Choice of Law Rules in Australia for Resulting and Constructive Trusts

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Abstract

It is both surprising and troubling that Australia's choice of law rules for resulting and constructive trusts are fundamentally unsettled. A key reason for this unsatisfactory state of affairs is that the choice of law discussion has not proceeded on the basis of a holistic understanding of domestic law. Rejecting the suggestion that the *lex fori* ought always to apply to equitable claims, this article takes the view that the development of choice of law rules is closely informed by a proper understanding of domestic law. It proposes a structured understanding of domestic law by drawing on the different ways in which resulting and constructive trusts are informed by the plaintiff's and defendant's pre-trial rights and duties. The article then demonstrates how this understanding can lead to a systematic development of the choice of law rules that apply to resulting and constructive trusts.

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I Introduction

Resulting and constructive trusts arise by operation of law in certain predefined situations. A resulting trust arises when property is voluntarily transferred to a defendant from a plaintiff directly or where the plaintiff provides the purchase money, in circumstances where the defendant is not intended to obtain the beneficial interest in the property. Constructive trusts, on the other hand, arise in a wide variety of situations. For example, they arise where there is an informal, non-express agreement that the defendant will hold the plaintiff's property on trust; where the parties enter into a specifically enforceable contract for sale; where a defendant-fiduciary obtains a gain in breach of a duty owed to the plaintiff-principal; and where the plaintiff successfully makes out a proprietary estoppel claim against the defendant. Whenever they arise, resulting and constructive trusts generate a similar legal consequence: they grant the plaintiff an equitable proprietary interest in property whose legal title is in the defendant's name, thus allowing the plaintiff to compel the defendant to transfer the property to the plaintiff.

It is both surprising and troubling that the choice of law rules that apply to a resulting or constructive trust dispute are fundamentally unsettled.[1] Many civil law jurisdictions do not recognise the concept of a trust — those that do usually only recognise express trusts and not resulting and constructive trusts.[2] Even between common law jurisdictions, conceptions of these trusts often vary considerably.[3] In a cross-border dispute, then, vastly different results may ensue depending on which law is applied. Without a concrete and justifiable set of choice of law rules, there is extant uncertainty for the parties involved. That uncertainty is even more troubling in view of the proprietary consequences at stake in resulting and constructive trust disputes.

When it comes to express trusts, the choice of law rules are straightforward: Australia, being a Contracting State to the *Hague Convention on the Law Applicable to Trusts and on Their Recognition* ('*Hague Trusts Convention*'), will apply the rules found in the Convention.[4] Unlike England,[5] however, Australia has not chosen to extend the scope of the Convention 'to trusts declared by judicial decisions', as allowed for by art 20.[6] This means that the choice of law rules for resulting and constructive trusts are not to be found in the Convention, but are governed by the

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1 This article deals with cases where a resulting or constructive trust is alleged to arise between the plaintiff and the defendant. It does not consider claims made against third parties who are said to be under an obligation to return the property to or to compensate the plaintiff on the basis that the property was burdened by a prior resulting or constructive trust. In those circumstances, it seems clear that the *lex situs* ought generally to apply, since this best accords with the third party's expectations in acquiring the property: see *Akers v Samba Financial Group* [2017] AC 424, 449–50 [39] (Lord Mance JSC).

2 See Ying-Chieh Wu, 'Constructive Trusts in the Civil Law Tradition' (2018) 12(3) *Journal of Equity* 319.

3 See, eg, Ying Khai Liew, *Rationalising Constructive Trusts* (Hart Publishing, 2017) 245–50.

4 *Hague Convention on the Law Applicable to Trusts and on Their Recognition*, signed 1 July 1985, [1992] ATS 2 (entered into force 1 January 1992) ('*Hague Trusts Convention*').

5 See *Recognition of Trusts Act 1987* (UK) s 1(2).

6 Even so, English courts have scarcely made reference to the *Hague Trusts Convention* in resulting and constructive trusts disputes: see Lord Collins of Mapesbury and Jonathan Harris, *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 15th ed, 2018) 1522–3 [29–084].

common law. Due to the paucity of decided cases, no clear rules emerge, a state of affairs that has been described as both 'surprising'[7] and 'unfortunate'.[8]

Direct academic consideration of the matter has also been relatively sparse, with discussions tending to suffer from either over-inclusion or under-inclusion. Over-inclusion is detected in suggestions that a single choice of law rule should apply across all resulting and constructive trusts disputes, with little consideration for any potential qualitative differences between instances of those trusts.[9] On the other hand, under-inclusion — a far more common phenomenon — occurs where commentators address the matter in a piecemeal fashion, cherry-picking specific instances in which those trusts arise and treating each instance in isolation.[10]

A key reason for this unsatisfactory state of affairs is that the choice of law discussion has not proceeded on the basis of a holistic understanding of domestic law. It is common knowledge that the precise nature, content, and ambit of resulting and constructive trusts in Australian domestic law are far from settled. Without a systematic understanding of domestic law as a solid foundation, any discussion from the choice of law perspective rests on shaky ground.

This article aims to fill that gap. Part II begins by addressing three analytical building blocks. The first provides a rejection of the suggestion that the *lex fori* ought always to apply to equitable claims. Second, it explains how a sound understanding of domestic law impacts on the development of choice of law rules. Third, it identifies what, precisely, is being characterised in resulting and constructive trusts disputes. It will be seen that the subject matter differs, depending on the type of trust in question. Parts III and IV then deal with resulting and constructive trusts respectively, drawing on the third building block in Part II to provide a systematic approach towards the choice of law question.

II Building Blocks

Three building blocks call for discussion before we are in a position to deal directly with the choice of law rules for resulting and constructive trusts.

A *A 'Lex Fori Only' Approach?*

The first is a ground-clearing exercise. It concerns the rule, which is often said to apply in Australia, that the *lex fori* invariably applies whenever an equitable right or

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[7] Dyson Heydon and Mark Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis, 8th ed, 2016) 626 [28–21].

[8] Harold Ford, WA Lee, Michael Bryan, Ian G Fullerton and John Glover, *Ford & Lee: The Law of Trusts* (Thomson Reuters, 2012) [25.7210]. See also Mapesbury and Harris (n 6) [29–076].

[9] See, eg, Adeline Chong, 'The Common Law Choice of Law Rules for Resulting and Constructive Trusts' (2005) 54(4) *International and Comparative Law Quarterly* 855; Lachlan Forrester, 'Resulting Trusts in the Conflict of Laws: An Australian Perspective' (2021) 17(2) *Journal of Private International Law* 193.

[10] See, eg, Jonathan Harris, 'Constructive Trusts and Private International Law: Determining the Applicable Law' (2012) 18(10) *Trusts & Trustees* 965 ('Constructive Trusts and PIL'); Ford et al (n 8); Mapesbury and Harris (n 6).

remedy is at stake.[11] The apparent rationale for this rule, according to the cases that have affirmed it, is that equity 'acts *in personam*' and therefore forum courts necessarily 'ha[ve] jurisdiction over persons within and subject to its jurisdiction to require them to act in accordance with the principles of equity administered by the court wherever the subject matter and whether or not it is possible for the court to make orders in rem in the particular matter'.[12] If the '*lex fori* only' approach applies, '[t]his would be tantamount to saying that there is no choice of law applicable to equitable claims.'[13]

To the extent that this '*lex fori* only' approach applies, Australia is unique among Commonwealth jurisdictions: courts in other jurisdictions, such as New Zealand, Singapore and England, have given up this approach and seek instead to identify the underlying obligation or relationship giving rise to the equitable dispute at hand and to apply the relevant law governing that obligation or relationship.[14] Certainly, Australian courts have carved out an exception for express trusts.[15] But in relation to resulting and constructive trusts, or indeed other equitable doctrines closely related to them (such as fiduciary law), Australian courts have at best gone so far as to hold that the '*lex fori* only' approach is of 'general' application, to which 'specific exceptions' apply.[16] Those exceptions are stated in circumscribed terms, the most oft-quoted of which comes from the Federal Court of Australia in *Paramasivam v Flynn*:

> where the circumstances giving rise to the asserted duty or the impugned conduct (or some of it) occurred outside the jurisdiction, the attitude of the law of the place where the circumstances arose or the conduct was undertaken is likely to be an important aspect of the factual circumstances by reference to which the Court determines whether a fiduciary relationship existed and, if so, the scope and content of the duties to which it gave rise.[17]

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[11] See, eg, *The Prince's Case* (1610) 8 Co Rep 1, 77 ER 481; *National Commercial Bank v Wimborne* (1978) 5 BPR 11,958, 11,982 (Holland J) ('*Wimborne*'); Peter Young, Clyde Croft and Megan Smith, *On Equity* (Thomson Reuters, 2009) 113 [2.390].

[12] *Wimborne* (n 11) 11,982 (Holland J). See also *The Prince's Case* (n 11); *United States Surgical Corporation v Hospital Products International Pty Ltd* (1982) 2 NSWLR 766, 798 (McLelland J) ('*Hospital Products*'); *OZ-US Film Productions Pty Ltd (in liq) v Heath* [2000] NSWSC 967, [13] (Young J) ('*OZ-US*'); *Piatek v Piatek* (2010) 245 FLR 137, 160–1 [117] (Douglas J) ('*Piatek*').

[13] Mapesbury and Harris (n 6) [34–084] n 422.

[14] See, eg, *Schumacher v Summergrove Estates Ltd* (2014) 3 NZLR 599, 607 [37] (Miller J); *Rickshaw v Baron von Uexkull* (2007) 1 SLR(R) 377 ('*Rickshaw*'); *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387, 391–2 (Staughton LJ) ('*Macmillan*'); Mapesbury and Harris (n 6) [29R–075]; Tiong Min Yeo, *Choice of Law for Equitable Doctrines* (Oxford University Press, 2004).

[15] See, eg, *Augustus v Permanent Trustee Co (Canberra) Ltd* (1971) 124 CLR 245 ('*Augustus*'); *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, 192 (McHugh JA) ('*Heinemann Publishers*'); *Paramasivam v Flynn* (1998) 90 FCR 489, 502–3 (Miles, Lehane and Weinberg JJ) ('*Paramasivam*'). In any event, express trusts now fall within the ambit of the *Trusts (Hague Convention) Act 1991* (Cth).

[16] See, eg, *Hospital Products* (n 12) 796–9 (McLelland J); *OZ-US* (n 12) [17]–[22] (Young J); *Paramasivam* (n 15) 503 (Miles, Lehane and Weinberg JJ); *Heinemann Publishers* (n 15) 192 (McHugh JA); *Murakami v Wiryadi* (2010) 268 ALR 377, 402–3[129], 404 [139]; (Spigelman CJ, McColl JA agreeing at 408 [166], Young JA agreeing at 408 [167]) ('*Murakami*'); *Nicholls v Michael Wilson & Partners Ltd* (2010) 243 FLR 177, 240–2 [339]–[346] (Lindgren AJA) ('*Nicholls*'); *Piatek* (n 12) 160–2 [117]–[119] (Douglas J).

