The constructive trust is often used as a remedy in cases of unjust enrichment. Where it is employed, specific property owned or possessed by the defendant is impressed with a trust in favour of the constructive trust beneficiary, thereby removing that property from the defendant's estate. The remedy therefore has the effect of securing the plaintiff's claim. Despite this, courts have yet to establish a principled basis for deciding to award this priority in particular cases. In this article the author examines a number of principles that can be consulted to determine whether the remedial constructive trust should be employed in preference to a personal remedy in cases of unjust enrichment.

Introduction

A plaintiff who requests a "remedial constructive trust" seeks a declaration that he has a beneficial interest in specific property owned, or in the possession of, a defendant who has been unjustly enriched by that ownership or possession. If successful, the relief that the plaintiff obtains is proprietary in the sense that it gives the successful plaintiff rights in the specific property which are good, not only against the defendant, but also against most others, including and most especially, the general creditors of the defendant.

Even if the plaintiff secures the remedy, the defendant does not become a trustee in the ordinary sense of the term. According to the
American view, he is not even a fiduciary, although the Canadian position appears to be otherwise. Even if the constructive trustee is a fiduciary, he does not assume the usual obligations of an express trustee for he is not expected to manage or even to hold the property. His basic duty is to transfer nominal title in the property to the plaintiff who receives the declaration, although in practice, the plaintiff will often receive money rather than a conveyance.

According to the prevailing view, the constructive trust arises at the time that the duty to make restitution does, namely, when the unjust enrichment occurs. Yet, a court has a discretion whether to order the defendant to assume the status of a constructive trustee. Other remedies, such as monetary damages, may also be available to rectify situa-

3 There is a tendency developing in constructive trust cases to dub the constructive trustee a fiduciary. The trend began with the English decision, Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd. [1981] Ch. 105, [1979] 3 All E.R. 1025 (Ch. D.), where it was held that a person who receives money paid under a mistake of fact is under an equitable obligation as a matter of conscience to return the money, which renders him a fiduciary. This analysis has been extended to Canada to declare as fiduciaries persons who have received money where the purpose for its payment had failed, Yorkshire Trust Co. v. Empire Acceptance Corporation Ltd. (1983), 44 B.C.L.R. 334, 13 E.T.R. 189 (B.C.S.C.), and persons who have received money paid under compulsion which, in equity they cannot keep, Phoenix Assurance Co. of Canada v. Corp. of City of Toronto (1981), 35 O.R. (2d) 16 (Ont. H.C.), affirmed on another point (1983), 39 O.R. (2d) 680 (Ont. C.A.), and Zaidan Group Ltd. v. City of London (1987), 58 O.R. (2d) 667 (Ont. H.C.), affirmed (1988), 64 O.R. (2d) 438 (Ont. Div. Ct.).
5 This will occur often in cases, such as those involving the division of property between spouses, where the constructive trust order declares the defendant to hold a portion of the value of an asset as constructive trustee. A sale of the assets and a division of the proceeds will be required to give effect to the order. It will also occur, of course, where the property in dispute is money. Since the payment need not be in the same bills that are traced, courts will analyze the case in constructive trust terms, only to order the payment of a sum of money rather than a conveyance. See, for example, Zaidan Group Ltd. v. City of London, supra, footnote 3. This does not deprive the order of its proprietary effect for, in cases where the defendant is insolvent, the constructive trust order will have the effect of removing the relevant sum from the estate of the defendant in favour of the plaintiff, thereby giving the plaintiff a priority over the defendant’s other creditors. See, for example, Phoenix Assurance Co. of Canada, supra, footnote 3; Re Attorney General of Canada and Northumberland General Insurance Co., supra, footnote 3; McDonald v. McDonald (1988), 11 R.E.L. (3d) 321 (Ont. H.C.).
tions of unjust enrichment." Thus, the constructive trust exists whether or not the plaintiff succeeds in obtaining specific relief.

There has been a great deal written about the remedial constructive trust, and it is commonly employed by Canadian courts. Despite this, we have yet to develop a firm understanding of the principles upon which the discretion to award a constructive trust should be exercised. This is, in part, because the language of "constructive trust" has been employed in a variety of contexts leaving both the meaning of the term and the relevant principles unclear. Of more significance is that the "constructive trust" is seen to be "the formula through which the conscience of equity finds expression". Since the "touchstone" of equity is understood to be "good conscience and fairness", courts are reluctant to make global generalizations. The authority, therefore, often appears to be result oriented, providing little guidance for future cases and, occasionally, producing what are, to my mind, undesirable results. In this article I examine a number of principles that can be consulted to decide

In Rawluk v. Rawluk (1987), 10 R.F.L. (3d) 113 (Ont. C.A.), the court held that the trust may arise either at the outset, or later on, as circumstances may require. This view is based on the judgment of Lord Denning in Hussey v. Palmer, [1972] 1 W.L.R. 1286, [1972] 3 All E.R. 774 (C.A.) in which Lord Denning attempted to introduce the American concept of the remedial constructive trust into English law. His decision has been widely criticized on the footing that the statements of law "are too sweeping, are made in defiance of established principles and fail to set limits on a very broad and powerful remedy": Oosterhoff and Gilles, op. cit., p. 384, and see footnote 37 where the authors list some of the commentators who have presented these criticisms of the judgment.

Apart from being used in connection with a variety of cases where specific recovery is ordered by courts of equity, the term has been employed to describe the process of tracing which may produce, by way of remedy, an equitable lien (McClean, loc. cit., footnote 6, at p. 175, sees this as a possible reading of the judgment of the court in Pettkus v. Becker, [1980] 2 S.C.R. 834, (1980), 117 D.L.R. (3d) 257); or to describe the status of a defendant who does not have possession of or title to property but who is treated as a trustee for the purpose of having to account to a plaintiff for profits, or to contribute money to the plaintiff because of his loss. The use of the term in this latter context has been criticized because of the potential for its proprietary connotation to mislead. See Oosterhoff and Gilles, op. cit., footnote 6, p. 578; R. Sullivan, Strangers to the Trust (1986-1988), 8 E.T.Q. 217, at p. 217.

whether constructive trust relief is appropriate. These principles should be consulted whenever a court is called upon to decide whether to remedy a defendant's unjust enrichment claim with a constructive trust order.

What makes the establishment of a principled basis for the application of the remedial constructive trust so important is that the remedy confers, to the same extent that an express trust does, a beneficial interest in the property which is made the subject matter of the trust. This has the effect of giving the plaintiff the status of a secured creditor with respect to the constructive trust property. In my opinion this status is not warranted in every case of unjust enrichment. For this reason, the constructive trust "cannot be viewed in isolation but must be examined in the context of priority issues at large". As Goode warned, "[t]o strengthen the equitable right to trace by expanding the constructive trust along American lines is ... to tinker with a problem of much wider implications".

In the pages that follow I will identify those implications and I will offer a number of suggestions for dealing with them. In general, I will argue that different principles should be applied in spousal cases than in commercial cases, and I will suggest that a number of equity's traditional maxims and rules provide unsuitable bases for the identification of the principles that should be consulted in deciding whether to award constructive trust relief. It will also be urged that, while the formula for unjust enrichment fails to identify every case where constructive trust relief is appropriate, its faithful employment goes a long way to eliminating the improper application of the remedy.

Before proceeding further it is necessary to digress and to deal with a controversy that is basic to this article. The view I take is that the constructive trust that is used to remedy unjust enrichment must be distinguished from the other types of constructive trusts known to Canadian law prior to 1980. This view is not universally held. It is not the

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14 Ibid.

15 For a description of most of the established categories of constructive trust, those which I would not consider to be remedial, see McCamus, op. cit., footnote 8, pp. 94-110. See generally, Waters, op. cit., footnote 4, and A.J. Oakley, Constructive Trusts (1978).

For a discussion of the principles to consult in determining whether constructive trust relief is appropriate for breach of a fiduciary duty, see T.G. Youdan, The Fiduciary
American position.\textsuperscript{16} Indeed, there are those who contend that, since the decision in \textit{Pettkus v. Becker},\textsuperscript{17} it must be understood that, even in Canada, there is but one type of constructive trust, the remedial constructive trust, and that it has subsumed the more established constructive trust variants.\textsuperscript{18}

This debate can be carried on at the theoretical level by using the language and definitions of "institutional" and "remedial" trusts.\textsuperscript{19} Yet, I do not think that to do so would be any more helpful than Austin's \textit{in rem} and \textit{in personam} definitions were to understanding the true nature of an express trust.\textsuperscript{20} In truth, even the "remedial constructive trust" that I refer to throughout this article is not truly "remedial".\textsuperscript{21} My point is simply that there are a number of so called constructive trusts that are distinguishable in fundamental respects.

\begin{itemize}
  \item \textsuperscript{16} See Seavey and Scott, \textit{loc. cit.}, footnote 4, at p. 41. For a contemporary description of the American perspective through the eyes of a Canadian, see Dewar, \textit{loc. cit.}, footnote 8, at p. 266.
  \item \textsuperscript{17} \textit{Supra}, footnote 9.
  \item \textsuperscript{18} For example, Oosterhoff and Gillese, \textit{op. cit.}, footnote 9, pp. 578-579; \textit{Lake Mechanical Systems Corporation v. Crandell Mechanical Systems Inc.} (1985), 9 C.C.E.L. 52 (B.C.S.C.). McClean, \textit{loc. cit.}, footnote 6, at p. 167, interprets \textit{Pettkus} as holding that all constructive trusts are now to be treated as specific examples of the operation of the principle of unjust enrichment (which he does not find satisfactory) although he suggests that it is wrong to consider there to be only one type of constructive trust.
  \item \textsuperscript{19} To say that a trust is institutional is to suggest that it "arises as a necessary consequence . . . whenever certain facts, which are recognized by law as being essential to the creation of the trust, are found to exist" and its existence automatically brings about pre-determined legal consequences. See Dewar, \textit{loc. cit.}, footnote 8, at p. 265, note 4. See also R. Pound, The Progress of Law, 1918-1919 (1919-20), 33 Harv. L. Rev. 420, at p. 421, and Waters, \textit{op. cit.}, footnote 14, pp. 9-23. A "remedy", on the other hand, is a particular consequence selected by an adjudicative body to give effect to a legal right which exists apart altogether from the remedy.
  \item \textsuperscript{21} If it was truly remedial the trust would not arise until the declaration of the court had been made and the status of constructive trust beneficiary conferred. See, also, \textit{McDonald v. McDonald, supra}, footnote 6, and J.G. McLeod, Annotation (1988), 11 R.F.L. (3d) 322, where it was held that the constructive trust could be raised by the husband, the constructive trustee. The husband wished to raise the trust to establish a proprietary interest in his wife in a business which had declined in value since the valuation date for the equalization of net family property. As a result, the wife would share in the decline in value after the separation, and would get less than if her claim was for an equalization payment based on the value of the business at the time of separation. If the constructive trust was remedial only, the husband could not have raised it to his advantage.
\end{itemize}
There are essentially two things that distinguish the constructive trust that I am speaking of from the other forms of constructive trust. First, before a court considers whether to award this form of constructive trust it must make a finding that there has been unjust enrichment according to the formula adopted by the majority in *Pettkus v. Becker.*

This requires a court to find that there has been:

1. an enrichment of the defendant,
2. a corresponding deprivation experienced by the plaintiff, and
3. the absence of any juristic reason for the enrichment.

