

Before the High Court

Is the Remedial Constructive Trust Fair Game? *Farm Transparency International Ltd v The Game Meats Company of Australia Pty Ltd*

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Abstract

Can a constructive trust be imposed over copyright in footage created in the course of a covert trespass? To put the same question a different way: can a constructive trust be imposed in the absence of a pre-existing relationship between the parties and over property that the claimant never owned? These are novel questions in Australia that may fall to be considered in the High Court of Australia appeal in *Farm Transparency International Ltd v The Game Meats Company of Australia Pty Ltd*. These questions are not novel in the United States, where a broad view of the potential of the remedial constructive trust has been taken.

I Introduction

The appeal in *Farm Transparency International Ltd v The Game Meats Company of Australia Pty Ltd* raises the question whether there could be a constructive trust over copyright in a film created in the course of a covert trespass.¹ Can a constructive trust be imposed in the absence of a pre-existing relationship and in circumstances where the defendant obtained property that was never owned by the plaintiff?

In 1941, Sykes described the use of the constructive trust as ‘a vague dust-heap for the reception of relationships which are difficult to classify or which are unwanted in other branches of the law’.² Difficulty of classification and unpredictability of outcome have intensified suspicion of the constructive trust. In England, the constructive trust is largely perceived as an institution.³ In those

Please cite this column as:

Aryan Mohseni, ‘Is the Remedial Constructive Trust Fair Game? *Farm Transparency International Ltd v The Game Meats Company of Australia Pty Ltd*’ (2026) 48 *Sydney Law Review* 22216:1–15 <<https://doi.org/10.30722/slr.22216>>.

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¹ *Farm Transparency International Ltd v The Game Meats Company of Australia Pty Ltd* (High Court of Australia, Case No M105/2025).

² Edward I Sykes, ‘The Doctrine of Constructive Trusts’ (1941) 15(6) *Australian Law Journal* 171, 175.

³ See *Hotel Portfolio II UK Ltd (in liq) v Stevens* [2025] 3 WLR 293, 304 [29].

circumstances, the requirement for something ‘pre-existing’ is readily explicable, as an attempt to tame the doctrine.

That attitude has not been adopted in the United States, where the remedial character of the constructive trust has been fully realised. The Americans and the English take different metaphysical starting points — the latter assuming that the trust springs up from some original material, such as a prior relationship or property; the former embracing the spontaneous and creative element of equitable property. In many respects, the Australian authorities are more consistent with the American approach than with the English. The comparison suggests that neither a pre-existing relationship nor a pre-existing property right is a precondition for a remedial constructive trust.

II The Proceedings Below

The appellant, Farm Transparency International Ltd (‘FTI’) is an animal advocacy group. Its agents trespassed on the respondent’s land, where the respondent, Game Meats Company of Australia Pty Ltd (‘GMC’) operated an abattoir. FTI’s agents installed recording equipment and obtained 14 minutes of footage of GMC’s abattoir practices. FTI forwarded the film to a government department by way of complaint, and later to the Channel Seven television network. Neither recipient published the footage. GMC does not want it published.

The similarities with *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (‘*Lenah Game Meats*’) are plain.⁴ Heeding the reasons in that case, GMC at trial did not fix upon any equity of confidence, still less on ‘unconscionability’ at large. Instead, it sought damages for the tort of trespass to land. This it obtained, in the amount of \$30,000, and \$100,000 in exemplary damages.⁵ The primary judge, Snaden J, found that the trespass and filming was part of a concerted ‘public shaming campaign’⁶ and that FTI’s purpose in seeking to publish the footage was to visit commercial loss upon GMC.⁷

To prevent future publication of the footage, GMC then sought an injunction in aid of their successful action in trespass. However, Snaden J recognised that the trespass was over. An injunction would only issue to redress the consequences of a completed tort if the plaintiff continues to suffer ‘ongoing and extreme prejudice’.⁸ That was not so.⁹

⁴ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 (‘*Lenah Game Meats*’).

⁵ *The Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* [2024] FCA 1455, [264] (‘*GMC* (FCA)’).

⁶ *Ibid* [179].

⁷ *Ibid* [142], [165], [179].

⁸ *Ibid* [214].

⁹ *Ibid*. This is now the subject of a notice of contention in the High Court: see Farm Transparency International Ltd, ‘Appellant’s Submissions’, Submission in *Farm Transparency International Ltd v The Game Meats Company of Australia Pty Ltd*, HCA Case No M105/2025, 5 February 2026, [2], [43]–[45] (‘FTI HCA Submissions’).

