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# THE MYTH OF THE REMEDIAL CONSTRUCTIVE TRUST

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## ABSTRACT

Remedial constructive trusts are held out as a way for the courts to make better decisions: freed from the strictures of rules, courts would be better positioned to do justice on the facts, tailoring a remedy to the circumstances of the case. If this were true, their rejection in English law would be a serious failing. But a closer look at the relationship between rules and discretion suggests that it's not true and that, when discretion is in genuine opposition to rule-determined decision-making, the outcome is not more justice but less. Moreover, when we look to the arguments of those calling for remedial constructive trusts to be introduced into English law and to those jurisdictions which claim to recognize them, this much seems to be agreed. Such differences as there are go instead to the substantive rules which govern the operation of constructive trusts. So the question English law faces is not whether we should recognise some 'new model' of constructive trust, but rather the more familiar inquiry into what rules are best. In addressing this question, the idea of the 'remedial' constructive trust is only an unnecessary distraction.

## I

### *Trusts as Remedies*

Equity is, at its root, remedial law: a body of rulings, then rules, devised as ex post facto remedies to specific injustices. The trust emerged as one of equity's principal remedial instruments. Yet as the practice of recognizing trusts on certain sets of facts became settled, individuals could not only plan their affairs in the knowledge of when such trusts would arise but also start to take steps to secure such outcomes. So one who took title to a particular asset on the understanding that he would hold it for another's benefit would be placed under an

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obligation to do just that. Once this was known, property owners were in a position to bring about this arrangement by making transfers on these terms. Not only that, the courts came to see these trusts as responding to the owner's intentions. In this way, what became express trusts arose from these remedial origins as, what may be called, a facilitative institution. Not all trusts lend themselves to this sort of recharacterization. If I am a fiduciary and you pay me to exercise my powers against my principal's interests, I'll be required to hold that money on trust for my principal. But it's unlikely that there's anyone in your position who takes advantage of this rule to 'create' such a trust and, even if there were, there's no chance of the courts coming to treat this as the point of the rule. Cases such as this give us a category of constructive trusts: trusts which arise by operation of law rather than to give effect to a settlor's intentions.

Some constructive trusts nonetheless have an affinity with express trusts. Once the courts came to treat an owner's intentions as a reason for recognizing a trust, rules were needed to determine how those intentions were to be identified and manifested. The effect of these, or any such, rules was that there would be cases where owners intended and tried to bring about a trust but failed to meet the legal requirements for effective trust creation. In these cases a court might simply deny the trust, leaving the legal title holder free to treat the asset as his own. But alternatively the court, reluctant to endorse what looked like an unjust result, might recognize a trust nonetheless. Since the formal requirements for the creation of a trust haven't been met, one can understand why these trusts would, at least on occasion, be classed as constructive trusts. But these were trusts which reflected the parties' intentions and these constructive trustees were people who had chosen to undertake the duties the courts then 'imposed' on them.

One application of the term 'remedial constructive trust' is to identify those constructive trusts which don't mirror express trusts in this way.<sup>1</sup> Understood in this way,

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<sup>1</sup> Cf *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189, [9] (Lord Sumption JSC), where a distinction is drawn between two types of constructive trust and constructive trustee: 'The first comprises 'persons who have lawfully assumed fiduciary obligations in relation to trust property, but without formal appointment. ... [The second] comprises persons who never assumed and never intended to assume the status of a trustee, whether formally or informally, but have exposed themselves to equitable remedies by virtue of their participation in the unlawful misapplication of trust assets. ... The intervention of equity in such cases ... is purely remedial.' (To much the same effect: *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400 (CA) 408-9 (Millett LJ).) This classification omits a further class of constructive trusts, which are remedial in the sense of not involving any assumption of trusteeship but don't derive from a breach of any pre-existing trust or fiduciary relationship, such as the vendor-purchaser constructive trust or the trust arising in cases such as *Re*

while there may be disagreement about the circumstances in which trusts of this kind should be imposed, there is no general controversy concerning their existence or legitimacy. More commonly, however, references to remedial constructive trusts identify a different idea and a different distinction. This is the distinction drawn by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*:<sup>2</sup>

Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such trust having arisen (including the possibly unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion. A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court.

The difference here is not one of rationale but of technique. So one option is for the operation of constructive trusts—when they arise, what they involve—to be settled by legal rules. Where this is so, these trusts will arise where and when the conditions set down in those rules are met. Another option, however, is for the operation of these trusts to lie, to some degree, at the court's discretion. Where they do depend on such an exercise of judicial discretion, they will arise only where the court decides that they arise and take effect only when a court decides that they take effect.

This passage also indicates what the remedial constructive trust might be thought to have going for it. Since institutional trusts are the product of rules, their operation is inflexible and, in this sense, indiscriminate. They arise when the rules say they arise and bind who the rules say they bind. If the effects of such a trust are thought to be unfair—for instance to third parties who have come into contact with the relevant asset—that's just the way it goes. So long as the rule remains in place, the judge's hands are tied and so we must take the rough with the smooth. By contrast, remedial constructive trusts free the court to recognize a trust only where and only so far as it considers it just to do so. In this way, these trusts have, so it is thought, a flexibility which enables the courts to reach better, more just, results. It is for this reason that Lord Browne-Wilkinson in *Westdeutsche* suggested that the

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*Rose* [1952] Ch 499 (CA). Indeed, for reasons indicated in the text, these might be seen as the truest or most central cases of constructive trusts.

<sup>2</sup> [1996] AC 669 (HL) 714-5.

remedial constructive trust may be a more suitable vehicle for proprietary restitution in cases of unjust enrichment.

Though it is possible for a legal system to adopt each of these techniques at different times and in different contexts, the received wisdom is that, at present, English law adopts only the former, institutional model.<sup>3</sup> Opposition to remedial constructive trusts has tended to focus on the uncertainty they would bring and concerns about the legitimacy of the courts assuming such a power to reallocate property. In basing their opposition on these grounds, critics appear to concede that the remedial constructive trust would bring the sort of justice gains its proponents have claimed for it. This concession is, I think, a mistake. If it really were true that remedial constructive trusts would, or were likely to, lead to better, fairer decisions, then this is a places a significant burden on those who would nonetheless counsel against their introduction; a burden, I suggest, that their opponents have not discharged. Conversely, if these trusts would not after all bring about better results, they really have nothing going for them and the debate ends there.

