rules. We cannot know the number or the nature of the future legal events for which known rules do not dictate an answer. Therefore, "background" discretion will always have a place in judicial reasoning, but we should not suppose that there are certain types of legal questions, such as questions about the imposition of equitable remedies, which will be rule-free spaces forever.

III. *Rules and Remedial Questions—An Example*

If exercises of weak remedial discretion generate rules, then we would expect to be able to identify types of equitable remedial questions, which are always answered in the same way. A different answer is to be justified by arguing that the case is a different *type* of case. Birks has given the example of the specific performance of contracts. It is possible to give an abstract definition of a category of cases in which there is a *right* to specific performance. Cases in which there has been a breach of contract but specific performance is refused can, as Birks preferred, be described as situations in which the "right to specific performance" is "qualified".[74] The definitions of categories of cases in which the right to specific performance is qualified may be subject to continual revision in the face of novel fact situations, but this does not imply an absence of categories or an absence of rules governing the qualification of the right.[75]

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[73] Birks, "Equity in the Modern Law", *supra* note 31 at 25.

[74] Birks, "Three Kinds of Objection", *supra* note 1 at 13.

[75] Gardner made the same point when he observed that the fact that the remedies of injunction and specific performance involve "inexact concepts" does not justify describing them as "discretionary" (Gardner, *supra* note 22 at 464–5).

It is certainly the case that the remedy of specific performance does not follow automatically from a finding that there has been a breach of contract. The plaintiff must, for a start, satisfy the court that common law damages would not be an adequate remedy in the circumstances of the case. While the category of situations in which it might be said that damages are inadequate is not closed, it is possible to give generic descriptions of some types of cases that always satisfy the requirement. Nobody doubts that contracts for the sale of land form a class of situations in respect of which specific performance will usually be granted. Where the contract is for the sale of personal property, the inadequacy of damages requirement is much more likely to be satisfied in cases involving unique or unusual items.[76] The inadequacy of damages requirement is constrained by certain more specific requirements in applications for injunctions for breaches of contract as well. The requirement is met in cases of ongoing loss in which it would be difficult to quantify the plaintiff's loss in money terms.[77] Spry has identified a common theme. The category of cases in which the requirement is satisfied are bound together by the fact that a remedy in damages would not place the plaintiff in the same position in which it would have been had the contract been performed.[78] This generic description of the relevant category of cases embodies a link between the choice of remedy issue and the event that justifies legal intervention in the first place, which is that the plaintiff and the defendant had made a bargain—that is, what Birks would classify as a "consent" event[79]—and the defendant had failed to provide the bargained for performance. It is a generic description that serves the goal of predictability in so far as its constraint as to the choice of remedy is informed by the purpose for legal intervention—that is, ensuring that the plaintiff receives the bargained-for performance or a monetary substitute for performance.[80] The plaintiff is entitled to a remedy from the

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[76] *Dougan v. Ley* (1946) 71 C.L.R. 142, *Borg v. Howlett*, unreported, Supreme Court of New South Wales, Young J., 24 May 1996. An analogous question arises in detinue cases. It is resolved in the same way. Whether the court ought to order specific restitution of the goods or award damages only may depend upon whether the goods may be easily replaced. See *Howard E Perry & Co. Ltd. v. British Railways Board* [1980] 1 W.L.R. 1375 at 1383 and *McKeown v. Cavalier Yachts* (1988) 13 N.S.W.L.R. 303 at 307–8.

[77] See, for example, *Ampol Petroleum v. Mutton* (1952) 53 S.R. (N.S.W.) 1 at 13; *Lumley v. Wagner* (1852) 1 De. G. M. & G. 604 [42 E.R. 687] and *Donnell v. Bennett* (1883) 22 Ch.D. 835 might also be seen as illustrations of this principle.

[78] I.C.F. Spry, *Equitable Remedies, Injunctions and Specific Performance*, 6th ed. (Sydney: Law Book Company, 1997) at 72.

[79] Birks, "Equity in the Modern Law", *supra* note 31 at 9.

[80] It should be noted that so-called "reliance" damages for breach of contract are *not* an exception to this rule. An award of damages for breach of contract is *always* to be measured by the plaintiff's expectation of receiving the bargained for performance. Reliance damages are awarded in cases where the breach of contract has prevented the plaintiff from being able to prove the value of the performance. The measure of damages will be the plaintiff's wasted

"fulfilment of expectations" remedial hierarchy and, since the case is one in which a monetary substitute for performance would not place the plaintiff in substantially the same position that it would have been had the performance taken place, the plaintiff is *entitled* to specific performance.

