Singapore Journal of Legal Studies
[September 2026 Online] 1–16

CONSTRUCTIVE TRUSTS: FROM CONFUSION TO CLARITY

Ying Khai **Liew***

Constructive trusts occupy a unique and powerful position in common law. They are one of equity's most potent tools for resolving property disputes. At the same time, the incremental and siloed way in which constructive trust doctrines have developed has generated significant confusion, both in their internal rationales and in their cross-border applications. This article argues that, by approaching constructive trusts systematically – starting with a clear definition that distinguishes them from express and resulting trusts; analysing them as replicative, reflective or transformative constructive trusts; and then applying that analytical framework to the institutional and remedial constructive trust debate, as well as to choice of law matters – we can begin clearly to see patterns and principles that were previously obscured.

I. Introduction

Stripping the constructive trust to its core, a finding that A holds property on constructive trust for B entails that A, the apparent owner of property, effectively loses his or her substantive rights to the property, and B is effectively treated as its owner. In many cases, that finding will support an order that A should transfer the property, or account for it, to B. Therefore, constructive trusts have the effect of reallocating or varying[1] property rights between private parties, potentially shifting significant and substantial economic value, and doing so in ways that cut across the appearance of absolute ownership that would normally be indicated by A's formal legal title.

Yet, constructive trusts do not occupy some obscure, marginal corner of equity. Across the common law world, they are actively used, in a plethora of different contexts, ranging from family property disputes, joint ventures, and commercial relationships to cases involving unauthorised profits, mistaken payments, bribes, and secret commissions, and so on. Indeed, in the last fifty years or so, new constructive trust doctrines have been developed by common law courts. Examples include the

---

* Professor, Melbourne Law School, University of Melbourne. This article is a modified version of a lecture presented in the Kwa Geok Choo Distinguished Visitors Lecture series at the National University of Singapore in January 2026. I thank NUS Law for the opportunity to speak at that prestigious occasion, Hans Tjio for chairing the lecture, and the participants for their generous comments.

[1] *Re Polly Peck International plc (in administration) (No. 2); Marangos Hotel Co Ltd and others v Stone and others* [1998] 3 All ER 812 at 831 (CA, Eng) [*Re Polly Peck*].

"common intention constructive trust",[2] the "*Pallant v Morgan*[3] equity",[4] and the uniquely Australian doctrine, the "joint endeavour constructive trust".[5] Moreover, constructive trusts have even been found to arise in novel contexts, including over crypto-assets[6] and intellectual property such as copyright.[7] Their significance is therefore unmistakable: the law of constructive trusts is a living, evolving, and practically important area of law.

Yet, despite their centrality, it is widely acknowledged that the law in this area is confused. In very broad terms, there are two different but related dimensions to that confusion.

First, there is doctrinal confusion, in that we do not yet have clear rationales for constructive trusts. Why, exactly, do constructive trusts arise, and how precisely do they operate? Certainly, a large part of this confusion centres around the well-rehearsed debate concerning institutional and remedial constructive trusts, which turns on the extent to which judges can or should exercise discretion in awarding constructive trusts. This point will be discussed further below. But even at a more basic level, courts and commentators have struggled to agree on a number of fundamental issues, including: the role of constructive trusts in the law; how they arise; what their justifications are; and whether they are best understood as rights, as remedies, or as a combination of the two. Resolution of these issues matters greatly because, as already mentioned, a constructive trust is a device by which property is taken from one party and given to another. That sort of reallocation of property rights is not something that the law should do lightly. This is particularly critical in societies that respect property owners' autonomy to decide for themselves what they want to happen with their own property: any legal intervention that disrupts legal ownership must surely be rationalised properly. And without clear answers, the practical application of constructive trusts is likewise impacted in many respects: the requirements that must be satisfied before a constructive trust is recognised; the limits of the doctrines; the ambit of their application; how existing doctrines should be developed, or new ones created; and so on.

Secondly, there is confusion from a cross-border perspective, specifically in relation to choice of law rules. In an increasingly globalised world, disputes involving parties, assets, and transactions that are spread across more than one jurisdiction will become more and more common. Unfortunately, the choice of law rules applicable to constructive trust disputes are deeply unsettled. This is not a coincidence. It is, in large part, a side effect of the doctrinal confusion just mentioned, that is, the failure to appreciate the rationales of constructive trusts themselves. Without a

---

2 This doctrine was first introduced into English law by the twin cases of *Pettitt v Pettitt* [1970] AC 777 (HL, UK) and *Gissing v Gissing* [1971] AC 886 (HL, UK).

3 *Pallant v Morgan* [1953] Ch 43 [*Pallant*].

4 This doctrine emerged as a distinct doctrine since being rationalised by the English Court of Appeal in *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372.

5 This doctrine was first introduced by the High Court of Australia in *Muschinski v Dodds* (1985) 160 CLR 583.

6 *D'Aloia v Persons Unknown* [2025] 1 WLR 821 (Ch D, UK).

7 *The Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 (FC, Aust) [*Game Meats*].

proper understanding of domestic common law, it is no surprise that the confusion is perpetuated when it comes to the realm of the conflict of laws.

There are many reasons for this overall picture of confusion. From a doctrinal point of view, two key reasons stand out.