## II

### *Certainty, Legitimacy, Justice*

English courts' rejection of the remedial constructive trust reflects a stance they have taken towards proprietary claims more broadly.

Property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend upon ideas of what is 'fair, just and reasonable'. Such concepts, which in reality mask decisions of legal policy, have no place in the law of property.<sup>4</sup>

Property law can be more or less fair, more or less just and the suggestion here is not that the law or the courts should regard this with indifference. But while the law aims for just property rules, these rules should not make any direct appeal to justice and so proprietary entitlements should be capable of determination without inquiry into their justness. Accordingly, judges resolving property disputes shouldn't be asking what is fair, just and reasonable on the facts. Cases should, one might say, be decided on the law, not on their

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<sup>3</sup> See eg *Bailey v Angove's Pty Ltd* [2016] UKSC 47, [27] (Lord Sumption JSC), *Crossco No 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619, [2012] 1 P&CR 16, [84] (Etherton LJ).

<sup>4</sup> *Foskett v McKeown* [2001] 1 AC 102 (HL) 127 (Lord Millett).

merits or, more precisely, they should be decided by laws which shut off any such consideration of the merits of the parties' claims.

Why? One good that comes from having a legal system is in the stability and predictability it provides. If we know where we stand—what options we have, what demands we can make of others, what demands they can make of us—we are better positioned to set and pursue our diverse life goals. A principal value of private property regimes lies precisely in their expansion and facilitation of the choices open to communities and their individual members.<sup>5</sup> But a real world system of laws will serve this good only where it does indeed provide this information and a system of private property will advance our interests only where our holdings are sufficiently definite, accepted and not liable to arbitrary confiscation or revision, so that we have some measure of confidence in what is truly ours and what we can do with it.

Sometimes the only values at stake in the law's resolution of some practical problem are, or appear to be, these certainty values. Should we drive on the left or on the right? There's nothing to do other than pick one and move on. (Though even here it is values other than certainty which tell us that we should discount various other options: 'on the left in the mornings, right in the afternoons', 'whichever side you like'.) But more often there are reasons for preferring one answer to another and, where there are, these reasons will be added to and will sometimes compete with the reasons for wanting a—any old—clear answer. Should the right of a beneficiary bind a purchaser for value of misapplied trust assets? Here there are competing considerations, competing interests, to be weighed in coming to any determination. We can come up with various answers which would give more certainty, more clarity than the answer English law has in fact given: 'yes, always', 'no, never', 'only where the purchaser was conscious, at the point of receipt, that he was receiving proceeds of a breach of trust'. The choice to go instead with the doctrine of notice is one which acknowledges the deficiencies of these alternatives and attempts a more just, more reasonable balancing of the interests of respective parties: purchasers for value will take subject to the beneficiary's rights only where they should have appreciated that what they were receiving was misapplied trust property. The application of this rule requires the judge not only to look into the facts—What did the purchaser know? What more would he have known had he made additional inquiries?—but also to consider what inquiries a purchaser *should* make. This question is not answered simply by asking what questions other purchasers typically do make but requires, in the end, an evaluation; a judgment of fairness, of reasonableness.

The claim that proprietary entitlements can, in all cases, be determined without inquiry into what is fair, just and reasonable is, therefore, mistaken and so it is mistaken too to

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<sup>5</sup> See generally Adam J Macleod, *Property and Practical Reason* (Cambridge University Press 2015).

suggest that questions of fairness, justice and reasonableness have no place in the adjudication of property disputes. In any case, even where the law adopts rules which prioritize clear, certain outcomes over those which require a fact-sensitive inquiry into the merits of the case at hand, the choice of those rules is grounded in the reasonableness of promoting certainty over other goods and values the law might otherwise, or better, promote. There are goods that come from legal certainty, but those goods are not the only goods at stake in law and adjudication and they have no necessary priority over those other goods and values to which our legal practices are or may be directed. And so, if the uncertainty the remedial constructive trust would bring is to count decisively against its recognition, we would need to show that, in the sorts of cases in which it would be open for adoption, certainty is of particular importance or that the justice gains which might be made from giving courts greater flexibility are outweighed by the disruption this would cause to those whose interests the law exists to serve. This would require a clearer articulation of what these justice gains might be and why giving courts greater discretion is the only or preferable means to their achievement. But it would also require that the value of legal certainty be not simply asserted but expounded. In this regard, it is significant that many of the cases in which it has been suggested that remedial trusts might be a useful tool involve conduct which the law prohibits and seeks to discourage (eg unauthorized gains by fiduciaries) or situations the parties do not plan for (eg mistaken transfers, other unjust enrichments). For in these settings, the concern that the law be clear so that we might arrange our affairs in its light, if applicable at all, is less strong.

A similar response can be given to the argument that it would be illegitimate for courts to assume this sort of power to vary or reallocate property rights. Again we can see the force of this objection. No doubt it would be improper for courts to upset proprietary entitlements conferred by statute, so too, through the award of property rights, to undermine statutory schemes for the ranking of claims in insolvency. And even when dealing with questions regulated only by common law, where whatever decision the court reaches would impact on no legislative provision or scheme, all accept that there are choices, and perhaps also considerations, which are not properly available to the courts but which fall within the exclusive competence of the legislature. All this means, however, is that the discretion accorded to judges in deploying remedial constructive trusts must be, in various ways, limited. Often the argument is taken further:<sup>6</sup>

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<sup>6</sup> *Re Polly Peck International plc (No 2)* [1998] 3 All ER 812 (CA) 831 (Nourse LJ). See too Peter Birks, 'Proprietary Rights as Remedies' in Peter Birks (ed), *The Frontiers of Liability: Volume 2* (Oxford University Press 1994).

You cannot grant a proprietary right to A who has not had it beforehand, without taking some proprietary right away from B. No English court has ever had the power to do that, except with the authority of Parliament.