A person's right to specific performance (in common with other prima facie rights to equitable relief) may be further qualified by numerous other factors, which include, in the case of specific performance, the matters of futility, lack of mutuality, need for constant supervision, lack of willingness to "do equity" and "unclean hands". These factors correspond with categories of cases in which a court has a *duty* to refuse to award the equitable relief, at least in the particular form requested by the plaintiff. They do not, in so far as anyone of them is applicable to a particular case, necessarily provide the defendant with a complete defence to the claim for equitable relief. They may demand merely that the court impose conditions upon the award of the equitable remedy. Nevertheless, the question of whether the court has to respond to one of these factors is determined by the fact that the case exhibits certain generic characteristics—for example, the case is one in which the award of relief would result in the plaintiff deriving a benefit from its own unconscionable conduct (*i.e.* "unclean hands"),[81] the award of the relief would not result in any practical benefit to the plaintiff (*i.e.* "futility"), the award of relief would give effect to the defendant's obligations to the plaintiff without requiring the plaintiff to perform its corresponding obligations (*i.e.* "failure to do equity") or that the obligations to be performed by the defendant are of such a nature as to preclude effective supervision by the court (*i.e.* "constant supervision"). Each of these factors represents a category of cases in which the award of equitable relief would offend the conscience of equity in a particular way and the court's "discretion" as to the moulding of relief is constrained by the nature of the unconscionability to be avoided. The court has a *duty* to refuse relief or place conditions upon the award of relief in particular types of cases.

Australian case law on the failure to do equity factor, far from pointing to the existence of a discretion as to whether to grant relief or grant relief

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expenditure, but not a greater amount than the plaintiff could reasonably expect to recoup in the event that the contract is fully performed. See *Robinson v. Harman* (1848) 1 Ex. 850 [154 E.R. 363] and *The Commonwealth of Australia v. Amman Aviation Pty Limited* (1991) 174 C.L.R. 64 at 80–1 *per* Mason C.J. and Dawson J., at 99, 105–8 *per* Brennan J., at 126–8 *per* Deane J. [*Amman Aviation*]. Whether "expectation" damages or "reliance" damages are awarded in a particular case is determined by a rule and is not a matter for the plaintiff's election (*Amman Aviation, ibid.*, at 82 *per* Mason C.J. and Dawson J., at 108 *per* Brennan J.)

[81] Note the comment of Young J. in *FAI Insurances Limited v. Pioneer Concrete Services Limited* (1987) 15 N.S.W.L.R. 553 at 561 that "it is only if the right being sought to be vindicated by the plaintiff . . . is one which if protected, would mean that the plaintiff was taking advantage of his own wrong, that the court will . . . debar him from relief . . .." His Honour described this proposition as a "rule".

subject to conditions, is consistent with the assertion that there are categories of cases in which courts have *obligations* to either refuse relief or place conditions upon the award of relief. Courts do not refuse to grant specific performance in every case in which the plaintiff has failed to perform some of its obligations under the contract, but this is because it is *substantial* non-compliance (rather than simply *any* non-compliance) that activates the factor. The substantiality of non-compliance is referable to whether the plaintiff is willing and able to deliver the substantial thing that the defendant bargained for.[82] If the non-compliance is insubstantial, the case is not a "failure to do equity" case. The fact that, in "failure to do equity" cases, appellate courts consider themselves to be obliged to correct the failure of a court of first instance to place appropriate conditions upon an award of equitable relief[83] also lends support to the theory that there are types of cases in which defendants are *entitled* to see the court impose conditions upon the plaintiff. It is the court's assessment of whether the case is a case of the relevant type, rather than its assessment of the fairness of the outcome in the particular case, which dictates the imposition of conditions.

A court must formulate its remedial response so as to do no more or no less than the remedial work that is justified by the contract or other legal event upon which liability is grounded. Where there is a breach of contract, the remedial work to be done—that is, ensuring that the plaintiff is placed in a position as near as possible to that which the plaintiff would have enjoyed had the contract been performed—provides us with some (but not necessarily all) of the information that a court needs to determine the precise form of the remedy. Refusal of specific performance on grounds such as futility, the need for constant supervision or other grounds that are independent of the ground for liability is, nonetheless, justified and required because the case exhibits the characteristics of one of several categories of cases in which specific performance has conventionally been considered to be inappropriate. The characterisation of a case as one of those types of cases may require the exercise of careful judgment, but exercising judgment of that type is very different from exercising a remedial discretion.

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[82] *Mehmet v. Benson* (1965) 113 C.L.R. 295 at 307–8 *per* Barwick C.J.

[83] See, for example, *Riches v. Hogben* [1986] 1 Qd.R. 315, in which the Full Court of the Supreme Court of Queensland modified the trial judge's order by declaring that the defendant had an equitable interest in the property claimed successfully by the plaintiff. The case involved an informal property sharing arrangement. Williams J. said (at 343) that the court was "satisfying and enforcing the equities resulting from the transaction and must mould its order accordingly." This case was not, strictly speaking, about specific performance of a contract, but it is a good example of a situation in which a court was obliged to impose an obligation upon the plaintiff in order to ensure that the defendant received "equity". The court had to ensure that the reversal of the plaintiff's detriment (by fulfilling the plaintiff's expectation) did not leave the defendant worse off than she would have been had the parties never embarked upon the transaction.