The first is a siloed approach that courts and commentators have taken when approaching the law of constructive trusts. Each constructive trust doctrine has tended to be developed in isolation, without adequate appreciation of the overall picture into which it might fit. That is, of course, understandable. Courts decide cases as they come; counsel make submissions tailored to a specific set of facts; and it is rarely anyone's job, in the context of a single case, to step back and ask how the various strands of the law of constructive trusts fit together. But this state of affairs is also unsatisfactory. The bread-and-butter of lawyers is to challenge, test, and extend the scope of existing doctrines; and in case-law-based areas, of which the law of constructive trusts is one, judges have the significant role of ensuring that the law develops in a coherent and holistic way. If cases are argued and decided against the background of an incomplete or fragmented understanding of constructive trusts, with no clear sense of where each doctrine sits in the broader landscape, then doctrinal development will, at best, be unsatisfactory.

The second reason for the picture of confusion is the pervasiveness of a particular way of thinking and speaking about constructive trusts, and indeed equity more broadly: the language of unconscionability. This point will be addressed later.

In this article, I want to suggest that a certain analytical framework can help the law move from confusion to clarity. The article is structured around four issues. First, a scoping exercise: as a prelude to introducing the framework, it is first necessary to address what might seem a very basic definitional question: what are constructive trusts? That is, how should we define them, and how should we distinguish them from other types of trusts we find in case law? Second, the article approaches constructive trusts from a rights and remedies perspective, asking whether constructive trusts are best understood as rights, as remedies, or as both. Here, an analytical framework will be proposed that helps to organise the different doctrines in a coherent way. Third, the article addresses the distinction between institutional and remedial constructive trusts. It will argue that the proposed analytical framework can clarify what really is at stake in that debate, and why remedial constructive trusts need to be handled with particular caution. Finally, the article addresses constructive trusts from a choice of law perspective. It will suggest that the analytical framework can also bring clarity to the question of which law should govern cross-border constructive trust disputes.

II. What Are Constructive Trusts?

First, what are constructive trusts? It is important to address this definitional question head-on, because how we define constructive trusts has a fundamental effect on and shapes our understanding of their ambit and their role within the broader law.

As every student of trusts law will know, modern taxonomy conventionally draws a distinction between express trusts on the one hand, and trusts that arise "by operation of law" on the other.[8] Trusts arising by operation of law is a wide category that includes resulting and constructive trusts. The usual explanation for this two-fold distinction is that express trusts are intentionally – that is, expressly – created, while resulting and constructive trusts are not: they arise because the law provides that they should (hence the turn of phrase "by operation of law").

But as soon as one subjects this picture to closer examination, it begins to blur. Express trusts do not have a separate existence apart from their operation at law: just like resulting and constructive trusts, they come into being only because the law provides so. On the other hand, many resulting and constructive trusts do in fact arise in response to the parties' intentions. One obvious example is the "common intention constructive trust", where the relevance of intention is even in its name. Thus, as French CJ observed in the High Court of Australia in *Korda v Australian Executor Trustees*,[9] "[t]he boundaries between express and constructive trusts have not always been clear". That is an understatement.

To chart the precise ambit of constructive trusts, it is first necessary to begin with a careful definition of express trusts and resulting trusts. The reason for this is, as we will see, constructive trusts are a miscellaneous or catch-all category of trusts.[10]

An express trust arises where there is a unilateral, proper manifestation of a positive intention by a person, the settlor, to create a trust.

Each element of that definition matters. It is *unilateral*, in the sense that it is the settlor's intention alone that counts: this is so even if the intention is manifested through a contract between the settlor and trustee. It requires *positive* intention, in the sense that the settlor must be taken to be actively exercising the powers that the law provides people to make use of the facility to create a trust arrangement. It requires a *manifestation*, in that the intention must be communicated or made apparent. And the manifestation must be *proper*, which means that compliance with any formalities, where relevant, is necessary for the trust to be enforced as an express trust. Most notably, the relevant formalities in the Statute of Frauds or its modern equivalents, which impose a writing requirement for certain express trusts to be valid and enforceable, must be fulfilled.

Once we adopt that definition, certain consequences follow. If a court recognises a trust in circumstances where those requirements are not met, then by definition the trust cannot be an express trust. An obvious example is the trust found by way of the doctrine in *Rochefoucauld v Boustead*,[11] by which courts enforce an oral, informal agreement to hold land on trust. The trust cannot be an express trust, properly so called, because there is no compliance with the writing requirement in the Statute of Frauds for the creation of trusts over interests in land.[12] So the trust must be a trust "arising by operation of law".

---

[8] Statutory trusts are not discussed: they are conceptually different, being utilised by the legislature in an instrumental way to achieve particular policy goals, and raise questions of statutory interpretation.

[9] *Korda and Others v Australian Executor Trustees (SA) Ltd* (2015) 317 ALR 225 at 230 (HC, Aust).

[10] For a fuller discussion of the taxonomy of trusts, see Ying Khai Liew, "Trusts: Modern Taxonomy and Autonomy" (2021) 35 Trust L Intl 27 [Liew, "Taxonomy"].

[11] *Rochefoucauld v Boustead* [1897] 1 Ch 196 (CA, Eng).

[12] For a fuller discussion, see Ying Khai Liew, "*Rochefoucauld v Boustead* (1897)" in C Mitchell & P Mitchell, eds. *Landmark Cases in Equity* (Oxford: Hart Publishing, 2012) 423.