This formula is simply not employed, nor is it appropriate, in deciding whether any of the other constructive trusts exist. Each of the traditional categories of constructive trust employ its own specific criteria. It makes no sense to abandon these precise indicia in favour of the more general formula developed in *Pettkus.* Indeed, if the formula of unjust enrichment is applied honestly, it would change dramatically the appearance of many of these conventional constructive trusts. For example, in the largest traditional category, the fiduciary constructive trust, there need be no deprivation experienced by the particular plaintiff. The constructive trust is imposed to raise the morality of the marketplace generally, with the beneficiaries of some of these trusts receiving what can only be described as a windfall. Whether this policy is advisable or not, it is unlikely that the Supreme Court of Canada intended to reverse it indirectly by its comments in *Pettkus.*

The second feature that distinguishes what I call the “remedial constructive trust” from these traditional categories is its discretionary nature. The plaintiff has no real rights arising from the so-called trust until he secures a declaration. This is not true of the more established constructive trust models. For example, an express trustee is a trustee of property acquired by him through the use of his trusteeship whether or not a court so declares, and the declaration confers no entitlements on the beneficiary that he did not already have. The only issue for the court is whether those criteria exist, on the facts, to give rise to the constructive trust.

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22 Supra, footnote 9. For the clearest example of this two stage analysis see *Sorochan v. Sorochan,* supra, footnote 7. Occasionally, the two inquiries are merged together, inappropriately, as they were in *Yorkshire Trust Co. v. Empire Acceptance Corporation Limited,* supra, footnote 3, at p. 361.

23 See Oakley, *op. cit.,* footnote 15.

24 See McClean, *loc. cit.,* footnote 6, at p. 168.


The Remedial Constructive Trust

trust in question. If so, the right to be treated as a trust beneficiary in connection with that property is established.

It follows that when the court in Pettkus said that the "principle of unjust enrichment lies at the heart of the constructive trust", it was speaking of that principle in the broad sense of "the ties of natural justice and equity", and not of the specific formula it was later to articulate for identifying the existence of a right to restitution.\(^{28}\) As Professor McClean said shortly after the decision in Pettkus v. Becker was rendered:\(^{29}\)

Even though all constructive trusts may be referable to some general principle of preventing unjust enrichment, some may indeed create a conventional trust; others may result simply in the transfer of title. The exact nature . . . will depend upon the type of constructive trust that has arisen.

I. Wider Implications: The Problem of the Creditors of the
Constructive Trustee

The remedial constructive trust will have the effect of giving the constructive trust beneficiary a priority over the unpaid general creditors of the constructive trustee with respect to the trust property. This is because its effect is to recognize the plaintiff as the beneficial owner of the property, thereby removing it from the constructive trustee's estate, and hence from the reach of his creditors. If the trust property is used by the constructive trustee for the payment of his debts before the beneficiary can realize upon it, however, the beneficiary's interest may be defeated. This is because creditors who in good faith and without notice of the trust accept trust property in satisfaction of their debts are bona fide purchasers for value without notice.\(^{30}\) Secured creditors may also be bona fide purchasers for value without notice, so those who receive security interests in the trust property may have rights in the trust property superior to those of the constructive trust beneficiary.\(^{31}\) Thus, where a constructive trustee is insolvent, a declaration of constructive trust

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\(^{29}\) McClean, loc. cit., footnote 6, at p. 168.


\(^{31}\) Oosterhoff and Gilsele, op. cit., footnote 9, p. 58. And see Cave v. Cave (1880), 15 Ch. D. 639 (Ch. D.). Even where the secured creditor might not be a bona fide purchaser for value without notice in equity, statutory regimes relating to land have the effect of giving the secured party a priority interest where the secured party does not have actual notice of the beneficiary's competing interest; Rose v. Peterkin (1875), 13 S.C.R. 677; City of Toronto v. Jarvis (1895), 25 S.C.R. 237. For a case where a remedial constructive trust would have been ordered but where it was defeated by a registered interest, see Re King and McMillan (1982), 137 D.L.R. (3d) 368 (Ont. H.C.).
turns the unpaid general creditors of the constructive trustee into the real losers.\footnote{32}

Concern has been expressed by a number of authors that this result is not always justified.\footnote{33} It violates the basic policy that "insolvency should create equality in creditors",\footnote{34} that "property . . . in liquidation should be applied in satisfaction of its liabilities pari passu".\footnote{35} This policy has such appeal that it has been speculated that, had statutory regimes not been created to implement it, equity would have developed rules relating to the equal distribution of assets.\footnote{36} It seems that the force of this policy focuses the burden of persuasion squarely on those who would give priority to remedial constructive trust beneficiaries.

The priority that the constructive trust beneficiary has over unpaid general creditors with respect to the constructive trust property is traditionally defended on two grounds: the "proprietary interest" justification and the "acceptance of risk" explanation. In the context of the remedial constructive trust, the proprietary interest justification proves on examination to do no more than mask complex policy issues, while the acceptance of risk explanation requires serious qualification before it is at all persuasive.

\footnote{32} Where the constructive trustee is bankrupt and the declaration of constructive trust has not yet been made, it may be that the interests of the general creditors can be taken into account so as to deprive a plaintiff of constructive trust relief. In Bedard v. Schell (1987), 59 Sask. R. 71 (Sask. Q.B.), it was held that, pending the declaration, property is not "held by the bankrupt in trust for any person" and therefore was not exempt from the bankrupt's estate under s. 47(a) of the Bankruptcy Act, R.S.C. 1970, B-3. A plaintiff therefore requires leave under s. 49(1) to maintain the constructive trust action, and the judge, in deciding whether to grant leave, can take into account the interests of the general creditors. It has to be wondered whether this decision is correct given that the constructive trust is considered to arise at the time of the unjust enrichment. See the discussion supra, footnote 6.


\footnote{34} Note, Must the Remedy at Law Be Inadequate Before a Constructive Trust Will Be Impressed? (1950-51), 25 St. John's Law Rev. 283, at p. 290.


A. The Proprietary Interest Justification

According to this view, the priority of the constructive trust beneficiary is warranted generally because, in the eyes of equity, the property has been his since the unjust enrichment of the defendant occurred, even though title or possession has been in the defendant.\(^\text{37}\) Since the asset in question does not belong benefitically to the defendant, to use it to pay general creditors of the defendant would be to enrich unjustly those creditors.\(^\text{38}\)

Goff and Jones have pointed out that there is a difference between a "pure proprietary claim", where the plaintiff's call on the conscience of equity is that the defendant has property that was, as a matter of title, his own, and a "restitutionary proprietary claim", in which the plaintiff suggests that, as a matter of equity, the property should be considered to be his.\(^\text{39}\) Where a plaintiff is asserting a pure proprietary claim, the proprietary interest justification is compelling.\(^\text{40}\) The existence of a proprietary interest arising from a remedial constructive trust, on the other hand, is not an independent fact from which legal significance can be culled; the decision to give a plaintiff a proprietary interest is itself based on the conviction that it is fair or appropriate to do so. Consequently, in the context of the remedial constructive trust, the view that the existence of a proprietary interest justifies the beneficiary's priority does no more than beg the question as to what it is that makes giving the beneficiary a proprietary interest appropriate in the first place.\(^\text{41}\) As Waters has said:\(^\text{42}\)

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\(^{38}\) It is sometimes stated that it would enrich the defendant since his debts are reduced through the use of the property of another. See Palmer, \textit{ibid}. This is an inappropriate general characterization since the defendant who uses another's property to pay his creditors will simply have replaced the creditors with the plaintiff, and will have been in no substantial sense enriched. If the repaid debt was secured, the plaintiff would have the remedy of subrogation.


\(^{40}\) This is why the proprietary interest justification is persuasive in the context of the decision in \textit{Kimwood Enterprises Ltd. v. Roynat Inc.}, [1985] 3 W.W.R. 67 (Man. C.A.). Despite the fact that the court applied the remedial constructive trust formula in rendering its decision, the plaintiff's claim was a pure proprietary one and not merely a restitutionary proprietary one. The money used to pay the taxes of the defendant was, under the terms of an express trust, money which belonged beneficially to the plaintiff.

\(^{41}\) Indeed, Goode makes the point that even if proprietary relief is appropriate as between the plaintiff and the defendant, it may not be equitable to give a priority to the plaintiff over the defendant's general creditors; Goode, \textit{loc. cit.}, footnote 13, at p. 568.

Dobbs notes, too, that it might be appropriate to impose a constructive trust where its only effect is to give the plaintiff his property, but to deny such relief where its effect would be to work an unwarranted preference over general creditors; Dobbs, \textit{op. cit.}, footnote 37, p. 246.

\(^{42}\) Waters, \textit{in Youdan, op. cit.}, footnote 33, at p. 426.
It is easy enough to say that A's creditors advanced credit at risk and should not benefit as the result of A's unjust enrichment at the expense of B, a benefit which would constitute in their hands a mere windfall, but the spotlight is now on the issue of what it is that makes the enrichment unjust.