Here the suggestion is that the courts are, absent statutory permission, barred from decisions which have *any* redistributive effect. On this basis, it's plain that according courts any sort of discretion over the creation and scope of trusts would be illegitimate. The problem with this suggestion is that it just isn't true. Any judicial change to the law concerning the acquisition or passing of property entitlements will mean a change to people's real world property holdings. Since a significant part of this law is judge made, it is plain that judges have, and have long had, the power to make some such changes. This is true not least of the law of trusts, judge-made law redistributive not only in effect but by design. Now remedial constructive trusts may be redistributive in a way or to a degree other trusts are not and so it may well be possible to object to remedial trusts on the basis of the sort of redistribution they involve. But the argument then needs to move beyond a blanket refusal to countenance any form of judicial redistribution.

So here too the challenge raised against remedial constructive trusts is not without merit but it is taken too far. There are reasons to consider that certain questions are, for the courts, off-limits, reasons too to prefer that significant changes to the law and to individual's holdings are made with Parliamentary authority. But there are also reasons for judges faced with property disputes to seek to do justice to the parties and, more generally, to seek to develop the law in such a way as will best promote the full range of goods and values law can promote. The significant portion of English property law which is judge made is not therefore a testament to a long-standing abuse of judicial power but, in the main, a series of reasonable responses to the practical questions English judges have faced, given the particular social and political settings against which these determinations came to be made. If, therefore, introduction of the remedial constructive trust would be a development which we should consider beyond the courts' proper powers, then it will not be simply on account of the fact that these trusts are redistributive but because of the particular redistributive mechanism or consequences they involve. In any event, if the concern is with the courts' assuming for themselves this particular redistributive power, the objection is not to the remedial constructive trust but rather to this particular route to its recognition. If Parliament were to enact a statute granting courts the power to impose remedial constructive trusts, this objection would have no bite.

The case against the remedial constructive trust made by English lawyers is, in these ways, incomplete. The objections they have raised are overstated and, when tempered, they identify concerns which, though legitimate, are hardly decisive. Now, much the same could



be said of the case *for* remedial constructive trusts. Here too the claim that these should be welcomed for the better, fairer decisions they enable comes too quickly. Of course we should want courts to come to just decisions and we can understand how, in the face of rules which produce unjust, unfair outcomes, freeing courts from those rules could lead to better results. But is this in fact the situation English law is in? And, if it is, is giving courts the sort of discretion remedial constructive trusts confer the only—or, if not the only, then the best—way of improving results? These questions are too rarely asked, let alone answered, by those pushing for their adoption, judicial discretion an assumed panacea to unspecified ills.

This latter failing may seem the more significant. Isn't the onus on those arguing for change to show why that change is needed? Well, perhaps. Even so, all those calling for the remedial constructive trust's recognition need claim is that it would be for the better were English courts to have this option, this weapon in their armoury. To make this claim good, it's not necessary to say how that option should be exercised, only that there may be times when having it would be beneficial. And so we can see why advocates of the remedial constructive trust have, in the main, spoken only in general terms about the advantages of discretion over rules. If there are such advantages—if, as claimed, discretion does, at least on occasion, allow for better, more just, judicial decisions—then there is reason to think that this option is one worth having, for why would we want to rule out ever having access to those advantages? Of course, this option should nonetheless be ruled out if its exercise would always be improper or if these gains were always outweighed by attendant harms. This has in effect been the strategy of those opposed to remedial constructive trusts. But, as we have now seen, those blanket objections fail and so, if opponents concede the justice gains supporters claim, the argument for remedial constructive trusts is won.

### III

#### *Rules and Discretion*

Remedial and institutional constructive trusts differ, so it is assumed, in kind. Since remedial and institutional trusts differ on the basis that, while the operation of the latter is fixed by rules, the former depend on an exercise of judicial discretion, the distinction supposes a difference in kind between deciding by rule and having discretion. That there is such a difference is sometimes doubted.<sup>7</sup> Certainly there is no straight opposition between rule-based and discretionary decision-making. For one thing, discretion is often accorded by rules.

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<sup>7</sup> Cf Simon Gardner, 'The Element of Discretion' in Peter Birks (ed), *The Frontiers of Liability: Volume 2* (Oxford University Press 1994) 193-5.

The rules ('laws') of cricket give the captain who wins the toss a choice—a discretion—as to whether his side will bat or field first. When he makes his choice, this is both an exercise of discretion and an application of this rule. Rules may not only confer discretion but also regulate its exercise: having a discretion is consistent with rules determining what sorts of considerations the decision-maker must take account of in making his choice and how those considerations are to be weighted or prioritized. We see this in the way the law polices the exercise of trustees' discretions, requiring decisions to be made in good faith, for proper purposes, and so on.

In these ways, decisions can be and often are both discretionary and rule-governed. The rules governing such decisions may indeed provide extensive direction to one's determinations, significantly curtailing one's options and the considerations upon which one's decision is to be made. But, for the decision-maker to have discretion, however many options they count out, those rules must stop short of specifying what option he is to take. The rules of cricket provide that the captain that wins the toss gets to choose whether to bat or field, but they don't tell him, and don't purport to tell him, what choice he should make. So too the legal rules regulating the exercise of trustee discretions delimit the options available to trustees but don't go on to tell them what options to take. Discretion is, therefore, marked not by an absence of rules bearing on one's decision but by the fact that whatever rules bear on that decision don't fully settle what it is that the decision-maker ought to do: in the final analysis, he must make a choice, deciding for himself between options those rules leave open.

Saying that the decision-maker must make a choice doesn't mean that this choice should or can only be arbitrary. Nor does it mean that one choice is as good as any other. Exercises of discretion can be more or less reasonable (just or generous or wise or effective ...).<sup>8</sup> That the rules of cricket give the captain who wins the toss a discretion as to whether to bat or field doesn't mean that he may not have good reasons to pick one option over the other. Similarly, where the law accords a discretion, it leaves the decision-maker with a range of options, options which are, in one sense, equal in law: equally open to the decision-maker, equally effective in law if and when chosen. But the law need not and, at least typically, will not hold out these options as equally reasonable or choiceworthy. By granting discretion, the law doesn't signal the reasonableness of all these options but rather delegates responsibility for assessing their reasonableness to that decision-maker.