[17] *Paramasivam* (n 15) 503 (Miles, Lehane and Weinberg JJ).

There are good reasons why the '*lex fori* only' approach should not apply to resulting and constructive trusts. In the first place, distinguished commentators who have subjected the pedigree of the '*lex fori* only' approach to close scrutiny have all concluded that it finds no good basis in the cases as a general proposition applicable to all equitable disputes.[18] Other respectable commentators have also pointed to the practical problems that may arise should this approach apply generally to equitable claims.[19] Those problems include, for example, causing uncertainty, encouraging forum shopping and producing unfairness due to its potential to attract liability in the forum over an act that is lawful in the foreign jurisdiction in which it occurred.

To these reasons, it can be added that the '*lex fori* only' approach rests on a dubious rationale. The 'equity acts *in personam*' maxim, on which the approach rests, as mentioned earlier, is at best a 'vague generalisation'[20] and at worst a 'highly dubious proposition'.[21] This has led to the observation that 'no phrase has been more misused', because it has often been 'divorced … from its historical context'.[22] This is particularly relevant in the context of resulting and constructive trusts, because the maxim fails to reflect the fact that these trusts indisputably generate proprietary effects.[23] This is not simply a reference to the fact that all trusts require property,[24] although this much is true; it is also seen in the fact that the practical effect of the imposition of resulting and constructive trusts is, in most if not all cases, to allow the plaintiff-beneficiary to call for the property held by the defendant-trustee.[25]

It might be thought to be possible to justify the '*lex fori* only' approach as an application of the forum's public policy; however, this too does not withstand scrutiny. Chen has attempted such a justification in relation to fiduciary

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18 See, eg, RW White, 'Equitable Obligations in Private International Law: The Choice of Law' (1986) 11(1) *Sydney Law Review* 92; Laurette Barnard, 'Choice of Law in Equitable Wrongs: A Comparative Analysis' (1992) 51(3) *Cambridge Law Journal* 474; Martin Davies, Andrew Bell, Paul Le Gay Brereton and Michael Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis, 10th ed, 2019) 554–9 [21.11]–[21.17].

19 See, eg, Joseph Story, *Commentaries on the Conflict of Laws* (Little, Brown and Co, 6th ed, 1865) §§ 544–6; Robert Stevens, 'Resulting Trusts in the Conflict of Laws' in Peter Birks and Francis Rose (eds), *Restitution and Equity, Vol 1: Resulting Trusts and Equitable Compensation* (Mansfield Press, 2000) 147, 154–5; Davies et al (n 18) 554 [21.10]; Adrian Briggs, 'The Unrestrained Reach of an Anti-Suit Injunction: A Pause For Thought' [1997] (1) *Lloyd's Maritime and Commercial Law Quarterly* 90, 95; Richard Garnett, 'Identifying an Asia-Pacific Private International Law of Trusts' in Ying Khai Liew and Matthew Harding (eds), *Asia-Pacific Trusts Law, Vol 1: Theory and Practice in Context* (Hart Publishing, 2021) 381, 392; Yeo (n 14) [2.10]; Ford et al (n 8) [25.4010].

20 Justice PW Young, 'Equity', *New South Wales Bar Association Bar Practice Course* (Web Page, August 2007) 3 <https://nswbar.asn.au/docs/professional/prof_dev/BPC/course_files/Equity%20-%20Young%20J.pdf>.

21 *Macmillan Inc v Bishopsgate Investment Trust plc* (No 3) [1995] 1 WLR 978, 989 (Millett J).

22 John McGhee (ed), *Snell's Equity* (Sweet and Maxwell, 33rd ed, 2016) 100 [5–018], citing *Tyler v Court of Registration* (1899) 175 Mass 71, 76. See also Adrian Briggs, *The Conflict of Laws* (Oxford University Press, 3rd ed, 2013) 68–9; Stephen Lee, 'Restitution, Public Policy and the Conflict of Laws' (1998) 20(1) *University of Queensland Law Journal* 1, 6–7.

23 See, eg, *Murakami* (n 16) 402 [128] (Spigelman CJ, McColl JA agreeing at 408 [166], Young JA agreeing at 408 [167]); *OZ-US* (n 12) [14]–[15] (Young J); Ford et al (n 8) [1.090].

24 Cf Chong (n 9) 873–6.

25 This point is made in William Swadling, 'The Fiction of the Constructive Trust' (2011) 64(1) *Current Legal Problems* 399, although the present author disagrees with the conclusion that the constructive trust is a fiction.

obligations.[26] Whether or not one agrees with his argument, it is clear that fiduciary obligations are simply a subset of the law of equity. Moreover, a fiduciary relationship is not a precondition for a resulting or constructive trust to arise. Indeed, more generally, it is analytically difficult to mount a convincing argument that there is something distinct about *equity*, or, more specifically, about resulting and constructive trust disputes, that automatically warrants the protection of some fundamental value or rule of law of the forum such that the application of foreign law ought invariably to be excluded.[27]

Finally, it should be noted that in the specific context of constructive and resulting trusts, there has only been one resulting or constructive trust case, *Murakami v Wiryadi*, in which a court has discussed the potential applicability of the '*lex fori* only' approach in a way that affected the outcome of the case.[28] In that case, the Court applied the proper law of the parties' marital *contract*, which was Indonesian law, instead of the *lex fori*.[29]

For all these reasons, therefore, the '*lex fori* only' approach must be rejected in favour of a more nuanced approach.

B *The Relationship between Domestic Law and Choice of Law Rules*

The second building block concerns the relationship between domestic law and choice of law rules. It is trite that the exercise of characterisation is approached functionally,[30] by applying what Kahn-Freund has labelled an 'enlightened *lex fori*'.[31] That is, courts are not 'constrained by particular notions or distinctions of the domestic law of the *lex fori*, or that of the competing system of law', but have regard to both in order 'to strive for comity between competing legal systems'.[32]

One consequence of this approach is that choice of law rules can, and often do, reflect unique categories of case, in that they need not mirror the forum's categories of associated substantive rules. But it is also true to observe that the state

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26 Ben Chen, 'Historical Foundations of Choice of Law in Fiduciary Obligations' (2014) 10(2) *Journal of Private International Law* 171.

27 See Joanna Langille, 'Frontiers of Legality: Understanding the Public Policy Exception in Choice of Law' (2022) *University of Toronto Law Journal* (advance) <https://doi.org/10.3138/utlj-2021-0085>.

28 *Murakami* (n 16) 406 [149] (Spigelman CJ, McColl JA agreeing at 408 [166], Young JA agreeing at 408 [167]).

29 Ibid.

30 See, eg, Yeo (n 14) [3.08]–[3.09]; George Panagopoulous, *Restitution in Private International Law* (Oxford University Press, 2000) 33; Zheng Sophia Tang, Yongping Xiao and Zhengxin Huo, *Conflict of Laws in the People's Republic of China* (Edward Elgar Publishing, 2016) 30 [2.30], 284 [10.08]; Weizuo Chen and Gerald Goldstein, 'The Asian Principles of Private International Law: Objectives, Contents, Structure and Selected Topics on Choice of Law' (2017) 13(2) *Journal of Private International Law* 411, 421; Walter Wheeler Cook, 'Logical and Legal Bases of Conflict of Laws' (1942) 33(5) *Yale Law Journal* 457, 468–70; *Wight v Eckhardt Marine GmbH* [2004] 1 AC 147, 152–3 [12] (Lord Hoffmann); Adrian Briggs, 'Misappropriated and Misapplied Assets and the Conflict of Laws' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Lawbook Co, 2008) 53, 57–8 ('Misappropriated and Misapplied Assets').

31 Otto Kahn-Freund, *Collected Courses of the Hague Academy of International Law: General Problems of Private International Law (Volume 143)* (Brill, 1974) 377.

32 *Macmillan* (n 14) 407 (Auld LJ).

of understanding of domestic law will have a significant impact on the forum's development of choice of law rules where those rules are fundamentally ambiguous. After all, choice of law rules are rules of the forum[33] and so, in determining the applicable choice of law rules, judges are unlikely to approach the matter completely detached from their view of the related domestic law.

A striking example of this is found in the choice of law rules for restitution, the status of which is fundamentally unsettled. In England, until the matter was superseded by the *Rome II Regulation on the Law Applicable to Non-Contractual Obligations*,[34] the common law rules were ambiguous and in an 'embryonic state';[35] in Australia, the position is even more tenuous.[36] One significant contributing factor to this state of affairs in Australia is the ambiguity of the *domestic* law of restitution and unjust enrichment. As observed in *Nygh's Conflict of Laws in Australia*:

> One of the key challenges in identifying a choice-of-law rule for restitution is that the contours of that 'subject' are still very much a matter for lively debate. Some commentators contend that the myriad areas touched by this branch of the law may be explained by unifying, overarching principles, whilst others regard the 'subject' as a collection of disparate doctrines with no necessary underpinning or unifying meaning … This taxonomical debate has obvious implications for the articulation of any choice-of-law rule, including whether or not there should be one or more choice-of-law rules for restitution to reflect the wide variety of situations in which what are now recognised as restitutionary claims arise.[37]

As can be seen, the state of domestic law in Australia directly impacts on the development of associated choice of law rules.

The same can be said about resulting and constructive trusts: a proper understanding of domestic substantive resulting and constructive trusts rules may well have a positive impact on the development of the related choice of law rules,[38] where there is much uncertainty — in Australia as well as in other jurisdictions.[39] Specifically, a sound understanding of domestic law will allow judges to identify the 'issue' to be categorised accurately so that the choice of law aspect will receive proper treatment.

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[33] *The Ship 'Sam Hawk' v Reiter Petroleum Inc* (2016) 246 FCR 337, 385 [182] (Allsop CJ and Edelman J) ('*Sam Hawk*'); *Macmillan* (n 14) 407 (Auld LJ).

[34] *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II)* [2007] OJ L 199/40 ('*Rome II Regulation*').

[35] European Union Committee, *The Rome II Regulation: Report with Evidence* (House of Lords Paper No 66, 8th Report of Session 2003–04) 44 [144], 56 [199], cited in Mapesbury and Harris (n 6) [36–007]. See also Briggs, 'Misappropriated and Misapplied Assets' (n 30) 60.

[36] See Davies et al (n 18) 551 [21.5]–[21.9].

[37] Ibid 551 [21.5].

[38] See Chong (n 9) 861.

[39] See Ying Khai Liew, 'Trusts Choice of Law Rules in Asia-Pacific: Adapting to the Future' in Ying Khai Liew and Ying-Chieh Wu (eds), *Asia-Pacific Trusts Law, Vol 2: Adaptation in Context* (Hart Publishing, 2022, forthcoming).

C *The Matter Being Characterised*

The third preliminary point concerns identifying what, precisely, is being characterised. At present, it is clear that 'resulting trusts' and 'constructive trusts' do not represent unique categories of choice of law rules. Since 'the courts should identify and apply the law which governs the *issue or issues* that fall for decision',[40] the question arises: what is the subject matter — the 'issue' — that requires classification in relation to resulting or constructive trusts?