When we turn to trusts "arising by operation of law", it is more convenient to define resulting trusts first, because they are generally thought to be unified by a single rationale. What that rationale is has been the subject of a longstanding debate.[13] But as I have argued elsewhere,[14] the best view – and certainly the one prevailing in Singapore – is that resulting trusts respond to negative intention. Where A transfers property to B (or purchases property in B's name), B will generally hold the property on resulting trust for A where it is shown, by way of an unrebutted presumption or by way of positive evidence, that A *did not intend* B to take the full beneficial interest in the property. As the Singapore Court of Appeal explained in *Chan Yuen Lan v See Fong Mun*,[15] the resulting trust arises because of an absence of intention by A to transfer beneficial ownership to B.

If we accept all of the above, then the picture becomes clearer. We can say: express trusts are those that arise from a unilateral, properly manifested, positive intention to create a trust; resulting trusts are those that arise in response to a negative intention not to benefit another. And then all other circumstances in which courts find that trusts arise must be constructive trusts. On this view, constructive trusts are essentially the residual, miscellaneous, catch-all category of trusts. This is why we find so many disparate doctrines within the law of constructive trusts, such that those who have seriously attempted to identify their rationales have concluded that they are irreducible to a single basis.[16] Those doctrines include, for example:[17]

(a) Cases where there is an informal pre-acquisition agreement that the party who acquires land, A, will transfer some part of it to another party, B, and B relies on that promise in a way that confers an advantage on A in acquiring the land — the type of case falling within the so-called "*Pallant v Morgan*[18] equity";
(b) Cases of informal promises or assurances by one party to transfer property, coupled with detrimental reliance by another — the type of cases falling within the doctrine of proprietary estoppel or the "common intention constructive trust";
(c) Cases falling within the so-called "rule in *Re Rose*",[19] where A does everything in his power to transfer property to B but the legal title does not yet pass, and equity nevertheless treats A as holding the property on constructive trust for B;

---

13 See, *eg*, Robert Chambers, *Resulting Trusts* (Oxford: Oxford University Press, 1997); William Swadling, "Explaining Resulting Trusts" (2008) 124 Law Q Rev 72 at 80ff; John Mee, "Presumed Resulting Trusts, Intention and Declaration" (2014) Cambridge LJ 86.

14 Liew, "Taxonomy", *supra* note 10 at 31–40.

15 *Chan Yuen Lan v See Fong Mun* [2014] SLR 1048 at [45].

16 See, *eg,* Gbolahan Elias, *Explaining Constructive Trusts* (New York: Oxford University Press, 1990); Ying Khai Liew, *Rationalising Constructive Trusts* (Oxford: Hart Publishing, 2017) [Liew, *Rationalising Constructive Trusts*].

17 This is, of course, not an exhaustive list; it is merely meant to provide a sense of the breadth and variety of circumstances or doctrines which are covered by the law of constructive trusts.

18 *Pallant*, *supra* note 3.

19 Taking its name from the twin cases bearing similar names: *Re Rose, Rose v IRC* [1952] 1 Ch 499 (CA, Eng) and *Re Rose, Midland Bank Executor and Trustee Co Ltd v Rose* [1949] 1 Ch 78 (HC, Eng).

(d) Cases where constructive trusts are found to arise in relation to a specifically enforceable contract for the sale; and
(e) Cases where profits wrongfully made by fiduciaries are held on constructive trust for the principal.

At first glance, one might think that the definition sounds somewhat uninspiring: "constructive trusts are everything that is not express and not resulting". However, it is submitted that the clarity this brings to our understanding and practice of the law is more powerful than might appear. For example, it tells us what types of cases should and should not be of direct influence when courts are deciding constructive trust cases: it would, for instance, be mistaken to draw uncritically from express trust cases when deciding a constructive trust case. Doing so might confusingly suggest that a unilateral intention alone would suffice to give rise to a constructive trust, when in actuality something more is always required.[20] The renewed definitional picture also assists in explaining the reasons for which particular trusts are awarded: we would expect the justification of any constructive trust doctrine not to be duplicative of those underlying express and resulting trusts. I have also argued elsewhere that these definitional distinctions help us appreciate the different ways each of these trusts secures the autonomy of property owners.[21]

Moreover, the renewed definitional picture helps explain the "hierarchy of trusts" that we implicitly accept. When a set of facts can be analysed either as an express trust or as a constructive trust, we typically recognise it as an express trust — this much is clear from the well-known "*Chan Yuen Lan* framework" in Singapore. With clearer definitions, we can better explain why: we give primacy to properly manifested positive intentions as the primary route to creating trust obligations, with constructive trusts playing a role only where an express trust cannot be enforced.

The definitional picture also speaks to the language of unconscionability. It remains common for judges and commentators to rationalise constructive trusts by saying that they prevent defendants from acting "unconscionably", or from retaining property in a way that would be contrary to "good conscience". For example, it is typically said that "[a] constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property … to assert his own beneficial interest in the property and deny the beneficial interest of another".[22] However, the problem is that, taken in a general sense, unconscionability is far too vague to serve as a unifying rationale.[23] As Vinodh Coomaraswamy J observed in *Zaiton Binte Adom v Nafsiah Bte Wagiman*,[24] "[a] constructive trust is not equity's response to conduct by [the defendant] which is unconscionable only in the general sense of being conduct which is either not right or reasonable or which is contrary to good conscience."