This also brings out the notion of rules which is in play here. To have discretion is to have a certain kind of choice, to lack discretion is to lack such choice. (And, to repeat, having

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<sup>8</sup> Indeed one suggestion is that we should speak of an agent having discretion only in respect of choices which are guided or assessable by some such justificatory standard: H L A Hart, 'Discretion' (2013) 127 *Harvard Law Review* 652, 657.

a choice here doesn't mean a choice between equals, and so doesn't imply that any one choice is as good as any other or that there isn't a single best or right choice to make.) The essence of a rule—so far as rules, or rule-determined decision-making, are to be contrasted meaningfully with discretion—is that it accords no such choice but rather settles the practical question to which it is directed. Rules are conclusive.<sup>9</sup> This is no less true of those rules that create and regulate discretions. Where the law grants discretion, it leaves some practical question unanswered. For instance: How should I, as trustee, exercise this power of appointment I have been accorded? That I have a discretion here means that the law doesn't answer this question for me. But while it doesn't answer this question, it does answer others which are connected to or bear on that question: Am I entitled to make a payment to you? Yes, as you are within the range of objects identified by the settlor. Is it open to me to pay you with a view to making you agreeable to my romantic advances? No, the power must be exercised for proper purposes. In this way, the legal rules policing the exercise of trustee discretions are conclusive of the practical questions they set out to answer, indeed conclusive too of the fact that, in the end and from the options left open to me, the choice is mine to make.

A decision-maker who is granted discretion may be provided with a wide range of options or he may be left with a choice of only two. The reasons to which he may appeal may be more or less circumscribed. One can, in these ways, have more or less discretion. In law, the scope of discretion is determined by the reach of the legal rules which bear on such decisions. But while the extent to which a particular decision is rule-governed or discretionary is a matter of degree, the difference between decisions which are fully determined by rules and those where the decision-maker has any measure of discretion is indeed a difference in kind. If institutional and remedial constructive trusts are distinguished on this basis then the difference between the two is likewise one of kind.

#### IV

#### *Making Law*

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<sup>9</sup> The understanding of rules used here is much the same as that set out in Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 24-8. There are other uses or concepts of rules, which bring with them different conceptions of their essential or distinguishing features: see eg Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press 1991).

If, however, remedial constructive trusts are those whose operation is in any measure at the discretion of the courts, doesn't this undermine the claim that English law recognizes no examples of the remedial constructive trust? It is hardly credible to suggest that the courts never have and never exercise discretion when dealing with constructive trust cases. Nonetheless, I think it's right to say that the constructive trusts recognized in English law are all properly classed as institutional rather than remedial. To see why requires a closer look at the sorts of discretionary powers courts may have. This will then give us a clearer understanding of what it means to say that the operation of remedial constructive trusts but not institutional constructive trusts is at the discretion of the court.

In law, there is no discretion without rules, rules which confer and delimit that discretion. But it is also true that, with few exceptions, we don't get legal rules without discretion. Law—positive law—is man-made and man-made law is, at least in the main, made in exercise of law-making powers.<sup>10</sup> These law-making powers will be regulated by law, with laws not only determining the scope of these powers but imposing duties on law-makers in relation to their exercise. On occasion, these duties may go so far as to determine what law is to be made: legislators may, for instance, owe a duty to translate into domestic law the enactments of some supra-national institution or to adopt the recommendations of a state-sponsored law reform body. But more commonly the content of laws made by law-making officials will not be legally pre-determined in this way but will be chosen by those officials in exercise of a discretionary law-making power. In a common law system, the officials with such law-making discretion include some judges, with new laws made through the rulings they make when deciding cases.<sup>11</sup>

Accordingly for there to be institutional—rule-determined—constructive trusts, there will need to be officials with the power to make the legal rules which govern their operation.

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<sup>10</sup> Can law be made other than through the exercise of a law-making power? This depends on how broadly one is willing to stretch the idea of a law-making power. Some law derives from custom and customary norms don't derive from any exercise of law-making power. But these norms become law only through official action and so one could regard the legal adoption or application of customary norms as itself the exercise of a law-making power. A clearer example of law made other than through the exercise of law-making powers may be rules of recognition: if we think each legal system has a basic ground rule from which the validity of all other legal norms follows, then this rule cannot itself be the product of any exercise of a legal power or discretion. And since this rule will (typically) not be chosen but will instead emerge through the practices of members of that community, who, often un-self-consciously, come to act and decide as though there is such a rule, one might say that the rule does not even result from the exercise of some pre- or extra-legal power: see generally John Gardner, 'Some Types of Law' in Douglas E Edlin, *Common Law Theory* (Cambridge University Press 2007).

<sup>11</sup> See Gardner *ibid* 66-72.

Having such powers will, in turn, ordinarily mean having a discretion as to their exercise. In English law the makers of the law of constructive trusts are the judges, acting, self-consciously or not, in exercise of their law-making powers. Nor should we think that this judicial law-making power is, in relation to constructive trusts, no more than historic. In *FHR European Ventures LLP v Cedar Capital Partners LLC*, the Supreme Court addressed the question of when assets acquired in breach of fiduciary duty will be held on constructive trust for the principal.<sup>12</sup> The position that had emerged from the previous cases was that there would be a trust where the principal already had a beneficial interest in the asset at the point of its receipt by the fiduciary and where the relevant asset was obtained by the fiduciary by exploiting an opportunity which he should have exploited for the principal's benefit, but not in other cases. This meant no trust would arise over bribes and secret commissions received by the fiduciary, with the principal limited to a personal claim to their monetary value.<sup>13</sup> The court in *FHR* decided that this position was unsatisfactory and so declared that a constructive trust would arise in all such cases, overruling those cases which had held otherwise.

The power the court exercised in *FHR* to depart from those earlier decisions and set the law on a new course was law-given. But how that power should be exercised was not a question that found its answer in the positive law. So, while the court worked its way through the case law and though it stressed that its decision was in keeping with an older line of authority, its decision was in the end grounded in 'considerations of practicality and principle', which is to say, on an assessment of the merits of alternative approaches to these cases.<sup>14</sup>

Here then we have an example of a court exercising a discretionary law-making power and, in this way, the trust recognised in *FHR* was one which arose from the exercise of this discretion. Nonetheless the court didn't think of this trust as a remedial constructive trust.<sup>15</sup> Why was this? Institutional constructive trusts are, as we've seen, those whose operation is fully determined by rules, such that when the conditions identified in the rule are present, the trust arises without need for further decision or assessment. The upshot of *FHR* is that there is now a rule that provides that, wherever fiduciaries receive assets in breach of their fiduciary duties, they will hold those assets on constructive trust for their principals, the trust arising at the point those assets are received. This is the rule applied to the facts in *FHR*. The recognition of this trust is discretionary only in the sense that the decision to adopt this

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<sup>12</sup> [2014] UKSC 45, [2015] AC 250.