One commentator has made much the same point in the American context. In allowing preferences courts are not acting upon strict doctrinal rules. They are making policy choices "with an eye on the morality of the thing, . . . with a thought only of justice in its broad sense". 43

It is evident that the Supreme Court of Canada did not feel that giving the preferred status of a constructive trust beneficiary to all victims of unjust enrichment represents appropriate policy. 44 By separating the inquiry of whether a remedial constructive trust should be ordered from the decision as to whether there has been an unjust enrichment, the court has indicated that the unjust enrichment formula does not automatically identify those cases where specific relief, and inferentially, the preferable position it entails, will be systematically just, moral and appropriate. 45 It follows that those principles and policies which warrant priority for constructive trust beneficiaries, whatever they may prove to be, contemplate a smaller set of cases than the formula for unjust enrichment would include, and that the proprietary interest rationale has no place in the remedial constructive trust debate.

B. The Acceptance of Risk Explanation

It is sometimes said that the defendant's general creditors have accepted the risk of the defendant's insolvency by dealing with the defendant without taking security. 46 By contrast, it is said, persons who are beneficiaries of a trust do not accept that risk. As a result, it is appropriate to protect beneficiaries in situations of insolvency, while permitting general creditors to bear the burden. Indeed, it has been argued that this is particularly so given that the general creditors could have gained priority over the constructive trust beneficiaries by taking security in that property as bona fide purchasers for value. 47

44 Waters has queried whether the formula for identifying cases of unjust enrichment itself provides a principled basis for identifying cases where preference is appropriately granted to the constructive trust beneficiary; Waters, in Youdan, op. cit., footnote 33, at p. 426.
45 For a clear example of the separation of those inquiries, see Sorochan v. Sorochan, supra, footnote 7.
46 In Re Kountze Bros., 79 F. 2d 98, at p. 102 (2nd Cir., 1935), cert. denied, 296 U.S. 640 (1935); Palmer, op. cit., footnote 12, para. 2.14, p. 185; Hanbury, Maudsley and Martin, op. it., footnote 20, p. 660; Oosterhoff and Giliese, op. cit., footnote 9, p. 89; Goff and Jones, op. cit., footnote 39, pp. 79. 115.
47 Oosterhoff and Giliese. ibid., p. 580.
In fact, not all general creditors have accepted the risk of the defendant’s insolvency. It is not true of judgment creditors who have been victims of tortious conduct by the defendant, or of employees for whom the taking of security is not an option. Moreover, it is a harsh characterization with respect to small trade creditors for whom expensive searches and security arrangements would not be feasible. There is therefore a disquieting artifice to the general assumption. Despite this, it may be necessary to act on this assumption in the interests of developing realistic general rules.  

Even if we are prepared to assume that general creditors must be taken to have accepted that they would bear the risk of insolvency, however, it is undoubtedly the case that some potential constructive trust beneficiaries have equally accepted that risk. It follows that the “acceptance of the risk” justification is persuasive only in those cases where the constructive trust beneficiary was not himself prepared to accept the risk of the defendant’s insolvency. Moreover, even where the potential constructive trust beneficiary has not accepted that risk, other considerations may make it inappropriate to give him specific relief. Precise principles are required to ensure that the acceptance of risk explanation does not over-extend itself.

II. Principles for Identifying Constructive Trust Relief

A. Distinguishable Situations: The Family and the Commercial Setting

In the United States the remedial constructive trust grew, along with the law of restitution, out of commercial relationships. In Canada, on the other hand, it flowered in the family law context as a mechanism for the division of property upon marriage breakup. In those family cases where there has been a finding of unjust enrichment the constructive trust is all but the automatic remedy. This tendency must be avoided in the commercial sphere. In my view, to achieve appropriate results, courts must apply different principles, or at least apply the same principles differently, in these distinguishable settings. In short, courts should be

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48 The alternative is to develop a priority scheme which would give a remedial constructive trust beneficiary priority over those creditors who did accept the risk, but not over those who did not. The practical implications of such a rule are horrendous enough to eliminate it.

49 See the discussion infra, the text at and following footnote 140.

50 See the discussion infra, the text at and following footnote 144.

51 There is little mention of spousal cases in the American Law Institute, op. cit., footnote 2, or in Palmer, op. cit., footnote 12.

52 How does one distinguish between spousal and commercial constructive trust claims given that the claims of many spouses arise out of commercial activity carried on with a spouse? In my view, any constructive trust claim brought by one spouse against another is a spousal claim, even though it relates to a commercial undertaking. Joint commercial ventures by spouses stand on a different footing from arm’s length commer-
much more inclined to order specific relief in the context of spousal disputes, and much less inclined to do so in commercial cases.

The Supreme Court of Canada, in its leading cases dealing with the remedial constructive trust, recognized this distinction. In Petkus v. Becker, Dickson C.J.C., on several occasions, placed the particular issue before him in the spousal context, suggesting that the finding he made depended to a significant degree on the fact that the unjust enrichment arose out of that form of relationship. In Sorochan v. Sorochan, the court approved of Cory J.A.'s caveat in the Ontario Court of Appeal case of Murray v. Roty that "it may be important to distinguish commercial cases from those arising in the context of the family".

The reasons for this distinction are compelling. In spousal cases a general policy of division of property upon marriage dissolution had developed, both statutorily and through judicial initiative. Consistent with that policy, courts had been awarding specific relief for some time by employing a discreditable resulting trust analysis. The remedial constructive trust was adopted in an effort to legitimize that process. It was therefore used less as a means to determine whether to grant specific relief than as a mechanism for explaining the specific relief that courts had already been awarding. The spousal cases must be understood in this historical setting for which there is no parallel in the commercial sphere. Indeed, in commercial cases there has been for some time a healthy tendency among courts to be sceptical of the efforts of parties to employ equitable doctrines to secure priority over other creditors, where that priority had not previously been negotiated.
The benevolent treatment of spousal property claims is easy to appreciate. In the spousal context, the parties enter into what is now understood to be a social partnership where there are expectations that both life and life-style will be shared. Relationships are ordinarily based upon a complete and personal commitment that is initially intended by the parties to be of a permanent character. As a result, spousal relationships are typically established and maintained with little formality, and little real negotiation about how property is to be divided in the event of dissolution. The fair treatment of the parties to such relationships, and the maximum salvage of shared future expectations have broad social policy implications which go beyond the usual commercial considerations.

The other side of the coin is that in the commercial context, parties are expected to protect their interests contractually, and if there are partnership or acquisition of title expectations it is anticipated that these will be provided for specifically. Moreover, the plaintiff has to contend with the force of general considerations which militate against proprietary relief. In particular, there is the familiar concern that the efficiency of commerce depends upon security of title and protection of third parties.

59 See, for example, Murray v. Roty, supra, footnote 55, at pp. 444 (D.L.R.), 711 (O.R.), where the court emphasized in ordering a constructive trust that "Charlotte Murray believed that they were working towards common goals". Similarly, in family cases, a relevant consideration in deciding whether to award a constructive trust is the duration of the relationship; Sorochan v. Sorochan, supra, footnote 7, at pp. 53 (S.C.R.), 12 (D.L.R.). Indeed, in Sorochan the court distinguished the earlier case of Beard v. Beard, [1982] 1 S.C.R. 282, affirming (1980), 35 A.R. 448 (Alta C.A.), in which a constructive trust was denied, in part on the basis that to deny the remedy in Beard did not leave the plaintiff with nothing since title to the property had been distributed unevenly. This illustrates the extent to which the doctrine is used to accomplish a division of family assets.

60 See McCamus, op. cit., footnote 8, p. 114, and Klippert, op. cit., footnote 11, p. 197, where similar points are made.


62 The impact of these considerations has been emphasized by Goode, who maintains that, "in commercial transactions the need to protect the free flow of assets in the stream of trade overrides the principle that proprietary rights should be protected"; Goode, loc. cit., footnote 13, at p. 568. The same point was made by Lindley L.J. in Manchester Trust v. Furness, [1895] 2 Q.B. 539, at p. 545 (C.A.), and see also Goodhart and Jones, loc. cit., footnote 35. See also, Royal Bank of Canada v. 216200 Alberta Ltd., supra, footnote 58, in the context of a constructive trust claim.
from undisclosed charges. Reasonable investigation is less likely to reveal an unjust enrichment arising in the commercial sphere than it is to reveal a spousal claim. After all, it is easier to inquire into the spousal status of the debtor and to have the spouse subordinate any claim that he or she might have, than it is to obtain information about, and to attempt to assess, the potential claims arising out of the various and sundry commercial dealings of a party.

It follows, in my view, that whereas there are compelling reasons for the ready invocation of the constructive trust in cases of the unjust enrichment of a spouse, competing considerations counsel caution in the commercial context.

B. The Use of Equitable Principles and Rules in Applying Constructive Trust Relief

The remedial constructive trust is a creature of equity. This suggests that conventional equitable principles should be consulted to determine whether the constructive trust should be applied. It has been suggested with respect to the provision of specific relief, however, that the law is in an unsatisfactory state because equitable principles have been molded by fiduciary obligation and the concept of the trust. Those principles are said to be "intrinsically unsuitable as a medium for resolving competing interests in commercial assets". In my view this is largely correct, and the same can be said of the use of those principles in the spousal context. As a result, sound policy may require that equitable principles be compromised. This can be done legitimately without legislative intervention. Where the principle emerged because of the historical relationship between law and equity, the partial merger of the two streams of jurisprudence can be called into aid to discount the principle. Moreover, the law of restitution borrows from each of the legal and equitable

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64 Goodhart and Jones, loc. cit., footnote 35, at p. 491.
65 See Klippert, op. cit., footnote 11, p. 197. Goode has also argued that extra caution must be utilized in commercial cases because "it is in the sphere of business rather than private dealings that priority rules affecting personal property have their greatest impact"; loc. cit., footnote 13, at p. 565.
66 Robert Goff and G. Jones, The Law of Restitution (2nd ed., 1978), p. 60. This point is not made in the third edition of the book where the authors call into aid the fusion of law and equity in an effort to discredit the fiduciary requirement in equitable tracing cases; see Goff and Jones, op. cit., footnote 39, pp. 77-81.
68 Similar considerations are contributing to improvement in the law relating to specific performance. See R.J. Sharpe, Injunctions and Specific Performance (1983), p. 279.
jurisdictions, and represents a hybrid branch of the law of obligations. With the development of a general formula for identifying unjust enrichment, the distinction is becoming even more blurred than it was after the passage of the Judicature Acts. This has contributed to the fact that both Canadian and American courts are attempting to employ the constructive trust remedy to accomplish fairness, with less than meticulous regard for traditional equitable principles.