III. Constructive Trusts as Remedies

A. *Alteration of Proprietary Rights as a Remedy?*

One of the more vexed issues in relation to equitable remedial discretion has been the remedial use of constructive trusts. The term "constructive trust" can be used in at least two ways. In *Stephenson Nominees Pty Ltd v. Official Receiver ex parte Roberts*,[84] Gummow J. said that that constructive trust relief is available "if the applicable principles of equity require that the person in whom the ownership of property is vested should *hold it for the use or benefit* of the person asserting the existence of the trust."[85] In *Giumelli v. Giumelli*,[86] Gleeson C.J., McHugh, Gummow and Callinan JJ. said that the term "constructive trust" is also used to describe a situation in which a court imposes upon the defendant merely a personal obligation to account in the manner of an express trustee, such as in the case of liability for knowing assistance in a breach of trust or fiduciary duty.[87] Millett has suggested that the use of the term "constructive trustee" in connection with liability to account in those circumstances creates confusion.[88] This latter use is not, in any event, the concern of the present discussion, because the type of "trust" to which it refers does not vest proprietary rights in the plaintiff. Only the first-mentioned use involves a determination that the successful plaintiff is beneficial owner of part of the defendant's property and raises concerns about the possible effects upon third parties. Therefore, the term "constructive trust" is used, in the remainder of this article, to refer only to the former use of the term.

Grantham and Rickett have noted that the "traditional categories" of constructive trust do not have a remedial nature, but are responses to the plaintiff's "continuing property rights" in an asset held by the defendant.[89] A constructive trust may be a "direct vindication" of the plaintiff's right to property that has been traced into the defendant's hands,[90] the means

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84 (1987) 76 A.L.R. 485.

85 *Ibid.* at 506 [emphasis added].

86 (1999) 73 A.L.J.R. 547.

87 *Ibid.* at 549.

88 P.J. Millett, "Restitution and Constructive Trusts" (1998) 114 Law Quarterly Review 399 at 400. See also G.E. Dal Pont and D.R.C. Chalmers, *Equity and Trusts in Australia and New Zealand*, 2nd ed. (Sydney: Law Book Company, 2000) at 971, where the authors suggest that the description of knowing assistance liability as a constructive trust is a "misnomer". Recently, in *Dubai Aluminium Co Ltd v. Salaam and Others* [2003] 1 Lloyd's Rep. 65, Lord Millett suggested (at 87) that we should discard the words "accountable as a constructive trustee" in favour of the words "accountable in equity".

89 Ross Grantham and Charles Rickett, *Enrichment and Restitution in New Zealand* (Oxford: Hart Publishing, 2000) at 405 [Grantham and Rickett].

90 *Ibid.* at 406.

of giving effect to an intention to hold property on trust where, owing to a lack of compliance with statutory requirements of writing, there could be no express trust[91] or the means of giving effect to a contractual duty to transfer property or a fiduciary duty.[92] A "remedial" constructive trust differs from all of these uses of a constructive trust in so far as it is a response to the plaintiff's personal claim to an enrichment derived by the defendant.[93] It is "remedial" in the sense that it is a creation of the court—that is, the use of the word "remedial" of which the discretionary remedialists stand accused by Birks.[94] Since it is a response to what is normally a personal claim only, it cannot be triggered merely by the injustice of the defendant's enrichment. The choice of a remedial response with proprietary consequences demands "some additional justification and explanation."[95] The notion that a constructive trust could ever be used remedially implies the separation of remedy questions from liability questions.

Birks and Virgo have suggested that remedial constructive trusts should have no place in the law.[96] The English courts have been reluctant to embrace the remedial trust concept. Lord Browne-Wilkinson, in the course of some *obiter* remarks in *Westdeustche Landesbank Girozentrale v. Islington London Borough Council*,[97] suggested that a remedial constructive trust could be "tailored to the circumstances of the particular case" so that "innocent third parties would not be prejudiced".[98] Nevertheless, the Court of Appeal, in the subsequent case of *Re Polly Peck International plc (in administration) (No. 2)*[99], rejected the proposition that the remedial constructive trust is part of English law. The Court doubted that a court could have the discretion to grant a remedy that, in effect, subverted the insolvency scheme enacted by Parliament.[100] This approach to proprietary remedial responses seeks to ensure the predictability of outcomes by insisting that certain liability categories (and only those categories) will always lead to the imposition of a constructive trust. The reason justifying a proprietary response would be implicit in the reason for imposing liability. Therefore, proprietary responses would be available only where the plaintiff has an actual pre-existing proprietary right, which provides a foundation for

