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UNJUST ENRICHMENT AND THE REMEDIAL CONSTRUCTIVE TRUST

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INTRODUCTION: YOU CAN HAVE ONE WITHOUT THE OTHER

A common misperception, particularly endemic in Irish law but not confined to it, is that unjust enrichment is somehow equal to the remedial constructive trust. It is not. These are both important concepts in the modern law, but they are largely unconnected. Nevertheless, the recent decision of Barr J. in the High Court in *Kelly v. Cahill*[1] has replicated the erroneous equation of these distinct concepts. To (re)establish their separation, section 2 describes the strict, legal and personal nature liability in unjust enrichment; section 3 describes the entirely distinct equitable proprietary remedial constructive trust, and demonstrates that it is necessarily largely unrelated to unjust enrichment; whilst section 4 discusses the reasoning in *Kelly v. Cahill* and considers whether rectification or a more traditional constructive trust could have provided a sounder route to the same result. The conclusion will therefore be that unjust enrichment does not equal the remedial constructive trust, that you can indeed have one without the other.

UNJUST ENRICHMENT: COMING OF AGE

In *Dublin Corporation v. Building and Allied Trades Union*,[2] the *Bricklayers' Hall* case, Keane J. for the Supreme Court accepted that the principle against unjust enrichment organises the law of restitution as a matter of Irish law.[3] Not

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1. [2001] 2 I.L.R.M. 205 (H.C.; Barr J.); noted Hourican, "The Introduction of 'New Model' Constructive Trusts in this Jurisdiction" (2001) 6 (2) *C.P.L.J.* 49; Peart, "Do The Right Thing" (2001) 95 (4) *Law Society Gazette* 18.
2. [1996] 1 I.R. 468; [1996] 2 I.L.R.M. 547 (S.C.); on which see O'Dell [1996] *Restitution LR* § 134; O'Dell, "Restitution and *Res Judicata* in the Irish Supreme Court" (1997) 113 *L.Q.R.* 245; O'Dell, "Bricks and Stones and the Structure of Law of Restitution" (1998) 20 *D.U.L.J.* (*n.s.*) 101.
3. See, generally, O'Dell, "The Principle Against Unjust Enrichment" (1993) 15 *D.U.L.J.* (*n.s.*) 27.

only is this a development which had already occurred in the Supreme Court of Canada,[4] the High Court of Australia,[5] and the House of Lords,[6] but there had also been important precursors in Ireland.[7] At common law, the four common counts – the action for money had and received, for money paid to the use of the plaintiff, *quantum meruit*, *quantum valebant* – which were formerly based upon the fiction of an implied contract,[8] have now been largely based upon the principle. These actions arise at common law, not in equity;[9] they are strict[10]

4. *Deglman v. Guaranty Trust of Canada* [1954] 3 D.L.R. 785 (S.C.C.); *Petkus v. Becker* (1980) 117 D.L.R. (3d) 257 (S.C.C.); *Peel v. Canada* (1994) 98 D.L.R. (4th) 140 (S.C.C.); see, generally, Maddaugh and McCamus, *The Law of Restitution*, (Ontario, 1990); Fridman, *Restitution* (2nd ed, Ontario, 1992).
5. *Pavey & Matthews v. Paul* (1986) 162 C..L.R. 221 (H.C.A.); *ANZ v. Westpac* (1987) 164 C.L.R. 662 (H.C.A.); *David Securities v. Commonwealth Bank of Australia* (1992) 175 C.L.R. 353 (H.C.A.); *Baltic Shipping v. Dillon (The Mikhail Lermontov)* (1993) 192 C.L.R. 650 (H.C.A.); *Roxborough v. Rothmans* (2002) 76 A.L.J.R. 203 (H.C.A.); see, generally, Mason and Carter, *Restitution Law in Australia* (Butterworths, Sydney, 1995).
6. *United Australia v. Barclays Bank* [1941] A.C. 1 (H.L.); *Fibrosa v. Fairbairn*[1943] A.C. 32 (H.L.); *Woolwich v. IRC* [1993] A.C. 70 (C.A. and H.L.); *Lipkin Gorman v. Karpnale* [1991] 2 A.C. 548 (H.L.); *Banque Financière de la Cité v. Parc (Battersea)* [1999] 1 A.C. 221 (H.L.); *Kleinwort Benson v. Lincoln City Council* [1999] 2 A.C. 349 (H.L.); see, generally, the hugely influential Birks, *An Introduction to the Law of Restitution* (Clarendon Press, Oxford, rev ed, 1989) and Goff and Jones *The Law of Restitution* (Sweet & Maxwell, 5th ed., 1998); see also Burrows, *The Law of Restitution* (Butterworths, London, 1993); Virgo *Principles of the Law of Restitution* (OUP, Oxford, 1999).
7. *East Cork Foods v. O'Dwyer Steel* [1978] I.R. 103 (S.C.); *Murphy v. AG* [1982] I.R. 241 (S.C.).
8. See, *e.g.*, *Sinclair v. Brougham* [1914] A.C. 398 (H.L.); on which see O'Dell, "The Case That Fell To Earth. *Sinclair v. Brougham* (1914)" in O'Dell (ed.), *Leading Cases of the Twentieth Century* (Round Hall Sweet & Maxwell, 2000) 28.
9. Although Lord Mansfield in *Moses v. Macferlan* (1760) 2 Burr. 1005; 97 E.R. 676 seemed to base the action for money had and received on large principles of equity, he did not mean to transmute it into a chancery action, as was recognised in the contemporary Irish decision of *Rochfort v. Earl of Belvidere* where Lord Lifford LC was of the view that it contained "a great deal of learning, and a good resolution concerning the recovery at law out of personal estate, of money by receipt whereof that estate was increased; and if that resolution were understood and followed, it would prevent many equity suits" ((1770) Wall L 45, 50). On the flexibility of the action for money had and received, see now *Roxborough v. Rothmans* (2002) 76 A.L.J.R. 203 (H.C.A.).
10. *Lipkin Gorman v. Karpnale* [1991] 2 A.C. 458, 578 *per* Lord Goff: "The claim for money had and received is not … founded on any wrong …" (see also 572); *Banque Financière de la Cité v. Parc (Battersea)* [1999] 1 A.C. 221 (H.L.) 227 *per* Lord Steyn: "… restitution is not a fault-based remedy".

and personal, not fault-based or proprietary, in nature; and they comprise the large bulk of the modern law of restitution.

As a consequence, as Keane J. put it in the *Bricklayers' Hall* case, the "modern authorities … have demonstrated that unjust enrichment exists as a distinctive legal concept, separate from both contract and tort".[11] Hence, it is now clear that "under our law, a person can in certain circumstances be obliged to effect restitution of money or other property to another where it would be unjust for him to retain the property".[12] Much of the resistance to such a principle against unjust enrichment is based upon judicial fears of palm tree justice engendered by the potentially open-textured nature of the adjective "unjust".[13] Such fears are not entirely unfounded: there are examples of unselfconscious application of untrammelled notions of "unjust" enrichment as a broad principle of equity or fairness.[14] However, as Keane J. clarified in the *Bricklayers' Hall* case:

> "the law, as it has developed, has avoided the dangers of 'palm tree justice' by identifying whether the case belongs in a specific category which justifies so describing the enrichment: possible instances are money paid under duress or as a result of a mistake of fact or law or accompanied by a total failure of consideration".[15]

11. [1996] 1 I.R. 468, 483; [1996] 2 I.L.R.M. 547, 558; similarly, "unjust enrichment ranks next to contract and tort as part of the law of obligations" *Banque Financière de la Cité v. Parc (Battersea)* [1999] 1 A.C. 221 (H.L.) 227 *per* Lord Steyn.
12. [1996] 1 I.R. 468, 483; [1996] 2 I.L.R.M. 547, 557.
13. See, *e.g.*, *Baylis v. Bishop of London* [1913] 1 Ch. 127 (C.A.) 140 *per* Hamilton L.J.; *Sinclair v. Brougham* [1914] A.C. 398, 454–456 *per* Lord Sumner; *Holt v. Markham* [1923] 1 K.B. 504 (C.A.) 513; *Reading v. A.G.* [1951] A.C. 507, 513–514 *per* Lord Porter; *Orakpo v. Manson Investments* [1978] A.C. 95 (H.L.) 104 *per* Lord Diplock; *Petkus v. Becker* (1980) 117 D.L.R. (3d) 257 (S.C.C.) 262 *per* Martland J. (dissenting); *Attorney General v. Ryan's Car Hire* [1965] I.R. 642 (S.C.) 664 *per* Kingsmill-Moore J.
14. *Cotter and McDermott v. Minister for Social Welfare (No 2)* [1990] 2 C.M.L.R. 94 and 141 (Hamilton P.), criticised in Whyte and O'Dell, "Welfare, Women and Unjust Enrichment" (1991) 20 *I.L.J.* 304; O'Dell, "A Tragedy in Five Acts. Behind the Scenes in *Cotter and McDermott (No 2)*" (1992) 2 *I.S.L.R.* 34; and O'Dell, (1993) 15 *D.U.L.J.* (*n.s.*) 27, 38; *Goodman v. Minister for Finance* [1999] 3 I.R. 356 (Laffoy J.) criticised in O'Dell, "Restitution" in Byrne and Binchy (eds.), *Annual Review of Irish Law 1999* (Round Hall Sweet & Maxwell, Dublin, 2000) 458, 458–465, 473–477.
15. [1996] 1 I.R. 468, 484; [1996] 2 I.L.R.M. 547, 558; *cp. Moses v. Macferlan* (1760) 2 Burr 1005, 1012; 97 E.R. 676, 681 *per* Lord Mansfield; *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour* [1943] A.C. 32 (H.L.) 63 *per* Lord Wright; *Pavey & Matthews v. Paul* (1986) 162 C.L.R. 221 (H.C.A.) 256 *per* Deane J.; *Kleinwort Benson v. Lincoln City Council* [1999] 2 A.C. 349 (H.L.) 408–409 *per*

Consequently, if there is an existing cause of action (of which Keane J. gave three instances) then it can be concluded that an enrichment is unjust. Indeed, it is *only* if there is such a cause of action that it can properly be concluded that an enrichment is unjust. Hence, "unjust" is no more and no less than a conclusion drawn from the existence on the facts of a recognised cause of action, such as mistake, or duress, or failure of consideration. More generally, therefore, the principle against unjust enrichment is not, of itself, a free-standing basis for the prescription or imposition of a liability to make restitution; rather, it is descriptive of the liability to make restitution which arises when a recognised cause of action is made out.