---

20 For example, detrimental reliance or an advantage-based reliance: see discussion in Liew, "Taxonomy", *supra* note 10 at 44–47.

21 Ying Khai Liew, "Justifying Anglo-American Trusts Law" (2021) 12 William & Mary Business Law Review 685.

22 *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 at 409 (CA, Eng).

23 See discussion in Ying Khai Liew, "'Unconscionability' and the Case Against Lumping: Three Case Studies" (2021) 27 Trusts & Trustees 118 [Liew, "Unconscionability"].

24 *Zaiton Binte Adom v Nafsiah Bte Wagiman* [2023] 3 SLR 533 at [104] (HC) [*Zaiton Binte Adom*].

The definitional picture we have just sketched is useful for helping our understanding here. Once we see constructive trusts as a catch-all category – that is, covering all non-express, non-resulting trusts – and we recognise that the doctrines in this category are wide-ranging, were developed at different times, and arise in response to quite different policy concerns, it becomes implausible to think that unconscionability can, or should, provide a single unifying rationale. More specific rationales are required. Forcing everything into the mould of a generalised notion of unconscionability is artificial, and, it is submitted, a source of confusion.

III. Rights and Remedies

Turning to the second issue, consider constructive trusts from a rights and remedies perspective. In *Stevens v Hotel Portfolio II UK Ltd*,[25] Lord Burrows remarked that "the precise nature of a constructive trust imposed by law … has long perplexed commentators". One way of framing that perplexity is to ask: is a constructive trust a right, a remedy, or both?

At a very basic level, to say that a right–duty relationship exists is to say that the law recognises that certain real-world events, when they occur, immediately create a legal relationship between the parties. If A signs a contract with B, intending to create legal relations, and all the usual elements of contract are present, then they stand in a right–duty relationship — a contractual relationship: A has rights against B, and B has duties towards A, and *vice versa*. A remedy, on the other hand, is what a court grants to a successful claimant: it is the court's response to a claim. The question in the present context, then, is this: does the phrase "constructive trust" refer to a relationship that exists immediately when certain events occur – giving rise to rights that come into being regardless of whether any claim is brought – or does it describe one item in the judge's remedial toolkit? Or both?

There is much confusion on this matter. That confusion was borne out most recently in no less than the UK Supreme Court. In *Hotel Portfolio II*, the court was called upon to consider the nature of a constructive trust arising over unauthorised profits made by a fiduciary in breach of fiduciary duty. The majority took the view that "constructive trusts" described rights. Lord Briggs, for the majority, rejected the argument that the constructive trust was "in substance just equity's remedy".[26] Instead,

> [T]he constructive trust of the profits is a free-standing 'real' trust in its own right, and not merely a way of conferring additional proprietary remedies upon the beneficiary … [It is not a] remedy for a wrong [which] implies that it is something which is awarded by a court, just as damages are a court-provided remedy for the loss caused by a breach of contract or a tort. This is not how the constructive trust arises. It is equity's automatic and immediate response to a set of facts...[27]

---

[25] *Stevens v Hotel Portfolio II UK Ltd* [2025] 3 WLR 293 (SC, Eng) [*Hotel Portfolio II*].
[26] *Ibid* at 303.
[27] *Ibid* at 304.

On the other hand, it was Lord Burrows' view, in dissent, that constructive trusts are remedies. His Lordship said: "it is hard to deny that, in many situations, a constructive trust is a legal response to an equitable wrong"; and, "the constructive trust of the profits can be viewed … as a legal response to the breach of fiduciary duty".[28] This view was even more forcefully put by William Swadling, who once wrote that "The constructive trust is no trust at all, merely an inappropriate label to describe two species of court order".[29] In his view, there is not even such a thing as a constructive trust: it is just a fiction, as the title of his paper suggests.

How can we move from confusion to clarity? It is submitted that we need an analytical framework that reflects a more nuanced analysis than an "either/or" answer.

The starting point is to distinguish between different types of rights. According to John Austin,[30] as echoed by other distinguished scholars such as Hohfeld,[31] rights that exist before trial, and their corresponding duties, can be analysed as primary or secondary. Primary rights exist "in and *per se*": they arise when certain pre-determined events occur, events which do not involve the breach of an existing right. A contractual right and corresponding duties, for example, arise in response to the event of entering into a contract, and that does not involve a wrong or breach. Secondary rights, by contrast, arise when the wrong of breaching a primary duty is committed. A right to damages for breach of contract is a classic secondary right: it arises because of the violation of a contractual right.

This distinction between primary and secondary rights may be most recognisable in the contract law context, a distinction which was often relied upon by Lord Diplock in his judgments.[32] Somewhat amusingly, that distinction drew the ire of Lord Denning MR in the last judicial decision of his career, who said:

> I do hope … that we shall not often have to consider the newfound analysis of contractual obligations into 'primary obligations' [and] 'secondary obligations' … No doubt it is logical enough but it is too esoteric altogether. It is fit only for the rarified atmosphere of the House of Lords. Not at all for the chambers of the practitioner. Let alone for the student at the university.[33]

I must respectfully disagree with this sentiment. The dichotomy between primary and secondary rights is immensely powerful, for it allows us to distinguish between

---

28 *Ibid* at 326.