There is much in these principles, however, that is sustained as a matter of good sense and conscience, which can be used to provide a principled basis for awarding specific restitution through the device of the constructive trust.

1. The Title Requirement

Since an express trust operates to require the nominal title holder to use the incidents of ownership for the benefit of the beneficiary, it is a self-evident precondition of the trust that the trustee have title to the trust property. This has caused the belief in some that a constructive trust can be used only where the defendant holds title to the property; his possession of property alone is insufficient. The prevailing American view now appears to be that the constructive trust can be used as a remedial device to accomplish specific restitution whenever that result is appropriate, regardless of title, since the trust is merely a fiction.

It has been suggested persuasively that the requirement of nominal title in the constructive trust should be abandoned "as an unwarranted hangover of the historical connection between the constructive trust and the express trust", and it has been illustrated that steps have already been taken by Canadian courts in this regard.

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69 See Seavey and Scott, loc. cit., footnote 4, at p. 32, and McCamus, op. cit., footnote 8, p. 90, for discussions of the jurisdictional origin of many of the various restitutionary claims.

70 See Klippert, op. cit., footnote 11, p. 182.

71 See Palmer, op. cit., footnote 12, para. 4.7, p. 434.

72 It has been suggested, however, that the jurisdictional origin of the restitutionary claim may be critical in determining the relief. Professor McClean has suggested that where the nature of the restitutionary claim is purely equitable, the constructive trust will in fact be the only remedy available; McClean, loc. cit., footnote 6, at p. 171. Klippert, op. cit., footnote 11, p. 233, takes a similar approach.

73 See, for example, The American Law Institute, op. cit., footnote 2, para. 160, commentary j, p. 649; Note, loc. cit., footnote 34, at p. 286.

74 Palmer, op. cit., footnote 12, p. 1; Dobbs, op. cit., footnote 37, p. 246.

2. The Equitable Doctrine of Tracing: Its Relationship to the Remedial Constructive Trust

The remedy of tracing provides a plaintiff with the specific recovery of property. In equity, a plaintiff could traditionally use the remedy only where he held a beneficial interest in the property and where the property remained identifiable or ascertainable in the defendant's hands.76 Not surprisingly, because they are each means to obtain specific recovery there has been a destructive tendency to confuse the distinct remedy of equitable tracing with the constructive trust, with the effect that the development of the constructive trust has been hindered.77

(a) The Beneficial Interest—Fiduciary Requirement

The equitable tracing prerequisite of a beneficial interest has two aspects. First, it means that the plaintiff has to have a proprietary interest in the property. Secondly, it means that the proprietary right has to be equitable. Each of these aspects is satisfied where the property was, at a given point in time, held on behalf of the plaintiff by someone who stood in a fiduciary relationship to the plaintiff.78

Each of these requirements are inappropriate for consideration as guiding principles in the context of the constructive trust. Given that the formula for identifying unjust enrichment is intended to identify restitutio nary proprietary claims,79 the requirement of a "pure" proprietary interest in the beneficiary is irrelevant to the imposition of a remedial constructive trust. The proprietary interest associated with the remedial constructive trust arises, for the first time, as a result of the imposition of the trust.

The fiduciary requirement, in turn, reflects an insecurity over the scope of equity's jurisdiction. As Waters has explained, the requirement was retained because the fiduciary relationship was the traditional basis for equity's jurisdiction prior to the Judicature Acts.80 With the partial fusion of legal and equitable jurisdictions, the requirement is much less compelling than it may once have been.81 It has therefore been described

(P.E.I.S.C.), where the court considered the application of a constructive trust even though the potential constructive trustee did not have title to the property.


77 See Goff and Jones, op. cit., footnote 39, pp. 77-78, and Dewar, loc. cit., footnote 8, at pp. 270-272, where this point is made.

78 Hanbury, Maudsley and Martin, op. cit., footnote 20, p. 666.

79 See the discussion supra, the text following footnote 36.

80 Waters, op. cit., footnote 76, p. 1044.

81 See Hanbury, Maudsley and Martin, op. cit., footnote 20, p. 667.
as "a requirement of precedent and not of principle". Substantial inroads have been made into the fiduciary requirement. Indeed, there is no mention of it in Pettkus v. Becker where a constructive trust was imposed despite the absence of a fiduciary relationship. It has therefore been suggested that the recognition of the remedial constructive trust should eliminate the need for the fiduciary requirement, and its continued vitality in the context of the doctrine of equitable tracing is in doubt.

(b) The Identification or Ascertainment of the Property

The remaining "traditional" elements of the equitable tracing remedy are the "separate property requirement" and the "identifiability requirement". The separate property requirement necessitates that, at least initially, the fiduciary hold property, separate and apart from his own, in which the claimant has equitable title. The identifiability requirement ensures that the property remain identifiable in the defendant's hands. These requirements are intended to justify the proprietary remedy by ensuring that there is a substantial link between the plaintiff and the property that is recovered in specie.

The separate property requirement distinguishes the plaintiff from the defendant's general creditors on the basis of the proprietary interest rationale. Since that rationale is inappropriate to the determination of when constructive trust relief is appropriate, it follows that the precondition is itself inappropriate unless it can be supported on some other basis. It cannot be. Indeed, there is reason to reject it. The unjust enrichment formula requires that there be the absence of a juristic reason for the enrichment of the defendant. This will mean that there is typically no prearranged obligation under which the initial holder is to keep the property separate and apart from his own. The requirement is therefore unsuitable to the remedial constructive trust.

The identifiability requirement stands on a different footing. The Supreme Court of Canada has indicated that there must be a factual

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82 Waters, op. cit., footnote 4, p. 19.
84 Supra, footnote 9.
85 McCamus, op. cit., footnote 8, p. 118.
86 See Waters, op. cit., footnote 76, p. 1044; Oosterhoff and Gillese, op. cit., footnote 6, p. 728.
87 Waters, ibid., p. 1038; Kelly, loc. cit., footnote 76, at p. 96.
88 Waters, ibid.
89 See the discussion supra, the text following footnote 36.
connection between the constructive trust property and the unjust enrichment. The court described it in these terms:90

[T]here should be a "clear link between the contribution [of the plaintiff] and the disputed asset". The question of a connection between the deprivation and the property is further explained as "an issue of fact". That is, courts must ask whether the contribution is "sufficiently substantial and direct" to entitle the plaintiff to an interest in the property in question.

The need for factual identifiability is obvious if proprietary relief is justified according to the proprietary interest rationale; the property is awarded as the property of the plaintiff and it must, of course, be identified as such. But if the proprietary interest rationale is unconvincing in the context of the remedial constructive trust, what, if anything, is left to bolster the requirement? An argument can be made to the effect that once the proprietary interest rationale is discarded, it is arbitrary to require identifiability.

The arbitrariness argument is premised on the fact that a defendant is equally enriched whether or not that enrichment can be identified in specie. Any enrichment will have, as a matter of fact, swollen the general value of his asset pool.91 And, if the priority that a proprietary remedy gives to the plaintiff is justified, as it should be, according to the nature or source of the claim rather than on a pro forma recognition that the claim of the plaintiff is proprietary in nature, why should that priority disappear simply because it so happens that the property can no longer be identified? Goff and Jones argue that where a claim is restitutionary, "[i]t is the nature of the particular claim which creates both the equitable interest and the preference"; therefore the plaintiff's preference over general creditors should not disappear with the traceability of the property.92

This argument has persuaded some courts to grant proprietary relief to a plaintiff in an unjust enrichment claim even where factual tracing is


91 The so-called "swollen asset theory" has been challenged, primarily on the basis that along with the unjust enrichment comes an additional obligation of the same amount to provide restitution to the plaintiff. It follows that the asset pool has not been swollen at all. See Annot., 82 American Law Reports 46 (1933). This is no doubt true, but the ability to discount the enrichment of the defendant by making a notional paper entry based on a personal obligation to pay the plaintiff does little to enlighten us as to whether proprietary relief might not be an appropriate way to reduce the "swelling". If the defendant's obligation to the plaintiff remains personal and ranks pari passu with the other general creditors of an insolvent defendant, then the share realized by the plaintiff will be smaller than the defendant's obligation to pay, while that of the other creditors will have "swelled" because of the enrichment.

92 Goff and Jones, op. cit., footnote 39, p. 80. In the second edition, the learned authors argued that equitable tracing rules may be important in identifying property which should be made the subject of proprietary relief; Goff and Jones, op. cit., footnote 66, p. 61.
Most noteworthy is certain "American authority which suggests that the inability to trace is not an obstacle to the imposition of a constructive trust where the action is on facts which arise in a family setting or arrangement". In at least one Canadian case this approach appears to have been accepted in the commercial context. In *Atlas Cabinets and Furniture Limited v. National Trust Co. Ltd.* the court held that a dishonoured undertaking by the defendant to hold back money to secure payment to certain contractors would be remedied, even in the absence of an identifiable fund, by a constructive trust attaching to the general assets of the defendant.

Ironically, the submission against identifiability both lives and dies according to arguments based upon arbitrariness. Palmer recognizes that the identifiability requirement can produce arbitrary results in terms of awarding priorities, but he defends it on the basis that unless all unjust enrichment situations are seen to warrant constructive trust relief, "any intermediate point selected often will appear arbitrary".

