UNJUST ENRICHMENT AND THE REMEDIAL CONSTRUCTIVE TRUST

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INTRODUCTION: YOU CAN HAVE ONE WITHOUT THE OTHER

A common misconception, 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 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, 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. Not

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only is this a development which had already occurred in the Supreme Court of Canada, the High Court of Australia, and the House of Lords, but there had also been important precursors in Ireland. 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 valebutur – which were formerly based upon the fiction of an implied contract, have now been largely based upon these actions arise at common law, not in equity; they are strict [4].


9. Although Lord Mansfield in Moses v. Macferson (1763) 2 Burr. 1003; 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 Bocpart v. Earl of Bessborough 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. I 45, 50). On the flexibility of the action for money had and received, see now Resborough v. Rothman (2002) 76 A.L.R.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.

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and personal, not fault-based or proprietary, in nature; and they comprise the 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.” [5] 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.” [6] Much of the resistance to such a principle against unjust enrichment is based upon judicial fears of palm tree justice engendered by the potentially over-textured nature of the adjective “unjust.” [7] Such fears are not entirely unfounded: there are examples of unselﬁshly motivated application of untrammelled notions of “unjust” enrichment as a broad principle of equity or fairness. [8] However, as Keane J. elucidated 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." [9]


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 of 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, 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 forms 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 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'Ruairc v Revenue Commissioners (1996) 2 I.L.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, e.g., chap. 3). See also Deinrich, Restitution: A New Perspective (Federation Press, Sydney, 1998) and Jaffey, The Nature and Scope of Restitution (Hart Publishing, Oxford, 2000).


23. Unreported, High Court, March 6, 1996; this issue was not reached on appeal.


27. Contrast In re Goldcorp Exchange (1995) 1 A.C. 74 (P.C.) 104 per Lord Mustill

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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 ...". It is a very controversial doctrine, 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" but its appeal has been much broader, though this development has also been controversial. One locus for this controversy has been the decision of Budd J. in the High Court in the Bricklayers' Hall case on the one hand, his expressed need for caution in that case has been interpreted as putting an end to the remedial constructive trust in Ireland, 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. 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, the Supreme Court of Canada has
adopted the trust with care and sensitivity to issues of policy, priority and timing; the High Court of Australia, guided by general equitable notions of unconscionability, has generated a constructive trust, which, whilst it has been distinguished from Lord Denning’s model, plainly has affinities with it; and


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 1991 (Camwell, 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 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 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, 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. Too easy an acceptance of proprietary claims to constructive trusts will therefore be unfair to unsecured creditors, as Budd J. recognised in the High Court in the Bricklayers’ Hall case. Such


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, or to the time from which such an imposed trust takes effect, and the trust should not without very good reason be imposed where it would prejudice the rights of third parties 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. 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 unconstitutionality and of the remedial constructive trust has erroneously led to their equation. 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. More

42. For example, unconstitutionality seems to be used as a synonym for both unjust enrichment and equitable discretion by Laffoy J. in Goodman v. Minister for Finance [1990] 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).
44. This is especially so in Canada; see, e.g., Ruthwell v. Ruthwell (1978) 83 D.L.R. (3d) 289 (S.C.C) 306 per Dickson J.; Pettitt 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 unravel these concepts; see na.55-61 below.
47. E.g., Keerch v. Sandford (1726) Sel. Cas. t King 61; 25 E.R. 223.
independent institutional requirements of the substantive trust in question have been separately established.98 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.99 Indeed, some species of the doctrine of unconscionability might provide this additional element100 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., Beazley, "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 restitutory in pattern will be accommodated within the law of restitution generally. For example, Elias, Explaining Constructive Trusts (Oxford, 1991) argues that constructive trusts reflect these 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 (2nd 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 (Ashmole Press, London, 1964); see also Waters, above n.17); but whilst Elias establishes that many constructive trusts are restitutory 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 restitutory in pattern are also restitutory 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. Pain (Battersea) [1999] 1 A.C. 221 (B.H.L.), cf. Highland Finance v. Sacred Heart College of Agriculture (1998) 2 L.R. 180; [1997] 2 L.R.I.M. 87 (S.C.)) and Chambers, Restating Trusts (Oxford, 1997) (largely rejected by the House of Lords in Viareggia Americana v. Inglisong LBC [1996] A.C. 669 (H.L.); but cf. Att Jamaica v. Chartline [1999] 1 W.L.R. 1399 (P.C.); 412 per Lord Miller, Tomlin v. Sidley [2002] U.K.H.L. 12, paras 92, 100 per Lord Miller). However, even if some institutional trusts which are restitutory 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.