29 William Swadling, "The Fiction of the Constructive Trust" (2011) 64 Current Leg Probs 399.

30 John Austin & Robert Campbell eds. *Lectures on Jurisprudence*, 5th ed (London: John Murray, 1885) 762.

31 See Donal Nolan & Andrew Robertson, "Rights and Private Law" in Donal Nolan & Andrew Robertson eds. *Rights and Private Law* (Oxford: Hart Publishing, 2011) 1 at 19.

32 See, *eg*, *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 849 (HL, Eng); *Moschi v Lep Air Services* [1973] AC 331 at 350 (HL, Eng); *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association* [1966] 1 WLR 287 at 341–342 (CA, Eng). See too *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd* [1980] 144 CLR 300 (PC, Aust).

33 *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284 at 300–301 (CA, Eng).

three types of remedy that claimants seek in private law, and that turns out to be extremely useful when we come to constructive trusts.[34]

The first type of remedy is a replicative remedy. This is a remedy that simply restates and enforces a primary right. It does not function to correct the consequences of any breach, since a primary right, as discussed earlier, arises not from the event of a breach or wrong. A replicative remedy simply replicates and compels the defendant to perform a primary duty owed to the claimant. An action for specific performance, and an action for a debt, are examples: the remedy compels the defendant to do what he was already bound to do under the primary relationship with the claimant.

The second type is what may be called a reflective remedy. Here, the remedy enforces and gives effect to the claimant's secondary right arising out of the defendant's breach of a primary duty. The remedy awarded does not simply replicate the primary right; instead, the *content* of the remedy is targeted at correcting the effects of the defendant's wrongdoing. Damages for breach of contract are a paradigm example: the amount of damages is calculated to reflect the claimant's secondary right to be compensated for the loss caused by the defendant's breach of contract.

The third type is what can be labelled a transformative remedy. In this category, courts exercise wide-ranging discretion to determine both the *goal* and the *content* of the remedy. Its award requires courts to take into account considerations that go beyond the parties' pre-trial rights and duties. To put the same point the other way around, the claimant's pre-trial rights do not logically inform the remedy in any direct manner: the awarded remedy radically transforms the parties' pre-trial rights and duties. Statutory provisions to the effect that courts may provide a remedy where it is just to do so having regard to all the circumstances of the case[35] fall into this category. In such cases, the claimant does not have a substantive right to a particular remedy; at most, he has a right to have his case considered. The remedy transforms the parties' rights and duties, because its source is the court's discretionary judgment rather than the logical implications of any pre-existing right.

It is submitted that this tripartite framework of replicative, reflective, and transformative remedies provides an immensely powerful tool for understanding constructive trusts.

We can start from a modest but important observation: courts do, as a matter of practice, *award* constructive trusts. That is to say, they are at least undoubtedly recognised as *remedies* that are granted by the courts. With that in mind, we can then ask: in any given constructive trust doctrine, how does the constructive trust remedy relate to rights to which it is connected? Is it replicating a primary right, reflecting a secondary right, or transforming pre-trial rights altogether? If we ask this question across the range of constructive trust doctrines, an analytical framework for constructive trusts emerges: we can see that constructive trusts can themselves be understood as replicative, reflective, or transformative.

Replicative constructive trusts are those awarded to restate and affirm a primary right that already arose pre-trial. In these cases, there is consistency between

[34] The following analytical framework is explained in more detail in Liew, *Rationalising Constructive Trusts*, *supra* note 16 at Ch 2.

[35] There are many such statutes. An example is the Frustrated Contracts Act 1978 (NSW) s 15.

right and remedy, which is mirrored even in the language used: certain real-world events create a *constructive trust* relationship which gives rise to the parties' rights and duties, and the court, at trial, imposes a *constructive trust* remedy that simply restates that pre-existing position. So, in these cases, the phrase "constructive trust" describes the relationship which arises pre-trial, *and* also the remedy by which the court declares and gives effect to the primary right.

The "common intention constructive trust" provides a good example. When two parties have a common intention that the beneficial interest in their family home will be shared in a particular way, and one party detrimentally relies on it, a constructive trust relationship immediately arises. This reflects what Derrington J recently observed: that these constructive trusts "exist from the time of the transaction … and do not depend upon a court order to come into existence".[36] In court, the judge will award a constructive trust remedy that replicates that pre-trial relationship. A similar analysis can be applied to other constructive trust doctrines, such as those arising in the context of specifically enforceable contracts for the sale of land;[37] the rule in *Re Rose*;[38] agreement-based constructive trusts;[39] and cases of mistaken transfers where the defendant has knowledge of the mistake:[40] their respective real-world events trigger a constructive trust relationship, which a constructive trust remedy replicates and enforces.

Reflective constructive trusts are those imposed in response to a wrong — a breach of some primary right. In these cases, constructive trusts function as remedies enforcing secondary rights. Where courts exercise remedial discretion to determine the precise content of the remedy, that discretion is constrained by the goal of correcting the consequences of the wrong. Proprietary estoppel provides a helpful example. Where A promises to give B an interest in A's land, B detrimentally relies on the promise, and A then reneges, A breaches a primary duty not to cause detriment to B. The court's role is to fashion a remedy that as far as possible will undo the effect of B's detriment. Often that will require a constructive trust to be imposed, since parties usually litigate where the detriment suffered is extensive. But in other cases a monetary award may also suffice. The choice reflects an attempt to calibrate the content of the remedy to B's secondary right, with the aim of correcting the effects of A's wrongdoing.