The justification for requiring factual tracing before granting constructive trust relief that I find persuasive rests upon arbitrariness in a different sense. So long as the constructive trust is a remedy attaching to particular property and creating rights to that property in the plaintiff, it would be arbitrary to select simply a particular item of property and impose upon it a constructive trust. Why that property and not other property? There is an undeniable allure in ensuring that a plaintiff who is given a claim to particular property as a matter of remedy, have a claim as a matter of fact. Yet, that allure is not so strong as to maintain a pure and rigid approach to identifiability. Accordingly, if courts should be inclined to confer proprietary relief, as in the spousal context, a relatively loose factual connection should be required. In the commercial context where there should be a hesitance to award proprietary relief, a purer tracing process is justifiable. This approach accurately describes the prevailing trend in Canadian case law.

An extremely loose standard of "identifiability" has been adopted with respect to spousal claims. One need look no further than the leading case of *Sorochan v. Sorochan* to illustrate this. There the court held that the constructive trust remedy should not be confined to cases

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94 Klippert, *op. cit.*, footnote 11, p. 194, citing *Simmonds v. Simmonds*, 408 N.Y.S. 2d 359 (N.Y. Ct. App., 1978). McCLean has suggested in Canada that a factual causal connection between the enrichment and the constructive trust property should not be necessary in family cases where there is a reasonable expectation as to beneficial ownership by the plaintiff; *loc. cit.*, footnote 6, at p. 171.
96 Palmer, *op. cit.*, footnote 12, para. 2.14, p. 186.
97 *Supra*, footnote 7; and see the text, *supra*, footnote 90.
where the plaintiff contributed to the acquisition of the property; it would be enough if the plaintiff contributed to the "preservation, maintenance, or improvement of the property", so long as the services rendered have a "clear proprietary relationship". 98 That relationship was established on the factual footing that the contributions of the plaintiff prevented the property in question from deteriorating in value. 99

This represents an extremely generous, if not loose, factual connection between the efforts of the plaintiff and the wealth of the defendant with regard to the specific asset. The court did not impose the but/for condition that the assets would have deteriorated without the plaintiff's contribution. It was enough that the contribution was the means by which the assets were maintained and preserved. It would not appear to matter that a defendant may have sacrificed other property to preserve the asset in question if he had not had the contribution of the plaintiff. It follows that the causal connection requirement will be tempered by the dictates of "equity and fairness". 100

While the identifiability requirement is satisfied in spousal cases on the basis of a loose causal connection requirement, it does not follow that the mere existence of such a connection constitutes a sufficient condition for awarding constructive trust relief. In Sorochan v. Sorochan other factors were given prominence, including the plaintiff's reasonable expectation that she would acquire a proprietary interest in the farm, and the longevity of the plaintiff's relationship with the defendant. 101

In the Sorochan case the court was applying its causal connection requirement in the family law context, and made it clear that a similar application may not have been appropriate in a commercial setting: 102

It may well be necessary and appropriate to scrutinize closely the contributions of business partners to the acquisition of property. It is unnecessary and inappropriate to scrutinize the contributions of married couples or couples in a relationship such as this one in the same way.

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98 Ibid., at pp. 50 (S.C.R.), 10 (D.L.R.).
99 Ibid., at pp. 51 (S.C.R.), 10 (D.L.R.).
100 Ibid., at pp. 49 (S.C.R.), 9 (D.L.R.), citing a dictum of Cory J.A. in Murray v. Roty, supra, footnote 55, at pp. 444 (D.L.R.), 711 (O.R.). It has been suggested that the "causal connection" identifiability requirement does not constitute a condition precedent to constructive trust relief in the spousal context and that it is a fictional and unnecessary exercise; Litman, op. cit., footnote 8, pp. 78-81. I cannot agree. In Sorochan v. Sorochan, supra, footnote 7, the court stated explicitly that "it is important to require that some nexus exist between the claimant's deprivation and the property" (at pp. 50 (S.C.R.), 10 (D.L.R.)) and spoke of the "causal connection requirement" (ibid., at pp. 47 (S.C.R.), 8 (D.L.R.). While the connection may be loose, it does provide at least a threshold link between the property and the enrichment.
The close scrutiny of the causal connection requirement in the commercial context should involve a factual tracing process at least as pure as that imposed for the remedy of equitable tracing. In Phoenix Assurance Co. of Canada v. Corp. of the City of Toronto,\textsuperscript{103} the plaintiff was able to secure specific recovery of a realty tax overpayment that it had paid under compulsion on behalf of its insolvent joint venturer, after the court found as a fact that the plaintiff could trace the funds. In Canadian Commercial Bank v. Sheen's For Shoes Ltd.,\textsuperscript{104} the plaintiff was unsuccessful in a constructive trust claim, in part because the money could no longer be identified in the hands of the defendant. The court said:\textsuperscript{105}

If the claimant is to have his remedy out of the funds, or the acquired property, the factor of traceability must be present. Otherwise he may be put only to an action for breach of trust, for whatever purpose that might serve [in light of the insolvency of the defendant].

In contrast to these decisions is the disturbing British Columbia Court of Appeal decision of Syncrude Canada Ltd. v. Hunter Engineering Company Inc.,\textsuperscript{106} While that decision has been overruled on the constructive trust point by the Supreme Court of Canada,\textsuperscript{107} it is instructive to examine the reasoning in the Court of Appeal decision. Syncrude had contracted with Hunter Canada for machine parts. Hunter Canada, in turn, subcontracted for the production of the parts with ACO Sales and Engineering. After the parts had been machined but before they were paid for, Hunter Engineering notified Syncrude that Hunter Canada had obtained the contract through dishonesty by misrepresenting itself as a subsidiary of Hunter Engineering, and contended that the business opportunity belonged, in equity, to Hunter Engineering. Hunter Engineering therefore claimed the right to be substituted as the contracting party. Syncrude was caught in the middle. It required the parts to carry on its business. To avoid delay Syncrude elected to contract directly with ACO for the supply of the parts, rather than to wait for the dispute between Hunter Canada and Hunter Engineering to be settled. Believing that it might have to account ultimately to one or other of the companies for the profit that would have been made on the original contract, Syncrude decided unilaterally to set aside funds, in trust. As a term of the trust Syncrude provided that it could indemnify itself from the fund for reasonable legal expenses that it would incur because of the dispute between the two other corporations. It also provided that it should receive the interest earned by the fund. The principal, minus the legal expenses, was to be given to the corporation whose claim to the contract pre-

\textsuperscript{103} Supra, footnote 3.
\textsuperscript{104} Supra, footnote 75.
\textsuperscript{105} Ibid., at p. 133.
\textsuperscript{106} (1985), 68 B.C.L.R. 367 (B.C.C.A.).
\textsuperscript{107} 23 March, 1989 (S.C.C.), not yet reported.
vailed. Incredibly, after Hunter Engineering prevailed in its action against Hunter Canada, Syncrude was held by the British Columbia Court of Appeal to be a constructive trustee of the whole fund, including the interest it earned, for Hunter Engineering.

The majority of the Supreme Court of Canada ultimately held that the Court of Appeal had erred in finding there to have been an unjust enrichment and, that being the case, no constructive trust could attach to the trust fund. According to Dickson C.J.C., none of the three prerequisites of unjust enrichment was made out on the facts of the case because, due to the misrepresentations of Hunter Canada, Syncrude was free to rescind the contract. It therefore owed no obligations to anyone pursuant to the original arrangement. Even assuming that Syncrude was unjustly enriched by its decision to defy payment to the detriment of Hunter Engineering, it is difficult to appreciate how the trust fund was traceable as the unjust enrichment. The contract with Hunter Canada created no specific property; under the contract Syncrude was a mere debtor of Hunter Canada's. Prior to the establishment of the fund by Syncrude there was therefore no property which was identifiable as the unjust enrichment. The British Columbia Court of Appeal must have reasoned the once Syncrude earmarked money as the contract payment it became identifiable as specific property attributable to the contract.108

Even on this footing, however, the finding of identifiability is questionable. If it was the action of Syncrude in establishing the fund which created the identifiability, then only that property which Syncrude earmarked as its obligation under the contract should have been identifiable as such. Syncrude never earmarked the income from the fund, or the amount which it would take to cover its legal fees, as money due and payable.

(c) Other Rules Relating to Equitable Tracing

There are a number of other rules developed by equity in connection with its equitable tracing remedy. Examples include equity's willingness to impose liens on commingled assets,109 the rule in Hallett's case,110 and the rule in Re Oatway.111 Each of these rules represent fictions which artificially preserve "identifiability" in cases where it is impossible to identify truly specific property.

108 In effect, Syncrude put itself in a worse position than it otherwise would have been in had it done nothing at all.
110 A trustee is deemed to withdraw his own share of a mixed fund first, before withdrawing the property of the beneficiary; Re Hallett's Estate (1880), 13 Ch. D. 696 (C.A.).
111 [1903] 2 Ch. 356 (Ch. D.). The beneficiary can follow any property removed from a mixed fund into an investment or purchase.
It is generally assumed in commercial cases involving constructive trusts that such special rules apply. Phoenix Assurance Co. of Canada v. Corporation of the City of Toronto\textsuperscript{112} involved tracing into a mixed fund as did \textit{Re Attorney General of Canada and Northumberland General Insurance}.\textsuperscript{113} In \textit{Zaidan Group Ltd. v. City of London}\textsuperscript{114} the court had reference to the rule in Hallett's case.

Goff and Jones have warned, however, that such rules emerged in the context of the equitable tracing remedy in order to prefer the beneficiaries to the bankrupt trustee's general creditors.\textsuperscript{115} Moreover, they emerged in the context of what were "pure proprietary claims". It has to be wondered whether they are truly appropriate in the context of remedial constructive trust in the commercial context where concern for creditors may constitute a reason why such rules should not be employed. Dobbs has suggested that to allow the imposition of a remedial constructive trust in the absence of true identifiability is to work a preference for no good reason.\textsuperscript{116} Why should the law presume that the funds of the general creditors are dissipated before the funds of the constructive trust beneficiary?

While it is healthy to pose such questions before simply importing these artificial tracing rules into the remedial constructive trust context, it is my view they can be applied to confer a justifiable priority on the plaintiff in some restitutionary actions. Where the plaintiff has never accepted the risk of being a simple debtor of the defendant, he should not bear the same risks as do the general creditors. It follows that where the proceeds of the unjust enrichment have become identifiable in a mixed fund, but where some of the mixed fund or its proceeds remain unsquandered, the non-risk taking plaintiff would have a higher claim to the property than do those general creditors.