51. Goff and Jones, chap. 2. It would, however, be impossible circular if unjust enrichment were to be taken as insufficient 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

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and the rights of third parties. Furthermore, although the early Canadian cases also gave the impression that the only basis for constructive trust liability was unjust enrichment, this is plainly not the case, 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.

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” 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.

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, but unless there is either a separate parallel proprietary interest.


60. Breach of trust and of fiduciary duty can also in appropriate cases give rise to constructive trust liability; see na. 47–48 above.

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, and Turner L.J. considered the jurisdiction of the court to rectify voluntary deeds to be a "well-established principle and doctrine." 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 impelled 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 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 unamended. Again, in Lister v. Hodgson, Lord Rookly M.R. accepted that a voluntary deed which

65. (1856) 8 De G.M.&G. 531; 44 E.R. 495.
67. (1856) 8 De G.M.&G. 531, 545; 44 E.R. 495, 506; see, e.g., Wright v Goff (1856) 22 Beav. 207; 52 E.R. 1067; James v. Couchman (1885) 29 Ch.D. 212, 217 per North J.
68. (1856) 8 De G.M.&G. 331, 341–342; 44 E.R. 495, 499 per Knight-Bruce L.J.
70. He had exercised just such a jurisdiction in the earlier Wright v Goff (1856) 22 Beav. 207, 213–215; 52 E.R. 1067, 1090–1091. The jurisdiction was also accepted in, though not made out on the facts of, Thompson v. Whitmore (1860) I & H 288, 271; 70 E.R. 748, 750 per Page-Wood V.C.; Bonhote v Henderson (1895) 1 Ch. 742, 748 per Kekeichow J.; Van Der Linde v Van Der Linde [1947] Ch. 306, 310–312 per Evered J.; Blacklocks v. JB Developments (Golding) (1982) Ch. 183, 196 per Judge Mervis-Davies.
71. (1867) 4 Eq. 30, 34, the deed recited an absolute gift of $200 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 donor.
72. [1896] 1 L.R. 435 (Chatterton V.C.) q&d (1896) 1 L.R. 441 (L.C. 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. (1958) 2 De G.&J. 110; 44 E.R. 929.
76. (1958) 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 Shonahan v. Redmond.78 A donor had instructed79 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 name81 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 perform an incomplete gift84; 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

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.
82. O’Dell, (1997) 1 L.M.C.L.Q. 197, 202–203; see also Wargo v. Wargo 48 Misc. 2d. 349 (1965) 356: “When an insured 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.
within current constructive trust orthodoxy. In Westdeutsche Landesbank Girozentrale v. Baxton, 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." 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". Hence, in the words of Lord Browne-Wilkinson's formulation in Westdeutsche, the defendant was sufficiently aware of the factors which affected his conscience to justify the imposition of a constructive trust. In cases such as Shavaz 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, a lawyer had been appointed executor of a will, and, as the law then stood, therefore succeeded to the substantial undisposed residual; but Hart L.C. held that he held the residue on trust for the testator's next of kin. This was followed in Bulky v. Wilford, 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.


93. At p.114 of the transcript (emphasis added); see also pp.117-119, 123.

94. Incantations of conscience are ritualistic: in many chancy cases, rarely have a constant meaning in the various contexts in which it is invoked, and add little of substance, but have the tendency to obscure subsequent analysis and development; see generally Klink, "The Unexamined 'Conscience' of Contemporaneous Canadian Equity" (2001) 46 McGill L.J. 1.

95. (1828) 1 Beatt. 157.


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.