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91 *Ibid.* at 408.
92 *Ibid.* at 409.
93 *Ibid.* at 412.
94 Birks, "Rights, Wrongs, and Remedies", *supra* note 1 at 17.
95 Grantham and Rickett, *supra* note 89 at 415. See also Austin, *supra* note 19 at 85.
96 Birks, "Proprietary Rights as Remedies", *supra* note 1 at 223; Virgo, *The Principles of the Law of Restitution, supra* note 32 at 635–7, 658–9.
97 [1996] 2 W.L.R. 802.
98 *Ibid.* at 839.
99 [1998] 3 All E.R. 812.
100 *Ibid.* at 827 *per* Mummery L.J. (Nourse and Potter L.JJ. agreeing).

tracing,[101] or the plaintiff is able to say that the defendant had a specifically enforceable obligation to transfer property to the plaintiff, so that the plaintiff is deemed to be the equitable owner under the maxim that equity looks upon that as done which ought to be done.[102]

The constructive trust recognised by the Privy Council in *Attorney General for Hong Kong v. Reid*[103] is a possible, if controversial, example of a proprietary response justified in the latter way. Lord Templeman concluded that a Crown employee, who had received a bribe, held the proceeds of the bribe on constructive trust for the Crown on the basis of the following reasoning:

> As soon as the bribe was received it should have been paid or transferred instanter to the person who suffered from the breach of duty. Equity considers as done that which ought to have been done. As soon as the bribe was received, whether in cash or in kind, the false fiduciary held the bribe on a constructive trust for the person injured.[104]

The Crown's beneficial title to property in the employee's hands arose at the moment that the employee received the bribe and the establishment of a claim over the land that was purchased by the employee was simply a matter of following the money trail. Grantham and Rickett have suggested that the Privy Council's decision illustrates the use of a constructive trust to give effect to a fiduciary duty.[105] The reason for a proprietary response was, on this view, implicit in the pre-existing duty of the Crown officer to pay the bribe money to the Crown.

Some other scholars have had reservations about Lord Templeman's analysis. A basic problem with the decision is that it is difficult to identify the basis upon which the defendant could have been said to have had a specifically enforceable obligation to *transfer* the bribe money to the plaintiff as opposed to a mere personal liability to *account* to the plaintiff for the amount received. The case differs, in this respect, from cases about contracts for the sale of land and other manifestations of the maxim that equity looks upon that as done which ought to be done.[106] Rotherham has suggested that the use in *Reid* of the maxim that equity looks upon that as done which ought to be done was inappropriate and that "a stronger justification" was needed to

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[101] A recent example is *Foskett v. McKeown* [2001] 1 A.C. 102, where purchasers of blocks of land had paid deposits to the defendant, who then misappropriated the money by purchasing a new asset in his name.

[102] Virgo, *The Principles of the Law of Restitution*, *supra* note 32 at 543.

[103] [1994] 1 A.C. 324.

[104] *Ibid.* at 331.

[105] Grantham and Rickett, *supra* note 89 at 409.

[106] See the criticisms of *Reid* in *Virgo, The Principles of the Law of Restitution, supra* note 32 at 543 and Darrel Crilley, "A Case of Proprietary Overkill" [1994] Restitution Law Review 57 at 65–6.

justify the extension of the idea underlying the maxim to the enforcement of an obligation to which the defendant had not consented.[107] Rotherham suggested further that treating the constructive trust as "a natural consequence of the fiduciary relationship" involved a "subterfuge" that disguised a derivation of ownership on the part of the plaintiff (and hence deprivation of the defendant) from mere personal obligation on the part of the defendant.[108] Far from suggesting that property rights involved an inviolable dominion with which judges could not interfere, Rotherham was expressing a desire that, if judges are to interfere with existing property rights, they should do so on the basis of "a justificatory theory for the qualification of property rights."[109] Evans has elaborated upon this idea. He said that the courts should acknowledge that constructive trusts are judicially created and, since that is the case, they need to be candid about the basis upon which certain successful plaintiffs should be given priority over other creditors of the defendant "by means of (and not by reason of) their having a proprietary interest."[110]

The Singapore Court of Appeal, in *Ching Mun Fong v. Liu Cho Chit*,[111] indicated that it was willing to contemplate the use of a constructive trust as "a restitutionary remedy which the court, in appropriate circumstances, gives by way of equitable relief."[112] Nevertheless, the Court (relying ostensibly on the House of Lords' decision in *Westdeutsche*) said that this type of trust would arise only where the conscience of the payee has been affected by an event that occurs while the relevant money remains in the hands of the payee. If the payee dissipated the money or mixed it with other money prior to the conscience-affecting event, there could be no constructive trust because "there would no longer be an identifiable fund for the trust to bite."[113] Therefore, in a case like *Ching Mun Fong*, where the plaintiff's ground for restitution of the payment was a mistaken belief, of which mistake the defendant did not become aware until many years after the payment, and the defendant was not otherwise obliged to retain the money or keep it distinct from his own money, a remedial constructive trust was not available.[114] This approach to the matter stops well short of the approach contemplated