Understood in this way,[16] the principle against unjust enrichment is trammelled to personal causes of action at common law, it is entirely unrelated to principles of equitable discretion which might be thought to give rise to proprietary liability. Consequently, of itself and without more, it cannot form the basis of a claim to a remedial constructive trust. That is not to say that the remedial constructive trust is unprincipled or unjustifiable – whether it is or not is the work of the section – merely that the justification for the remedial constructive trust must be found elsewhere.

THE REMEDIAL CONSTRUCTIVE TRUST: PROCEED WITH CAUTION

The modern remedial constructive trust[17] probably begins – as with many other innovations – with Lord Denning M.R., who said that: "… it is a trust imposed

Lord Hope; Keane J. returned to the point (sitting as a High Court judge) in *O'Rourke v. Revenue Commissioners* [1996] 2 I.R. 1 (H.C.) 18.

16. For an entirely different understanding, see Hedley, *Restitution. Its Division and Ordering* (Sweet & Maxwell, London, 2001) arguing that "unjust enrichment" is an unnecessary concept generating unnecessary theory, and that most of its work can be accommodated within an expanded law of contract (see, *esp.*, chap. 3). See also Deitrich, *Restitution. A New Perspective* (Federation Press, Sydney, 1998) and Jaffey, *The Nature and Scope of Restitution* (Hart Publishing, Oxford, 2000).
17. The emergence of the remedial constructive trust can be tracked through these important articles: Oakley, "Has the Constructive Trust Become a General Equitable Remedy" (1973) 26 *C.L.P.* 17; Neave, "The Constructive Trust as a Remedial Device" (1978) 11 *Melb. U.L.R.* 343; Dewar, "The Development of the Remedial Constructive Trust" (1982) 60 *Can. Bar. Rev.* 263; O'Connor, "Happy Partners or Strange Bedfellows: The Blending of Remedial and Institutional Features in the Evolving Constructive Trust" (1988) 20 *Melb. U.L.R.* 735; Waters, "The Constructive Trust in Evolution: Substantive and Remedial" in Goldstein (ed.), *Equity and Contemporary Legal Developments* (Hebrew University, Jerusalem, 1992) 457 (reprinted: (1990-1991) 10 *Est. & Tr. J.* 334); Waters, "The Nature of the Remedial Constructive Trust" in Birks (ed.), *Frontiers of Liability* (OUP, 1994) vol. 2, 165.

by law whenever justice and good conscience require it. It is a liberal process, founded on large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone …".[18] It is a very controversial doctrine,[19] but in this form it has taken root in Irish soil. The remedial constructive trust has often been deployed by Barron J. – who has held that "the constructive trust is imposed by operation of law independent of intention in order to satisfy the demands of justice and good conscience"[20] – but its appeal has been much broader,[21] though this development has also been controversial.[22] One locus for this controversy has been the decision of Budd J. in the High Court in the *Bricklayers' Hall* case[23]: on the one hand, his expressed need for caution in that case[24] has been interpreted as putting an end to the remedial constructive trust in Ireland[25]; whilst, on the other, his approval of many of the leading English and Irish authorities and the general tenor of his judgment has been interpreted as supportive – perhaps cautiously supportive – of the remedial constructive trust.[26] The latter approach is entirely consistent with that taken in other common law jurisdictions. Although the English courts seem yet to have made up their mind,[27] the Supreme Court of Canada has

18. *Hussey v. Palmer* [1972] 1 W.L.R. 1286 (C.A.) 1290; see also *Binions v. Evans* [1972] Ch. 359 (C.A.) 368; *Eves v. Eves* [1975] 1 W.L.R. 1338 (C.A.) 1341; *DHN Food Distributors v. London Borough of Tower Hamlets* [1976] 1 W.L.R. 852 (C.A.) 859; a line of authority criticised in Maudsley, "Constructive Trusts" (1977) 28 *N.I.L.Q.* 123, 132-133 because of potential impact upon third parties.
19. Contrast Birks, "The End of the Remedial Constructive Trust?" (1998) 12 *T.L.I.* 202 (critical of the trust) with Wright, *The Remedial Constructive Trust* (Butterworths, Sydney, 1998) (defending it) and Wright, "Professor Birks and the Demise of the Remedial Constructive Trust" [1999] R.L.R. 128 (same).
20. *NAD v. TD* [1985] I.L.R.M. 153 (H.C.) 160; for similar comments by Barron J., see, *e.g.*, *CM CB v. SB* (unreported, High Court, May 17, 1983, at p 5 of the transcript); *Reidy v. McGreevy* (unreported, High Court, March 19, 1993); *Murray v. Murray* [1996] 3 I.R. 251 (H.C.) 255.
21. *Heavey v. Heavey* (1977) 111 I.L.T.R. 1 (H.C.) 3-4 *per* Kenny J; *Re Irish Shipping* [1986] I.L.R.M. 518 (H.C.) 522 *per* Carroll J.; *HKN Invest Oy v. Incotrade Pvt* [1993] 3 I.R. 152 (H.C.) 162 *per* Costello J.
22. See, *e.g.*, Mee, "Palm Trees in the Rain - New Model Constructive Trusts in Ireland" (1996) 1 *Conv. & P.L.J.* 9 (critical); Mee, *The Property Rights of Cohabitees* (Hart Publishing, Oxford, 1999), chap. 6 (same); *c.f.* Delany, *Equity and the Law of Trusts in Ireland* (2nd ed, Round Hall Sweet & Maxwell, Dublin, 1999), pp.255-266 (*semble* not as critical).
23. Unreported, High Court, March 6, 1996; this issue was not reached on appeal.
24. At p. 109 of the transcript.
25. Mee, *The Property Rights of Cohabitees* (Hart Publishing, Oxford, 1999), p.183.
26. O'Dell, "Bricks and Stones and the Structure of the Law of Restitution" (1998) 20 *D.U.L.J.* (*n.s.*) 101, 168-180.
27. Contrast *In re Goldcorp Exchange* [1995] 1 A.C. 74 (P.C.) 104 *per* Lord Mustill

adopted the trust with care and sensitivity to issues of policy, priority and timing;[28] the High Court of Australia, guided by general equitable notions of unconscionability,[29] has generated a constructive trust, which, whilst it has been distinguished from Lord Denning's model,[30] plainly has affinities with it;[31] and

(open to the remedial constructive trust); *Westdeutsche Landesbanke Girozentrale v. Islington LBC* [1996] A.C. 669 (H.L.) 714–715 *per* Lord Browne-Wilkinson (same); *In re Polly Peck International (No 2): Marangos Hotel v. Stone* [1998] 3 All E.R. 812 (C.A.) (critical).

28. *Soulos v. Korkontzilas* (1997) 146 D.L.R. (4th) 214 (S.C.C.).
29. This has generated not only the constructive trust mentioned in the text, but also relief against unconscientious conduct (*Legione v. Hateley* (1983) 152 C.L.R. 406 (H.C.A.); *Ciavarella v. Balmer* (1983) 153 C.L.R. 438 (H.C.A.); *Stern v. McArthur* (1988) 165 C.L.R. 489 (H.C.A.); *Bridgewater v. Leahy* (1998) 194 C.L.R. 547 (H.C.A.)) or unconscionable bargains (*Blomley v. Ryan* (1956) 99 C.L.R. 363 (H.C.A.); *Commercial Bank of Australia v. Amadio* (1983) 151 C.L.R. 447 (H.C.A.); *Louth v. Diprose* (1992) 186 C.L.R. 126 (H.C.A.); *c.f. Garcia v. National Australia Bank* (1998) 194 C.L.R. 395 (H.C.A.)).
30. *Muschinski v. Dodds* (1985) 160 C.L.R. 583 (H.C.A.); *Baumgartner v. Baumgartner* (1987) 164 C.L.R. 137 (H.C.A.); *Bathurst City Council v. PWC Properties* (1998) 157 A.L.R. 414 (H.C.A.); *Giumelli v. Giumelli* (1999) 196 C.L.R. 101 (H.C.A.)) This line of authority (and the lower court decisions it has spawned, discussed in Dodds, "The New Constructive Trust" (1988) 16 *Melb. U.L.R.* 482) has sought to avoid charges of unfettered discretion (see especially *Muschinski* (1985) 160 C.L.R. 583, 615–616 *per* Deane J) but has nonetheless affirmed the remedial nature of the constructive trust so generated (see, generally, *Bathurst* and *Giumelli*; though there are signs that it might come to be accommodated within an unjust enrichment rubic: see *Roxborough v. Rothmans* (2002) 76 A.L.J.R. 203 (H.C.A.) at text below, n.57). The Irish cases share many affinities with the Australian authorities. For example, Budd J. in the *Bricklayers' Hall* case cited *Muschinski* and its caution with approval (see pp.116–117 of the transcript). More generally, Irish law has developed a doctrine of improvidence which parallels the general Australian doctrine of unconscionablity (the leading case is *Grealish v. Murphy* [1946] I.R. 35 (H.C., Gavan Duffy J.); on which see Clark, "An Everyday Tale of Country Folk (Not!). *Grealish v. Murphy* (1946)" in O'Dell (ed.), *Leading Cases of the Twentieth Century* (Round Hall Sweet & Maxwell, Dublin, 2000) 149) whilst Barron J. has often discussed the new model constructive trust in unconscionability terms (see especially *Reidy v. McGreevy* (unreported, High Court, March 19, 1993) (*cp. Giumelli*); he has also cast estoppel in unconscionability terms, see *In re JR, a Ward of Court* [1994] I.L.R.M. 657 (H.C.: Costello J.); noted Coughlan, "Equity – Swords, Shields, and Estoppel Licences" (1993) 15 *D.U.L.J.* (*n.s.*) 188; see also Mee, "Taking Precedent Seriously" (1993) *I.L.T.* 255).
31. Mason, "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: An Australian Perspective" in Waters (ed.), *Equity, Fiduciaries and Trusts 1993* (Carswell, Toronto, 1993), 3, 14: "…some may consider that his Lordship's model was a shorthand version of the constructive trust which we have recognized".

the New Zealand Court of Appeal[32] has been enthusiastic in its embrace of the remedial constructive trust. Though many of the earlier cases in these jurisdictions reflect Lord Denning's influence, the more recent cases and academic treatments[33] reflect a much more sophisticated dexterity with the issues of policy, priority, timing and doctrine (often avoided by Lord Denning) to which proprietary claims such as constructive trusts give rise. In many respects therefore, the cautious but strong support for the remedial constructive trust evinced by Budd J. in the *Bricklayers' Hall* case is entirely consistent with the attitude now properly being taken to it elsewhere.