One possible answer is that it is the trust *as a remedy* that is classified, rather than the events to which they respond. This is the argument made by Chong in what, to date, represents the most careful and considered attempt to identify the choice of law rules applicable to resulting and constructive trusts.[41] She writes:[42]

> It is suggested that the better approach is to focus on the response and to characterize the response; in other words, to classify trusts claims by reference to the underlying nature of constructive and resulting trusts. This method goes against conflicts orthodoxy. However, in view of the uncertainty plaguing the proper classification of trusts claims, choosing to characterize the response is the obvious alternative to choosing to characterize the cause of action, on which there is no consensus.

Chong ultimately suggests that resulting and constructive trust disputes should attract the *lex situs*, essentially because trusts always involve property.[43]

Chong's analysis might find particular support in Australia, specifically in relation to constructive trusts, where there is a tendency to view these trusts as discretionary remedies. The source of this tendency is various High Court of Australia obiter dicta,[44] which suggest, for example, that '[o]rdinarily relief by way of constructive trust is imposed only if some other remedy is not suitable',[45] and that '[a] constructive trust ought not to be imposed if there are other orders capable of doing full justice'.[46] On this understanding, there is a 'dissociation of liability and

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[40] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 519 [20] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) ('*John Pfeiffer*') (emphasis added). See also *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 426–7 [116] (Callinan J) ('*Sweedman*'), citing with approval *Macmillan* (n 14) 407 (Auld LJ); *Piatek* (n 12) 159 [111] (Douglas J); '*Sam Hawk*' (n 33) 385 [182] (Allsop CJ and Edelman J); Davies et al (n 18) 362–3 [14.7]; Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis, 4th ed, 2018) 195–6 [7.13]–[7.14].

[41] See generally Chong (n 9).

[42] Ibid 861.

[43] Ibid 873–880. See also Jack Wass, 'The Court's In Personam Jurisdiction in Cases Involving Foreign Land' (2014) 63(1) *International Comparative Law Quarterly* 103, 110.

[44] For an extensive review and refutation of these obiter dicta, see Ying Khai Liew, 'Constructive Trusts and Discretion in Australia: Taking Stock' (2021) 44(3) *Melbourne University Law Review* 963 ('Constructive Trusts and Discretion').

[45] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 172 [200] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) ('*Farah Constructions*').

[46] *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 11, 45 [128] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ). See also *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566, 585 [42] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 300 [91] (Gummow, Hayne, Heydon, Kiefel and Bell JJ) ('*Bofinger*'); *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1, 32 [74] (Gageler J).

remedy',[47] by which it is meant that the constructive trust response is applied flexibly, 'unguided by any explicit doctrinal justification'.[48] If so, then the only sensible approach is to characterise constructive trusts as remedial responses for choice of law purposes.

However, this approach is misleading and ought to be avoided. From the perspective of domestic law, although it is correct to say that constructive (and, to the same extent, resulting) trusts are legal responses,[49] in most instances they are not *freestanding* responses such that they are simply options in an arsenal of remedies from which judges can pick and choose in any given case.[50] Instead, in most instances these trusts, as remedies or responses, share an intimate analytical relationship with the parties' pre-trial rights and duties that lead to their award, such that those rights and duties must be factored in to the choice of law discussion.

From the perspective of private international law, characterising resulting and constructive trusts as remedial responses is likely to lead to the application of a single, overarching connecting factor, for example, the *lex situs*, as Chong suggests,[51] or the *lex fori* if constructive trusts are treated strictly as *remedies* and therefore as part of 'procedural' (as opposed to 'substantive') law. The problem here is that a blanket rule is not nuanced enough to get to the 'issue' raised by resulting and constructive trust disputes. As previously noted, resulting and constructive trusts are usually not imposed as freestanding remedies. Moreover, not all resulting and constructive trusts are qualitatively similar, given that different trusts respond to different types of rights and duties, as will be explained below.

An alternative answer to the question 'What is being characterised?' is found in the approach taken by other Commonwealth courts, which, as previously mentioned, is to characterise the underlying obligation or relationship, or 'source of the obligation'.[52] Thus, in cases of a 'factual matrix [whose] legal foundation is premised on an independent established category such as contract or tort, the appropriate principle in so far as the choice of law is concerned ought to be centred on the established category concerned'.[53] This answer fares better, for it allows for a more nuanced approach that takes into account the different circumstances in which these trusts may arise.

Ultimately, however, this approach does not provide specific guidance as to how courts should ascertain and characterise the underlying obligation or relationship. Unlike nominate concepts such as 'sale' or 'loan', which are shorthand

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47 Pamela O'Connor, 'Happy Partners or Strange Bedfellows: The Blending of Remedial and Institutional Features in the Evolving Constructive Trust' (1996) 20(3) *Melbourne University Law Review* 735, 751. See also David Wright, 'Third Parties and the Australian Remedial Constructive Trust' (2014) 37(2) *University of Western Australia Law Review* 31.

48 O'Connor (n 47) 750.

49 Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26(1) *University of Western Australia Law Review* 1, 19.

50 See Liew, 'Constructive Trusts and Discretion' (n 44) 972–4.

51 See also Harris, 'Constructive Trusts and PIL' (n 10) 966.

52 Ibid 967.

53 *Rickshaw* (n 14) 407 [81] (Andrew Phang Boon Leong JA), approving the approach suggested in Yeo (n 14). See also *Nicholls* (n 16) 241–2 [345] (Lindgren AJA).

for predefined underlying obligations or relationships,[54] resulting trusts and constructive trusts cannot be unpacked so straightforwardly. Neither does the paucity of case law assist: thus far, it can only be stated with certainty that a resulting or constructive trust 'arising from'[55] a contractual relationship will attract the proper law of the contract. Indeed, phrases such as 'source of', 'premised on', and 'arising from' do not have any core meaning from which firm guidance can be sought.

It is suggested that there is no one-size-fits-all answer to the question of what is being characterised. Instead, the correct approach depends on the type of claim in question.

To elaborate, we can begin by observing that substantive pre-trial rights (and their correlative duties) can be analysed as 'primary' or 'secondary'.[56] Primary rights exist 'in and per se';[57] that is, they arise upon the occurrence of pre-determined, real-world events that do not involve the breach of a pre-existing right. An example is a contractual right, which arises in response to the juristic act of entering a contract, an act which is not a breach of any right and therefore not wrongs-based. Secondary rights, on the other hand, arise where the defendant breaches a primary duty owed to the plaintiff. For example, a right to damages for breach of contract is a secondary right that arises due to the defendant's breach of the plaintiff's primary right through violation of a contractual term.

The dichotomy of primary and secondary rights allows us to distinguish between three types of remedies claimed by plaintiffs.

First, in a claim for the enforcement of a primary right, the remedy asked for by the plaintiff is a 'replicative' remedy. This is a remedy that simply restates and enforces the plaintiff's primary right against the defendant; it does not function to correct the consequences of the defendant's breach. Actions for specific performance or for a debt due are examples of this: the remedy compels the defendant to do as promised in the parties' primary contractual relationship.

Second, some claims are for a remedy that enforces the plaintiff's secondary rights. Here, a plaintiff seeks a 'reflective' remedy, the content of which is best calculated to correct the effects of the defendant's wrongdoing. In relation to some of these claims, courts exercise limited remedial discretion to determine the appropriate content of the remedy; at other times, no discretion is exercised because, by way of precedent, a particular wrong will invariably attract a particular remedy because it best corrects the effect of the wrong. In either case, the content of the remedy does not simply replicate the content of the plaintiff's primary right: it is targeted at correcting the consequences of the defendant's wrongdoing. A claim for damages in tort or for breach of contract are examples: the amount of damages awarded is calculated to reflect the plaintiff's secondary right to compensation.

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54 Respectively, 'transfer of property for value' and 'binding agreement to repay'.

55 *Murakami* (n 16) 404 [141] (Spigelman CJ, McColl JA agreeing at 408 [166], Young JA agreeing at 408 [167]). See also *Paramasivam* (n 15) 503 (Miles, Lehane and Weinberg JJ).

56 See, eg, *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association* [1966] 1 WLR 287, 341 (Diplock LJ); John Austin, *Lectures on Jurisprudence*, ed Robert Campbell (John Murray, 5th ed, 1885) 762; Donal Nolan and Andrew Robertson, 'Rights and Private Law' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2014) 1, 19.

57 Austin (n 56) 762.

The third type of remedy claimed by plaintiffs is a claim for a 'transformative' remedy. Here, courts exercise wide-ranging discretion to determine the remedy, taking into account considerations extraneous to the parties' pre-trial rights and duties. Thus, the parties' pre-trial rights and duties do not logically inform the awarded remedy in a direct way, and the remedy radically transforms the parties' 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 are examples.[58] The plaintiff has no substantive right to the remedy. At best, the plaintiff has a right that the court considers his or her case according to the provision. The remedy therefore transforms the plaintiff's pre-trial right, in the sense that the source of the award is the court's exercise of wide-ranging discretion, rather than any substantive right of the plaintiff.

Parts III and IV below will demonstrate that this trichotomy provides invaluable guidance in determining what precisely is characterised in a resulting or constructive trust dispute. In a nutshell, the analysis is as follows. First, in a claim for a trust of a replicative nature, it is the primary relationship and the events that give rise to it that present the 'issue' that calls for classification. Second, in a claim for a trust of a reflective nature, where the primary relationship whose breach gives rise to the plaintiff's secondary right can be characterised according to a pre-existing choice of law category, then that category will apply; if it cannot, then the case falls to be treated as a tort. Third, in a claim for a transformative trust, the trust falls to be characterised as a remedy and the *lex fori* will apply.

III Resulting Trusts

In domestic law, resulting trusts are commonly said to fall into two groups, 'presumed resulting trusts' and 'automatic resulting trusts', following Megarry J's decision in *Re Vandervell's Trustees Ltd (No 2)*.[59] Presumed resulting trusts include cases where A makes a voluntary transfer of property to B, and where A provides the purchase money for property vested in B. Automatic resulting trusts include resulting trusts that arise over incompletely disposed beneficial interests under express trusts. It is immediately clear that the two phrases are not merely descriptive, but also imply a particular conception of why those trusts arise.[60] To adopt normatively neutral descriptors, the labels 'apparent gifts' for presumed resulting trusts and 'failing trusts' for automatic resulting trusts will be employed, as Lord Millett has done extra-judicially.[61]

Resulting trusts are replicative in nature. This is because the relevant rights and duties under the trusts arise from the occurrence of real-world events that do not involve wrongdoing. Thus, what is required for choice of law purposes is a close examination of the circumstances that give rise to the parties' primary relationship.

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58 There are many such provisions in the statute books, but two examples are: *Frustrated Contracts Act 1978* (NSW) s 15 and *Bankruptcy Act 1966* (Cth) s 30(1)(b).