But the exercise of discretion on a case-by-case basis is not always necessary, if the court determines, by way of precedent, that a particular wrong will *invariably* attract a particular remedy because it best corrects the effect of the wrong. For example, in English law (although not in Australia),[41] unauthorised profits made by fiduciaries are always held on constructive trust for the principal.[42] That rule is now treated as automatic, but its underlying nature remains reflective: the constructive trust arises in response to the wrong of breaching a fiduciary duty, and functions to

---

36 *Secretary, Department of Social Services v Hulett* [2025] FCA 23 at [31] (FC, Cth).

37 Liew, *Rationalising Constructive Trusts*, *supra* note 16 at Ch 8.

38 *Ibid* at Chs 4–6.

39 Ying Khai Liew, "Making Sense of Agreement-Based Constructive Trusts in the Commercial Context" (2022) J Bus L 330.

40 *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 at [172] (CA).

41 *Grimaldi v Chameleon Mining NL (No. 2)* (2012) 200 FCR 296 (FC, Aust).

42 *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250 (SC, Eng).

correct the effect of that wrong by stripping the fiduciary of the profit and restoring it to the beneficiary.

Transformative constructive trusts are essentially what are commonly known as "remedial constructive trusts". Their award requires the court to exercise open-textured discretion, taking into account considerations extraneous to the justice between the parties, most significantly, the effect of a proprietary award on third parties such as creditors. The remedy radically alters – transforms – the parties' pre-trial position. Here, there is little, if any, direct relationship between the claimant's pre-existing right and the imposition of the constructive trust. This point will be revisited below.

Understanding constructive trusts by way of this analytical framework provides much-needed clarity. It allows us to see why constructive trusts arise in different contexts, what rights and duties parties have, and when those rights and duties arise, and the extent to which courts may exercise remedial discretion. It also tells us that not all constructive trusts are equal: some are tightly linked to pre-existing rights; others are the product of broader policy choices.

Perhaps one concrete example of how the analytical framework can clarify a notoriously confusing area would be apposite. As mentioned previously, in proprietary estoppel cases courts have remedial discretion to award either a constructive trust or a lesser remedy, typically a monetary award, depending on the extent of the claimant's detrimental reliance. Courts and commentators have struggled to explain the nature and limits of this discretion. In England, the majority of the UK Supreme Court in *Guest v Guest*[43] framed the flexibility of proprietary estoppel remedies as having the aim of "remedying the unconscionability identified in the promisor's repudiation of the promise". In Singapore, the Court of Appeal in *Low Heng Leon Andy v Low Kian Beng Lawrence*[44] mooted the idea that the choice of remedy should simply be left to claimants. And in Australia, the High Court in *Giumelli v Giumelli*[45] classified constructive trusts awarded by way of proprietary estoppel as remedial constructive trusts.

Each of these approaches fosters unnecessary confusion. Unconscionability is not a sufficiently certain yardstick to ground liability or to calibrate remedies;[46] delegating a legal question to the parties to answer is inappropriate;[47] and proprietary estoppel remedies, properly understood, do not give courts a blank cheque to do whatever seems fair — they are concerned with doing justice between the parties themselves.[48]

If we use the analytical framework I have outlined, a picture of clarity emerges. We can recognise that proprietary estoppel aims to correct the effects of a breach of the defendant's duty to avoid detriment to the claimant by encouraging, and then

---

43 *Guest v Guest* [2024] AC 833 at 843.

44 *Low Heng Leon Andy v Low Kian Beng Lawrence (administrator of the estate of Tan Ah Kng, deceased)* [2018] 3 SLR 799 at [41].

45 *Giumelli v Giumelli* (1999) 196 CLR 101 at [3].

46 Liew, "Unconscionability", *supra* note 23.

47 Ying Khai Liew, "The Singaporean Court of Appeal on Proprietary Estoppel Remedies" (2019) 135 Law Q Rev 540.

48 Ying Khai Liew, "Constructive Trusts and Discretion in Australia: Taking Stock" (2021) 44 Melbourne UL Rev 963 [Liew, "Taking Stock"].

reneging on, a reliance-inducing promise. The court's role is to ascertain the appropriate remedy to undo, as best it can, the effects of that detriment. Sometimes that will call for a constructive trust; sometimes for a lesser remedy. Either way, the remedy is reflective: it reflects a secondary right that arises from the breach.[49] That, it is submitted, is more illuminating than the existing approaches: it provides a theoretically sound and practically implementable framework for the courts' exercise of remedial discretion.

IV. Remedial Constructive Trusts

The third issue concerns remedial constructive trusts. As observed earlier, remedial constructive trusts correspond to what may be called transformative constructive trusts. What distinguishes them from replicative and reflective constructive trusts is that claimants have no pre-existing right to the remedy as such. Instead, courts have wide-ranging discretion to determine whether to impose a remedial constructive trust, taking into account factors that extend beyond the two parties before the court, including the interests of creditors and other third parties.

It is worth noting that this understanding aligns with the position that has been developing in Singapore. In *Ok Tedi Fly River Development Foundation*[50] and again in *Zaiton Binte Adom*,[51] the plaintiffs argued that the remedial constructive trust is "both a right and a remedy", and that therefore they were entitled to it simply because the defendants acted unconscientiously. In both cases, Vinodh Coomaraswamy J rejected that argument in clear terms, holding that the remedial constructive trust is a remedy and not a right. What follows from that is important: claimants must first establish a cause of action known to the law before the question of imposing a remedial constructive trust even arises. That is what distinguishes remedial – or transformative – constructive trusts from replicative and reflective constructive trusts, which are anchored in pre-trial rights.