The last form of relief GMC sought is the subject of this appeal. GMC submitted that:

- (a) FTI is the author of the ‘cinematograph film’ and holds the copyright in it;¹⁰
- (b) the film was unconscientiously obtained as the fruit of a surreptitious trespass;
- (c) FTI therefore held their copyright in the film on constructive trust for GMC; and
- (d) an injunction would go, in equity’s exclusive jurisdiction, to restrain FTI from publishing the footage, in breach of constructive trust.

That submission was unsuccessful at trial. Snaden J held that there was a dearth of authority that ‘equity might intervene to qualify proprietary interests (including in the nature of copyright) in information obtained as the intended and direct result of tortious or criminal wrongdoing’.¹¹

However, the submission was successful on appeal to the Full Court of the Federal Court of Australia.¹² Jackman J, with whom Burley and Horan JJ agreed, did not consider that there was such an absence of authority. In *Lenah Game Meats*, Gummow and Hayne JJ observed in obiter that a constructive trust might be imposed on copyright in circumstances ‘involving the invasion of the legal or equitable rights of the plaintiff’ as much as circumstances involving ‘a breach of the obligations of the maker to the plaintiff’.¹³ One such ‘invasion’ is trespass to land. Equity responds because it would be ‘inequitable and against good conscience for [a trespasser] to assert ownership’ against GMC.¹⁴

Still, unconscionability is not at large. Jackman J reasoned by analogy with other examples: a thief holds the benefit of their possessory interest for the legal owner;¹⁵ one who induces another not to bid on the faith of a conveyance holds the acquired property for the other;¹⁶ and the recipient of a mistaken payment holds the debt for the payor once they are apprised of the mistake and their conscience is thereby burdened.¹⁷ His Honour rejected the submission that all these analogies required either a pre-existing relationship or the taking of property belonging to another, neither of which was the case here.¹⁸

¹⁰ *Copyright Act 1968* (Cth) s 90.

¹¹ *GMC (FCA)* (n 5) [181].

¹² *Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd* (2025) 312 FCR 272 (*GMC (FCAFC)*).

¹³ *Lenah Game Meats* (n 4) 246 [102] (Gummow and Hayne JJ, Gaudron J agreeing at 231 [58], Callinan J agreeing at 320 [309]).

¹⁴ *Ibid.*

¹⁵ *GMC (FCAFC)* (n 12) 278 [17], referring to *Black v S Freedman & Co* (1910) 12 CLR 105 (*Black v S Freedman*).

¹⁶ *GMC (FCAFC)* (n 12) 279–81 [24]–[28], discussing *Pallant v Morgan* [1953] Ch 43 (*Pallant*).

¹⁷ *GMC (FCAFC)* (n 12) 278 [19], referring to *Wambo Coal Pty Ltd v Ariff* (2007) 63 ACSR 429.

¹⁸ *GMC (FCAFC)* (n 12) 279 [21].

The Full Federal Court therefore declared that FTI's copyright in the film is held on constructive trust for GMC and ordered that FTI assign its copyright to GMC.¹⁹

III The High Court Appeal

FTI's submissions on appeal are three-fold.

First, FTI submits that the constructive trust was imposed by a vague assessment of FTI's 'moral calibre', which 'lack[s] the objective quality of standards appropriate to the adjudication of persons' substantive legal rights'.²⁰

Second, FTI submits that Jackman J was wrong to reason by analogy with the cases of constructive trust by theft, fraud and mistake:

[T]here was no consensual relationship between FTI and GMC (contractual, fiduciary or otherwise); and FTI committed no theft or fraud on GMC; and no payment was made (or, for that matter, other property transferred) by GMC to FTI by mistake.²¹

Implicit in that submission is a requirement for either: (a) a pre-existing relationship; or (b) pre-existing ownership by the claimant.

Third, FTI submits that the Court did not consider alternative remedies as a discretionary reason to refuse a constructive trust.

A *The Constructive Trust as a 'Remedy'*

The origins of 'the constructive trust' in a systematic taxonomy of trusts seem to lie in Lord Nottingham's judgment in *Cook v Fountain*: they are trusts 'raised or created by act or construction of law'.²² The Lord Chancellor emphasised that equity construes the circumstances as requiring the imposition of a duty; it does not 'construct' a trust.²³ Even so, it is wrong to confuse constructive and resulting trusts, although the mistake is often made.²⁴ Resulting trusts proceed from an inferred intention, constructive trusts from an imputed one (however notionally).

Singularity of label — 'the constructive trust' — disguises variety. Some constructive trusts involve an obligation to account: dissipation could sound in a monetary award to restore the account.²⁵ Others impose no such obligation: they might only require the trustee to make specific restitution of an asset to the beneficiary.²⁶ In *Evans v European Bank Ltd*, the thief had only a duty to return the

¹⁹ Ibid 284 [42]–[43] (Jackman J, Burley J agreeing at 274 [1], Horan J agreeing at 287 [54]).