Caution is necessary if the remedial constructive trust is not to collapse the distinction between personal and proprietary claims,[34] a distinction which is crucial in the context of a defendant's bankruptcy or insolvency. A personal claim will rank on the lowest rung, and will usually be worthless; whereas, a proprietary claim will confer priority.[35] Too easy an acceptance of proprietary claims to constructive trusts will therefore be unfair to unsecured creditors,[36] as Budd J. recognised in the High Court in the *Bricklayers' Hall* case.[37] Such

32. *Elders Pastoral v. Bank of New Zealand* [1989] 2 N.Z.L.R. 180 (N.Z. C.A.); *Gilles v. Keogh* [1989] 2 N.Z.L.R. 327 (NZ CA); *Liggett v. Kensington* [1993] 1 N.Z.L.R. 257 (N.Z. C.A.) (*cp. In re Goldcorp Exchange* [1995] 1 A.C. 74 (P.C.) 104 *per* Lord Mustill on appeal); *Fortex v. Macintosh* [1998] 3 N.Z.L.R. 171 (NZ CA).
33. Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors" (1989) 68 *Can Bar Rev* 315; Glover, "Bankruptcy and Constructive Trusts" (1991) 19 *A.B.L.R.* 98; Scott, "The Remedial Constructive Trust in Commercial Transactions" [1993] *L.M.C.L.Q.* 330; Gardner, "The Element of Discretion" in Birks (ed.) *The Frontiers of Liability* (OUP, 1994) vol. 2, 186; *cp.* Burrows, (n.52 below).
34. Goode, "Ownership and Obligation in Commercial Transactions" (1987) 103 *L.Q.R.* 432; Fealy, "The Role of Equity in the Winding Up of a Company" (1995) 17 *D.U.L.J.* (*n.s.*) 18. See generally Rotherham, *Proprietary Remedies in Context* (Hart Publishing, Oxford, 2002).
35. *Shanahan's Stamp Auctions v. Farrelly* [1962] I.R. 386 (H.C.) 444–445, 448 *per* Budd J.; Anderson, "The Treatment of Trust Assets in English Insolvency Law" in McKendrick (ed.), *Commercial Aspects of Trusts and Fiduciary Obligations* (Clarendon Press, Oxford, 1992), p.167; Oditah, "Assets and the Treatment of Claims in Insolvency" (1992) 108 *L.Q.R.* 458; Oakley, "Proprietary Claims and Their Priority in Insolvency" [1995] *C.L.J.* 377; Finch and Worthington, "The *Pari Passu* Principle and Ranking Restitutionary Rights" in Rose (ed.), *Restitution and Insolvency* (LLP/Mansfield Press, London, 2000), p.1.
36. See, *e.g.*, Goode, "Property and Unjust Enrichment" in Burrows (ed) *Essays on the Law of Restitution* (Clarendon Press, Oxford, 1991), p.215; Goode, "Proprietary Restitutionary Claims" in Cornish, Nolan, O'Sullivan and Virgo (eds.), *Restitution: Past, Present and Future. Essays in Honour of Gareth Jones* (Hart Publishing, Oxford, 1998), p.63; arguing that the constructive trust should be confined for this reason.
37. See at p.109 of the transcript.

considerations demand that great care be taken in imposing a remedial constructive trust: notions of justice and good conscience should not displace sensitivity to doctrine and policy,[38] or to the time from which such an imposed trust takes effect;[39] and the trust should not without very good reason be imposed where it would prejudice the rights of third parties[40] especially the unsecured creditors of the defendant or where a personal remedy would be more appropriate. As a consequence, the Supreme Court, in the context of an insolvency, has been slow to elevate purely personal claims into proprietary ones.[41] Hence, although Irish law has now unequivocally adopted the remedial constructive trust, we should nevertheless proceed with caution in its future deployment.

It should by now be clear that, to the extent that the principle against unjust enrichment gives rise to legal, personal claims, it cannot support an equitable proprietary claim such as the remedial constructive trust. More generally, of itself and without more, unjust enrichment is no basis for a constructive trust; it merely gives rise to a personal claim for the return of the value of the enrichment received by the defendant at the expense of the plaintiff. However, the superficial similarity between the language of unjust enrichment and the language of unconscionability and of the remedial constructive trust has erroneously led to their equation.[42] For example, Budd J.'s approval of the remedial constructive trust in the *Bricklayers' Hall* case might be tied up with an equation of a liability to make restitution of an unjust enrichment and the constructive trust.[43] More

38. Scott, "The Remedial Restitutionary Proprietary Remedy: An Evaluation of the Extent to which Preferential Recovery should be Available for the Recovery of Money" (1995) 6 *Cant. L. Rev.* 123, 141–147; Birks, "Three Kinds of Objection to Discretionary Remedialism" (2000) 29 *U.W.A.L.R.* 1.
39. Levine, "Does Equity Treat as Done that which Ought to be Done? The Consequences Flowing from the Timing of the Imposition of a Constructive Trust" (1997) 5 *A.P.L.J.* 75; see also Oakley, "The Effect of the Imposition of a Constructive Trust" in Goldstein (ed.), *Equity and Contemporary Legal Developments* (Hebrew University, Jerusalem, 1992) 427.
40. See the approach of the majority in *Soulos v. Korkontzilas* (1997) 146 D.L.R. (4th) 214 (S.C.C.); *cp. Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] A.C. 669, 716 *per* Lord Browne-Wilkinson; Wright, "The Remedial Constructive Trust and Insolvency" in Rose (ed.), *Restitution and Insolvency* (LLP/Mansfield Press, London, 2000), p.206.
41. *In Re Barrett Apartments* [1985] I.R. 350; [1985] I.L.R.M. 679 (S.C.); noted Coughlan, "Equitable Liens for the Recovery of Booking Deposits" (1988) 10 *D.U.L.J. (n.s.)* 90; *c.f. Hewett v. Court* (1981) 149 C.L.R. 639 (H.C.A.).
42. For example, unconscionability seems to be used as a synonym for both unjust enrichment and equitable discretion by Laffoy J. in *Goodman v. Minister for Finance* [1999] 3 I.R. 356 (H.C.).
43. This depends on the precise meaning of his comments at pp.108, 119–120 of the transcript; but I have argued elsewhere that, on a careful reading, the judgment does not make the erroneous equation of unjust enrichment with the remedial constructive trust (see O'Dell (1998) 20 *D.U.L.J. (n.s.)* 101, 179).

generally, some unjust enrichment cases have called in aid Lord Denning's new model constructive trust; whilst, conversely, remedial constructive trust cases have called in aid Lord Mansfield's statement of the principle against unjust enrichment in *Moses v. Macferlan*.[44] Such an equiperation has occurred in Ireland: the common law case of *Moses v. Macferlan* has been deployed to justify a remedial constructive trust,[45] whilst unjust enrichment liability – which ought to be *prima facie* personal – has been assumed to require a constructive trust.[46] This way lies muddle, and ought to be eschewed. Doctrinal clarity and predictive certainty require that liability be based upon stable principles and not upon muddle, confusion and conflation. Indeed, much of the misplaced criticism of the principle against unjust enrichment is crossfire from similar but less misguided critique of the open-textured nature of the remedial constructive trust, at least on Lord Denning's model of a trust imposed whenever justice and good conscience require.

Although unjust enrichment and the constructive trust represent separate streams of analysis, they may on occasion flow in parallel, and there may even be one point at which they join. First, they may run in parallel where a plaintiff has two separate claims against the defendant; a personal claim to restitution of an unjust enrichment, and an *alternative* proprietary claim to a constructive trust. In such cases, although unjust enrichment *simpliciter* can be made out, it is not the basis for the constructive trust. That arises because there is something else, such as breach of trust[47] or breach of fiduciary duty,[48] which gives rise to a constructive trust in parallel with but independently of the defendant's unjust enrichment. Hence, such a trust will not have arisen simply because of the defendant's unjust enrichment at the plaintiff's expense, but because the

44. This is especially so in Canada; see, *e.g.*, *Rathwell v. Rathwell* (1978) 83 D.L.R. (3d) 289 (S.C.C.) 306 *per* Dickson J.; *Pettkus v. Becker* (1981) 117 D.L.R. (3d) 257 (S.C.C.) 273 *per* Dickson J. The problems of this equation have required the Supreme Court of Canada to untangle these concepts; see nn.55–61 below.
45. Keane, *Equity and the Law of Trusts in the Republic of Ireland* (Butterworths, London, 1998), p.186, para. 13.10; O'Connor, *Key Issues in Irish Family Law* (Round Hall, Dublin, 1988), p.191; see also n.63 below.
46. See, *e.g.*, *East Cork Foods v. O'Dwyer Steel* [1978] I.R. 103 (S.C.) 111-112 *per* Henchy J.; *Murphy v. A.G.* [1982] I.R. 241 (S.C.) 316 *per* Henchy J.; *In re Frederick Inns* [1991] I.L.R.M. 582 (H.C., Larnder J.); [1994] 1 I.L.R.M. 387 (S.C.); *O'Rourke v. Revenue Commissioners* (Supreme Court, unreported, 1996) revenue held money "on a form of constructive trust for taxpayer" (at p. 3 of the transcript of the judgment of O'Flaherty J.); less bluntly, see also Maudsley (1977) *N.I.L.Q.* 123, 125–126, 138-140, 142.
47. *E.g., Keech v. Sandford* (1726) Sel. Cas. t King 61; 25 E.R. 223.
48. *E.g., Boardman v. Phipps* [1967] 2 A.C. 46 (H.L.).

independent institutional requirements of the substantive trust in question have been separately established.[49]

Second, notwithstanding that, of itself and without more, unjust enrichment is no basis for a constructive trust, nevertheless it may very well be that analysis will identify *a further element*, which, *in conjunction with unjust enrichment*, will be sufficient to generate a proprietary liability such as a constructive trust;[50] (indeed, some species of the doctrine of unconscionability might provide this additional element[51] though for reasons of policy, priority and timing, recent