<sup>13</sup> *Metropolitan Bank v Heiron* (1880) 5 Ex D 319 (CA), *Lister v Stubbs* (1890) 45 Ch D 1 (CA), *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [2012] Ch 453.

<sup>14</sup> *FHR* (n 12) [46].

<sup>15</sup> *Ibid* [47].

rule involved the exercise of a discretion. If this rule had been enacted by Parliament and subsequently applied by the court in *FHR*, all this would be beyond doubt. That there is any possibility of confusion here comes about only because judicial law-making involves a court doing two things at once: choosing a rule and applying it.

The clearest sort of judicial law-making involves making new legal rules, whether by introducing a rule where none existed previously or, more commonly, and as was the case in *FHR*, by replacing one rule with another. But much judicial law-making is of a different kind. The idea, or ideal, of rule-determined decision-making is for there to be a rule which fully settles the relevant decision, so requiring no choice by the decision-maker and hence no appeal to or inquiry into other considerations, no assessment of various options on their merits. Rules do this by identifying what decision is to be made on what facts, such that, once we know the rule and we know the facts, we have all the information we need to know what we should decide.

All such rules, therefore, aspire to the same form: [facts] A + B + C ... = [legal conclusion] X. But aspiration isn't always reality. So, as mentioned earlier, a recipient of misapplied trust assets will hold them on trust for the beneficiary unless he is a bona fide purchaser for value without notice. Whether a purchaser has notice depends not only on what he knows but also what he should have known. What he should have known turns on the questions he should have asked and what he would have learned had he asked them. So what inquiries should a purchaser make? The law's answer: reasonable inquiries. But this is effectively to say that the purchaser should ask the questions he should ask and the problem is that what these questions are will vary from case to case. Of course, some guidance will be found in the cases which have themselves had to address this question and so, in certain ordinary, repeat kinds of transaction, it's clear what questions are to be asked. But not every case fits into some such established pattern and, in those cases which don't, the law effectively runs out. We have a rule which sets out to settle the question of when a purchaser will be bound by the beneficiary's interest but that rule is, in these cases, indeterminate, its content and application on these facts as yet unsettled.<sup>16</sup>

Any court faced with such a case is therefore confronted with a question to which the positive law provides no answer. Whatever answer the court gives takes it beyond existing law and so involves an exercise of discretion, choosing an interpretation or development of the rule it adjudges reasonable all things considered.<sup>17</sup> Through this exercise of discretion, the

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<sup>16</sup> Or, in Hart's words, the rule has an 'open texture': H L A Hart, *The Concept of Law* (Oxford University Press, 3<sup>rd</sup> edn 2012) 123, 128.

<sup>17</sup> Cf Dworkin (n 9) 31-2 who sees such cases as instances of 'soft' discretion. This requires more discussion than I can give it here but the argument in the text shows, I think, why, if—unlike

court not only answers a question left open by the under-determined rule but also adds to that rule, making it (more) determinate. This too is a form of judicial law-making, making law not by setting down new legal rules but by filling in gaps in existing rules. Accordingly, the determinations made by the courts in these cases are not ad hoc supplements to the relevant rules. Rather they settle the content of those rules not only for the case at hand but for all materially like cases to follow.

In this instance the indeterminacy of the rule and hence the need for courts to have and to exercise this sort of rule-making or rule-completing discretion is a consequence of the practical impossibility of framing in advance a fully determinate rule which deals justly with all the cases that fall within its ambit. What constitute reasonable inquiries is so dependent on the circumstances of the case and the range of circumstances to which the rule applies is so great that the best the law can do is to leave much of the work of spelling out this rule to the courts as and when they are faced with such claims. Elsewhere however this sort of rule-completing discretion is a consequence of a prior rule-making failure. *Pennington v Waine* concerned an unsuccessful attempt to transfer legal title to some shares.<sup>18</sup> The shareholder executed a share transfer form identifying her nephew as the intended donee. However she failed to pass it on to him or to the company so that he may be registered as the new shareholder, handing it instead to a representative of the company's auditors. It was accepted that this wasn't sufficient to pass legal title. The question for the court was whether a constructive trust nonetheless arose in the nephew's favour. Previous cases had held that such a trust would arise only where the donor had done everything within his power to make the transfer of title effective.<sup>19</sup> This wasn't the case here since the donor had handed over the share transfer form to the wrong person. Nonetheless, the Court of Appeal held that she did indeed hold the shares on constructive trust for her nephew.

In coming to this decision, the court exercised a law-making discretion like that exercised by the Supreme Court in *FHR*, adopting a new legal rule which had the effect of extending an established class of constructive trust to a further set of cases. But what is the new rule it set down? Here, in contrast to *FHR*, things are muddy. Arden LJ considered that it would have been unconscionable had the donor changed her mind and attempted to resile from the transfer and so equity would intervene to ensure that she couldn't do so. This is what the imposition of the trust did. Clarke LJ held that, in the circumstances, the completion of the share transfer form was sufficient to effect an equitable assignment of the shares, no

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Dworkin—one takes law to mean positive law, the discretion exercised where the court is called on to apply some under-determined legal rule is a genuine (ie 'hard') discretion.

<sup>18</sup> [2002] EWCA Civ 227, [2002] 1 WLR 2075.