59 *Re Vandervell's Trustees Ltd (No 2)* [1974] Ch 269, 289.

60 *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 708 (Lord Browne-Wilkinson) ('*Westdeutsche Landesbank*').

61 Lord Millett, 'Pension Schemes and the Law of Trusts: The Tail Wagging the Dog?' (2000) 14(2) *Trust Law International* 66, 73.

A *Failing Trusts*

There is an absence of case law on the choice of law rules applicable to failing trusts. However, commentators generally agree that these should be governed by the law applicable to the relevant express trust.[62] The reason for adopting this test is often said to be that the law that governs the failure of an express trust should also determine the consequences of that failure.[63] This is an argument based on coherence between failure and consequence, and is well-taken. But there is also an additional, important point that can be made in support of this approach. It is that a failing trust resulting trust arises in response to the settlor's intentions in so far as the original express trust does, such that the same law ought to govern both trusts.

To explain this point, it should be noted that in *Re Vandervell's Trustees Ltd (No 2)* Megarry J thought that these resulting trusts arise 'automatically', by which his Honour meant that '[w]hat a man fails effectually to dispose of remains automatically vested in him',[64] regardless of intentions. This implies that the only requirement for these trusts to arise is that the settlor does not make sufficient provision to exhaust the trust assets. But this does not paint a complete picture of the necessary conditions for the resulting trust to arise.

First, it is also a requirement that the settlor must not have 'expressly, or by necessary implication, abandoned any beneficial interest in the trust property',[65] thereby disqualifying himself or herself from benefitting from any surplus. Otherwise, no resulting trust will arise, with the property being held *bona vacantia*.[66]

Second, the settlor also must not have explicitly provided that the trustee will benefit from any surplus, otherwise the trustee will take the surplus and no resulting trust will arise. An explicit provision is required because it is only natural to presume that a person designated as 'trustee' — who occupies an office that involves acting for the benefit of another[67] — is intended not to benefit from the trust property, unless there is express evidence to the contrary.

These two further conditions are often taken for granted, but they indicate the crucial point that the resulting trust arises as a necessary implication of the settlor's intentions; that is, that the settlor has left himself or herself as the only remaining candidate who may take any outstanding interest in the property. The source of the resulting trust is therefore the very intention of the settlor that constituted the express trust in the first place. Since the resulting trust, as much as the express trust that fails,

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62 Whether under the *Hague Trusts Convention* (n 4) or common law, this generally entails an application of the law expressly or impliedly selected in the trust deed, or else it is determined by way of a close connection test.

63 See, eg, Stevens (n 19) 157; Jonathan Harris, *The Hague Trusts Convention* (Hart Publishing, 2002) 126–7; Harris, 'Constructive Trusts and PIL' (n 10) 967; Mapesbury and Harris (n 6) [29–082]; David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (LexisNexis, 19th ed, 2016) 1360 [100.67].

64 *Re Vandervell's Trustees Ltd (No 2)* (n 59) 289.

65 *Westdeutsche Landesbank* (n 60) 708 (Lord Browne-Wilkinson).

66 Ibid.

67 Derwent Coshott, 'To Benefit Another: A Theory of the Express Trust' (2020) 136 (April) *Law Quarterly Review* 221, 221.

responds to the settlor's intentions, it follows that both trusts ought to be governed by the same law.

Against this, it has been argued that the settlor's intention does not provide a justification, because otherwise the law applicable to the express trust would also have to be applied to other forms of resulting trusts that are 'apparently based on the settlor's assumed intentions'.[68] It is true that resulting trusts of whatever variety arise in response to the (presumed or actual) intentions of the settlor or transferor (A). More precisely, they all respond to A's unilateral negative intention; that is, that the recipient (B) was not intended to take the beneficial interest in the property.[69] However, context matters. For failing trusts, that negative intention and the positive intention to create the (failed) express trust are two sides of the same coin. Resulting trusts arising from apparent gifts, on the other hand, are different: they arise in a context where B was never a trustee at all; indeed, B would take the property absolutely unless a resulting trust arises. Therefore, there is no express trust whose applicable law can be extended to cover these resulting trusts. Instead, it is necessary to investigate what underlying issue is raised by these resulting trusts in order to determine the applicable choice of law rules. To this matter the discussion now turns.

B *Apparent Gifts*

The first point to make is that some commentators have argued that the presumption that arises in apparent gift cases is a presumption that A had *positively intended* and declared an express trust for himself or herself.[70] This view has gained some traction in Australia.[71] It stands in contrast to the view that the presumption is that A did not intend to benefit B.[72] The latter is clearly preferable for historical, taxonomical, coherency and normative reasons, all of which have been extensively discussed elsewhere.[73] One of those points is particularly pertinent for the present discussion. It is that the positive intention analysis unjustifiably conflates express trusts with resulting trusts: it allows for apparent gifts cases that are proved by way of the presumption to be recognised as resulting-express trusts. This state of affairs is both confusing and misleading. From the perspective of domestic law, the law would fail

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68 Harris, *The Hague Trusts Convention* (n 63) 126.

69 *Anderson v McPherson (No 2)* [2012] WASC 19, [103] (Edelman J) ('*Anderson*'); Ford et al (n 8) [24.040]; Ying Khai Liew, 'Trusts: Modern Taxonomy and Autonomy' (2021) 35(1) *Trust Law International* 27, 36–40 ('Taxonomy and Autonomy').

70 See generally John Mee, 'Presumed Resulting Trusts, Intention and Declaration' (2014) 73(1) *Cambridge Law Journal* 86; William Swadling, 'Explaining Resulting Trusts' (2008) 124 (January) *Law Quarterly Review* 72; Heydon and Leeming (n 7) 205–6 [12–01].

71 See, eg, *Bosanac v Federal Commissioner of Taxation* (2022) 96 ALJR 976, 997 [104] (Gordon and Edelman JJ) ('*Bosanac*'); *Anderson* (n 69) [106] (Edelman J); *Tonna v Mendonca* [2019] NSWSC 1849, [465] (Ward CJ in Eq). See too, in English law, *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399, 1412 (Lord Millett); *Lavelle v Lavelle* [2004] EWCA Civ 223, [13]–[14] (Lord Phillips MR); *Twinsectra v Yardley* [2002] 2 AC 164, 190 [92] (Lord Millett); *Patel v Mirza* [2017] AC 467, 536–7 [238] (Lord Sumption JSC, Lord Clarke JJSC agreeing); *Marr v Collie* [2018] AC 631, 647–8 [54] (Lord Kerr JSC); *Prest v Petrodel Resources Ltd* [2013] 2 AC 415, 429 [49] (Thorpe LJ); PJ Millett, 'Restitution and Constructive Trusts' (1998) 114 (July) *Law Quarterly Review* 399, 401.

72 See *Bosanac* (n 71) 983 [13] (Kiefel CJ and Gleeson J); *Hodgson v Marks* [1971] Ch 892, 933 (Russell LJ); Robert Chambers, 'Is There a Presumption of Resulting Trust?' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 267, 276.

73 Liew, 'Taxonomy and Autonomy' (n 69) 32–6.

to distinguish between trusts arising as a result of a settlor's successful exercise of power to create a trust, and trusts arising despite the lack of an exercise of such a power. From the private international law perspective, it would lead to the mistaken conclusion that apparent gifts resulting trusts should be treated as express trusts for choice of law purposes.[74] As discussed earlier, unlike in the failing trusts context, apparent gifts resulting trusts do not arise from an express trust relationship, and so this approach must be rejected.

According to most commentators[75] and Commonwealth authorities, including one in Australia,[76] the *lex situs* should apply, because 'rights in property are ultimately at stake'.[77] But this position is not universally accepted: notably, the Court of Appeal of England and Wales in *Lightning v Lightning Electrical Contractors Ltd*[78] and the New South Wales Court of Appeal in *Damberg v Damberg*[79] both applied the *lex fori* as opposed to the *lex situs* to apparent gifts resulting trusts. Although the reason for applying the *lex fori* was not explicitly stated in these cases, it has been argued that the courts had operated under the assumption that the *lex fori* would apply because the claims were inherently equitable.[80] But, as discussed earlier, the '*lex fori* only' approach ought not apply to resulting and constructive trusts.

Disputes concerning apparent gifts resulting trusts are functionally property disputes, and therefore the *lex situs* ought to apply.[81] To make this point, it is necessary to emphasise that resulting trusts arise in response to A's *unilateral* negative intention: it is A and A alone whose lack of intention to benefit B gives rise to a resulting trust. The trust has nothing to do with B, whose consent, agreement, or acquiescence has no implication on whether a resulting trust arises. It follows that a resulting trust is not concerned with any fault on B's part, as demonstrated by the fact that B's ignorance of the receipt of property will not prevent a resulting trust from arising.[82] Since personal liabilities do not arise unless a recipient has knowledge of the circumstances surrounding the transfer,[83] it follows that an apparent gift resulting trust is not at all concerned with making B do something *equivalent to* giving up property to A. Rather, it arises precisely to compel B *to give*

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74 Hayton, Matthews and Mitchell (n 68) 1360–1 [100.69].

75 Yeo (n 14) [6.05]–[6.08]; Mapesbury and Harris (n 6) [29–077], [29–081]; Chong (n 9) 877; Stevens (n 19) 154; Jonathan Harris, 'The Trust in Private International Law' in James Fawcett (ed), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (Oxford University Press, 2002) 187, 187, 212.

76 *Whung v Whung* (2011) 258 FLR 452, 486 [198] (O'Reilly J). See also *Martin v Secretary of State for Work and Pensions* [2009] WLR (D) 346; *Ross v Ross* (1892) 23 OR 43; *McNeil v Sharp* [1921] 62 SCR 504; *Chartered Trust Co v Benjamins* [1965] SCR 251.

77 Mapesbury and Harris (n 6) [29–081].

78 *Lightning v Lightning Electrical Contractors Ltd* [1998] NPC 71 ('*Lightning*').

79 *Damberg v Damberg* (2001) 52 NSWLR 492 ('*Damberg*').

80 See Davies et al (n 18) 835 [34.46] (commenting on *Damberg* (n 79)); *Lightning* (n 78)).

81 Modified as necessary in certain cases depending on the precise nature of the property in question: see Davies et al (n 18) ch 32.

82 See, eg *Re Vinogradoff* [1935] WN 68; *Port of Brisbane Corporation v ANZ Securities Ltd (No 2)* [2003] 2 Qd R 661, 678–9 [31] (McPherson JA).

83 Ying Khai Liew and Charles Mitchell, 'The Creation of Express Trusts' (2017) 11(2) *Journal of Equity* 133, 142–8; Liew, 'Constructive Trusts and Discretion' (n 44) 976–7. A claim based on knowledge is a knowing receipt claim, and for choice of law purposes the claim would be characterised as a tort: see discussion below at nn 147–156 and accompanying text.

up property to A. It then becomes clear that this resulting trust is ultimately a property dispute and ought to be treated as such for choice of law purposes.