49. The integration of common law and equity in this context is an ongoing project in the modern law of restitution (see, *e.g.*, Beatson, "Unfinished Business: Integrating Equity" in *The Use and Abuse of Unjust Enrichment* (Oxford, 1991), p.244), and it may very well be that some institutional trusts which are restitutionary in pattern will be accommodated within the law of restitution generally. For example, Elias, *Explaining Constructive Trusts* (Oxford, 1991) argues that constructive trusts reflect three principles, the "perfection" of dispositions, the "reparation" of losses, and the "restitution" of unjust enrichments. This represents an enormous advance on more atomistic views of the constructive trust (*e.g.*, Cope, *Constructive Trusts* (Law Book Co, Sydney, 1992); Oakley, *Constructive Trusts* (3rd ed, Sweet & Maxwell, London, 1997)) on the one hand or views which seek to base all constructive trusts on unjust enrichment (*e.g.*, Waters, *The Constructive Trust: The Case for a New Approach in English Law* (Athlone Press, London, 1964); see also Waters, above n.17); but whilst Elias establishes that many constructive trusts are restitutionary in pattern, he does not go further and demonstrate how such trusts might be accommodated with a law of restitution which starts from a principle of personal liability for unjust enrichment. As such he does not establish that the constructive trusts which are restitutionary in pattern are also restitutionary in origin. Though susceptible of other criticisms, much more successful in this regard are the analyses of Mitchell, *The Law of Subrogation* (Oxford, 1994) (largely adopted by the House of Lords in *Banque Financière de la Cité v. Parc (Battersea)* [1999] 1 A.C. 221 (H.L.); *cf. Highland Finance v. Sacred Heart College of Agriculture* [1998] 2 I.R. 180; [1997] 2 I.L.R.M. 87 (S.C.)) and Chambers, *Resulting Trusts* (Oxford, 1997) (largely rejected by the House of Lords in *Westdeutsche Landesbanke Girozentrale v. Islington LBC* [1996] A.C. 669 (H.L.); but *cf. Air Jamaica v. Charlton* [1999] 1 W.L.R. 1399 (P.C.) 1412 *per* Lord Millet; *Twinsectra v. Yardley* [2002] U.K.H.L. 12, paras 92, 100 *per* Lord Millett). However, even if some institutional trusts which are restitutionary in pattern are accommodated within the law of restitution generally, this should not alter the requirements *separate* from unjust enrichment which give rise to such trusts. See also n.53 below.
50. See, *e.g.*, O'Dell, "Bricks and Stones and the Structure of the Law of Restitution" (1998) 20 *D.U.L.J.* (*n.s.*) 101, 168–180.
51. Goff and Jones, chap. 2. It would, however, be impossibly circular if unjust enrichment were to be taken as sufficient to generate such unconscionability: the point in the text is that unconscionability could be the *additional* factor which transmutes the personal liability to make restitution into a propriety liability to hold the property representing the enrichment on constructive trust. This might be supported by *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] A.C. 669 (H.L.) 705 *per* Lord Browne-Wilkinson, discussed text with and in nn. 90–102 below. The High Court of Australia, in reconceptualising some truths formerly understood to respond to unconscionability as now based on unjust enrichment (see *Roxborough*, above, n.30), has avoided the circularity and begun the quest for a principal basis for a trust responding to unjust enrichment.

scholarship seems to be coalescing around some notion of whether the plaintiff had accepted the risk of the defendant's insolvency[52]). It is this further element which elevates the *prima facie* personal unjust enrichment claim into a proprietary one. In these circumstances, unjust enrichment is a necessary element, but it is insufficient of itself to generate the proprietary nature of the claim; the proprietary nature is justified by the additional factor.[53] It may very well also be that such a restitutionary constructive trust will come to be seen as at least one[54] strand of the remedial constructive trust. In this way, the separate streams of unjust enrichment and constructive trust analysis may join at one point. However, there is, as yet, no stable analysis along these lines, but it is the only principled way in which unjust enrichment and the remedial constructive trust can meet and merge.

It is true that the early Canadian cases[55] gave the impression that unjust enrichment was both necessary and sufficient for constructive trust liability; but more recent authorities have significantly refined that position. It is now clear even in Canada that unjust enrichment simply gives rise to a personal claim;[56] and although it is still necessary for a constructive trust,[57] it is no longer sufficient, something more is required which has to be sensitive to policy

52. Burrows, "Proprietary Restitution. Unmasking Unjust Enrichment" (2001) 117 *L.Q.R.* 412.
53. Indeed, the additional factor which elevates a personal unjust enrichment claim into a proprietary one might be informed by analogy with any institutional trusts which might come to accommodated within the law of restitution generally, on which see n.49 above.
54. Thereby giving rise to a restitutionary remedial constructive trust: see, *e.g.*, *In re Goldcorp Exchange* [1995] 1 A.C. 74 (P.C.) 104 *per* Lord Mustill; Scott, n.38 above. Although it has been argued that unjust enrichment is the sole basis for the remedial constructive trust (see, *e.g.*, Waters, above, n. 17), the better view is that remedial "[c]onstructive trusts can remedy other injustices besides unjust enrichment" (Hayton, "Constructive Trusts: Is the Remedying of Unjust Enrichment a Satisfactory Approach?" in Youdan (ed.) *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989), 205, 210).
55. *Rathwell v. Rathwell* (1978) 83 D.L.R. (3d) 289 (S.C.C.); *Pettkus v. Becker* (1981) 117 D.L.R. (3d) 257 (S.C.C.); *Sorochan v. Sorochan* (1986) 29 D.L.R. (4th) 1 (S.C.C.); *Rawluk v. Rawluk* (1990) 65 D.L.R. (4th) 161 (S.C.C.).
56. *Peel v. Canada* (1994) 98 D.L.R. (4th) 140 (S.C.C.); see also *Deglman v. Guaranty Trust of Canada* [1954] 3 D.L.R. 785 (S.C.C.).
57. *Peter v. Beblow* (1993) 101 D.L.R. (4th) 621 (S.C.C.).

and the rights of third parties.[58] Furthermore, although the early Canadian cases also gave the impression that the only basis for constructive trust liability was unjust enrichment,[59] this is plainly not the case,[60] and it is now clear that whilst unjust enrichment (plus something more) can give rise to a constructive trust, such trusts can also arise for a host of other reasons.[61]

All of this emphasises the personal nature of liability on the basis of unjust enrichment, and the inappropriateness of this concept *simpliciter* to sustain a remedial constructive trust. Nevertheless, this is what Barr J. did in *Kelly v. Cahill*.

Kelly v. Cahill: Handle with Care

In *Kelly v. Cahill*, the deceased had willed his property on trust for his nephew, but having changed his mind, he instructed his solicitor that he wanted to leave all of his property to his wife. The solicitor advised that the best way to achieve this would be to transfer his property into the names of himself and his wife as joint tenants. The solicitor drew up a deed of transfer which was duly executed by the deceased and his wife. All parties believed that the deed referred to all of the deceased's property, but in fact, through the inadvertence of the solicitor and unknown to the testator and his wife, much of the testator's land was not in fact included in the deed of transfer contrary to the express intentions of the testator. When the deceased died, those lands passed under the will ultimately for the benefit of the nephew.

Barr J. held that the kernel of the question which he had to determine was "whether the evidence establishes a clear, positive intention on the part of the testator that his wife should inherit all of his property on his death; that he took appropriate steps to bring that about and that he could not reasonably have known that through his solicitor's error the Deed of Transfer, which he and his wife duly executed, did not include all of his lands and that his stated intention to benefit his wife exclusively on his death was defeated in part"[62] and held that it did. That having been established, it followed that

> "'justice and good conscience' require[d] that the [nephew] should not be allowed to inherit the testator's property or any part of it on the death of his widow and that his interest in remainder under the will should be deemed to be a constructive trust in favour of the widow. In my opinion a 'New Model' constructive trust of that nature the purpose of which is to prevent unjust enrichment is an equitable concept which deserves recognition in Irish law".[63]

This passage is yet another example of the unfortunate conflation of unjust enrichment and the remedial constructive trust. As has already been explained, liability in unjust enrichment is strict and personal, and arises at common law; whereas, the remedial constructive trust is an equitable proprietary liability. By collapsing the distinction between them, Barr J. has collapsed the fundamental distinction between personal and proprietary claims. It may very well be that in *Kelly v. Cahill* the testator's widow had a legal personal claim against the testator's nephew,[64] but unless there is either a separate parallel proprietary

58. *Soulos v. Korkontzilas* (1997) 146 D.L.R. (4th) 214 (S.C.C.). This development is unsurprising; see, *e.g.*, Litman, "The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of the Constructive Trust" (1988) *Alta L Rev* 407; Parkinson, "Beyond *Pettkus v. Becker*: Quantifying Relief for Unjust Enrichment" (1993) 43 *U.T.L.J.* 217; Hoegner, "How Many Rights (or Wrongs) Make a Remedy? Substantive, Remedial and Unified Constructive Trusts" (1997) 42 *McGill L.J.* 437.
59. See also *LAC Minerals v. International Corona Resources* (1989) 61 D.L.R. (4th) 14 (S.C.C.); *Hunter v. Syncrude* (1989) 57 D.L.R. (4th) 321 (S.C.C.).
60. Breach of trust and of fiduciary duty can also in appropriate cases give rise to constructive trust liability; see nn. 47–48 above.
61. *Soulos v. Korkontzilas* (1997) 146 D.L.R. (4th) 214 (S.C.C.); on which see Smith, "Constructive Trusts – Unjust Enrichment – Breach of Fiduciary Obligation" (1997) 76 *Can. Bar Rev.* 539; McInnes, "Unjust Enrichment and Constructive Trusts in the Supreme Court of Canada" (1988) 25 *Manitoba L.J.* 513.
62. [2001] 2 I.L.R.M. 205, 210.
63. [2001] 2 I.L.R.M. 205, 209–210; citing Keane, *Equity and the Law of Trusts in the Republic of Ireland* (Butterworths, London, 1988) 186, para. 13.10; *Hussey v. Palmer* [1972] 1 W.L.R. 1286 (C.A.) and *HKN Invest OY v. Incotrade pvt* [1993] 3 I.R. 152 (H.C.) 162 *per* Costello J. (in the *Bricklayers' Hall* case, Budd J. also cited this passage from Keane (at p.108 of the transcript), discussed *Hussey v. Palmer* (at pp.103–105 of the transcript) and also relied upon *HKN* (at p.109 of the transcript)).
64. O'Dell, "Restitution, Rectification and Mitigation: Negligent Solicitors and Wills, Again" (2002) 65 (3) *M.L.R.* 360, considering whether the intended beneficiary under a miscast will can have a direct personal action in restitution to reverse the unjust enrichment of an unintended recipient. This personal action of the intended beneficiary against the unintended recipient is structurally analogous to the personal claim of the beneficiaries in an intestacy against the recipients under an invalid (*Re Diplock; Diplock v. Wintle* [1948] Ch. 465 (C.A.); *aff'd sub nom Ministry of Health v. Simpson* [1951] A.C. 251 (H.L.); *cf. Welwood v. Grady* [1904] 1 I.R. 388) or forged (*Gertsch v. Atsas* [1999] N.S.W.C.A. 898) will. It is also structurally analogous to the many cases where benefits intended for a plaintiff arrived with a defendant, and which the plaintiff successfully recovered from the defendant as money had and received – that is, a legal personal liability to reverse an unjust enrichment (*e.g.*, *Jacob v. Allen* (1703) 1 Salk 27; 91 E.R. 26; *Official Custodian for Charities v. Mackey (No. 2)* [1985] 1 W.L.R. 1308 (Nourse J.); *In re PMPA Insurance*[1986] I.L.R.M. 524 (H.C.; Lynch J.)).

claim or a further element which in conjunction with unjust enrichment would be sufficient to generate a proprietary liability then there would be no basis for the remedial constructive trust.