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[107] Craig Rotherham, "Proprietary Relief for Enrichment by Wrongs: Some Realism about Property Talk" (1996) 19 University of New South Wales Law Journal 378 at 398 [Rotherham]; *cf*. Grantham and Rickett's suggestion that *Reid* is to be explained in terms of equity giving effect to "the intention of the parties, as expressed in Reid's fiduciary status." (Grantham and Rickett, *supra* note 89 at 409 and accompanying text).

[108] Rotherham, *supra* note 107 at 397.

[109] *Ibid.* at 407–8.

[110] Evans, "Property", *supra* note 17 at 44.

[111] [2001] 3 S.L.R. 10.

[112] *Ibid.* at 25.

[113] *Ibid.*

[114] *Ibid.* at 26.

by Evans. There is no sense in which the Court of Appeal reduced proprietary responses to mere means of giving effect to plaintiffs' restitutionary claims. There was no constructive trust because, at the time of the liability-justifying event, there was no particular property, in the defendant's hands, over which the plaintiff could be said to have had an interest.

A tendency towards the thoroughly remedial approach advocated by Evans has been more apparent in the Australian case law, beginning with the decision of the High Court of Australia in *Muschinski v. Dodds*.[115] Mrs. Muschinski and Mr. Dodds purchased a block of land as tenants in common in equal shares, upon which they intended to live and conduct a business. Their relationship ended prior to the completion of their scheme for the improvement of the land. Deane J. (with whom Mason J. agreed) justified the recognition of a constructive trust by recourse to reasoning similar (although not identical) to that of Lord Templeman in *Reid.* Deane J. said:

> The old maxim that equity regards as done that which ought to be done is as applicable to enforce equitable obligations as it is to create them and, notwithstanding that the constructive trust is remedial in both origin and nature, there does not need to have been a curial declaration of order before equity will recognize the prior existence of a constructive trust . . . Where an equity court would retrospectively impose a constructive trust by way of equitable remedy, *its availability as such a remedy provides the basis for, and governs the content of, its existence inter partes independently of any formal order declaring or enforcing it*.[116]

The remedial goal in *Muschinski v. Dodds* was to give effect to Mr. Dodd's obligation—an obligation which is supposed to have existed from the moment of the premature collapse of the relationship between Mrs. Muschinski and Mr. Dodds—to disgorge some of the benefit that he had acquired from the transaction. This obligation arose because part of the benefit that accrued to Mr. Dodds had been acquired by him at Mrs. Muschinski's expense—Mrs. Muschinski having provided the larger part of the purchase price of the property—and the parties had not "specifically intended or specially provided" that Mr. Dodds should enjoy that benefit in the event of the premature collapse of their joint endeavour.[117]

While Deane J. said that the constructive trust existed independently of the court's order, he also suggested that a court could postpone the operation of a constructive trust to the moment of the court's publication of its reasons for judgment.[118] The notion that a court could do this is inconsistent with

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[115] (1985) 160 C.L.R. 583.
[116] *Ibid.* at 614 [emphasis added].
[117] *Ibid.* at 620.
[118] *Ibid.* at 623.

the notion that a property right (which prevails against the claims of the defendant's creditors) is either the liability-justifying event or an inexorable consequence of that event. While Lord Templeman's reasoning in *Reid* proceeded on the basis that there was, at the moment of the liability-justifying event, a proprietary interest that secured for the plaintiff the benefit of the full basket of proprietary consequences, the reasoning of Deane J. in *Muschinski* assumed that a court may deprive the plaintiff of all or some of those consequences. One cannot take the position that Deane J. did without supposing that the matters to be considered in choosing the form of the remedy ought to extend beyond the matters that were relevant to answering the liability question.

B. *Choosing the Correct Remedy*

Since *Muschinski v. Dodds*, Australian courts and commentators have shown a willingness to embrace an approach to proprietary remedies that separates the remedy question from the liability question.[119] The protection of the interests of third parties claiming through the defendant is, on this view, a matter to be addressed within the remedy question, rather than a reason for denying the existence of the remedial constructive trust concept. The identification of reasons that are independent of the reasons justifying liability and which direct the court to either a proprietary remedy or a non-proprietary remedy in a particular case is an exercise which, in the Australian context at least, can no longer be avoided.