Before moving on, it is worth considering Forrester's criticism that the *lex situs* is too 'rigid and does not adequately give effect to the reasonable expectations of the parties'.[84] This criticism is, unfortunately, based on a fundamental misunderstanding of the nature of resulting trusts. As discussed in the preceding paragraph, a resulting trust responds to A's unilateral intention, and therefore is not *relationship*-based, nor does it generate *expectations* between two parties. Thus, the 'rigidity' in applying the *lex situs* is hardly unjustified if any proposed flexibility does not accord with the true nature of a resulting trust. Indeed, this is precisely the criticism that can be levied against Forrester's own suggested choice of law rule for apparent gift resulting trusts. He proposes that these trusts should be governed by the proper law of the relationship leading to the claim, whereby the court should consider 'the *situs* of the trust assets, the place of residence of the trustee and beneficiary, and the place of the transfer of money used for the purchase price' in determining the law with the closest connection to the resulting trust.[85] It is not obvious that the uncertainty of this approach is justified, in view of the true nature of resulting trusts. More worryingly, Forrester's suggestion presupposes that a resulting trust already exists — this much is clear where he speaks of the 'trustee' and 'beneficiary' — when, in fact, the existence of the resulting trust can only be determined after the applicable law is first ascertained. In sum, there seems to be no good reason to doubt the application of the *lex situs* in relation to apparent gift resulting trust cases.

IV Constructive Trusts

Constructive trusts arise in a wide variety of distinct circumstances, and therefore, unlike resulting trusts, constructive trusts are not susceptible to any unitary rationale.[86] But it does not follow that it is necessary — or, indeed, appropriate — to undertake a choice of law analysis on an ad hoc basis without having regard for the law of constructive trusts as a whole. An ad hoc approach risks inconsistent and unprincipled results because, when considered in a vacuum, the nature of constructive trusts is elusive. This poses difficulties for determining the real issue at stake. As observed in *Nygh's Conflict of Laws in Australia*:

> The matter is rendered particularly complex because … a constructive trust which, to an Australian (or perhaps New South Wales) lawyer's eyes will be unmistakably 'equitable', may be, to an English lawyer's eyes, restitutionary whilst to a lawyer from a civil law system, a constructive trust, so-called, may

[84] Forrester (n 9) 210.

[85] Ibid 220.

[86] See Gbolahan Elias, *Explaining Constructive Trusts* (Oxford University Press, 1990); Liew, *Rationalising Constructive Trusts* (n 3); Ben McFarlane, 'Constructive Trusts Arising on a Receipt of Property *Sub Conditione*' (2004) 120 (October) *Law Quarterly Review* 667; Simon Gardner, 'Reliance-Based Constructive Trusts' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 63.

> well not exist at all but may have a functional equivalent which, in civil law terminology, is not regarded as either equitable or restitutionary.[87]

The discussion below will demonstrate how analysing constructive trusts in the light of the trichotomy discussed above — by categorising claims as claims for either replicative, reflective, or transformative remedies — can lead to a proper and systematic understanding of the choice of law rules for constructive trusts. While it is impossible exhaustively to discuss every situation in which constructive trusts have arisen, the discussion aims to cover as many as possible.

A *Replicative Constructive Trusts*

There are several established situations in which replicative constructive trusts arise. In each of these situations, the plaintiff makes a claim for a constructive trust that restates and enforces his or her primary right arising from a non-wrong event that arose from the moment the relevant events occurred. For choice of law purposes, it is the primary right-duty relationship and the event giving rise to it that calls for characterisation. Six such situations are discussed below.

First, there is a group of doctrines that may be labelled 'agreement-based constructive trusts'.[88] It includes secret trusts,[89] mutual Wills,[90] the doctrine in *Rochefoucauld v Boustead*,[91] and the doctrine in *Pallant v Morgan.*[92] These doctrines have in common the events of promise and reliance, of a particular kind: B informally promises to hold property on trust for A or for C, and A acts in some way that provides B an advantage in acquiring the property — in most cases, by transferring the legal title to B — in reliance on B's promise. From the moment those events occur, primary rights and duties arise, placing the parties in a constructive trust relationship. A plaintiff's claim for a constructive trust remedy in these cases is conceptually akin to a declaration that that relationship had arisen pre-trial.

The trusts would be express trusts but for the lack of compliance with the formalities required for creating a valid and enforceable express trust.[93] Indeed, the

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87 Davies et al (n 18) 549–50 [21.2].

88 See Ying Khai Liew, 'Making Sense of Agreement-Based Constructive Trusts in the Commercial Context' (2022) 4 *Journal of Business Law* 330.

89 *Blackwell v Blackwell* [1929] AC 318; *Voges v Monaghan* (1954) 94 CLR 231. Typically, A names B as apparent legatee in A's Will, leaving the Will unchanged in reliance on B's informal promise to hold the legacy for the benefit of C.

90 *Birmingham v Renfrew* (1937) 57 CLR 666. Typically, A dies leaving property in A's Will to B in reliance on B's promise to leave the property at B's death to C.

91 *Rochefoucauld v Boustead* [1897] 1 Ch 196, 206 (Lindley LJ). See, eg, *ISPT Nominees Pty Ltd v Chief Commissioner of State Revenue* (2003) 53 ATR 527, 602–3 [329] (Barrett J) ('*ISPT Nominees*'); *Ciaglia v Ciaglia* (2010) 269 ALR 175, 192 [72] (White J). Typically, A relies on B's informal promise to hold A's land on trust for A by transferring the legal title to that land to B.

92 *Pallant v Morgan* [1953] 1 Ch 43. See, eg, *Comlin Holdings Pty Ltd v Metlej Developments Pty Ltd* [2018] NSWSC 761, [189]–[190] (Parker J). See also Ying Khai Liew and Cristina Poon, 'The "*Pallant v Morgan* Equity" in Australia: Substantive or Superfluous?' (2021) 29(1) *Australian Property Law Journal* 74. Typically, one party (B) who is interested in purchasing a property informally promises to cede some part of the property yet to be acquired to another competitor (A), and A relies on that promise by refraining from attempting to procure the property.

93 See *Property Law Act 1958* (Vic) s 53(1)(b); *Civil Law (Property) Act 2006* (ACT) s 201(2); *Conveyancing Act 1919* (NSW) s 23C(1)(b); *Law of Property Act 2000* (NT) s 10(1)(b); *Property*

trusts are functionally akin to express trusts, in that they respond to a positive intention to subject B to duties under a trust. It follows that the choice of law rules applicable to express trusts should apply here.[94] This would entail an application of the rules under the *Hague Trusts Convention*, should the circumstances fall within its scope. In particular, art 3 requires that the trust be 'evidenced in writing'; this would exclude purely oral agreements, but include those in relation to which there is writing, even if not signed as required under domestic law.[95] Should the constructive trust fall outside the scope of the Convention, the common law rules for express trusts should apply; but the differences are slight, if any: 'the Convention is regarded as consistent with the common law on almost all points'.[96]

Situations two and three can be dealt with together. In one situation, where parties enter into a specifically enforceable contract for sale, the seller, B, holds the property on constructive trust for the buyer, A, until legal title to the property is conveyed.[97] In another situation, where B agrees to convey future property to A and A has provided valuable consideration, a constructive trust arises for A's benefit if and when B eventually acquires the property.[98]

It seems clear that these situations should be categorised as contracts for choice of law purposes. This outcome is easy to explain in relation to the former situation. Not only is it consistent with case law,[99] it also rightly reflects the fact that, in this context, the primary relationship is a contractual relationship, with the constructive trust a feature of equity's concurrent jurisdiction at play. This is why the entering into a valid common law contractual relationship is a precondition for equity to intervene at all. In relation to the latter situation, although a purported assignment of future property is wholly void, where B provides valuable consideration then the assignment is 'regarded in equity as a contract'[100] and thus binding on the basis that 'equity considers as done that which ought to be done'.[101] Here, again, the primary

Law Act 1974 (Qld) s 11(1)(b); *Law of Property Act 1936* (SA) s 29(1)(b); *Conveyancing and Law of Property Act 1884* (Tas) s 60(2)(b); *Property Law Act 1969* (WA) s 34(1)(b).

[94] As suggested by a majority of commentators: see, eg, Mapesbury and Harris (n 6) [20–085]; David Hayton, 'The *Hague Convention on the Law Applicable to Trusts and on Their Recognition*' (1987) 36(2) *International and Comparative Law Quarterly* 260, 264; Harris, *The Hague Trusts Convention* (n 63) 130.

[95] See above n 93.

[96] Garnett (n 19) 382. See also *Augustus* (n 15) 252 (Walsh J); *Ballard v AG (Vic)* (2010) 30 VR 413, 418 [22] (Kyrou J); *Chellaram v Chellaram (No 2)* [2002] 3 All ER 17 (Ch D).

[97] *Holroyd v Marshall* (1862) 11 ER 999; *PSAL Pty Ltd v Raja* [2016] WASC 295, [69] (Pritchard J); *ISPT Nominees* (n 91) 598–601 [307]–[325] (Barrett J). See also *Stern v McArthur* (1988) 165 CLR 489, 522–4 (Deane and Dawson JJ); PG Turner, 'Understanding the Constructive Trust between Vendor and Purchaser' (2012) 128 (October) *Law Quarterly Review* 582, 596–600.

[98] *Holroyd v Marshall* (n 97); *Tailby v Official Receiver (Trustee of the Property of HG Izon, a bankrupt)* (1888) 13 App Cas 523, 530 (Lord Herschell) ('*Tailby*'); *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, 403 [504] (Finn, Stone and Perram JJ) ('*Grimaldi*'); *Palette Shoes Pty Ltd (in liq) v Krohn* (1937) 58 CLR 1, 26 (Dixon J) ('*Palette Shoes*').

[99] See *Murakami* (n 16) 404 [141] (Spigelman CJ, McColl JA agreeing at 408 [166], Young JA agreeing at 408 [167]); *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch).

[100] *Tailby* (n 98) 543.