3. \textit{The Inadequacy Doctrine}

Equitable remedies developed historically to address situations where the common law proved inadequate to remedy a wrong. Indeed, the

\textsuperscript{112} \textit{Supra}, footnote 3.
\textsuperscript{113} \textit{Supra}, footnote 5.
\textsuperscript{114} \textit{Supra}, footnote 3.
\textsuperscript{115} Goff and Jones, \textit{op. cit.}, footnote 39.
\textsuperscript{116} Dobbs, \textit{op. cit.}, footnote 37, p. 245. Waters has made much the same point with respect to tracing rights of secured creditors under personal property security regimes. In a passage that could be equally applicable in the context of remedial constructive trust beneficiaries he said: "[i]f the unsecured creditor has a legitimate place in the contemporary commercial scene, then I suggest there is no persuasive reason why the secured creditor should be able to trace in those circumstances where identifiability is recognized . . . to have become artificial."; Waters, \textit{loc. cit.}, footnote 36, at p. 434.
jurisdiction of the Courts of Equity depended, where what was at stake was the vindication of a common law right, upon the inadequacy of the common law remedy. This basic jurisdictional doctrine of inadequacy has been adopted as the primary criteria by many commentators and by a number of courts in deciding whether the remedial constructive trust is available, although there is some controversy in the United States as to its real influence.

According to the doctrine, it is asked whether the personal remedy of damages provided by the common law is adequate as a matter of fact. It will not be where the unjust enrichment involves the acquisition by the defendant of land, or of a unique chattel. Significantly, the legal remedy of damages is also said to be inadequate where, because of the defendant's insolvency, the plaintiff will fail to recover full damages. Thus, a plaintiff may be confined to a personal damage award where the defendant is capable of paying, but have access to a remedial constructive trust, on the same facts, where the defendant is not.

This doctrine has found its way into Canadian case law dealing with the remedial constructive trust. In Ruff v. Strobel the court applied the doctrine in the spousal property division context. It has to be wondered whether this case can be considered authoritative since, in subsequently rendering its decisions in Pettkus v. Becker and Sorochan v. Sorochan, the Supreme Court of Canada never addressed the question of adequacy. At least with respect to remedial constructive trust claims relating to the

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117 It has been pointed out, therefore, that even if the inadequacy doctrine applies in the context of remedial constructive trusts, it is irrelevant where the restitutionary claim is maintainable according to a court's equitable jurisdiction: Klippert, op. cit., footnote 11, p. 233.

118 Hanbury, Maudsley and Martin, op. cit., footnote 20, p. 5.

119 Ibid., p. 575; Klippert, op. cit., footnote 11, p. 198; Seavey and Scott, loc. cit., footnote 4, at p. 42.

120 That controversy is discussed in Note, loc. cit., footnote 34. Palmer, op. cit., footnote 12, para. 2.19, pp. 218-221, denies that the principle has significance in American law with respect to the remedial constructive trust.


122 American Law Institute, op. cit., footnote 2, para. 160, comment f, p. 645. For a persuasive explanation of why insolvency must be treated as a relevant form of inadequacy, see Horack, loc. cit., footnote 36, at p. 703.

The law is not settled as to whether insolvency of a defendant causes inadequacy in the analogous area of specific performance. See Sharpe, op. cit., footnote 68, pp. 282-284, paras 550-554.


124 Supra, footnote 9.

125 Supra, footnote 7.
division of spousal property this seems a strong indication that the doctrine has been recognized as unsuited to the basic purpose of the exercise.\(^{126}\)

The adequacy doctrine has been applied in the commercial context. In *Phoenix Assurance Company of Canada v. Corporation of the City of Toronto*\(^{127}\) the court cited the insolvency of the party in whose name a tax refund was paid as a reason for giving a constructive trust interest to the plaintiff.\(^{128}\) In *Zaidan Group Ltd. v. City of London*\(^{129}\) the court noted that a constructive trust will arise to prevent unjust enrichment where there is no other effective remedy, but ultimately concluded that the doctrine of constructive trust applied without ever considering the adequacy of the legal remedy.

In my view, the adequacy doctrine should be rejected in both family and commercial cases alike.\(^{130}\) It produces curious and unsatisfactory results. In particular, it begs the very question that needs to be answered: when is it just and appropriate to confer on a plaintiff the priority over the general creditors of the defendant? The answer according to the inadequacy doctrine appears to be "when that priority is required".\(^{131}\)

McCLean has made the point that the inadequacy doctrine is an outdated vestige of the political relationship between the Court of Chancery and the courts of common law. It is not based on a substantive analysis.\(^{132}\) This, coupled with its tendency to provide specific relief in preference to the general creditors of the defendant without the support of a substantively principled analysis,\(^{133}\) should be enough for its rejection as a guiding principle.

4. Competing Equities

(a) Discretion, Creditors and the Constructive Trust

Even if the inadequacy doctrine does apply, it need not give rise to the automatic application of a constructive trust in cases where the unjustly

\(^{126}\) Litman, *op. cit.*, footnote 8, p. 74, argues that the presumption in favour of personal relief can justifiably be departed from in family cases. See McCamus, *op. cit.*, footnote 8.

\(^{127}\) *Supra*, footnote 3.


\(^{130}\) Contrast Litman, *op. cit.*, footnote 8, who notes that the doctrine may be applied appropriately in commercial cases because of the serious consequences of tying up business assets.

\(^{131}\) Sharpe, *op. cit.*, footnote 68, has raised similar concerns with respect to insolvency and specific performance, as has Horack, *loc. cit.*, footnote 36.

\(^{132}\) McClean, *loc. cit.*, footnote 6, at p. 171.

\(^{133}\) Curiously, Klippert argues that the adequacy doctrine should be retained in commercial cases because, to abandon it in favour of a "broad approach to unjust enrich-
enriched defendant is insolvent. As Horack points out, "[j]urisdiction to grant relief and the exercise thereof are entirely different propositions". 134 "The remedies, being equitable, are discretionary, and should not be applied where their application would not be conducive to the pursuit of justice." 135

This general notion has been invoked by courts in the context of tracing. In *Re Diplock* 136 the beneficiaries of an estate lost their right to an equitable charge, "[e]ven where there [was] no equitable bar". 137 To have allowed the remedy could have worked the injustice that buildings and land might have been forcibly sold so that the beneficiaries could recover a disproportionately small indebtedness. In *Sinclair v. Brougham* 138 depositors were held entitled to trace their deposits into the hands of the defendant bank, but were compelled, in order to secure that remedy, to recognize an equal claim in the defendant's shareholders with whom they were made to rank *pari passu*.

This limitation on equity's jurisdiction suggests that, at least with respect to some cases of unjust enrichment, there should be no constructive trust order. This should be the result where the plaintiff and the general creditors of the defendant stand on a roughly equal footing. 139 The "acceptance of risk" rationale can help identify when this will be so.

(b) The "Acceptance of Risk" Equation

Earlier I argued that the only justification for granting preference to a constructive trust beneficiary that is persuasive is the "acceptance of risk" rationale. I suggested that its persuasive value depends, however, upon the qualified application of the constructive trust remedy in cases of unjust enrichment. 140 Qualification is necessary because the "acceptance of risk" rationale rests on the premise that the material distinction between general creditors and constructive trust beneficiaries is that only

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134 Horack, loc. cit., footnote 36, at p. 720.
135 Hanbury, Maudsley and Martin, op. cit., footnote 20, p. 675. The same point is made by Seavey and Scott, loc. cit., footnote 4, at p. 36.
137 Megarry and Baker, op. cit., footnote 27, p. 290.
139 Horack has invoked the maxim that "equality is equity" to argue that the remedy of specific performance cannot be justified on the sole basis that the defendant is insolvent. There is nothing to distinguish a plaintiff from other creditors in the context of that remedy in cases of insolvency since a damage award will be inadequate for them as well: Horack, loc. cit., footnote 36, at p. 711.
140 See the discussion, supra, the text at footnotes 46-50.
the former have dealt with the defendant while accepting the risk of his insolvency. The premise represents an over-generalization in the context of the remedial constructive trust; some plaintiffs who can establish a claim to relief based upon the unjust enrichment formula have also dealt with the defendant while accepting the risk of his insolvency. Where this is so, there will be nothing of substance to distinguish between the unjust enrichment claimant and the general creditors with the result that proprietary relief for the unjust enrichment claimant should be denied.

It is sometimes mistakenly maintained that intention is not an important consideration in the context of constructive trusts and that therefore such things as the expectation of the plaintiff that he would only be a general creditor must be disregarded.\(^\text{141}\) This view is based on statements to the effect that the constructive trust arises irrespective of intention.\(^\text{142}\) Such comments relate mainly to the intention of the constructive trustee, who finds himself as a trustee irrespective of his intention to be beneficial owner. Moreover, the fact that the parties to a constructive trust may not have anticipated or intended a relationship of trustee/beneficiary does not mean that the entire state of mind of the parties is irrelevant to whether a trust should be imposed.\(^\text{143}\)

There is widespread agreement that a party who has accepted the role of a general creditor should be denied proprietary relief.\(^\text{144}\) The decision in *Sinclair v. Brougham*\(^\text{145}\) is often used to make the point. There the depositors of the bank entered into their transactions with the expectations that they would be unsecured creditors of the bank. Allowing them to trace therefore gave them proprietary protection which was never expected. Only an out of court settlement with the other general creditors of the bank and the condition imposed by the court that the depositors recognize the claims of the shareholders prevented this from producing an unwarranted priority. It has therefore been suggested that:\(^\text{146}\)


\(^{143}\) See Litman, *op. cit.*, footnote 8, p. 65.


\(^{145}\) *Supra*, footnote 138.

\(^{146}\) McCamus, *op. cit.*, footnote 8, p. 122. A similar recommendation has been made with respect to the awarding of specific performance to a plaintiff where the debtor is insolvent; Horack, *loc. cit.*, footnote 36, at p. 717.
As a general principle, . . . people who willingly choose to become unsecured creditors of an eventual bankrupt ought not to be given priority over other unsecured creditors through the extended use of the constructive trust remedy.