There may very well, however, be a separate parallel proprietary claim which was not explored in the case itself but which would justify its outcome. The real problem was with the mis-drafted deed; the solution ought to have been found there, by rectifying the deed itself. There is an important series of cases in which the courts have done just that. For example, in *Walker v. Armstrong*,[65] Turner L.J. considered the jurisdiction of the court to rectify voluntary[66] deeds to be "a well-established principle and doctrine".[67] A marriage settlement of 1824 was amended by a deed of 1825 to extend the couple's powers of appointment, and by will made in 1827 the wife made an appointment under those powers. However, the 1825 deed as drafted imperilled the couple's life estates, and a further deed was executed in 1840 to cure this defect. When the wife died, it was discovered that the 1840 deed had been mis-drafted by the couple's solicitor, so that it called into question the extended powers of appointment under the 1825 deed and their exercise in the wife's will. The Court of Appeal held that the husband was entitled to have 1840 deed rectified[68] to reflect their intention to alter the 1825 deed only to restore the life estates and to leave its extension of the powers of appointment untouched. Again, in *Lister v. Hodgson*,[69] Lord Romilly M.R. accepted[70] that a voluntary deed which

65. (1856) 8 De G.M.&G. 531; 44 E.R. 495.
66. The principle is similar in cases of purchase rather than of gift; see, *e.g.*, *Craddock Brothers v. Hunt*[1923] 2 Ch. 136 (C.A.); *Lac Minerals v. Chevron Mineral Corporation of Ireland and Ivernia* [1995] 1 I.L.R.M. 161 (H.C.; Murphy J.); noted O'Dell, "Contract" in Byrne and Binchy (eds.), *Annual Review of Irish Law 1994* (Round Hall Sweet & Maxwell, Dublin, 1996), pp.134, 146–150.
67. (1856) 8 De G.M.&G. 531, 545; 44 E.R. 495, 500; see, *e.g.*, *Wright v. Goff* (1856) 22 Beav. 207; 52 E.R. 1087; *James v. Couchman* (1885) 29 Ch.D. 212, 217 *per* North J.
68. (1856) 8 DeGM&G 531, 541–542; 44 E.R. 495, 499 *per* Knight-Bruce L.J.
69. (1867) L.R. 4 Eq. 30. This decision has been approved by the House of Lords: in *White v. Jones* [1995] 2 A.C. 207 (H.L.) Lord Goff treated it is an unexceptionally correct authority (see [1995] 2 A.C. 207, 262; this is a much-cited passage: *e.g. Bacon v. Howard Kennedy* [1999] P.N.L.R. 1, 9 *per* Bromley J.; *Carr-Glynn v. Frearsons* [1997] 2 All E.R. 614, 625 *per* Lloyd J; *rvsd* [1999] Ch. 326 (C.A.)).
70. He had exercised just such a jurisdiction in the earlier *Wright v. Goff* (1856) 22 Beav. 207, 213–215; 52 E.R. 1087, 1090–1091. The jurisdiction was also accepted in, though not made out on the facts of, *Thompson v. Whitmore* (1860) 1 J&H 268, 273; 70 E.R. 748, 750 *per* Page-Wood V.C.; *Bonhote v. Henderson* [1895] 1 Ch. 742, 748 *per* Kekewich J.; *Van Der Linde v. Van Der Linde* [1947] Ch. 306, 310–312 *per* Evershed J.; *Blacklocks v. JB Developments (Goldaming)* [1982] Ch. 183, 196 *per* Judge Mervyn-Davies.

did not properly state the donor's intentions could be rectified after the donor's death.[71] Similarly, in *McMechan v. Warburton*,[72] the donor intended to settle certain shares upon the plaintiff, but the solicitor in error omitted this from the deed; after the death of the donor, Chatterton V.C. – unanimously affirmed by the Irish Court of Appeal – ordered rectification of the deed.

Hence, in *Walker v. Armstrong* and *McMechan v. Warburton*, an error by a solicitor in drawing up a deed resulted in a gift intended for the plaintiff reaching the defendant, and the error was corrected simply by rectifying the deed. Similarly, in *Kelly v. Cahill*, an error by the solicitor drawing up a deed resulted in a gift intended by the husband for his wife reaching his nephew instead, and the error could likewise have been corrected simply by rectifying the deed. There almost certainly would be a personal claim in unjust enrichment[73] to which this rectification action would provide an alternative parallel proprietary claim.

Furthermore, there is a strong affinity between these rectification cases and trust solutions, and the trust analysis in the rectification cases may very well identify a further element, which, in conjunction with unjust enrichment, would be sufficient to generate a proprietary – trust-based – liability. For example, in *Craddock Brothers v. Hunt*, in which the Court of Appeal held that that a purchaser could have rectification of a deed of conveyance, Lord Sterndale M.R. was prepared to go further and hold that the defendant held the property on trust for the claimant.[74] This had been done in the earlier case of *Leuty v. Hillas*.[75] A vendor sold adjoining properties to the claimant and defendant, a portion of property was conveyed to the defendant which the vendor and claimant had intended would go to the claimant, and Lord Cranworth L.C. held the defendant to be "a trustee of the excess"[76] for the plaintiff. Hence, in *Lac Minerals v. Chevron*, where two parties had made an error in reducing to writing a contract for the sale of land, and one had then sold his erroneously-stated interest to a third party, Murphy J. held that the third party had a sufficiently close nexus to the first contract to rectify it and so obtain the full interest; and

71. (1867) L.R. 4 Eq. 30, 34; the deed recited an absolute gift of £900 to the defendant, and not the intended gift to the defendant for life, with the money on his death to be divided between the donor's sisters. On the facts, the donor obtained the cancellation of the deed, and the return of the money from the defendant.
72. [1896] 1 I.R. 435 (Chatterton V.C.); *aff'd* [1896] 1 I.R. 441 (Ir. CA).
73. See n.64 above.
74. [1923] 2 Ch. 136, 155 *per* Sterndale M.R. There was no majority for this: both Sterndale M.R. and Warrington L.J. supported the rectification order successfully sought by the plaintiff, Younger L.J. dissented, but only the Master of the Rolls spoke of imposing the trust.
75. (1858) 2 De G.&J. 110; 44 E.R. 929.
76. (1858) 2 De G.&J. 110, 122; 44 E.R. 929, 934.

that the party who had mistakenly obtained that title held it on trust until the rectification of the first contract had vested it in the party properly entitled.[77]

Similarly straddling rectification and trusts is the more recent *Shanahan v. Redmond*.[78] A donor had instructed[79] his life assurance company to replace an existing policy under which the defendant was the beneficiary with a similar one under which the plaintiff would be the beneficiary. The company failed to carry out these instructions, and when the donor died, the defendant was paid on foot of the original policy. Applying the equitable maxim that equity regards as done that which ought to be done,[80] Carroll J. held that obligation on the insurance company ought to be treated as if it had been performed, and the existing policy treated as though it named the claimant and not the defendant. This outcome can be cast either as rectification of the policy in all but name[81] or as requiring the defendant to hold the proceeds of the policy on trust for the plaintiff.[82]

In this case, as in *Kelly v. Cahill*, the donor had done all that he could have done to ensure that the benefit arrived with his intended beneficiary. Because equity will not assist a volunteer,[83] it will not perfect an incomplete gift[84]; though if the donor has done everything which was necessary to be done in order to transfer the property, equity will treat the transfer as effective, and if the transfer has not occurred, the donor will hold the property on constructive trust for the intended recipient.[85] Hence, in *Re Rose*, the transfers of shares were effective when the shareholder had done all that he could do to divest himself of his beneficial interests in them, rather than three months later when the company registered the transfers.[86] In such circumstances, although "equity will not aid a volunteer, it will not strive officiously to defeat a gift".[87] Consequently, by way of an exception to the principle that equity will not assist a volunteer,[88] where a donor has done all that he or she could have to transfer a benefit to a beneficiary, equity will require the recipient to hold it on constructive trust for the intended beneficiary. In *Shanahan v. Redmond*, the donor had done everything that was required by the terms of the policy; despite the insurance company's subsequent failure to carry out his instructions, Carroll J. gave effect to his intentions. That result, at least, conforms with the *Re Rose* pattern. Similarly, the fact that the testator had done all that he could have done was crucial to Barr J.'s decision in *Kelly v. Cahill*; Barr J. held that, not only had the evidence to establish a "clear, positive intention" on the part of the testator that his wife should inherit his property on his death, it also had to show – as it did – that the testator took the "appropriate steps to bring that about and that he could not reasonably have known [of] … his solicitor's error".[89] Hence, the trust conforms to the *Re Rose* pattern, and ought perhaps therefore to be understood, not as a remedial constructive trust at all, but instead as a case in the *Re Rose* line of authority.