[101] Ibid 546, quoted in *Palette Shoes* (n 98) 26.

relationship is — at least functionally — treated as a contract, which suggests that the choice of law rules applicable to contracts ought to apply.[102]

The fourth and fifth situations can also be taken together. The fourth is the rule in *Corin v Patton*: a constructive trust arises in A's favour when B does everything necessary to effect a transfer of property to A and equips A to achieve the transfer of legal title, despite the fact that the legal transfer has not yet occurred.[103] The fifth situation is the 'common intention constructive trust', which arises to give effect to two parties' express or implied common intention concerning their beneficial interests in a property — usually a family home — where the plaintiff has detrimentally relied on that common intention.[104]

It is submitted that both situations ought to attract the choice of law rules applicable to property disputes. In relation to the rule in *Corin v Patton*, this doctrine can be understood essentially to be concerned with identifying the precise point in time at which B successfully and finally exercises his or her power to transfer property to A such that it is beyond recall. As Mason CJ and McHugh J commented in *Corin v Patton*:

> Just as a manifestation of intention plus sufficient acts of delivery are enough to complete a gift of chattels at common law, so should the doing of all necessary acts by [B] be sufficient to complete a gift in equity. The need for compliance with subsequent procedures such as registration, procedures which [A] is able to satisfy, should not permit [B] to resile from the gift.[105]

Thus, this doctrine is ultimately concerned with determining rights in property, and the *lex situs* ought to apply. In relation to the common intention constructive trust, some commentators suggest that the choice of law rules for property[106] ought to apply, while others suggest that the trust should be treated as an express trust.[107] The latter approach can find support in *Allen v Snyder*, where Glass JA analysed the common intention constructive trust as 'an express trust which lacks writing' and was of the view that it shared the same rationale as the doctrine in *Rochefoucauld v Boustead*.[108] However, the property characterisation provides a more realistic view of the doctrine. For the purposes of inferring common intention, it is enough simply for the plaintiff to have contributed in a way that facilitated the acquisition of the property[109] or that improved the property. This approach is not comparable to the kind of evidence necessary to demonstrate an intention to create an express trust: contributions or improvements alone would not indicate any intention to assume duties and create rights under a trust. The common intention constructive trust can also be contrasted with the agreement-based constructive trust, in relation to which

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102 That is, the proper law of the contract will apply: this may be expressly or impliedly chosen by the parties, otherwise it is the law with the closest connection to the contract.

103 *Corin v Patton* (1990) 169 CLR 540; also commonly known as the rule in *Re Rose* following the decision in *Re Rose (deceased)* [1952] Ch 499. See *Sydney Futures Exchange Ltd v Australian Stock Exchange Ltd* (1995) 56 FCR 236, 270 (Gummow J).

104 *Allen v Snyder* (1977) 2 NSWLR 685, 690 (Glass JA, Samuels JA agreeing at 697); *Austin v Keele* (1987) 10 NSWLR 283, 290–1 (Lord Oliver for the Court) (Privy Council).

105 *Corin v Patton* (n 103) 558.

106 Mapesbury and Harris (n 6) [29–077]; Harris, 'Constructive Trusts and PIL' (n 10) 967.

107 Hayton, Matthews and Mitchell (n 63) 1366 [100.83]; Hayton (n 94) 265.

108 *Allen v Snyder* (n 104) 692. See also Ford et al (n 8) [22A.420].

109 *Allen v Snyder* (n 104) 690 (Glass JA).

courts have insisted that the relevant intention must be firmly expressed: for example, that the parties' beneficial interests must be 'sufficiently defined',[110] or that 'an assurance' as opposed to a mere 'friendly gesture' is necessary.[111] Only firmly expressed intentions approximate, in a functional sense, to the intention necessary for creating an express trust. Therefore, it is submitted that the common intention constructive trust doctrine is functionally a doctrine governing property disputes, which ought to attract the *lex situs*.

Finally, in the sixth situation, a constructive trust may arise in A's favour when B receives property mistakenly transferred from A, for example where B acquires knowledge of the mistake while the property remains in hand.[112] It might be thought that mistaken transfers, being the archetypal restitution claim for unjust enrichment, should attract the choice of law rules for restitution or unjust enrichment. But such an analysis, while now straightforward in English law due to the *Rome II Regulation*,[113] is rendered complicated under Australian law for two reasons.

First, the High Court of Australia has rejected unjust enrichment as a principle capable of direct application in domestic law.[114] This view complicates matters at the private international law level, as discussed earlier.[115] Certainly, the ambiguous state of domestic law does not make it impossible for Australian courts to recognise restitution or unjust enrichment as a choice of law category. However, it makes it significantly more unlikely, given the difficulty of identifying when precisely a dispute raises such an issue.

Second, even if it is accepted that restitution or unjust enrichment has its own set of choice of law rules, it is not at all obvious what connecting factor it would entail. In England, before this area of law was superseded by the *Rome II Regulation*, the connecting factor was the law of the place where the enrichment occurred.[116] In Australia, obiter dictum in one case suggested that the applicable law for unjust enrichment 'is the law of the place with which the obligation to make the payment has the closest connection'.[117] But the accuracy of this statement is questionable given that the passage purported to follow the connecting factor applied in a High Court decision that, when closely examined, was concerned not with restitution by way of unjust enrichment, but restitution by way of a statutory right to indemnity.[118]

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[110] *Bannister v Bannister* [1948] 2 All ER 133, 136.

[111] *Pallant v Morgan* (n 92) 46.

[112] *Wambo Coal Pty Ltd v Ariff* (2007) 63 ACSR 429, 437 [42] (White J); *Westpac Banking Corporation v Ollis* [2007] NSWSC 956, [18]–[26] (Einstein J).

[113] See Mapesbury and Harris (n 6) r 257; but cf Briggs, 'Misappropriated and Misapplied Assets' (n 30).

[114] *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560; *Muschinski v Dodds* (1985) 160 CLR 583, 617 (Deane J) ('*Muschinski*').

[115] See above text accompanying n 39.

[116] Davies et al (n 18) 551 [21.5]. This was said to be subject to two exceptions: if the restitutionary obligation arose in connection with a contract then the proper law of the contract would apply; or if it arose in connection with a transaction involving land then the *lex situs* would apply: Mapesbury and Harris (n 6) [36–008].

[117] *Benson v Rational Entertainment Enterprises Ltd* (2018) 355 ALR 671, 689 [103] (Leeming JA); Sherborne suggests that the 'proper law of the restitutionary obligation' ought to apply, although there is no Australian authority for this proposition: Andreas Karl Edward Sherborne, 'Restitution in the Conflict of Laws: Characterization and Choice-of-law in Australia' (2017) 13(1) *Journal of Private International Law* 1, 25–8. Moreover, the Sherborne article predates the decision in *Benson*.

[118] *Sweedman* (n 40).

In the mistaken payment case, there is no obligation to make payment in the first place for this connecting factor to apply coherently. Thus, in the absence of clarity, the surer path may well be to treat the case as one of property, attracting the *lex situs*, on the basis that this area of law functions to determine the circumstances in which B ought to (re)transfer property in B's name to A.

B *Reflective Constructive Trusts*

In certain other situations, constructive trusts are reflective in nature; that is, they enforce the plaintiff's secondary rights. Such claims are wrongs-based: there is always a pre-existing relationship between the parties, the primary duty of which the defendant has breached. The remedy imposed aims to correct the effects of the defendant's wrongdoing. To determine the applicable choice of law rules, a two-step analysis is apposite.[119] If the primary relationship in relation to which the defendant breached a duty can be categorised within a pre-existing category of choice of law rules, then those rules should apply because the primary relationship is the source of the plaintiff's secondary right. After all, the secondary duty is but 'a rational echo of the primary [duty], for it exists to serve, so far as may still be done, the reasons for the primary [duty] that was not performed when its performance was due'.[120] However, it may be that the primary relationship is not susceptible to being so categorised. They should then attract a tort classification, because the law of tort functions to identify wrongs; namely 'secondary obligations generated by the infringement of primary rights'.[121] In Australia, this classification entails an application of the *lex loci delicti commissi*.[122]

One situation in which reflective constructive trusts may be imposed is where a fiduciary makes a gain in breach of his or her fiduciary duty: a constructive trust may arise over the gains in favour of the principal. It is first necessary to distinguish between two types of cases. In one type of case, the principal has a 'proprietary base'[123] or a 'pre-existing proprietary right to the profits'.[124] This includes cases where the gains represent the original or traceable proceeds of the principal's property, and cases where the gains represent the proceeds of the exploitation of an opportunity that ought to have been exploited in favour of the principal. In another type of case, the gains represent 'extant property which a delinquent fiduciary ... has derived on their own account as a result of their wrongdoing'.[125] In that type of case — where the gains are typically bribes or secret commissions — any constructive

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[119] For a similar view, see Briggs, 'Misappropriated and Misapplied Assets' (n 30) 77.

[120] John Gardner, 'What is Tort Law For? Part 1: The Place of Corrective Justice' (2011) 30(1) *Law and Philosophy* 1, 40. See also Mapesbury and Harris (n 6) [36-070].

[121] Robert Stevens, *Torts and Rights* (Oxford University Press, 2009) 2.

[122] *John Pfeiffer* (n 40) 535–6 [72]–[74] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491. Note, also, that whenever an application of the *lex loci delicti commissi* points to a foreign legal system, the entirety of that legal system, including its choice of law and renvoi rules, will apply (the 'double *renvoi*' approach): *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 ('*Neilson*').

[123] Peter Birks, *An Introduction to the Law of Restitution* (Oxford University Press, rev ed, 1989) 388.

[124] Roy Goode, 'Proprietary Liability for Secret Profits: A Reply' (2011) 127 (April) *Law Quarterly Review* 493, 494.

[125] *Grimaldi* (n 98) 360 [256] (Finn, Stone and Perram JJ).

trust imposed is transformative in nature, because the principal will not have had a pre-trial substantive *right* that a fiduciary should receive a bribe or secret commission for the principal.[126] The latter type of case is dealt with in Part IV(C).

In the former type of case, the constructive trusts are not transformative in nature, because the High Court has held on multiple occasions that constructive trusts invariably arise, with little remedial discretion exercised.[127] Instead, they are reflective in nature, arising in response to breaches of fiduciary duties. Here, the two-step analysis discussed in the preceding paragraph can be applied. In the vast majority of cases, where a fiduciary duty arises out of a contractual relationship, the choice of law rules applicable to contracts will apply.[128] But a fiduciary relationship may also arise from a non-contractual relationship.[129] In this context, the Federal Court of Australia has suggested that the *lex fori* should always apply, subject to the court making 'reference' to 'the attitude of the law of the place where the circumstances arose or the conduct was undertaken'.[130] However, as discussed earlier, this '*lex fori* only' approach must be rejected. The better approach is to apply the choice of law rules for tort, in recognition of the fact that what is claimed is a reflective constructive trust to correct the consequence of the fiduciary's breach of duty owed to the principal.[131]

Another situation in which reflective constructive trusts may be imposed is where proprietary estoppel arises. Where B induces A to assume that B will cede an interest in property he or she owns to A, and A detrimentally relies on that promise, courts exercise remedial discretion whereby a constructive trust or a lesser remedy may be imposed to correct the detriment or loss suffered by A.[132] Again, the two-step analysis is apposite here.

In many cases the primary relationship between the parties can be said functionally to be one of contract. This characterisation would not reflect domestic common law, but the wider choice of law category that takes into account a civilian understanding of 'contracts' where offer, acceptance, and consideration are not necessary ingredients. Thus, where A's induced assumption arises from a direct and express promise by B to A, the law applicable to the 'contract' would apply.

But induced assumptions may also arise from encouragement or acquiescence by B.[133] The appropriate analysis here is that the primary duty B has is

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126 See Joanna Bird, 'Bribes, Restitution and the Conflict of Laws' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 198.