There are two kinds of case where a claimant can be considered, every bit as much as the general creditors can, to have accepted the risk of the defendant's insolvency: where there are contractual dealings between the plaintiff and defendant which anticipate that the plaintiff will assume the status of a general creditor; and where the plaintiff's claim rests on a quantum meruit or quantum valebat basis in situations where there has been no reasonable expectation by the plaintiff of acquiring a proprietary interest.

(i) Contractual Dealings Contemplating General Creditor Status

Where there has been a contractual dealing between the plaintiff and defendant, and the defendant has been enriched as a result of the contractual relationship, there should be no finding of unjust enrichment and hence no remedial constructive trust imposed. This is because an unjust enrichment supporting a restitutionary claim can exist only where there is no juristic reason accounting for the enrichment of the defendant and the corresponding deprivation of the plaintiff. A contract provides such a juristic reason, thereby rendering any restitutionary action unavailable insofar as the enrichment can be accounted for on the basis of that contract.147

The case of Brown v. Royal Bank of Canada148 provides a clear example. Real estate agents employed by a bankrupt broker failed to secure constructive trust orders against the broker's trustee in bankruptcy with respect to commissions which they had earned on real estate transactions because the court characterized their entitlement to these commissions as contractual in nature. The contracts between the realtor and the agents contemplated that the agents would be mere creditors with respect to their commission claims. In Re Northern Union Insurance Company Limited149 the insolvent insurer, Northern, received proceeds payable on policies of re-insurance it had purchased, because of a loss suffered by its insured, B.C. Hydro.150 B.C. Hydro was unsuccessful in securing those proceeds through a constructive trust claim because Northern had purchased the policies of re-insurance through its own initiative.

147 In Sorochan v. Sorochan, supra, footnote 7, at pp. 46 (S.C.R.), 7 (D.L.R.), Dickson C.J.C. said: "There was no juristic reason for the enrichment. Mary Sorochan was under no obligation, contractual or otherwise, to perform the work and services...". (Emphasis added).
150 The contracts of re-insurance were purchased by Northern specifically to insure it against the risk that it might have to pay a claim to B.C. Hydro.
B.C. Hydro had contracted with Northern without providing that its claim would be secured by such re-insurance and had therefore accepted the risk of a general creditor that Northern would be able to honour its contractual obligations. B.C. Hydro therefore stood on the same footing with respect to the proceeds of re-insurance as did the other general creditors.\textsuperscript{151}

Occasionally courts have inappropriately awarded plaintiffs constructive trust relief despite the fact that the plaintiffs contracted with the defendant on the footing that they would be general creditors. In the notorious decisions in \textit{Taypotat v. Surgeson}\textsuperscript{152} and \textit{Waselenko v. Touche Ross Ltd.}\textsuperscript{153} the Saskatchewan Court of Appeal granted remedial constructive trusts to persons who were parties to contracts with the defendants, over assets which represented work in progress under the contracts. According to the terms of those contracts, the defendants were to receive progress payments and were to retain title to the work in progress,\textsuperscript{154} pending delivery to the plaintiffs. The defendants failed to uphold their end of the contract, although nothing occurred to enable the plaintiffs to avoid the contracts. There was therefore a juristic explanation for the fact that the defendants were enriched by the progress payments, and the case has been called into question because this element of the constructive trust formula was ignored.\textsuperscript{155} The plaintiffs' remedies should have sounded in contract. By the terms of their contracts they had accepted the risk of general creditors.

The mere fact that parties are involved in a contractual relationship does not preclude the application of the remedial constructive trust; this result will occur only where the existence of the contract accounts for the enrichment in question. Thus, if there is an overpayment arising out of a contractual relationship the remedial constructive trust may be appropriate to capture the overpayment, for it is not explained juristically by the terms of the contract.\textsuperscript{156}

The unjust enrichment may arise in other ways in the milieu of a contractual arrangement but not be contemplated by that contract. Such

\textsuperscript{151} The court also held that B.C. Hydro did not suffer a corresponding deprivation because of Northern's receipt of the re-insurance. B.C. Hydro's loss was caused by the fire, Northern's insolvency, and its own failure to protect itself contractually.

\textsuperscript{152} [1985] 3 W.W.R. 18 (Sask. C.A.).

\textsuperscript{153} Supra, footnote 141.

\textsuperscript{154} In \textit{Taypotat v. Surgeson}, supra, footnote 152, the Saskatchewan Court of Appeal held that under the terms of the contract title had, in fact, passed to the plaintiffs. They went on, however, to consider the case in the alternative on the footing that title had not passed. It was in this context that the remedial constructive trust was held to exist.

\textsuperscript{155} Waters, loc. cit., footnote 33, at pp. 23-27.

\textsuperscript{156} See Phoenix Assurance Co. of Canada v. Corporation of the City of Toronto, supra, footnote 3.
was the case in *Yorkshire Trust Co. v. Empire Acceptance Corporation Limited (No. 2)*\(^ {157} \) The plaintiff received the assignment of a second mortgage from the defendant mortgage broker. The mortgage went into default and there was no equity in the property to realize upon. The defendant, who was by then insolvent, successfully sued the real estate appraiser whom it had hired to appraise the property prior to lending the mortgage money on the mortgage which it had assigned. The plaintiff, in turn, obtained a remedial constructive trust over the proceeds of that law suit in the hands of the defendant on the footing that the proceeds unjustly enriched the defendant. The plaintiff thereby obtained a priority over the creditors of the defendant with respect to those proceeds.

The contract between the plaintiff and defendant did not provide that the defendant would assign its contractual rights against the appraiser to the plaintiff along with the mortgage assignment. Yet, the contract did not stand as a juristic reason explaining the defendant’s enrichment because the unjust enrichment did not arise out of the contract *per se*. The unjust enrichment arose because both the defendant and the plaintiff\(^ {158} \) had a cause of action against the appraiser, and the defendant’s successful action deprived the plaintiff, who had sustained the real loss, of its right to sue the appraiser.

A contract which is void or voidable may contemplate the enrichment of the defendant. Where this is so it may be that the avoided contract does not stand as a juristic explanation for the unjust enrichment and that constructive trust relief is appropriate. It has been suggested that a distinction should be drawn, however, between those ineffective transactions in which the defect vitiates the voluntariness of the transaction and those in which the defect does not. Where the defect does not vitiate voluntariness, a plaintiff who contemplated assuming the role of a general creditor should be denied constructive trust relief.\(^ {159} \) After all, he parted with his money or property expecting only a personal claim.

Whether voluntariness is vitiated by the ineffectiveness of a transaction is a difficult question. *Re Attorney General of Canada and Northumberland General Insurance Co.*\(^ {160} \) is illustrative. Northumberland had decided, because of its financial condition, to cease doing business. For the following week, certain brokers who were unaware of this fact continued to place insurance contracts with the company. Those plain-


\(^{158}\) The plaintiff’s action sounded in tort for negligent misstatement on the basis that the plaintiff’s loss was a foreseeable consequence of the appraiser’s negligence; *ibid.*, at p. 366.

\(^{159}\) McCamus, *op. cit.*, footnote 8, p. 122. The same position has been taken by Goff and Jones, *op. cit.*, footnote 39, p. 115.

\(^{160}\) *Supra*, footnote 5.
tiffs who purchased these contracts of insurance were able to secure remedial constructive trust relief with respect to deposits not yet remitted by the agents to the company, on the restitutionary basis that the money had been paid under mistake of fact as to Northumberland's continued business operations.

Despite the fact that the contracts were voidable, it is a close question whether the correct decision was arrived at in light of the above principle. These plaintiffs transferred funds to the credit of Northumberland on the footing that they would become general creditors, yet they ended up receiving proprietary relief. Was the voluntariness of their decision to become general creditors truly vitiated by Northumberland's inability to honour the contractual obligations which its agents contracted for under their ostensible authority? This question has to be answered, I think, in the context of those constructive claims which the court dismissed. It denied constructive trust relief to those parties who purchased contracts of insurance up to the time when Northumberland recognized that it could no longer carry on business. Could it not be said of those parties that they, too, were mistaken as to Northumberland's capacity to carry on business? They suffered the same defeated expectations, yet their claims were subordinated to those of others who had equally parted with their money in the expectation of becoming general creditors.

(ii) Quantum Meruit and Quantum Valebat Claims: Reasonable Expectations of Proprietary Interests

Where the plaintiff's claim is "quasi-contractual" in nature there will be no contract and hence no juristic reason for any enrichment enjoyed by the defendant. Where the quasi-contractual claim would have rested, prior to the development of the general formula for identifying unjust enrichment, on the old claims of quantum meruit or quantum valebat, it may be inappropriate to provide proprietary relief.

"Quantum meruit or quantum valebat claims lay respectively to recover reasonable remuneration for services and a reasonable price for goods supplied by the plaintiff." 161 In each case the action is based on the fact that the defendant has freely accepted the enrichment which the services or goods represent, after having requested the services or the goods, or with the knowledge that they were not being rendered or provided gratuitously. 162 Where the plaintiff has provided services or goods without making arrangements to secure the obligation to pay, the plaintiff will have dealt with the defendant while accepting the role of a general creditor; therefore constructive trust relief will be inappropriate.

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161 Goff and Jones, op. cit., footnote 92, p. 3.
In the spousal context, the unjust enrichment claim is typically based on what would have been, prior to the articulation of the general unjust enrichment formula by the court in *Pettkus v. Becker*, a *quantum meruit* claim.

In *Pettkus*, the Court held that [unjust enrichment] would be met in situations where one party prejudices himself or herself with the reasonable expectation of receiving something in return and the other person freely accepts the benefits conferred by the first person in circumstances where he or she knows or ought to have known of that reasonable expectation.

It has already been observed that, where such claims are maintained, the constructive trust is employed almost automatically. What distinguishes these spousal cases from cases of *quantum meruit* is the fact that a contributing spouse will not be expecting to be remunerated through the payment of money for services rendered. Rather, the contributing spouse will be found typically to have anticipated receiving a fair share of the fruits of the partnership, and to have expected that there would be a division of property in the event of a marriage breakup. Thus, in deciding whether the unjust enrichment should be remedied through the constructive trust, the court in *Sorochan* indicated that a more precise inquiry into the nature of the benefit was required than when deciding the initial question of whether there had been an unjust enrichment in the first place.