There remains, however, a great deal of confusion surrounding remedial constructive trusts. Two aspects may be observed.

First, in Australia, the High Court has, on several occasions, suggested, in *obiter*, that *all* constructive trusts are remedial.[52] *John Alexander* is a well-known example. The High Court there remarked that "[a] constructive trust ought not to be imposed if there are other orders capable of doing full justice"; and "third party interests must be borne in mind in deciding whether a constructive trust should be granted".[53]

Those *dicta* are, unfortunately, recipes for grave confusion. They betray a lack of proper differentiation between constructive trusts that replicate or reflect pre-existing rights, and constructive trusts that are transformative. As the analytical framework indicates, only transformative constructive trusts warrant the kind of

---

49 Liew, *Rationalising Constructive Trusts*, *supra* note 16 at Ch 7.

50 *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2023] 3 SLR 155 at [108].

51 *Zaiton Binte Adom*, *supra* note 24.

52 Liew, "Taking Stock", *supra* note 48 at 966–970.

53 *John Alexander's Clubs Pty Ltd and Another v White City Tennis Club Ltd* (2010) 266 ALR 462 at 492.

open-ended remedial discretion that takes into account third-party interests in that way. To repackage replicative and reflective constructive trusts as remedial is to misunderstand how they relate to rights. Clarity is achieved only if we keep these three types of constructive trusts clearly in mind.

Secondly, there is the tension between English law and many other major common law jurisdictions concerning the receptibility of the remedial constructive trust. It is well known that English courts do not recognise remedial constructive trusts. The concern, expressed for example in *Re Polly Peck International plc (in administration) (No. 2)*,[54] is that only with the authority of Parliament can a court "grant a proprietary right to A, who has not had one beforehand, without taking some proprietary right away from B".[55] In other words, the creation and destruction of property rights are matters that require absolute certainty, and not suitable to be subject to judicial discretion. By contrast, other jurisdictions, including Singapore and Australia, have been more receptive to remedial constructive trusts, though a cautious attitude has been urged. In *Zaiton Binte Adom*, for instance, Coomaraswamy J said:

> The remedial constructive trust allows the court to create and destroy property rights by decree. That undermines the policy imperative for rights in property to be stable and for the law to allocate and alter those rights only in a manner which is transparent, consistent and predictable … Once a system of law recognises a power to impose a remedial constructive trust – at least, if the remedial constructive trust is not kept within very strict constraints – it has the capacity to subvert this policy imperative.[56]

Not all judges have proceeded cautiously, however. In *National Bank of Oman v Bikash Dhamala*,[57] for example, Tan Siong Thye J awarded a remedial constructive trust in favour of a bank in Saudi Arabia that had been the victim of a conspiracy to defraud. The justification given was essentially that the defendants' "state of knowledge makes it unconscionable for the Defendants to keep the moneys and/or assets".[58] That decision has been criticised, for instance by Tang Hang Wu and Tay Yong Seng,[59] who write that "[t]he recognition of a remedial constructive trust may have serious ramifications in the context of the defendants' insolvency because it would give a plaintiff of a fraudulent conspiracy claim priority over the rest of the creditors".

Similarly, in Australia, the Full Federal Court recently in *The Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd*[60] awarded a constructive trust over copyright in footage of the claimant's premises and practices, surreptitiously obtained by animal rights activists, even though there was no

---

54 *Re Polly Peck*, *supra* note 1.
55 *Ibid* at 830.
56 *Zaiton Binte Adom*, *supra* note 24 at [145].
57 *National Bank of Oman SAOG Dubai Branch v Bikash Dhamala* [2021] 3 SLR 943 (HC).
58 *Ibid* at [55].
59 Tang Hang Wu & Tay Yong Seng, "Equity and Trusts" (2020) 21 SAL Ann Rev 531 at [16.20].
60 *Game Meats*, *supra* note 7.

strong doctrinal precedent for such a finding. That has been criticised, for example by Joshua Yuvaraj, who has written that the decision "neglects a copyright-oriented approach … Copyright is personal property; it is, however, a creature of statute. This means that the scope and extent of proprietary protection is governed entirely by the Act".[61]

If we understand remedial constructive trusts as transformative remedies, however, things become clearer. We can see that judges considering whether to impose a remedial constructive trust have before them a wide range of policy considerations, beyond the justice between the immediate parties. Those policy considerations may include, for example, third party rights and the nature of the (intellectual) property over which the constructive trust is to arise. These considerations must be addressed openly and explicitly. That understanding advises caution and encourages more careful and detailed reasoning when remedial constructive trusts are imposed. It is not enough to say that it would be unconscionable for the defendant to keep the property. The judge must explain why the drastic step of creating or re-allocating proprietary rights is justified, in light of the plethora of policy considerations which might be at play in that particular case.

V. Choice of Law

The fourth and final issue concerns constructive trusts and choice of law. Choice of law rules tell us which jurisdiction's laws will apply to a dispute that crosses jurisdictional borders. The basic methodology will be familiar. A judge characterises the issue in functional terms – as contract, tort, property, express trust, *etc* – and then applies the connecting factor for that category, that is, the rule that tells us which jurisdiction's law governs. These categories are functional in the sense that they serve the needs of private international law, where civil law modes of thinking are taken into account, and so they do not necessarily track the categories used in domestic substantive law, although they often overlap.