127 *Black v S Freedman & Co* (1910) 12 CLR 105 ('*Black*'); *Chan v Zacharia* (1984) 154 CLR 178, 199 (Deane J); *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 107–8 (Mason J).

128 *Paramasivam* (n 15) 503 (Miles, Lehane and Weinberg JJ); *Murakami* (n 16) 403 [132] (Spigelman CJ, McColl JA agreeing at 408 [166], Young JA agreeing at 408 [167]). This is the proper law of the contract.

129 See, eg, *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244.

130 *Paramasivam* (n 15) 503 (Miles, Lehane and Weinberg JJ).

131 See *Traxon Industries Pty Ltd v Emerson Electric Co* where French J applied the law of the place of the conduct giving rise to a breach of fiduciary duty, as opposed the place where the duties arose: (2006) 230 ALR 297, 309–10 [59] ('*Traxon*'). See also Yeo (n 14) [7.24]–[7.72], ch 8.

132 See, eg, *Giumelli v Giumelli* (1999) 196 CLR 101; *Sidhu v Van Dyke* (2014) 251 CLR 505 ('*Sidhu*').

133 See, eg, *McNab v Graham* (2017) 53 VR 311, 345–6 [111] (Tate JA); *Sidhu* (n 132) 511 [1] (French CJ, Kiefel, Bell and Keane JJ).

a duty to act reliably in relation to induced assumptions; and where B fails to do so, A suffers detriment — detriment having been defined as being 'that which would flow from the change of position if the assumption were deserted that led to it'.[134] B then comes under a secondary duty to correct the consequences of the wrongdoing, in line with the aim of proprietary estoppel, which is to avoid detriment.[135] Since the primary relationship under which B incurs a duty to act reliably does not fit within any pre-existing category of choice of law rules, it is appropriate to characterise the case as a tort.[136]

The same analysis can be applied to a number of other situations where it has been suggested (although with serious doubt cast in each case) that a constructive trust may arise. One of these is where a constructive trust arises to compel a thief to hold stolen property for the benefit of the victim.[137] Another is where a constructive trust arises to prevent a killer from benefiting from his or her victim's property, to which the killer would otherwise have been entitled.[138] A third situation is where a constructive trust arises in relation to gains made in breach of confidence.[139] In each of these cases, if constructive trusts do indeed arise, they are reflective in nature because they arise due to the breach of a primary duty by the defendant. Unless the primary relationship can be said to arise out of a contractual relationship, as is often the case in relation to confidence,[140] these should all be characterised as a tort for choice of law purposes.[141]

Finally, something can be said about the so-called '*Barnes v Addy* liabilities';[142] namely, knowing receipt and knowing assistance. These accessorial

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[134] *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674 (Dixon J) cited with approval in relation to equitable estoppel (which includes proprietary estoppel) in *Sidhu* (n 132) 528 [80] (French CJ, Kiefel, Bell and Keane JJ).

[135] *Walton Stores (Interstate) v Maher* (1988) 164 CLR 387, 404 (Mason CJ and Wilson J), 416 (Brennan J); *Commonwealth v Verwayen* (1990) 170 CLR 394, 412 (Mason CJ), 429 (Brennan J), 454 (Dawson J), 487 (Gaudron J), 500 (McHugh J).

[136] Note that Mapesbury and Harris suggests that property choice of law rules ought always to apply, on the basis that '[t]he doctrine has evolved to grant interests in land, or the right to use or occupy land, or to compensate for detrimental reliance on the encouragement or acquiescence of the defendant that the claimant would have rights over land.': Mapesbury and Harris (n 6) [36–095]. However, this is to overlook the fact that the doctrine can, and has been, applied to other types of property, for example: cash; furniture; chattels (*Re Basham (Deceased)* [1986] 1 WLR 1498, 1500 (Mr Edward Nugee QC)); profits arising from a development (*Lloyd v Sutcliffe* [2007] EWCA Civ 153); beneficial interests under a trust (*Strover v Strover* [2005] EWHC 860 (Ch)); patents (*Yeda Research and Development Co Ltd v Rhône-Poulenc Rorer International Holdings Inc* [2008] 1 All ER 425, 434 [22] (Lord Hoffmann)); and publishing licences (*Motivate Publishing FZ LLC v Hello Ltd* [2015] EWHC 1554 (Ch), [61] (Birss J)).

[137] *Black* (n 127). Cf Robert Chambers, 'Trust and Theft' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 223.

[138] *Re Stone* [1989] 1 Qd R 351, 352 (McPherson J); *Ekert v Mereider* (1993) 32 NSWLR 729, 733 (Windeyer J). Cf Ian Williams, 'How Does the Common Law Forfeiture Rule Work?' in Birke Häcker and Charles Mitchell, *Current Issues in Succession Law* (Hart Publishing, 2016) 51, 56–62.

[139] *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199, 246–7 [102] (Gummow and Hayne JJ), 320 [311] (Callinan J). Cf Matthew Conaglen, 'Thinking about Proprietary Remedies for Breach of Confidence' [2008] (1) *Intellectual Property Quarterly* 82.

[140] Yeo (n 14) [8.76]–[8.77].

[141] See *Traxon* (n 131).

[142] *Barnes v Addy* (1874) LR 9 Ch App 244.

liabilities give rise to personal, as opposed to proprietary, remedies,[143] and therefore are distinguishable from the other (proprietary) constructive trust doctrines discussed in this article. Nevertheless, it has become fashionable in Australia to speak of these liabilities as being part of the law of 'constructive trusts'. This is due in no small part to the fact that knowing recipients and assistants are often referred to as persons 'liable as ... constructive trustee[s]';[144] and moreover, the High Court has said, in obiter dicta, that 'the term "constructive trust" may be used not with respect to the creation or recognition of a proprietary interest but to identify the imposition of a personal liability to account upon a defaulting fiduciary'.[145] For the sake of completeness, therefore, a number of brief comments follow.

First, it is clear that these liabilities are wrongs-based.[146] Knowing recipients incur personal liability for breaching a primary duty not to retain proceeds of a trustee's or fiduciary's breach of duty with knowledge of the breach; and knowing assistants incur personal liability for breaching a primary duty not to assist knowingly in a trustee's or fiduciary's breach of duty. In particular, the High Court has explicitly rejected the strict liability, unjust enrichment analysis of knowing receipt liability.[147] For this reason, the English approach of characterising knowing receipt claims as concerning restitution on the basis that the claim is 'the counterpart in equity of the common law action for money had and received … [b]oth can be classified as receipt-based restitutionary claims' does not apply in Australia.[148]

Second, although some commentators have argued to the contrary, as a matter of Australian authority, a recipient or assistant is liable in respect of his or her own wrongdoing, as opposed to the liability being duplicative of the trustee's or fiduciary's liability.[149] For this reason, knowing receipt and knowing assistance liabilities cannot be characterised as express trusts or contracts for choice of law purposes, since these liabilities do not find their source in the original trust or contractual relationship which the trustee or fiduciary had breached.

Ultimately, then, a tort characterisation is again appropriate:[150] this recognises that the recipient's or assistant's liability arises due to their wrongdoing.

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[143] Liew, 'Constructive Trusts and Discretion' (n 44) 975–7.

[144] See, eg, *Grimaldi* (n 98) 439 [667] (Finn, Stone and Perram JJ).

[145] *Bofinger* (n 46) 290 [47] (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

[146] Charles Mitchell, 'Dishonest Assistance, Knowing Receipt, and the Law of Limitation' [2008] Conv 226, 226–7; Joachim Dietrich and Pauline Ridge, *Accessories in Private Law* (Cambridge University Press, 2016) 221–3; *Farah Constructions* (n 45) 158–9 [156] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Grimaldi* (n 98) 362–3 [267] (Finn, Stone and Perram JJ). Cf Charles Mitchell and Stephen Watterson, 'Remedies for Knowing Receipt' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 115.

[147] *Farah Constructions* (n 45) 156–8 [150]–[155] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

[148] *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717, 736 (Millett J).

[149] *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, 457–8 [106] (Gummow ACJ, Hayne, Crennan and Bell JJ); Dietrich and Ridge (n 146) 228–9. Cf Steven Elliott and Charles Mitchell, 'Remedies for Dishonest Assistance' (2004) 67(1) *Modern Law Review* 16; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), [1600] (Lewison J).

[150] See also *OJSC Oil Company Yugraneft v Abramovich* [2008] EWHC 2613 (Comm); *Fiona Trust & Holding Corporation v Privalov* [2010] EWHC 3199 (Comm), [142]–[181]; Ford et al (n 8) [25.7410]; Yeo (n 14) [7.24]–[7.72].

C *Transformative Constructive Trusts*

Finally, certain constructive trusts are transformative in nature; that is, their imposition follows from the court's exercise of a wide-ranging remedial discretion, taking into account considerations extraneous to the plaintiff's and defendant's pre-trial rights and duties. These are often labelled 'remedial constructive trusts'. It is of foremost importance to note that what calls for characterisation here is squarely the constructive trust as a *remedy*, as distinct from the claim from which the discretion to impose the remedy arises. Where the imposition of a transformative constructive trust is an option open to the court, its availability presupposes that the plaintiff has had a successful claim against the defendant: it is only where this is so that the question of the appropriate *remedy* will arise. This is unlike the replicative and reflective constructive trusts discussed earlier, where the remedy is inextricably linked to the plaintiff's pre-trial rights and therefore an analysis of those rights is indicative for choice of law purposes.

Consider two examples. The first is what may be labelled the 'joint endeavour doctrine':[151] where two parties have contributed towards, or pooled resources for the purposes of, a joint endeavour that has prematurely and unforeseeably failed or terminated without any attributable blame, a remedial constructive trust may be imposed at the court's discretion to prevent the defendant from unconscionably retaining the benefit of the property contributed by the plaintiff.[152] The second is in the context of bribes and secret commissions received by an errant fiduciary — the liability in relation to which, as mentioned above in Part IV(B), cannot be sourced in any substantive *right* of the principal to such gains.

In both situations, the claim itself is a separate matter from the imposition of a remedial constructive trust, and this is obvious from the fact that a successful claim is a precondition for the court's consideration for imposing such a trust. One way to understand this is to observe that a successful plaintiff will at a minimum obtain a personal remedy against the defendant; the separate question then arises as to whether the imposition of a constructive trust is, in addition, appropriate. It is only in answering this question that third-party considerations come into the picture: 'the legitimate claims of third parties [must not be] adversely affected';[153] a constructive trust will only be imposed if 'no third party issue arises'.[154] For choice of law purposes, then, the applicable law that determines whether a remedial constructive trust will be imposed is separate from the question of what choice of law rules should apply to determine whether the plaintiff successfully establishes his or her claim. This is consistent with the transformative nature of these constructive trusts: because their imposition is not significantly informed by the parties' pre-trial rights and duties, nothing is gained from characterising the

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[151] See generally Ying Khai Liew, 'The "Joint Endeavour Constructive Trust" Doctrine in Australia: Deconstructing Unconscionability' (2021) 42(1) *Adelaide Law Review* 73.