There have been several attempts to identify the crucial considerations. Austin has said that the court must compare the respective claims of the plaintiff and defendant to "any increase in value of property in the defendant's hands" and "the merits of the plaintiff with the merits of the defendant's unsecured creditors."[120] Tilbury has said that the court must consider the "practical effect" of the relief upon the parties.[121] Wright has been responsible for what is perhaps the most thorough consideration of factors relevant to a court's decision to impose a constructive trust as a remedy. Wright composed a very extensive list of factors, which he divided into six categories. One category of factors focussed upon the conduct of the plaintiff and included matters like delay in bringing proceedings and lack of clean

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[119] See, for example, *Riches v. Hogben* [1986] 1 Qd.R. 315, particularly at 326–7 *per* Macrossan J., *Bathurst City Council v. PWC Properties Pty Limited* (1998) 195 C.L.R. 566 at 585, *Paton v. Reck* [2000] 2 Qd.R. 619 at 644 *per* Davies J.A. and White J. Academic discussion of the separation has included Austin, *supra* note 19 at 84–5 and, of course, Wright, "Wrong and Remedy", *supra* note 1 at 316–9.

[120] Austin, *supra* note 19 at 85.

[121] Michael Tilbury, *Civil Remedies (Volume 1)* (Sydney: Butterworths, 1990) at 251, par. [4122].

hands. Another category focussed upon the results of imposing a constructive trust. The effect of a constructive trust upon the interests of creditors and other third parties had a prominent place in that category. The so-called "administration of justice" factors and "general policy" factors were to extend beyond the comparison of the merits of the claims of plaintiff, defendant and third parties to issues such as the need for curial supervision of a decree and the efficiency (in cost-benefit) terms of the remedy.[122] Wright did not claim to have created an exhaustive list and he described his six categories as "non-hierarchical".[123] While Wright insisted that the doctrine of precedent was relevant to the remedial constructive trust,[124] his simultaneous insistence that courts look to the "the requirements of justice in the particular case"[125] appears to exclude the notion that decisions generate binding rules for similar cases.

The greater the number of factors that one identifies as being relevant to any single instance of having to choose between a constructive trust remedy and a personal remedy, the less predictable the court's choice will be. Wright's approach to the matter gives particular cause for concern on account of its lack of any hierarchical framework for the consideration of relevant factors and apparent disavowal of the notion that decisions in particular cases generate rules that apply to all future cases of the same type. The weight of each factor will inevitably turn upon individual judges' impressions of the cases before them (as formed either independently or through the emphasis of counsel upon particular factors). This reduces the likelihood that a consistent pattern of remedial decision-making will emerge over time. Lack of consistency is always a matter of concern, but it is a particularly serious matter where the parties' property rights and the interests of third parties claiming through the defendant are at stake. The interest of all parties in knowing their legal position with a reasonable degree of certainty would be best met by maintaining a clear delineation between types of cases in which plaintiffs' claims will meet with a proprietary response (and, accordingly, prevail over the claims of third parties claiming through the defendant) and types of cases in which they will not. The nature of "judge-made" systems of law is (as Birks has acknowledged[126]) such that the boundaries between categories of cases are subject to piecemeal revision. Moreover, particular cases may require a court to exercise careful judgment as to how they should be categorised. Nevertheless, the goal of predictability requires the courts' frame of reference should be the hitherto recognised

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[122] *Ibid.* at 165–84, pars. [5.9]–[5.45].
[123] *Ibid.* at 161 par. [5.1].
[124] *Ibid.* at 180, par. [5.38].
[125] *Ibid.* at 172–3, pars. [5.22]–[5.23].
[126] Birks, "Equity in the Modern Law", *supra* note 31 at 25.

categories and that the categorisation of a case dictates an answer to the question as to whether the court ought to award proprietary relief.

Reasons for preferring a proprietary remedy in a particular case (and which dictate the same outcome in subsequent similar cases) may well consist of a combination of the numerous factors referred to by Wright. No factor in Wright's scheme has an absolute operation, in the sense of answering the proprietary question conclusively. Nevertheless, different factors will come to the fore in different types of cases. Some of the factors mentioned by Wright are relevant only to the respective merits of the plaintiff's claim and the claim of the legal owner of the property. Other factors, such as the effect of a constructive trust upon the other party's creditors, are relevant only to the merits of the plaintiff's claim vis-à-vis the claims of those creditors. There are other factors, such as whether a court's decree requires constant supervision, that are not concerned with the immediate interests of any particular person but are concerned with the proper functioning of the justice system. The ability of these factors to determine particular questions conclusively may be obscured by the tendency of Wright and advocates of discretionary remedialism to aggregate three distinct questions into one.

It could be argued that a dispute about whether a proprietary remedy is appropriate involves (potentially, at least) three distinct disputes, namely:

(i) the dispute concerning the plaintiff's entitlement to the property *as against the legal owner*;
(ii) the dispute concerning the plaintiff's entitlement to the property *as against third parties claiming through the legal owner*;
(iii) the dispute concerning the merits of the plaintiff's claim *as against society as a whole* or, in other words, those merits viewed in the light of the collective goals that a society seeks to fulfil by way of its justice system.