<sup>19</sup> *Re Rose* (n 1), *Mascall v Mascall* (1984) P&CR 119 (CA).

matter what then happened to that form. But the court identified no broader test or principle which identified when, for other types of asset, a failed attempt to transfer legal title would amount to a successful equitable assignment nor which would determine when, on differing facts, it would be unconscionable for a donor to go back on an intended gift. ‘There can be no comprehensive list of factors which makes it unconscionable for the donor to change his or her mind: it must depend on the court’s evaluation of all the relevant considerations.’<sup>20</sup>

Here then we have a rule: a constructive trust will arise as a result of a failed attempt to convey legal title where it would be unconscionable for the donor to resile from his intended gift and keep the asset for himself. We know from the cases which preceded *Pennington* that it will be considered unconscionable for a donor to seek to resile from a gift once he has done everything within his power to make the transfer of legal title effective and so a trust will arise in these instances. But what we don’t know is in what other circumstances will such a trust arise. *Pennington* tells us that there are such circumstances and provides us with one such example. Beyond this, however, it offers very little guidance for later courts charged with applying this new rule. In turn, these courts have no option but to flesh out this rule for themselves, making their own determinations as to how the rule should be understood and applied.

So the upshot of *Pennington* is that it leaves us with a significantly indeterminate rule, which, unless and until it is replaced, will make for more cases in which the courts are required to exercise law-making, rule-completing discretion. But this indeterminacy, in contrast to the indeterminacy we find in the bona fide purchase rule, doesn’t seem to be an inevitable and acceptable cost of the law’s attempt to regulate a complex or diverse array of circumstances or to synthesize a range of considerations. True, cases of imperfect gifts differ in various dimensions: the reasons for its failure, the nature of the asset, the circumstances of the would-be recipient, and so on. But there’s nothing in *Pennington*, or for that matter in the earlier cases, to give us cause to think that these differences should stop us being able to articulate clearly the reasons the law may have for recognizing trusts in such cases or that their application across a range of diverse fact patterns involves any particular complexity or unpredictability. In turn, this means that there is nothing stopping us from devising a rule which provides a just and reasonable response to these cases without any significant uncertainty or indeterminacy. Perhaps the most likely explanation for the court’s failure to offer any clear and convincing rationale for the trust in *Pennington* is that there is no such rationale to be found. At best, *Pennington* passes the buck, leaving later courts to flesh out a

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<sup>20</sup> *Pennington* (n 18) [64] (Arden LJ).



rule which can account for the ruling in *Pennington* while providing a just and workable response to other cases of imperfect gifts.<sup>21</sup>

So it wasn't necessary for the court in *Pennington* to adopt such a slack, indeterminate rule and the wide discretion courts now have in determining when equity will perfect imperfect gifts serves no useful purpose. But we shouldn't think that the law can ever get by without courts exercising some such discretion. There are inevitably indeterminacies in the language in which rules are expressed, in the intentions of rule-makers and in the reasons to which they appeal. As a result there are no fully determinate legal rules.<sup>22</sup> The rule set down in *FHR* may be not only more just but also more certain than the rule it replaced. But there remain cases where its application remains uncertain, unsettled. Applying the rule that all assets received in breach of fiduciary duty are held, from the point of receipt, on constructive trust for the principal requires that we know who is a fiduciary and what constitutes a breach of fiduciary duty. Sometimes we don't. Accordingly, while legal rules can be more or less determinate, leaving a correspondingly smaller or greater number of questions to be settled by those called on to apply those rules, that they will inevitably be indeterminate in some measure means that courts will always have some discretion to determine their content and application.

## V

### *Alternative Strategies*

Rule-determined and discretionary decision-making represent distinct techniques, distinct strategies for coming to decisions. The ideal of rule-determined decision-making is of a system of rules which fully resolves all relevant practical questions, such that, once those rules are in place and the facts known, the decision-maker knows what he is to do without further inquiry. Discretionary decision-making differs in that it rejects this aim. While it has rules which exist to guide the decision-maker, these rules stop short—and stop short by

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<sup>21</sup> So in *Curtis v Pulbrook* [2011] EWHC 167 (Ch), [2011] 1 BCLC 638, [43] the court took *Pennington* to be a case where a trust was imposed in response to the donee's detrimental reliance on the apparent gift, though one finds little support for this in Arden LJ's judgment and none at all in Clarke LJ's. The alternative to looking for a rule which makes sense of *Pennington* is to ignore it or, which is much the same thing, to treat it as confined to its own facts. This is more or less what the court did in *Zeital v Kaye* [2010] EWCA Civ 159, [2010] 2 BCLC 1.

<sup>22</sup> Hart (n 16) 124-36, Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 2<sup>nd</sup> edn 2009) 70-7, John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press 2012) 34-5, 71.

design—of settling the decision he is to reach. Instead this strategy sees that the decision-maker is left with a range of options from which he is to choose, the choice requiring that decision-maker to undertake his own assessment of their merits.

To adopt the first of these strategies is to commit to an ongoing project. This is true not only in the sense that rule-determined decision-making is a strategy for making decisions extending over a period of time but, more fundamentally, for the reason that the choice of rules is itself ongoing, indeed unending. Rules which were necessary or apt at one point in time and in one setting may later, when circumstances change, cease to be appropriate; those which appeared just or practical may, on reflection, come to be seen as deficient. More to the point, no set of man-made rules will be wholly free of ambiguity, none will be capable of providing fully determinate answers to all questions they address. Any such set rules will necessitate continuing interpretation and supplementation, requiring on each occasion further choices to be made. We see this in law and in particular in common law. Lines of cases now considered outdated or mistaken are overruled or distinguished. Solutions are fashioned for new, or newly recognized, problems. Old doctrines get novel rationales. The law keeps moving.

Rule-determined decision-making, as such a strategy, is, therefore, compatible with decision-makers retaining discretion over the content of these rules. More importantly, it requires it. The power to change rules can be taken away from those charged with applying those rules and assigned instead to some independent body. But since some measure of indeterminacy is an unavoidable consequence of any set of man-made rules, it is likewise unavoidable that decision-makers will, on occasion, face questions which those rules do not answer. Where they do, there is no option but to choose, no way out other than to have and to exercise discretion.

Under both strategies, therefore, decision-makers will sometimes face questions to which no rule provides an answer. Where the strategies differ is in how they see and respond to such cases. For a system of rule-determined decision-making, indeterminate rules are a practical inevitability and are in any case sometimes reasonably chosen, given the limited time and information available to rule-makers and the difficulty of framing *ex ante* (more) determinate general rules which adequately address the range of circumstances and concerns in play. Nonetheless, the ambition is to have or to develop conclusive, fully determinative rules. Accordingly, where the indeterminacy of a rule requires the decision-maker to make a determination of his own, that determination is appended to or subsumed within that rule, settling the question not just for this decision-maker in this case but also for other decision-makers in other cases. In this way, indeterminate rules are progressively made more determinate as various questions left unanswered by those rules as initially formulated receive answers in the concrete determinations of individual decision-makers.