When it comes to constructive trusts, the choice of law rules are, at present, fundamentally unsettled. There is no recognised choice of law category of "constructive trust", and there are relatively few cases. So there is much uncertainty about how constructive trusts should be characterised for choice of law purposes. It is submitted that the analytical framework discussed earlier – distinguishing replicative, reflective and transformative constructive trusts – can help bring much needed clarity here as well.[62]

Starting with replicative constructive trusts. Recall that in these cases, the constructive trust remedy restates a primary constructive trust relationship that already exists pre-trial. For choice of law purposes, courts should focus on characterising that primary constructive trust relationship and the event that gives rise to it. For example, the primary relationships in agreement-based constructive trust doctrines

---

[61] Joshua Yuvaraj, "Justified Hesitation: Constructive Trusts over Copyright in Australia after *Game Meats v Farm Transparency International*" (2025) 44(3) UQLJ 127 at 135.

[62] The discussion below is elaborated further in Ying Khai Liew, "Choice of Law Rules in Australia for Resulting and Constructive Trusts" (2022) 44 Sydney L Rev 441.

are usually express trusts but for the lack of compliance with formalities. It is therefore plausible to say that, functionally, they are equivalents of express trusts, and should be categorised as such for choice of law purposes. The connecting factor for express trusts would then guide the choice of law. To take another example: in relation to specifically enforceable contracts for the sale of land, the primary relationship between the parties is a contractual one, with the constructive trust arising only in equity's concurrent jurisdiction. For choice of law purposes, it is natural to characterise the dispute as contractual, and to apply the choice of law rules for contracts. To draw a third example: in relation to the rule in *Re Rose*, the doctrine is concerned with determining the point in time when beneficial ownership in property passes, in the context of an attempted transfer. That is, the primary relationship is essentially one to determine ownership of property. For choice of law purposes, it is therefore appropriate to characterise it as a property issue, and to apply the property-related connecting factor.

Next, consider reflective constructive trusts. If the primary relationship in relation to which the defendant breached a duty can be characterised by way of an existing choice of law category, then that category should govern, because it is that relationship which is the source of the claimant's secondary right. For example, if a fiduciary relationship arises out of a contract or an express trust, then constructive trust claims over unauthorised profits made by the fiduciary can be characterised as contract or trust, as the case may be, and the corresponding choice of law rules applied. But fiduciary relationships, and other primary rights and duties in the reflective constructive trusts context, sometimes arise where there is no underlying contract or trust, nor any obvious existing category within which they can be characterised. In these cases, it is natural to ask: what is the functional nature of the wrong? Here, the law should treat such cases as belonging to the category of "wrongs" more generally, that is, to characterise them as torts for choice of law purposes, because it is the law of torts that generally identifies and regulates civil wrongs.

Finally, consider transformative constructive trusts. We know that these constructive trusts are purely remedies that call for a particularly broad exercise of judicial discretion to consider not only the content but also the aim of the remedy. Across England, Australia and Singapore, there is a well-established principle, reflected in *Phrantzes v Argenti*,[63] that courts will not apply foreign law where the issue in question calls for a very large measure of discretion. The logic is that such issues are better governed by the law of the forum, which is the law of the jurisdiction of the court exercising that discretion. If we accept that principle, then it follows that remedial constructive trusts will always attract the *lex fori*. In other words, the law of the forum will govern the availability and scope of remedial constructive trusts, even if the underlying cause of action is governed by foreign law.

VI. Conclusion

Bringing all of this together, we may return to the overarching theme of moving from confusion to clarity.

---

63 *Phrantzes v Argenti* [1960] 2 QB 19.

Constructive trusts occupy a unique and powerful position in common law. They are one of equity's most potent tools for resolving property disputes. At the same time, the incremental and siloed way in which constructive trust doctrines have developed has generated significant doctrinal uncertainty, both in their internal rationales and in their cross-border applications.

This article has attempted to demonstrate that, by approaching constructive trusts systematically – starting with a clear definition that distinguishes them from express and resulting trusts; analysing them as replicative, reflective or transformative constructive trusts; and then applying that analytical framework to the institutional and remedial constructive trust debate, as well as to choice of law matters – we can begin to see patterns and principles that were previously obscured.

On this view, then, constructive trusts are not inherently messy. They appear messy only when we conflate doctrinally distinct situations, or when we try to explain everything under the vague banner of unconscionability, or when we overlook the different roles that constructive trusts play as rights and as remedies. But if our analytical tools are sharpened – if we pay attention to how constructive trusts relate to primary and secondary rights, to the kinds of remedies courts are granting, and to the ways in which courts exercise remedial discretion – then we can bring much-needed clarity to this area.

That clarity matters not only for academic satisfaction. It matters because constructive trusts determine who owns what; they shape expectations in commerce and in family life; they affect creditors and third parties; and, increasingly, they operate across borders. A law of constructive trusts that is stable, transparent, coherent, and well-rationalised is therefore essential if the law is to function in a principled way. It is hoped that the analytical framework sketched in this article will contribute, in some modest way, to bringing the law of constructive trusts from confusion to clarity.