The division of a complex dispute into a series of bipartite relationships makes it easier to discern the reasons that inform us as to the desirability or otherwise of proprietary consequences *as between those parties*. A reason that does not resolve the multipartite dispute conclusively may well have an absolute operation in relation to the bipartite dispute. It is particularly important to keep the first and second dispute separate from one another. The reasons for saying that the claims of the plaintiff ought to prevail against the legal owner will necessarily be founded upon considerations that arise within the confines of that relationship. The answer to the liability question may dictate an answer here, in so far as the *quantification* of relief will suggest the form of relief.

When the facts of *Muschinski v. Dodds* are analysed as a dispute between Mrs. Muschinski and Mr. Dodds only, a reason favouring a proprietary

response appears. The parties had agreed to share the benefits of their joint endeavour in equal shares rather than in proportion to their contributions. The evidence before the court supported an inference that Mrs. Muschinski intended that Mr. Dodds would have one-half beneficial ownership from the outset.[127] Mrs. Muschinski and Mr. Dodds were not entitled merely to the return of what they had contributed to the endeavour. They were also entitled to equal shares of the property's appreciation in value. The nature of their entitlement dictated a response in terms of shares in property rather than sums of money. Where the parties have acquired property for their mutual benefit but have not made it clear that they intend to share in any particular proportions (as in the subsequent case of *Baumgartner v. Baumgartner*[128]), a court may have to make a judgment about the appropriate basis for sharing in the particular case. Since there was a considerable disparity between the respective contributions of the parties in *Baumgartner*, the High Court of Australia opted for sharing in proportion to those contributions rather than equal sharing.[129] Nevertheless, the case was similar to *Muschinski v. Dodds* in so far as the parties had intended to share the benefits of their joint endeavour, so a response in terms of property sharing, rather than repayment of contributions, was called for. The situation in those cases stands in contrast to that of plaintiffs who claim restitution of mistaken payments. Those plaintiffs ought not to be favoured with proprietary responses because, in the absence of additional circumstances giving rise to a trust or fiduciary relationship, their only entitlement would be to the return of the amounts paid by mistake.[130]

Whether the successful plaintiff may assert its proprietary rights against third parties must depend upon whether the plaintiff's moral claim to the assertion of those property rights is superior to the claims of any interested third parties, including the defendant's unsecured creditors. It is unfortunate that, in *Muschinski v. Dodds*, Deane J. did not elaborate upon his reasons for postponing the constructive trust to the date of publication of the courts' reasons. His Honour did not make it clear whether postponement was required by the mere prospect of the constructive trustee having

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127 (1985) 160 C.L.R. 583 at 598 *per* Mason J., at 606–7 *per* Brennan J., at 611 *per* Deane J.

128 (1987) 164 C.L.R. 137.

129 *Ibid.* at 149–50.

130 It should be remembered that the decision of Goulding J. in *Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd.* [1979] 3 All E.R. 1025 that the payee held the money paid by mistake upon trust for the payer turned upon his Honour's acceptance of the controversial proposition that "payment into wrong hands itself gave rise to a fiduciary relationship" (at 1032), thus allowing the payer to establish its ownership of money in the hands of the payee by recourse to the rules of tracing. This aspect of the reasoning of Goulding J. was criticised by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] A.C. 669 at 714. See also *Ching Mun Fong v. Liu Cho Chit* [2001] S.L.R. 10, particularly at 26.

unsatisfied creditors or whether different types of cases required different approaches. The "all or nothing" nature of postponement of the constructive trust has been criticised by a number of commentators on the basis that it deprives the successful plaintiff of the principal benefit of a proprietary response, namely priority over (as opposed to *pari passu* ranking with) the defendant's unsecured creditors.[131] Two of these critics have suggested an alternative means of protecting the interests of third parties—namely, to recognise that the trust exists from the moment of the liability-justifying event but to allow the imposition of conditions upon the enforcement of the associated proprietary rights in appropriate cases.[132]

Whether a court opts for postponement of the trust or the imposition of conditions upon its enforcement, pursuit of the goal of predictability requires that the court's decision be dictated by the fact that the case is a case of a particular *type*—that is, a case in which the plaintiff's conduct, in asserting its equitable rights to defeat the interests of third parties claiming through the defendant, would offend the conscience of equity. It might be appropriate to draw an analogy between constructive trust cases and cases about priorities between equitable interests, to the end that matters such as the plaintiff's undue delay in enforcing its rights or its failure to otherwise protect its position may dictate that a plaintiff should be left to take its chances in a *pari passu* distribution of the defendant's assets among creditors.[133] Burrows suggested that the "key principle" in determining whether the plaintiff should have the benefit of a proprietary response ought to be "whether the claimant is, or is analogous to, a secured creditor who has not taken the risk of the defendant's insolvency."[134] This general principle, by referring to two distinct types of factual scenario and requiring judges to categorise the particular case before them, provides a sound basis upon which the case-by-case working out of more specific rules can proceed.