[152] *Muschinski* (n 114) 620 (Deane J).

[153] Ibid 623.

[154] *Grimaldi* (n 98) 423 [583] (Finn, Stone and Perram JJ). See also *Suzlon Energy Ltd v Bangad* [2014] FCA 1105, [75] (Rares J); *Disctronics Ltd v Edmonds* [2002] VSC 454, [213] (Warren J).

plaintiff's claim-right. Instead, the question is which choice of law rule ought to apply to the constructive trust as a remedy.

On one view, it might be said that the *lex causae* should apply. On this view, remedial constructive trusts are classified as 'substantive' (thus attracting the *lex causae*) as opposed to 'procedural' (thus attracting the *lex fori*). In support of this view, Yeo has suggested that only a 'thin line' separates remedial and non-remedial ('institutional') constructive trusts, and therefore both should be regarded as 'substantive law, even if the trust is labelled in domestic law as remedial'.[155] Garnett, too, has written that this view is supported by the fact that a constructive trust 'is closely linked to the rights and liabilities of the parties as it involves the imposition of an interest over property and has limited relevance to the conduct of court proceedings'.[156] In addition, there are a number of decisions in Commonwealth jurisdictions that expressly adopt or assume the classification of constructive trusts as substantive.[157]

It seems right that transformative constructive trusts are substantive as opposed to procedural in nature. This obviously follows if the concept of 'procedural' law is narrowly confined to those rules that concern court proceedings or the administration of justice:[158] transformative constructive trusts have nothing to do with such rules.

Nevertheless, the *lex fori* ought always to apply. Harris has argued that this sort of approach 'ignore[s] the law applicable to the underlying obligation' and 'distort[s] the nature of the property rights that would or would not be created by that law'.[159] But his argument glosses over the fact that transformative constructive trusts do not relate to any 'underlying obligation' in the same way as replicative and reflective constructive trusts do. When the distinctively transformative nature of remedial constructive trusts is borne squarely in mind, three reasons can be found for applying the *lex fori.*

The first reason is that the award of remedial constructive trusts falls within the 'formative jurisdiction' of the forum court, which arguably provides a *lex fori* exception to matters of substance. This is based on Kahn-Freund's distinction between 'declaratory' and 'formative' proceedings.[160] In declaratory proceedings, the aim of a judgment is 'to enforce rights and obligations' and the judge 'does not

[155] Yeo (n 14) [4.86].

[156] Richard Garnett, *Substance and Procedure in Private International Law* (Oxford University Press, 2012) 306 [10.21]. See also the Australian High Court decision in *John Pfeiffer* (n 40) 543 [99] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ): 'matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance'.

[157] See, eg, *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105; *Bank of Ireland v Pexxnet Ltd* [2010] EWHC 1872 (Comm); *Murakami* (n 16); *To Group Co Ltd Xiamen King v Eton Properties Ltd* [2010] HKCFI 236, [107].

[158] This is Garnett's thesis: see Garnett (n 156). See also *John Pfeiffer* (n 40) 543[99] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

[159] Harris, 'Constructive Trusts and PIL' (n 10) 968.

[160] Kahn-Freund (n 31) 349–59. While this distinction is not explicitly recognised in the case law at present, Yeo has argued that this provides a reasonable explanation for why English courts never apply foreign law in certain claims (eg, divorce, custody, and guardianship) although these are not classified as public policy matters, or mandatory rules, or procedural issues: Yeo (n 14) [1.83].

create any new rights'; in formative proceedings, the judgment 'create[s] such rights and obligations afresh', and the judge's 'function is not declaratory, but creative, constitutive, formative.'[161] This distinction indicates that replicative constructive trusts are declaratory, while claims for transformative constructive trusts are formative. Kahn-Freund also clarifies that '[a] judge does not … take "formative" action if he enforces a right whose *content or extent* is, according to the foreign law which he applies, subject to judicial discretion.'[162] This indicates that reflective constructive trusts, which may well allow for the exercise of discretion to determine the content of the remedy, are declaratory rather than formative. Kahn-Freund argues that formative proceedings invariably require the application of the *lex fori*. He explains that '[a] judge derives his powers [to create new rights] from the "judicial mandate", and the mandate derives wholly from the *lex fori*. No foreign law can add to or subtract from it'.[163] Moreover,

> [a] court cannot change the rights and obligations of the parties without a specific mandate to do so. Failing it, the court has no jurisdiction. The facts which permit a court to act or compel it to do so circumscribe its jurisdiction, not the rights of the parties. Hence they cannot be determined by a foreign law…[164]

If Kahn-Freund is right, then the availability of transformative constructive trusts falls to be determined by the *lex fori*.

The second reason for applying the *lex fori* is that the decision whether to impose a transformative constructive trust is invariably accompanied by the exercise of wide-ranging remedial discretion. It is trite that Australian courts will not exercise jurisdiction over 'matters largely for the discretion of [foreign] courts', that is, those matters 'involving a very large measure of discretion'.[165] Remedies involving the exercise of such discretion are to be distinguished from those remedies of the *lex causae* that arise as a question of 'fact',[166] which forum courts can ascertain and award to a successful plaintiff. For example, the determination of a sum payable under a contract that a foreign law requires to be determined 'according to the requirements of good faith, ordinary usage being taken into consideration' and 'having regard to all the circumstances of the case'[167] is ascertainable and can be awarded in the forum. This distinction suggests that those constructive trusts that are replicative and reflective in nature can be treated as questions of 'fact' to which a foreign law may apply, depending on the applicable choice of law rules. Conversely, a transformative constructive trust, even if it may be awarded under a foreign *lex causae*, cannot be awarded in the forum, due to the extensive discretion it entails. If so, then *in effect* the availability of transformative constructive trusts is a matter to which the *lex fori* will always apply.

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[161] Kahn-Freund (n 31) 350.
[162] Ibid 352 n 788 (emphasis added).
[163] Ibid 352.
[164] Ibid 355.
[165] *Phrantzes v Argenti* [1960] 2 QB 19, 35 (Lord Parker CJ). See also *Re Paulin* [1950] VLR 462, 465 (per Sholl J); *Neilson* (n 122) 392–3 [191] (Kirby J).
[166] *Kornatzki v Oppenheimer* [1937] 4 All ER 133, 138–9 (Farwell J).
[167] Ibid 138.

The third reason is that judges always take third-party considerations into account in determining whether to impose transformative constructive trusts.[168] Specifically, judges ask themselves whether it is appropriate to grant priority to the plaintiff to the detriment of a defendant's potential or actual creditors.[169] It is trite that the question of priority between creditors attracts the *lex fori*.[170] A key case reflecting this rule is *The Halcyon Isle*,[171] a Privy Council decision that has been explicitly approved in Australia.[172] One of the principles emerging from that case is that, in relation to claims by creditors against a debtor who has a limited fund insufficient to fulfil all the debts, the *lex fori* applies to determine priorities even though the creditors' claims might have attracted a different *lex causae*. Although, in *The Halcyon Isle* itself, there were indeed multiple creditors whose priorities would have attracted the laws of multiple jurisdictions had the *lex fori* rule not applied, this fact was not expressed to be a precondition. Rather, the *lex fori* applied because it fell to the forum courts to achieve 'evenhanded justice between competing creditors'.[173] The principle appears to be of application given that remedial constructive trusts are transformative in nature *precisely* because courts take into account the potential claims of other third parties over the property in which the plaintiff claims a proprietary interest. Therefore, the *lex fori* should apply.

If the above analysis is correct, then this also provides a stark warning to Australian courts in their development of the law of constructive trusts. Courts have demonstrated an increasing tendency of 'repackaging' replicative and reflective constructive trusts as transformative constructive trusts, by suggesting that replicative and reflective constructive trusts arise only as a consequence of a court's exercise of wide-ranging discretion following its creative or formative jurisdiction.[174] That approach is misleading and does not reflect the reality in which constructive trusts operate.[175] If taken seriously, it would eventually lead to the application of the *lex fori* in circumstances where different choice of law rules would otherwise apply. In substance, this would be to backslide into the '*lex fori* only' approach towards equitable claims, which was discussed above in Part II(A). For the reasons given in that earlier discussion, this approach ought to be rejected. Thus, in developing domestic laws, judges ought to be circumspect in extending the application of transformative constructive trusts, reserving the imposition of this sort of constructive trust for exceptional cases.

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168 Every single significant case relating to the imposition of remedial constructive trusts in Australia has emphasised the importance of third-party considerations: see Liew, 'Constructive Trusts and Discretion' (n 44) 997–9.

169 See, eg, *Muschinski* (n 114) 623 (Deane J); *Grimaldi* (n 98) 422–3 [583] (Finn, Stone and Perram JJ).

170 See, eg, *Ex Parte Melbourn* (1870) LR 6 Ch App 64; *Cook v Gregson* (1854) 61 ER 729; *The Colorado* [1923] P 102, 109 (Scrutton LJ).

171 *Bankers Trust International Ltd v Todd Shipyards Corp (The Halcyon Isle)* [1981] AC 221 ('*The Halcyon Isle*').

172 '*Sam Hawk*' (n 33).

173 *The Halcyon Isle* (n 171) 230–1 (Lord Diplock).

174 See Liew (n 44).

175 Ibid.

V Conclusion

The Introduction to this article notes that certain commentators aspire towards a single choice of law approach for resulting and/or constructive trusts — that is, that disputes ought to be governed by a single rule.[176] Those holding this view might object to the pluralistic approach suggested in this article. But this article provides solid ground to refute such overly-inclusive accounts. Since what ultimately matters is that choice of law rules properly reflect the issue of the dispute in question, it is to the issue that we must look. A proper understanding of domestic law reveals that resulting and constructive trusts do not raise any unitary issue, but a plurality of issues — hence, the plurality of approaches.

But this is not to say that those rules are to be determined on a case-by-case basis with no overarching logic. As observed in this article, at the level of domestic law, resulting and constructive trusts can be categorised as 'replicative', 'reflective', and 'transformative' — a distinction that depends on whether courts are concerned with giving effect to the plaintiff's primary right or secondary right, or with awarding a remedy that is not logically informed by such pre-trial rights at all. This trichotomy is capable of informing the choice of law rules that ought to apply to resulting and constructive trusts. In relation to those trusts that are replicative in nature, the 'issue' that calls for classification is to be found in the primary right-duty relationship between the parties and the events that give rise to it. Thus, for example, should the relationship arise from what is functionally a contract, express trust, or property relationship, then the relevant category of choice of law rules ought to apply. In relation to those trusts of a reflective nature, the primary relationship whose breach gives rise to the plaintiff's secondary right should first be examined to see if it fits within a pre-existing choice of law category. Only where it does not should the case attract the choice of law rules applicable to tort claims, because the function of the law of tort is to identify wrongs. Finally, because transformative trusts are imposed as a remedy without being directly informed by the parties' pre-trial rights and duties, they fall to be characterised as a *remedy*, to which the *lex fori* ought always to apply.

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[176] See above n 9.