There are however problems with accommodating that line of authority

77. [1995] 1 I.L.R.M. 161, 176–178, discussing *Craddock Brothers v. Hunt, Majestic Homes Property v. Wise* [1978] Qd. R. 225 and *Shepheard v. Graham* (1947) 66 N.Z.L.R. 654.
78. Unreported, High Court, June 21, 1994, Carroll J.; on which see O'Dell, "Insurance Payments (Mis)Directed, Equitable Maxims (Mis)Used, and Restitution Doctrines Missed" [1997] *L.M.C.L.Q.* 197.
79. Indeed, this was the donor's second attempt to achieve this end; his first attempt by Deed of Appointment had failed; on this second attempt his instructions to the insurance company were sufficient according to the terms of the policy to replace it with one which named the plaintiff.
80. *Cp. Lord Napier and Ettrick v. Hunter* [1993] A.C. 713 (H.L.) 752 *per* Lord Browne-Wilkinson; *A.G. for Hong Kong v. Reid* [1994] 1 A.C. 324 (P.C.) 331 *per* Lord Templeman.
81. O'Dell, (2002) 65 (3) *M.L.R.* 360.
82. O'Dell, [1997] *LMCLQ* 197, 202-203; see also *Wargo v. Wargo* 48 Misc. 2d. 349 (1965) 356: "When an assured signs a change of beneficiary form provided by the insurer and files it with the local office as is required by the policy, and all that remains to be done is purely formal by the insurer or its representative, such change is effective". However, on the facts, the insured had validly exercised his right to change the beneficiaries under various insurance policies, and the claim by the originally named beneficiary failed.
83. Delany, *Equity and the Law of Trusts in Ireland* (2nd ed., Round Hall Sweet & Maxwell, Dublin, 1999), pp.113–116.
84. *Milory v. Lord* (1862) 4 De G.F.&J. 264; 45 E.R. 1185; *West v. West* (1882–1883) 9 L.R. Ir. 121 (Chatterton V.C.); *Devoy v. Hanlon* [1929] I.R. 246 (S.C.).

85. *Re Rose*; *Rose v. Inland Revenue Commissioners* [1952] 1 Ch. 499 (C.A.); see also *Vandervell v. IRC* [1967] 2 A.C. 291 (H.L.): *Corin v. Patton* (1990) 169 C.L.R. 54 (H.C.A.); *Pennington v. Waine* [2002] E.W.C.A. Civ. 227 (March 4, 2002); see generally Oakley, *Constructive Trusts* (3rd ed, Sweet & Maxwell, London, 1997), pp.311–318; Dowling, "Can Roses Survive on Registered Land?" (1999) 50 *N.I.L.Q.* 90 (discussing the application of *Re Rose* to cases involving registered land); *cf.* Lowrie and Todd, "*Re Rose* Revisited" [1998] *C.L.J.* 46.
86. [1952] 1 Ch. 499, 509. As the law then stood, if the transfers were effective only when the company had registered them, then they would have been sufficiently close to the subsequent death of the shareholder to trigger estate duty; whereas if they were effective on the earlier date when the transfer was executed, no such duty would have been payable. The effect of the decision of the Court of Appeal that they were effective on the earlier date meant that no estate duty was payable.
87. *T Choithram International SA v. Pagarnai* [2001] 1 W.L.R. 1 (P.C.) 11 *per* Lord Browne-Wilkinson.
88. The rectification jurisdiction discussed above (text with and in nn65–73) is a similar exception; see, *e.g.*, *Lister v. Hogson* (1867) L.R. 4 Eq. 30, 33–35 *per* Lord Romilly M.R. and *McMechan v. Warburton* [1896] 1 I.R. 435, 440–441 *per* Chatterton V.C.
89. [2001] 2 I.L.R.M. 205, 210.

within current constructive trust orthodoxy.[90] In *Westdeutsche Landesbank Girozentrale v. Islington LBC*,[91] Lord Browne-Wilkinson held that constructive trusts arise where the recipient holding "identifiable trust property … [is] aware that he is intended to hold the property for the benefit of others … [or] of the factors which are alleged to affect his conscience".[92] Consequently, though he considered himself to be applying broader principles of equity in imposing a constructive trust, the main reason given by Budd J. in the *Bricklayers' Hall* case for its imposition was that when the defendants received the money to reinstate their Hall, they were "*well aware* that the premises had already been demolished and there was no longer any intention to carry out the reinstatement".[93] Hence, in the words of Lord Browne-Wilkinson's formulation in *Westdeutsche*, the defendant was sufficiently aware of the factors which affected its conscience[94] to justify the imposition of a constructive trust. In cases such as *Shanahan v. Redmond* and *Kelly v. Cahill*, the recipient under the insurance policy or will would usually be unaware that the donor had intended and sought to change the direction of the gift, so such a trust will usually be inappropriate. Of course, in those cases in which the recipient does know, then on Lord Browne-Wilkinson's analysis, such a trust would be justified. For example, in the old Irish case of *Seagrave v. Kirwan*,[95] a lawyer had been appointed executor of a will, and, as the law then stood, therefore succeeded to the substantial undisposed residue; but Hart L.C. held that he held the residue on trust for the testator's next of kin. This was followed in *Bulkley v. Wilford*,[96] where, by the negligence of her attorney, a devise to a widow was revoked; the attorney then succeeded to the property as heir-at-law; and Lord Eldon L.C.

90. As a consequence, Lowrie and Todd, "*Re Rose* Revisited" [1998] *C.L.J.* 46, argue that in *Re Rose* cases the full incidents of trusteeship would be onerous or inappropriate, so that such cases should be regarded as examples merely of the separation of legal and equitable title without all the incidents of trusteeship.
91. [1996] A.C. 669 (H.L.).
92. [1996] A.C. 669, 705; Swadling has been a harsh critic of this approach; see, *e.g.*, Swadling, "Property" in Birks and Rose (eds.), *Lessons of the Swaps Litigation* (Mansfield Press, Oxford, 1998), p.242; Swadling, "Property and Conscience" (1998) 12 *T.L.I.* 228.
93. At p.114 of the transcript (emphasis added); see also pp.117–119, 123.
94. Incantations of conscience are ritualistic in many chancery cases, rarely have a constant meaning in the various context in which it is invoked, and add little of substance, but have the tendency to obscure subsequent analysis and development; see generally Klinck, "The Unexamined 'Conscience' of Contemporary Canadian Equity" (2001) 46 *McGill L.J.* 571.
95. (1828) 1 Beatt. 157.
96. (1834) 2 C.&F. 102; 6 E.R. 1094; Handley, "Negligent Solicitors and Wills" (1994) 110 *L.Q.R.* 55; Elias, *Explaining Constructive Trusts* (Oxford, 1990), pp.66-71; see also *Re Birchall* (1881) 44 L.T. 243 (Ch.D.) 245 *per* Malins V.C.

held that the attorney held the property on trust for the widow. In these cases, the consciences of the recipients were affected by their actual or constructive awareness that they would benefit.[97]

This *Westdeutsche* criterion of awareness or knowledge might explain *Shanahan v. Redmond*: Carroll J. found that the donor had "had a falling out with"[98] the recipient. This would certainly have given the recipient constructive notice[99] – and he may even have had knowledge – of the donor's change of plans in relation to the policy. But even if the recipient's knowledge or notice of the donor's intention can explain *Shanahan v. Redmond*, it cannot explain either the *Re Rose* cases[100] or *Kelly v. Cahill*, where Barr J. expressly held that was irrelevant that the nephew was neither aware of nor had any responsibility for the solicitor's error.[101]

Consequently, if the trusts expressly imposed in *Re Rose* and *Kelly v. Cahill*, and all but imposed in *Shanahan v. Redmond*, are to be accommodated within orthodox notions of the constructive trust, the *Westdeutsche* criterion of what affects conscience will have to evolve. One possibility might be to objectivise it.[102] At present, a defendant's conscience is affected by knowledge or awareness of the circumstances; it is a subjective test. However, the key to the rectification cases seems to be that one party should not gain and the other loose due to the error or failure of the third party; this is especially so where the cases have supplemented rectification orders with trusts. Similar concerns underlie *Re Rose*: once the donor has done all that was possible, the intended beneficiary should not loose simply because a third party has not performed. It is the same with *Kelly v. Cahill*: Barr J. was of the view that the nephew should not gain and wife loose simply because the error of the third party, the solicitor. In all of these cases, the courts are therefore not so much concerned with subjective awareness on the part of the recipient as with an objective view of the

97. See *Seagrave v. Kirwan* (1828) 1 Beatt. 157, 169 (ought to have known of the rule of law by which he succeeded); *Bulkley v. Wilford* (1834) 2 C.&F. 102, 179–181; 6 E.R. 1094, 1123 *per* Lord Eldon L.C. (fraud); *cf. Lysaght v. McGrath* (1883–1884) 11 L.R. (Ir.) 142, 161-163 *per* May L.J., 169–170 *per* Deasy L.J., 172 *per* Fitzgibbon L.J. (no such problems where an experienced barrister had drafted for an experienced solicitor a disposition under which the barrister had ultimately benefited).
98. At p.4 of the transcript.
99. *Cf.* Brindle and Hooley, "Does Constructive Knowledge Make A Constructive Trustee?" (1987) 61 *A.L.J.* 281.
100. Lowrie and Todd, "*Re Rose* Revisited" [1998] *C.L.J.* 46, 47: "there was no obvious reason to impose on his [*i.e.*, Mr Rose's] conscience".
101. [2001] 2 I.L.R.M. 205, 210.
102. *Cp.* the similar issue as to whether the criterion for the imposition of liability for assistance in a breach of trust is objective or subjective: see *Royal Brunei Airlines v. Tan* [1995] 2 A.C. 378 (P.C.); *Twinsectra v. Yardley* [2002] U.K.H.L. 12.

circumstances surrounding that receipt. Hence, it might said that, on *Westdeutsche* lines, whilst subjective awareness of factors rendering the receipt against conscience would be *sufficient* to trigger a constructive trust, such subjective awareness is not always necessary insofar as an objective view of the facts might also trigger a constructive trust. However, such objectivisation, whilst it would ensure the accommodation of *Kelly v. Cahill* and *Re Rose* with *Westdeutsche*, would carry with it its own problems. Not least, it comes perilously close to the loose "justice and good conscience" formula which was applied in *Kelly v. Cahill* itself. It may very well be, therefore, that *Kelly v. Cahill* is not easily accommodated within mainstream constructive trust reasoning, thus raising doubts – not easily stilled – about its correctness.