This Westdeutsche criterion of awareness or knowledge might explain Shavaz v. Redmond: Carrol J. found that the donor had "had a falling out with"66 the recipient. This would certainly have given the recipient constructive notice— 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 Shavaz v. Redmond, it cannot explain either the Re Rose cases67 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.68

Consequently, if the trusts expressly imposed in Re Rose and Kelly v. Cahill, and all but imposed in Shavaz 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. 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 lose 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 lose 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 lose 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
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, many jurisdictions seem nevertheless to prefer the remedy of rectification. For example, in Massucco v. Massucco, 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. Many jurisdictions have statutory powers to rectify mis-drafted wills. For example, in England, section 20(1) of the Administration of Justice Act 1982 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. This is a relatively limited provision, the Queensland equivalent is more limited, but the provision in New South Wales is broader. Despite the historical absence of a similar power at common law, one has nevertheless be.

gun to develop in the US, in New Zealand, and in Jersey. There is no Irish statutory equivalent, but there would seem to be scope for a recitation power to develop at common law, perhaps by analogy with Lister v. Hodgson and McMeachan v. Warburton. Interestingly, in Kelly v. Cahill, Barr J. required that the evidence establish a “clear, positive intention” 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 recitation 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 acquiesce a statutory or common law power to rectify mis-drafted wills, nevertheless, it would not be difficult to extend the constructive trust reasoning 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. Of course, this would represent an undesirable extension of an already problematic case, but a similar result has been reached in Canada and the United States. In the Florida case of In re the Estate of Tolim, 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 that he benefited the beneficiary under the codicil

118. Fornshadowed in Brady, p. 4, para. 1.11.
119. Whilst it would 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 testator’s changes of mind, and no trust would therefore arise on substantive Werderiana-like grounds; see, e.g., Hill v. van Erp (1996–1997) 188 C.L.R. 139 (H.C.A.) 228 per Gummow J.
121. 622 So. 2d 988 (1993); noted Kull, [1993] Reformation L.R. § 291.

held the bequest on constructive trust for the intended beneficiary under the will. 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…” Hence, unlike Kelly v. Cahill, by reference to fraud, breach of confidence, and the mistake of another, Harding J. in Tolim did at least attempt to find a justification beyond merely unjust enrichment to justify the proprietary outcome. 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 Werderiana formulation. The extension to mistake is similar to the reasoning underpinning the recitation cases, and there have been attempts to impose constructive trusts on mistaken payments, 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. In the end, therefore, though a better stab than Kelly v. Cahill, Tolim still fails to provide a sufficient justification for elevating a personal unjust enrichment claim to a proprietary one.

In the later Florida case of Daft v. Allen, the deceased’s will was unsealed, but the judge at first instance admitted it to probate, holding that constructive trusts would otherwise be imposed on the recipient in the intestacy for the benefit of the intended beneficiaries named in the unsigned will. This was quite properly reversed on appeal. Although the first instance judge in Daft had purported to follow Tolim for the proposition that constructive trusts would be imposed, the cases are different: in failing to sign the will, the deceased in Daft, (unlike in Tolim 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
office. 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. 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 mutal wills, or of claims of beneficiaries to the contents of joint deposit accounts, and they are gone around even in the context of White v. Jones. Hence, in Jago v. Kurnan, 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 who 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, and if the mis-drafting had been negligent, he would have been liable to them. Liability for mis-drafting the deed would seem to follow irresistibly and by analogy. However, the trust imposed by Harr 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 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 objectified 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

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).


131. Brady, pp. 5-6, para. 3.1, n.1, 1.2-1.3.


134. (1828) 1 Beav. 157, 163–165.


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been negligent, he would have been liable to them. Liability for mis-drafting the deed would seem to follow irresistibly and by analogy. However, the trust imposed by Harr 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 of actionable loss on the part of the unintended recipient or of causation between any loss and the solicitor’s negligence.


137. See, generally, Germain, Testamentary Negligence (SLS, Belfast, 2000).

simply to have rectified the deed, and not to have yoked together the distinct
corporate 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
recognized 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 resisted 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 be 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.