Under a system of discretion, by contrast, the objective is not to provide conclusive direction but to keep some questions open. Accordingly, where the rules run out and the decision-maker is left to choose for himself, the decision he then makes isn't incorporated within those rules. The discretion the decision-maker exercises in making such a decision doesn't resolve any indeterminacy or incompleteness in the relevant rule: the rule stays as it was, its content unchanged. So in a system of discretion, the questions the rules leave open stay open. Each time such a question arises, the decision-maker is invited to decide afresh what he should do. The discretion accorded by the rules of cricket to the captain who wins the toss works like this. If, having won the toss, I decide today that my side shall bat first, I am not bound by this decision or by my reasons next time I face this choice and nor is anyone else.

The difference between institutional and remedial constructive trusts is, as we saw at the outset, one of strategy or technique. The technique of adopting and applying rules which fully determine, or which seek to fully determine, where and how such trusts operate is the technique of the institutional constructive trust. The choice of this strategy doesn't presume that these rules won't need to be revised or refined, nor does it foreclose their revision or refinement. Accordingly it doesn't demand that we deny judges discretion when it comes to recognizing such trusts. All it requires is that this discretion is always in the service of devising or developing such rules. So where a court makes constructive trust law—whether by recognizing a new category of constructive trust, or by modifying the rules on some established class of such trusts, or by filling in a gap in such rules—its decision involves an exercise of discretion. But the presence and exercise of this sort of judicial discretion doesn't make these trusts any less institutional. The discretion this technique lacks—the discretion remedial constructive trusts must claim if they are to differ from institutional trusts—is the sort of ongoing and repeated freedom of choice accorded where rules are rejected.

The difference in practice is this: imagine I, as judge, am called on to decide whether a constructive trust should be recognized on a given set of facts (say, the claimant has paid the defendant a significant sum of money by mistake and the question is whether that money is held on trust for the claimant). Assume there is no rule in place which settles how I should decide this case. Perhaps no court has previously had to consider this question; perhaps no clear or coherent answer emerged from those who have. On any view, whatever strategy I adopt, I can get to an answer only by looking beyond the existing rules and making a determination of my own, one made on the merits. Where the two strategies differ is in what comes next. On the institutional model that determination makes law, settling the question of whether recipients of mistaken payments hold that money on trust for their payers, unless and until that rule is changed by some other official in exercise of a law-changing discretion. On the remedial model, by contrast, the next judge who is confronted with such a claim would be

in substantially the same position as I was and faces the same choice I faced. There remains no rule, no law which settles whether a trust arises on these facts and so this judge must likewise make his own determination on the merits. Now that judge may well reach the same decision I did. The reasons which struck me as sound may strike him as sound. More to the point, he may reasonably take the fact of my decision as giving him reason to decide the same way, since he sees the value of predictability and certainty and the justice of treating like cases alike. Nonetheless, the law's position would be that there is no requirement that he does so. The choice, as it were, is his.

If this is the strategy which distinguishes the remedial constructive trust, it puts the suggestion that remedial trusts allow the courts to reach better results in a different light. First, there is nothing in the nature of the institutional constructive trust which prevents it from being used to reach the very same just outcomes remedial constructive trusts supposedly enable. Wherever we think justice would be done by the imposition of a trust, an institutional constructive trust, given appropriately framed rules, can bring about that result. Institutional and remedial constructive trusts, as we have seen, reflect different techniques, different strategies for coming to judicial decisions. But these different strategies for decision-making don't compel different decisions.

Second, while the value of treating like cases alike is one a judge is free to appeal to when exercising his ongoing discretion under a remedial constructive trust, this value is, we might say, built in to the institutional constructive trust. The very idea of deciding by rule entails a commitment to this basic aspect or condition of justice and to the ideas of equality and rational constancy it embodies.<sup>23</sup> Of course, there can be bad rules, rules which work injustice, and sticking to those rules will often do more injustice than deviating from them. But while there can be injustice with rules, there cannot be justice without them, without, that is, the commitment to the like treatment of like cases which is their hallmark.

This doesn't mean that giving courts discretion guarantees injustice. Discretion is not a mandate to treat like cases differently. As we've seen, a judge with discretion must make his own determination of justice and reasonableness. Since justice demands that like cases be treated alike, any reasonable exercise of discretion will likewise see that like cases get like treatment. But what this shows is that discretionary decision-making will do justice only if decision-makers nonetheless decide as though there were a rule in place. The upshot is that discretionary decision-making differs from rule-determined decision-making by leaving open an option—the option to treat like cases differently—no judge should take.

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<sup>23</sup> See Hart (n 16) 206. The argument assumes that all just rulings are universalizable and hence, working back the other way, can be regarded as applications of a rule. Some doubt this: see eg Gardner (n 22) 254-6.

## VI

### *Choosing Rules*

The English law of constructive trusts is not in a state of perfection. The rules the courts have developed are in various ways less than fully reasonable and, on occasion, do injustice to those they affect. It may be that, in some places, we would be better off with no rules at all than to continue on with the unjust rules we have. This is the medicine of the remedial constructive trust. But it is a medicine grounded in a misdiagnosis of the problem. For where the law's rules cause injustice, the source of this injustice is not the choice of deciding by rule but rather the rules chosen. Discretion, as a technique of judicial decision-making, has no justice advantage over rule-determined decision-making. There is no just outcome or process which the choice of rules as a technique shuts off, no justice which can be done only by discretion. These different techniques identify different means of decision-making, not different ends. So there is simply no justice gain in rejecting institutional constructive trusts and the commitment to rules they involve. Indeed, if we want to see justice done, making the like treatment of like cases optional rather than obligatory is a step back, not a step forward. In law, the solution for bad rules is better rules, not their rejection.