Even so, it is possible to fall back upon rectification of the deed to achieve the result in *Kelly*. Indeed, even in the US where the trust is often rather easily deployed as a remedy,[103] many jurisdictions seem nevertheless to prefer the remedy of rectification. For example, in *Massicotte v. Matuzas*,[104] the plaintiff had intended to give her son a future interest in property, but the deed as drawn up by her attorney had given the son a present interest in it. The judge at first instance held that the son must therefore hold the interest on constructive trust for his mother, but on appeal, Thayer J. in the Supreme Court of New Hampshire reversed in favour of rectification of the deed to correct the mistake and reflect what she had intended to convey. Likewise, in *Kelly v. Cahill*, since a deed failed to have its intended effect, the remedy ought to have focussed on remedying that failure; that is, the remedy ought to have been rectification of the deed to achieve the effect intended by the testator and his wife.

Another issue arises from the facts of *Kelly v. Cahill*. Assume that the alteration to the will was to have been achieved, not by means of a deed *dehors* the will, but by the straightforward drafting of a new will. Assume further that the drafting was botched so that a gift intended for the testator's wife went instead to his nephew. In this scenario, the question arises as to whether there might be a remedy for this mis-drafted will. As above, at least two are possible, rectification and trust.

First, rectification.[105] Many jurisdictions have statutory powers to rectify

103. See, *e.g.*, Rendleman, *Remedies* (6th ed, West, St. Paul, Minn., 1999) 345; this is often done by reference to the judgment of Cardozo J. in *Beatty v. Guggenheim* (1919) 225 N.Y. 380, 386. On a passage which has attracted Lord Denning (see the references in n.18 above) and many of those who have followed in his footsteps, including Barr J. in *Kelly v. Cahill* (see [2001] 2 I.L.R.M. 205, 210), see Powell, "'Cardozo's Foot': The Chancellor's Conscience and Constructive Trusts" (1993) 56 *L. & Contemp. Probs.* 7.
104. 738 A 2d 1260 (1999); noted Kull [2000] *Restitution L.R.* § 289.
105. See generally Atherton and Vines, *Australian Succession Law. Commentary and Materials* (Butterworths, Sydney, 1996), chap. 11; Goodman and Hall, *Probate Disputes and Remedies* (FT, London, 1997), chap. 17.

mis-drafted wills.[106] For example, in England, section 20(1) of the Administration of Justice Act 1982[107] allows a court to rectify a will where it "fails to carry out the testator's intention in consequence – (a) of a clerical error; or (b) of a failure [by the solicitor] to understand … [the testator's] intentions", provided that the testator's intention can be established by convincing evidence.[108] This is a relatively limited provision,[109] the Queensland[110] equivalent is more limited, but the provision in New South Wales[111] is broader. Despite the historical absence of a similar power at common law,[112] one has nevertheless be-

106. See Rowland, "The Construction or Rectification of Wills to Take Account of Unforeseen Circumstances Affecting Their Operation" (1993) 1 *A.P.L.J.* 87 (Part 1), 193 (Part 2).
107. See Miller, *The Machinery of Succession* (2nd ed, Dartmouth, Aldershot, 1996), pp.136-138; Histed, "Rectification of Wills and Charitable Trusts for Poor Relations: Broadening the Boundaries" [1996] *Conv.* 379. For the equivalent position in Northern Ireland under Article 29(1) of the Wills and Administration Proceedings (NI) Order 1994, see Grattan, *Succession Law in Northern Ireland* (SLS, Belfast, 1996), pp.35–39.
108. *Re Segelman (decd)* [1996] Ch. 171, 184 *per* Chadwick J.; *Wordingham v. Royal Exchange Trust Co.* [1992] 2 W.L.R. 496; *Walker v. Medlicott* [1999] 1 All E.R. 685 (C.A.) 690 *per* Sir Christopher Slade; *Gibbons v. Nelsons* [2000] P.N.L.R. 734 (Ch.D.) 748 *per* Blackburne J.; *Re Grattan* [2001] W.T.L.R. 1305 (Behrers J.).
109. In *Horsfall v. Haywards*[1999] 1 F.L.R. 1182 (Rich, "Errors in Will-Drafting: The Limits of a Remedy in Negligence" (1999) 15 P.N. 211; Sprince, "Disappointed Beneficiaries and Disappearing Principles" (2001) 17 P.N. 104) the bequest had been transferred to Canada, and would not be returned, so that rectification of the will would have been of no benefit to the plaintiffs. In *Hooper v. Fynmores (a Firm)* (Chancery Division, May 23, 2001; *The Times*, July 19, 2001) Pumfrey J. held that a solicitor, who negligently cancelled an appointment for the execution of a will of an elderly hospitalised client who subsequently died without changing his existing will, was in breach of his duty of care to the beneficiaries intended under the unmade will; rectification of the existing will to reflect the changes intended by the testator would not be within the ambit of s.20(1) of the 1982 Act. See now also *Bell v. Georgiou* [2002] E.W.H.C. 1080 (Ch.D., Blackburne J.) noted Hewitt, "Recitification of Wills" (2002) 152 *N.L.J.* 950.
110. See s.13 of the Succession Act 1981; on which see Maxton, *Nevill's Law of Trusts, Wills and Administration in New Zealand* (8th ed, Butterworths, Wellington, 1985), pp.261-262; Rowland, pp.205–209.
111. See s.29A of the Wills, Probate and Administration Act 1899 as inserted by s.3 of the Wills, Probate and Administration (Amendment) Act 1989; on which see Voyce, "Statutory Reform of Rectification of Wills in NSW" (1991) 8 (1) *Aust. Bar Rev.* 49.
112. Lee, "Correcting Testator's Mistakes: The Probate Jurisdiction" (1969) 33 *Conv.* 322; Hardingham, "The Jurisdiction of Courts of Probate to Rectify Errors in Wills" (1972) 46 *A.L.J.* 221.

gun to develop in the US,[113] in New Zealand,[114] and in Jersey.[115] There is no Irish statutory equivalent, but there would seem to be scope for a rectification power to develop at common law,[116] perhaps by analogy with *Lister v. Hodgson* and *McMechan v. Warburton*. Interestingly, in *Kelly v. Cahill*, Barr J. required that the evidence establish a "clear, positive intention"[117] on the part of the testator to benefit his wife. Hence, the facts required to sustain Barr J's remedial constructive trust and the standard of proof on which they are to be established are exactly the same as those required in the rectification action. If they can be established in the one place, then they can also be established in the other.

Second, trust: even if Irish law does not acquire a statutory or common law power to rectify mis-drafted wills, nevertheless, it would not be difficult to extend the constructive trust reasoning[118] in *Kelly v. Cahill* to cover situations where the evidence establishes a clear, positive intention on the part of the testator to benefit someone other than the person named in a will.[119] Of course, this would represent an undesirable extension of an already problematic case, but a similar result has been reached in Canada[120] and the United States. In the Florida case of *In re the Estate of Tolin*,[121] the testator had destroyed a copy of a codicil to his will, in the mistaken belief that it was the original codicil, intending to revoke it. The Supreme Court of Florida held that this was insufficient to revoke the codicil, but held that the beneficiary under the codicil

113. Langbein and Waggoner, "Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?" 130 *U. P.a. L.Rev.* 521 (1982).
114. *Re Jensen* [1992] 2 N.Z.L.R. 506 (N.Z. H.C.); *McConagle v. Starkey* [1997] 3 N.Z.L.R. 635 (N.Z. H.C.), noted McMorland, "Succession" [1997] *N.Z.L. Rev.* 576, 578; *cp.* Rowland, pp.94, 200; see also Maxton, "Rectification of Wills: The Case for Reform" [1984] *N.Z.L.J.* 142.
115. O'Connell, "Rectification of Wills: Recent Developments in Jersey" (2001) 5 *Jersey L. Rev.* 64.
116. Foreshadowed in Brady, *Succession Law in Ireland* (2nd ed., Butterworths, Dublin, 1995), p.129, para. 5.06.
117. [2001] 2 I.L.R.M. 205, 210.
118. Foreshadowed in Brady, p.4, para 1.11.
119. Whilst it would not be difficult to extend *Kelly v. Cahill* in this manner, any trust would be imposed for objective rather than subjective reasons; in such situations, where solicitors negligently fail to alter testamentary gifts, in the great majority of such cases, the actual beneficiaries would be unaware of the testators' changes of mind, and no trust would therefore arise on subjective *Westdeutsche*-like grounds; see, *e.g.*, *Hill v. van Erp* (1996-1997) 188 C.L.R. 159 (H.C.A.) 228 *per* Gummow J.
120. *Cp.* the cases discussed in Farquhar, "Designated Insurance and Pension Beneficiaries and Unfulfilled Expectations" (1997) 14 *Can. J.F.L.* 63; see also *Wilcox v. Wilcox* [2000] B.C.C.A. 491.
121. 622 So. 2d 988 (1993); noted Kull, [1995] *Restitution L.R.* § 291.

held the bequest on constructive trust for the intended beneficiary under the will.[122] As with *Kelly v. Cahill* – and the similar Canadian cases – this trust was imposed to reverse unjust enrichment, but Harding J. continued that "[a]lthough this equitable remedy is usually limited to circumstances in which fraud or a breach of confidence has occurred, it is proper in cases in which one party has benefited by the mistake of another at the expense of a third party …".[123] Hence, unlike *Kelly v. Cahill*, by reference to fraud, breach of confidence, and the mistake of another, Harding J. in *Tolin* did at least attempt to find a justification beyond merely unjust enrichment to justify the proprietary outcome.[124] Fraud and breach of confidence on the part of a defendant are plainly factors affecting conscience sufficient to trigger a constructive trust on Lord Browne-Wilkinson's *Westdeutsche* formulation. The extension to mistake is similar to the reasoning underpinning the rectification cases, and there have been attempts to impose constructive trusts on mistaken payments,[125] though it has been argued that these cases turn not on the mistake but upon the fact that knowledge of the mistake affected the defendants' consciences.[126] In the end, therefore, though a better stab than *Kelly v. Cahill*, *Tolin* still fails to provide a sufficient justification for elevating a personal unjust enrichment claim to a proprietary one.