At this point ... we must direct our minds to the specific question of whether the claimant reasonably expected to receive an actual interest in property and whether the respondent was or reasonably ought to have been cognizant of that expectation. This will usually be inferred easily in the spousal context, but rarely will it be an appropriate inference in the commercial sphere. Even in the family law context, however, the facts may drive the court to the conclusion that there was no expectation on the part of the plaintiff of receiving a proprietary interest, and where this is the case proprietary relief should be denied despite the existence of a causal connection between the plaintiff's deprivation and specific property; the plaintiff's reason-

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163 *Supra*, footnote 9.
166 As McCamus has suggested, "[o]ur experience with the resulting trust would suggest that trial judges are able to find the existence of such expectations on fairly slender grounds"; *op. cit.*, footnote 8, p. 118.
167 In *Homebuilder Inc. v. Man-Sonic Industries Inc.* (24 August 1987), (unreported) (Ont. H.C.), Master Donkin relied on the absence of an expectation on the part of the plaintiff to acquire a property right in homes constructed by the defendant to refuse constructive trust relief. In my opinion this should have been irrelevant on the facts of the case because the plaintiff's claim was not a *quantum meruit* claim, but rested rather on an allegation that the defendant had converted the plaintiff's home designs.
able expectations for remuneration, not being tied to proprietary interests, place the plaintiff on the same footing as a general creditor insofar as the assumption of risk is concerned.

5. The Behaviour of the Parties

It has been suggested that a relevant factor in deciding whether to award proprietary relief is the conduct of the parties.\(^{169}\) Equity does consider such matters. In exercising its discretion with respect to its remedies, equity will look at "the conduct not merely of the defendant but also of the plaintiff".\(^{170}\) Yet, it is possible to exaggerate the importance of such considerations and to use them inappropriately.

(a) The Conduct of the Defendant

Goff and Jones, in a view which the learned authors now appear to have tempered substantially, suggested in their next to last edition that "there is much to be said for the view" that a dishonest defendant should more readily be made a constructive trustee than an honest one.\(^{171}\) I find it difficult to understand how this perspective ever had appeal. The real value in a constructive trust order is two-fold: it provides a priority over general creditors of the defendant and it gives the plaintiff the right to enjoy the increase in the value of the property.\(^{172}\) What is it about the state of honesty of the defendant that sheds light on whether such advantages should be bestowed upon a plaintiff? Surely the wrongdoing of the defendant has no bearing on the justification for awarding the victim priority over the general creditors of the defendant. After all, the general creditors will often be victims of the defendant's wrong. Moreover, in cases of insolvency it does little to punish the defendant to award priority to some over others of his creditors.

How about the right to enjoy the increase in the value of the property? It is frequently suggested that a plaintiff should be entitled to profits made through the use of the trust property only if the defendant is a wrongdoer\(^{173}\) or a fiduciary.\(^{174}\) If the defendant is "innocent", the plain-
tiff is considered to be too heavily compensated if he is awarded the fruits of the defendant’s efforts. Perhaps by parallel reasoning the plaintiff should not enjoy the increase in the value of constructive trust property where the defendant is innocent, but should enjoy it where the defendant is a wrongdoer. This reasoning is unconvincing. Even where the defendant is innocent, there is no reason why he should enjoy the increase in the value of property to which the plaintiff has a compelling restitutionary claim. In my view, the wrongdoing of the defendant should be irrelevant in deciding whether constructive trust relief should be awarded.

(b) The Conduct of the Plaintiff

The maxim that “he who comes to equity must come with clean hands” supports the view that the conduct of the plaintiff may disentitle him to equitable relief. This may be the result, for example, where the plaintiff who is a party to an illegal contract seeks restitution. Where the plaintiff has merely been negligent the position is not so clear. Insofar as the equitable remedy of tracing is concerned, the negligence of the plaintiff in watching over his interests is irrelevant, even where it injures the general creditors of the defendant, or third parties. Yet, in such cases the claim of the plaintiff is a pure proprietary one, which may distinguish equitable tracing from the remedial constructive trust. It is one thing to refrain from conferring a proprietary interest on a plaintiff because of his negligence; it is quite another to prevent him from following property which is already his in equity.

Goff and Jones suggest that the negligence of the plaintiff may be relevant in deciding whether restitutionary proprietary relief should be ordered. This position is attractive intuitively because it inquires into

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175 This is apparently not the reasoning that Goff and Jones had in mind. When they made the point they were concerned with tracing profits earned by breach of agency and fiduciary duties, not with increases in the value of trust property.

176 Where the increase is due to the initiatives of the defendant, a liberal allowance should be paid to the defendant. See Goff and Jones, op. cit., footnote 39, pp. 78-79.


179 Goff and Jones, op. cit., footnote 66, p. 62. In the third edition the position does not appear to be stated as directly but the learned authors suggest that where
whether a plaintiff really should, as a matter of equity, have priority over the other creditors of the defendant, whose losses may be attributable in part to the negligence of the plaintiff. What Waters has said of secured creditors applies equally to those who seek security through the offices of equity in the form of a constructive trust:180

Surely we might look at the conduct of each creditor, and ask ourselves whether any secured party allowed a situation to come about which led to a later creditor misunderstanding the degree of solvency of the debtor. Perhaps we should be concerned with contributory responsibility for loss, as we are concerned with contributory negligence.

It should be emphasized that the negligence of the plaintiff should be considered a relevant factor only where actual prejudice to general creditors has resulted, otherwise the loss of the constructive trust claim will represent a windfall to those creditors. If the fact of the negligence has no adverse consequences what is to be gained by using it to deprive the plaintiff of a remedy he would otherwise have?

6. The Constructive Trust, Profits, and Creditors

The “fiduciary breach” constructive trust, being based on the conflict and profit principles, frequently results in a plaintiff receiving a constructive trust award for more than he has lost. The rule does so because, historically, we have been at least as interested in depriving the defendant as we are in compensating the defendant. It has to be wondered whether this approach produces desirable results,181 especially in the context of the remedial constructive trust. In my view, constructive trust relief should be awarded to make good the plaintiff’s deprivation, which may include lost profits, but not necessarily to confer on the plaintiff the full extent of the defendant’s enrichment.

In those cases where a constructive trust could be imposed on the profits earned by the defendant through the use of the constructive trust property, many courts in the United States apparently refuse to use the remedy where the defendant is insolvent.182 It is felt that the plaintiff can be compensated adequately by awarding him a lien against the specific property in question which secures a judgment for the amount of his loss. Since it is the defendant’s creditors, rather than the defendant himself, who will enjoy the ill-gotten fruits of the defendant’s initiative, there is no need to compel disgorgement in favour of the plaintiff in

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180 Waters, loc. cit., footnote 36, at p. 434.

181 See Waters, op. cit., footnote 76, p. 745 ff. See also Youdan, op. cit., footnote 15.

order to keep the unjust enrichment which the profits represent from the defendant. After all, the plaintiff's only real claim to such profits is that the defendant should not have them.

**Conclusion**

There will be many cases where a plaintiff establishes a cause of action based upon the formula of unjust enrichment but where it will be unjust to remedy a breach of his rights with a remedial constructive trust order. The priority which the remedial constructive trust will give to a plaintiff over the unpaid general creditors of the defendant is warranted only where the plaintiff has a higher claim in equity to the specific property sought to be impressed with the constructive trust than do the general creditors of the constructive trustee. Where that priority is warranted, it should not be denied because of equitable principles culled from the historical recesses of equitable jurisdiction.

In general terms, before a claimant should be awarded a proprietary remedy there must be a causal connection or nexus between the plaintiff and the property. Yet, this alone is not enough. What distinguishes the meritorious constructive trust beneficiary from the general creditors of the defendant is that the general creditors can be taken to have accepted the risk of the defendant's insolvency in their dealings with him, while the constructive trust beneficiary cannot.

For a variety of compelling reasons, these considerations should produce a different approach in cases involving the division of spousal property than that used in purely commercial relationships.

**Necessary Condition #1: The Causal Connection Requirement**

In spousal division of property cases, social policy reasons and the absence of a tradition of formalized property sharing arrangements have inspired a loose, but nonetheless important causal connection requirement. Before constructive trust relief is appropriate a court must be satisfied that the actions of the plaintiff spouse have contributed to the acquisition, maintenance or improvement of specific property, whether or not the specific property would have been acquired, maintained or improved in the absence of that contribution.

In commercial cases, the property, or, by the application of conventional tracing techniques, its proceeds, must be identifiable as the unjust enrichment of the defendant.

**Necessary Condition #2: The Absence of an ‘‘Acceptance of Risk’’**

In spousal property division cases proprietary relief is justified because of the usual, implicit understanding that the plaintiff spouse has contributed money or money's worth in the reasonable expectation that, in
return, he or she is contributing to the fruits of a partnership and that the partnership involves the joint benefit of acquisitions. Absent firm evidence that the contributing spouse did not have such expectations, constructive trust relief should be awarded.

In commercial cases proprietary relief will not be warranted where the plaintiff parted with the property or money which represents the defendant’s enrichment, while accepting the role of a general creditor. This will occur where there is a valid contract between the parties which accounts for the defendant’s enrichment, or a contract which has been avoided where the condition which rendered the contract ineffective does not vitiate the voluntariness of the plaintiff’s decision to assume the role of a general creditor. This will also occur where the claim is quasi-contractual in nature and the plaintiff does not have a reasonable expectation that payment will be in the form of specific property.

**Miscellaneous Considerations**

The wrongdoing of the defendant should be irrelevant to the provision of constructive trust relief to a plaintiff, but the wrongdoing or negligence of the plaintiff may be relevant where it has prejudiced third parties or the general creditors of the defendant.

At least in cases where the defendant is insolvent, constructive trust relief should attach only to so much of the unjust enrichment of the defendant as represents an actual deprivation to the plaintiff. Beyond the degree of his actual loss, the plaintiff has no higher claim to the defendant’s profits than do the defendant’s general creditors.