English law has, therefore, been right to reject the remedial constructive trust. But it has, in the main, got to the right answer for the wrong reasons. Conversely, those who have pushed for the recognition of remedial constructive trusts might be said to have got to the wrong answer for the right reasons. English property lawyers have been far too quick to bat away calls for the law to move closer to some demand of justice by insisting that this would cause intolerable uncertainty or simply that it is not the sort of thing the courts should be doing. But remedialists have in turn been too ready to believe that various persistent problems within property law would dissolve if only courts were given greater discretion. One problem with this way of thinking is that discretion comes in different varieties and can extend to different questions, yet those advocating greater discretion rarely go on to say what sort of discretion courts should be given, still less to say how they think it should be exercised. This failure is evident in the arguments of those who have supported the introduction of remedial constructive trusts, where there's often a mismatch between what they say they are arguing for and the arguments they in fact make.

So, as we've seen, the remedial constructive trust is explicitly identified as a new model of constructive trust, different in kind to the institutional trusts presently found in English law. The distinguishing feature of this new model of constructive trusts is the discretion it accords to the courts over their imposition and operation. But what sort of

discretion would truly distinguish these trusts from standard institutional trusts? Not, as I have argued, discretion to make new and improved legal rules, for this is precisely a discretion to recognize new *institutional* constructive trusts and is, in any case, a discretion the courts have already. The same goes for the sort of rule-completing discretion exercised when courts are called on to apply indeterminate rules. If the remedial constructive trust is, as claimed, something new and distinct from the institutional constructive trust, then the discretion it provides must be the kind that results from the rejection of rules and rule-determined decision-making. And, as we've seen, once we abandon rules, we abandon the commitment to the like treatment of like cases they entail.

Unsurprisingly, lawyers hailing the remedial constructive trust as a cure for manifold injustices have not insisted on the justice of treating like cases differently. Quite the contrary. The importance of discretion being exercised in accordance with established principles and common standards is routinely proclaimed, which gets us very near to an endorsement of the importance of like cases being treated alike.<sup>24</sup> Instead, the discretion they end up arguing for is a combination of the two sorts of law-making discretion discussed earlier: the introduction of a broad power to impose constructive trusts in situations not presently covered by established institutional trusts, with the circumstances in which such trusts are recognized to be developed incrementally by the courts in full consideration of the circumstances of the case.<sup>25</sup> The idea of the remedial constructive trust which stands in true opposition to the

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<sup>24</sup> See eg Simon Evans, 'Defending Discretionary Remedialism' (2001) 23 *Sydney Law Review* 463, 483-9. See too Sir Terence Etherton, 'Constructive Trusts: A New Model for Equity and Unjust Enrichment' (2008) 67 *Cambridge Law Journal* 265, where *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432 is heralded as an example of 'discretionary relief by way of remedial constructive trust'. But there is no word in *Stack* supporting the sort of rule-rejecting discretion I have suggested must distinguish the remedial constructive trust. Instead the suggestion that the remedy in *Stack* was discretionary is instead supported on the basis that the court's approach makes it impossible to know before judgment quite what the parties' property entitlements are. This discretion is, I suggest, the same sort of rule-completing discretion we find throughout the common law when courts are faced with indeterminate rules.

<sup>25</sup> We see much the same in some of the judgments from other common law jurisdictions which expressly recognize the remedial constructive trust: see eg *Soulos v Korkontzilas* [1997] 2 SCR 217, (1997) 146 DLR (4th) 214, [35] (McLachlin J), *Muschinski v Dodds* [1985] HCA 78, (1985) 160 CLR 583, 614 (Deane J). More broadly, it's far from clear how we should understand the claim that these jurisdictions do indeed recognize remedial constructive trusts. Sometimes it seems to mean just this: the recognition of a broad power to impose constructive trusts, the exercise of which is to be made on consistent and common principles, to be applied and developed incrementally. At other times, 'remedial' is used in the distinct sense set out at the start of this paper, by which remedial trusts are distinguished from express or voluntarily created trusts. Either way, the remedial constructive trust

institutional constructive trust and its commitment to decision by rules may not even have the support of its own advocates.

It may be, therefore, that there is an unwitting consensus in favour of rules and the technique, if not the markings, of the institutional trust. If so, the only question is what rules we should have. Indeed we may do better to read the debate over remedial constructive trusts as a debate about different styles of rule and rule-making. As we have seen, rules can be more or less open-textured, more or less determinate. Advocates of remedial constructive trusts might then be regarded as favouring more loosely-framed, open-textured rules, leaving much of their content to be hammered out in the cases by the courts. Sometimes there is no option but to frame rules in loose terms, for instance where the question the rule seeks to answer is one of degree—How much care must I take when driving? How much force can I use against this assailant?—or where the law seeks to accommodate a range of considerations which point in differing directions—think for instance of the law’s ‘tests’ for identifying duties of care. Even when a law-maker is in a position to frame a rule of greater precision and determinacy, there may still be something to be said for delegating some of this law-making to judges who can see better the full range of circumstances to which the rule will apply and the concrete implications of differing applications or interpretations of that rule. At other times, however, indeterminate rules reflect indecision: the choice of an open-ended rule the consequence of not knowing what rule to choose, with the cost needless uncertainty.<sup>26</sup>

So there is no one-size-fits-all model for good legal rules and good legal rule-making and the question of what degree of indeterminacy we should welcome or tolerate is a question which, like all other questions about the proper content of such rules, can only be answered on the merits, by consideration of the goods and values the law may promote and how they best be served. These are the questions trust lawyers should be addressing. When addressing them, they will have no need for the idea of the remedial constructive trust.

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found in these jurisdictions is, it seems, just a local label for a particular class of institutional constructive trust. For more on, respectively, Australian and American style remedial constructive trusts, each lending support to the suggestion that these are a different phenomenon from the idea discussed in the English cases, see Michael Bryan, ‘Constructive Trusts: Understanding Remedialism’ in Jamie Glister and Pauline Ridge (eds), *Fault Lines in Equity* (Hart Publishing 2012) and Andrew Kull, ‘The Metaphorical Constructive Trust’ (2012) 18 *Trusts and Trustees* 945.

<sup>26</sup> We saw this in *Pennington* (n 18). For another example (outside trusts law): *Attorney-General v Blake* [2001] 1 AC 268 (HL).