In the later Florida case of *Dalk v. Allen*,[127] the deceased's will was unsigned, but the judge at first instance admitted it to probate, holding that constructive trusts would otherwise be imposed on the recipients in the intestacy for the benefit of the intended beneficiaries named in the unsigned will. This was quite properly reversed on appeal.[128] Although the first instance judge in *Dalk* had purported to follow *Tolin* for the proposition that constructive trusts would be imposed, the cases are different: in failing to sign the will, the deceased in *Dalk*, (unlike in *Tolin* and *Kelly v. Cahill*), had not done all that she could have: she had failed to sign the will, albeit as a consequence of confusion in circulation of multiple original documents for her signature when she attended her lawyer's

122. 622 So. 2d 988, 990–991.
123. 622 So. 2d 988, 991.
124. *Cp.* Goff and Jones, pp.39, 699, 706.
125. *Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd* [1981] Ch. 105; [1979] 3 All E.R. 1025 (Ch.D.; Goulding J.); *In re Irish Shipping* [1986] I.L.R.M. 518 (H.C.; Carroll J.); see also the *Bricklayers' Hall* case (unreported, High Court, April 6,.1996, Budd J.) at p.109 of the transcript.
126. See, *e.g.*, Lord Browne-Wilkinson's reinterpretation of *Chase Manhattan* in *Westdeutsche* ([1996] A.C. 669, 715).
127. 774 So. 2d 787 (2000).
128. For the position on this point on this side of the Atlantic, see *Re White, dec'd, Barker v. Gribble* [1991] Ch. 1 (codicil lacking testator's signature invalid); *Wood v. Smith* [1993] Ch. 90 (C.A.) (unsigned will saved by heading in testator's handwriting: "My will by [testator's name] …"); see generally Miller, "Reforming the Formal Requirements for the Execution of a Will" [1993] *Denning L.J.* 71.

office.[129] In not doing all that she could have done, she had not therefore sufficiently demonstrated her intention to benefit the plaintiffs. In other words, even in the United States, the cases turn not on discretion but on considerations which are consistent with *Westdeutsche* and *Re Rose*.

However, either rectification of the will or a trust of a bequest could run foul of the strong public policy in favour of the finality of testamentary instruments. It is the policy basis of the Succession Act 1965 and of the Wills Act 1837 before it.[130] Indeed, the claim in *Kelly v. Cahill* would have also been vulnerable to similar policy objections. However, such policies do not defeat claims to constructive trusts over gifts in mutual wills,[131] or claims of survivors to the contents of joint deposit accounts,[132] and they are gone around even in the context of *White v. Jones*.[133] Hence, in *Seagrave v. Kirwan*,[134] Hart LC brushed aside such policy objections that the will was being undercut where a constructive trust for the benefit of the next of kin was imposed on the lawyer who drafted the will and had succeeded as executor to the undisposed residue of the estate.

So much then for the trust claims to which *Kelly v. Cahill* and similar cases give rise. For the sake of completeness, one final – unrelated – issue in the case ought to be briefly addressed. The case concerned a mis-drafted deed. Had the solicitor mis-drafted not the deed but the will, then quite clearly he would have owed a duty of care to the intended beneficiaries,[135] and if the mis-drafting had

129. A question was certified for the Supreme Court of Florida as to whether in principle such a constructive trust would be justified, but the Supreme Court granted review without publishing reasons: see 789 So. 2d 343 (2001) (Table).
130. Goff and Jones, pp.39, 706; see, *e.g.*, Davey, "The Making and Revocation of Wills – I" [1980] *Conv.* 64, 67–70; Critchley, "Privileged Wills and Testamentary Formalities: A Time to Die?" [1999] *C.L.J.* 49, 51–53.
131. Brady, pp.5–9, paras. 1.12–1.22.
132. *Lynch v. Burke* [1995] 2 I.R. 159 (S.C.) 167; [1996] 1 I.L.R.M. 114, 121 *per* O'Flaherty J.
133. [1995] 2 A.C. 207 (H.L.); Matthews, "Round and Round the Garden" [1996] *L.M.C.L.Q.* 460, 461.
134. (1828) 1 Beatt. 157, 163–165.
135. See *Wall v. Hegarty* [1980] I.L.R.M. 124 (H.C.; Barrington J.). The position is the same in other common law jurisdictions, such as England (*Ross v. Caunters* [1980] Ch. 297 (Ch.D.; Megarry V.C.); *White v. Jones* [1995] 2 A.C. 207 (H.L.)), New Zealand (*Gartside v. Sheffield Young & Ellis* [1983] N.Z.L.R. 37 (N.Z. C.A.)), and Australia (*Hawkins v. Clayton* (1989) 164 C.L.R. 539 (H.C.A.); *Hill v. van Erp* (1996–1997) 188 C.L.R. 159 (H.C.A.)). There seems to be no Supreme Court authority directly on point in Canada; however, in *White v. Jones* Lord Goff commented that "law appears to be developing in the same direction" ([1995] 2 A.C. 207, 255 referring to *Peake v. Vernon & Thompson* (1990) 49 B.C.L.R. (2d) 245 (Selbie J.) and *Heath v. Ivens, McGuire, Souch & Ottho* (1991) 57 B.C.L.R. (2d) 391 (Maczko J.)); these cases, combined with the early case of *Whittingham v. Crease* (1978) 88 D.L.R. (3d) 353 (B.C. S.C.) and the recent *Earl v. Wilhelm* (*orse Wilhelm v. Hickson*) (2000) 183 D.L.R. (4th) 45 (Sask. C.A.), and with the approval of *Ross v. Caunters* in *Central Trust v. Rafuse* [1986] 2 S.C.R. 146 (S.C.C.) and *Canadian National Railway Company v. Norsk Pacific Steamship Co.* [1992] 1 S.C.R. 1021 (S.C.C.), must make a *White v. Jones*-type liability irresistible in principle in that Court. See now generally McJannet, "*Wilhelm v. Hickson*: The Canadian Tort Approach to the Disappointed Beneficiary and the Negligent Solicitor" (2001) 64 *Sask. L. Rev.* 113.

been negligent,[136] he would have been liable to them.[137] Liability for mis-drafting the deed would seem to follow irresistibly and by analogy.[138] However, the trust imposed by Barr J. upon the nephew perfected the testator's gift to his wife. As she has in the event suffered no loss, she would no longer have a tort claim against the solicitor. However, the question arises as to whether – by analogy with the claims of intended beneficiaries who do not obtain the intended testamentary gifts – the solicitor could have owed a duty of care to the nephew who at the end of this case had failed to retain the benefit of the testamentary gifts? This is an entirely speculative extension, which is likely to fail not only in the case itself but also in many if not most similar cases for lack either of actionable loss on the part of the unintended recipient or of causation between any loss and the solicitor's negligence.

CONCLUSION

The result in *Kelly v. Cahill* may be justifiable either as an example of a *Re Rose* trust (perhaps refracted through an objecticised *Westdeutsche*) or on the basis of rectification of the deed; and either remedy might – depending on policy considerations – extend to a case where the error related to a will. However, the reasoning in *Kelly v. Cahill* leaves much to be desired. The remedial constructive trust upon which it is based, though clearly established at Irish law, is as yet too unfocussed and insensitive to issues of policy, priority and timing; the *Westdeutsche* formulation is no less inadequate; far better then

136. For example, in *Walker v. Medlicott* [1999] 1 All E.R. 685 (C.A.) the mis-drafting of the testator's will did not amount to negligence. See also *Queensland Art Gallery Board of Trustees v. Henderson Trout* [1998] Q.S.C. 250; *Knox v. Till* [1999] 2 N.Z.L.R. 753 (N.Z. C.A.); *Public Trustee v. Till* [2001] 2 N.Z.L.R. 508 (N.Z. H.C.; Richardson J.); *Worby v. Rosser* [2000] P.N.L.R. 140 (C.A.); *Gibbons v. Nelsons* [2000] P.N.L.R. 735 (Blackburne J.); *X v. Woollcombe Yonge* [2001] W.T.L.R. 301 (Neuberger J.).
137. See, generally, Grattan, *Testamentary Negligence* (SLS, Belfast, 2000).
138. See, *e.g.*, *Makhan v. McCawley* (1998) 158 D.L.R. (4th) 164 (Ont. H.C.; Lax J.); *Carr-Glynn v. Frearsons* [1999] Ch. 326 (C.A.); *Earl v. Wilhelm* (2000) 183 D.L.R. (4th) 45 (Sask. C.A.); *Corbett v. Bond Pearce* (2001) 151 *N.L.J.* 609 (C.A.); *cf.* *Queensland Art Gallery Board of Trustees v. Henderson Trout* [1998] Q.S.C. 250.

simply to have rectified the deed, and not to have yoked together the distinct concepts of unjust enrichment and the remedial constructive trust.

The principle against unjust enrichment, unequivocally adopted as a matter of Irish law in the *Bricklayers' Hall* case, establishes a liability *prima facie* at common law not in equity, that is strict and personal – not fault-based or proprietary – in nature. It is not, of itself, an untrammelled discretionary basis for the prescription or imposition of a liability to make restitution, but instead is merely descriptive of the liability to make restitution which arises when a recognised cause of action – such as mistake, duress, or failure of consideration – is made out.

Irish law has also largely adopted Lord Denning's remedial constructive trust, imposed, it seems, whenever justice and good conscience require it. However, it should be deployed with caution, and sensitivity to issues of doctrine, policy, priorities, and timing. Furthermore, it is a stream of authority and analysis entirely separate from the principle against unjust enrichment, and the two ought not to be confused, conflated, equated, or intertwined.

However, the two streams may run in parallel if a plaintiff has two separate claims against the defendant; one a personal claim to restitution of an unjust enrichment, and the other an *alternative* proprietary claim to a remedial constructive trust. Furthermore, the two streams may join if the basis of the remedial constructive trust identifies a further element, which, *in conjunction with unjust enrichment*, is deemed sufficient to elevate the personal liability into a proprietary one. But it is only if the necessary separation between the two streams is initially insisted upon that either or both of these developments can occur in a logical and principled fashion.

In *Kelly v. Cahill*, Barr J. adopted the remedial constructive trust but held that its purpose is to prevent unjust enrichment. This represents an unwelcome and unfortunate elision of entirely separate and distinct concepts. If their separation cannot be maintained, it may be necessary to expunge the remedial constructive trust. This would be unfortunate; it may yet prove a powerful and important tool in the legal toolbox; but it will need to handled with much greater care and sensitivity than that displayed by Barr J. in *Kelly v. Cahill.* In particular, unjust enrichment and the remedial constructive trust are distinct concepts which ought not to be equiperated.