The matters relevant to the third dispute—namely that between the plaintiff and the community as a whole—include certain matters, such as constant supervision considerations, which have a long history in the jurisprudence of equitable remedies and may be regarded as being absolute in their operation.

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131 Pamela O'Connor, "Happy Partners of Strange Bedfellows: The Blending of Remedial and Institutional Features in the Evolving Constructive Trust" (1996) 20 Melbourne University Law Review 735 at 738 [O'Connor]; A. Black, "*Baumgartner v. Baumgartner*, The Constructive Trust and the Expanding Scope of Unconscionability" (1988) 11 University of New South Wales Law Journal 117 at 128 [Black]; Judith Levine, "Does Equity Treat as Done that which Ought to be Done? The Consequences Flowing from the Timing of the Imposition of a Constructive Trust" (1997) 5 Australian Property Law Journal 74 at 78–9.

132 O'Connor, *supra* note 131 at 752, Black, *supra* note 131 at 128–9.

133 The joint judgment of Mason and Deane JJ. in *Heid v. Reliance Finance Corporation* (1983) 154 C.L.R. 326 at 339–45 is informative as to this matter.

134 Andrew Burrows, "Proprietary Restitution: Unmasking Unjust Enrichment" (2001) 117 Law Quarterly Review 412 at 427.

Wright has suggested that there is some doubt about whether the constant supervision consideration is the subject of an absolute rule.[135] The cases that Wright cites in support of this suggestion certainly doubt the proposition that it is an absolute rule that a court should not grant injunctive or specific relief where that relief would require the defendant to perform a series of acts over an extended period of time.[136] Nevertheless, those cases do point to the existence of a rule that a court should not award relief of a particular kind if there is a risk of "potential practical difficulties"[137] in enforcing that relief, to which questions of the nature of the tasks to be performed, the time period over which they will be performed and whether there is a contract that defines with sufficient precision what has to be done[138] will all be relevant factual considerations. A court faced with a case that poses a possible constant supervision problem has to exercise judgment as to whether the facts of the case bring the case within the scope of the rule or whether it is actually a different type of case in which those problems are not insurmountable. This is not remedial discretion. There is no difference between this process and the process that a court has to adopt on any other occasion when it decides whether a set of facts attracts a particular rule. Moreover, the pursuit of the goal of predictability requires that matters that are sufficiently important to the administration of justice as to affect the form of a remedy should be defined with a reasonable degree of certainty and of absolute operation. The yardstick is not whether it is convenient for this court to award and enforce the remedy in the particular circumstances of the case, but whether the case belongs to a factual category that is defined by reference to the risk of difficulties from an administration of justice perspective.

IV. Conclusion

The approach to remedial choice in equity cases that has been outlined in this article is merely a proposal for maintaining a balance between remedial plurality (hence flexibility) and predictability of adjudicative outcomes. The understanding of remedial choice that is presented here may differ radically from the understanding of many judges who exercise equitable jurisdiction. It certainly differs from discretionary remedialism in so far as it denies that cases about equitable remedies form a part of the law that is permanently impervious to rule-based decision making. The phenomenon that advocates of discretionary remedialism identify as "weak discretion" should be

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135 Wright, *The Remedial Constructive Trust, supra* note 1 at 181, par. [5.40].

136 *Gravesend Borough Council and Another v. British Railways Board* [1978] 1 Ch. 379 at 405B [*Gravesend*], *Posner and Others v. Scott-Lewis and Others* [1987] 1 Ch. 25 at 35 [*Posner*].

137 *Gravesend*, *supra* note 136 at 405G.

138 *Posner*, *supra* note 136 at 36B.

understood as a process whereby decisions about remedies are gradually subjected to rule-based decision making. Judges have to exercise careful judgment in particular cases about whether that case attracts the operation of a recognised rule or represents a hitherto unrecognised exception to it—that is, a different *type* of case. This will often require judges to look behind the established rules and form a view about the values to which the community is committing itself by and through its legal system. We can achieve a balance between the competing goals of flexibility and predictability if we combine an insistence that decisions about equitable remedies generate rules that are binding on future courts with a degree of scepticism about whether those rules have been defined once and for all. Novel situations do not provide opportunities for the exercise of discretion constrained only by a non-exhaustive list of the factors that courts are entitled to consider. A judge who is confronted by a novel situation must embark upon an interpretative exercise, the purpose of which is to define more precisely the rule that governs the selection of remedy in the case at hand and all future cases of the same type.