²⁰ 'FTI HCA Submissions' (n 9) [32].

²¹ Ibid [30].

²² *Cook v Fountain* (1672) 3 Swans App 585; 36 ER 984, 987; DEC Yale (ed), *Lord Nottingham's Chancery Cases* (Selden Society) (Bernard Quaritch Ltd, 1961) vol 2, 101; DEC Yale (ed), *Nottingham's Manual of Chancery Practice and Prolegomena of Chancery and Equity* (Cambridge University Press, 1965) XIII.

²³ See also William F Fratcher (ed), *Scott on Trusts* (Little, Brown & Co, 4th ed, 1989) vol 5, §462.4.

²⁴ *Evans v European Bank Ltd* (2004) 61 NSWLR 75, 100 [112].

²⁵ *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 290 [47]–[48].

²⁶ *Giumelli v Giumelli* (1999) 196 CLR 101, 112 [4]–[5] ('*Giumelli*').

money to victims, albeit to preserve it in the interim.²⁷ The orders in *Giumelli v Giumelli* are another example,²⁸ albeit in money form. Order 6 made by the Full Federal Court here,²⁹ requiring an assignment, is yet another.

It was Pound who gave us the distinction between institution and remedy.³⁰ The distinction is more apparent than real. As Deane J said in *Muschinski v Dodds*, ‘for the student of equity, there can be no true dichotomy between the two notions’.³¹ Of course, some ‘constructive trustees’ are trustees in the true sense: a trustee *de son tort* actually takes it upon herself, albeit informally, to act in the interests of another.³² But a constructive trust, properly called, is simply ‘the formula through which the conscience of equity finds expression’ by ascribing the benefit elsewhere.³³

The notion of a ‘trust’ imposed as a remedy has been met with more resistance in England and Wales than in the United States and Australia. In part, that is because of the dogma that discretion should have no role to play in the recognition of property rights. In part, it is because of a misapprehension that unconscionability brings with it idiosyncratic assessments of a defendant’s ‘moral calibre’.³⁴

Hence the ‘primacy of the fiduciary relationship’ as the generative principle of constructive trusts in England: fiduciary status ‘has an existence independent of fairness’ and thereby appears to ground the constructive trust in established norms.³⁵ It gives the impression of what Ford and Lee called a ‘predictable constructive trust’.³⁶ Hence also why the remedial constructive trust has been stigmatised as ‘equity at its flexible flabby worst’.³⁷ To that criticism, we have Sir Anthony Mason’s response that a look of ‘dismissive contempt’ would have crossed Sir Owen Dixon’s face.³⁸ To that it must also be said that the constructive trust responds not to conscience at large, but to a ‘properly formed and instructed conscience’.³⁹ Hence the importance of analogy in the reasoning of Jackman J. That mode of reasoning bears no resemblance to Lord Denning’s ‘new model constructive trust’,⁴⁰ which took ‘fairness’ as a sufficient premise.⁴¹ Rather, the constructive trust proceeds incrementally, ‘by the legitimate processes of legal reasoning, by analogy, induction

²⁷ *Evans v European Bank Ltd* (n 24), 100 [115]–[116].

²⁸ *Giumelli* (n 26) 128–9.

²⁹ *GMC (FCAFC)* (n 12) 289.

³⁰ Roscoe Pound, ‘The Progress of the Law 1918–1919: Equity’ (1919–20) 33(3) *Harvard Law Review* 420.

³¹ *Muschinski v Dodds* (1985) 160 CLR 583, 614.

³² *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, 403 [138].

³³ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 108 (Mason J) (‘*Hospital Products*’), quoting *Beatty v Guggenheim Exploration Co*, 225 NY 380, 386 (Cardozo J) (1919).

³⁴ ‘FTI HCA Submissions’ (n 9).

³⁵ DWM Waters, *The Constructive Trust: The Case for a New Approach in English Law* (Athlone Press, 1964) 8 (‘*The Constructive Trust*’).

³⁶ Harold Ford and WA Lee, *Principles of the Law of Trusts* (Law Book Co, 2nd ed, 1990) [22.160].

³⁷ Lord Neuberger, ‘The Remedial Constructive Trust: Fact or Fiction’ (Speech, Banking Services and Finance Law Association Conference, Queenstown, 10 August 2014) [6].

³⁸ Anthony Mason, ‘Foreword’ in Paul Finn, *Fiduciary Obligations* (Federation Press, 2016) v, xiv.

³⁹ *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, 325 [22], quoting *Lenah Game Meats* (n 4) 227 [45] (Gleeson CJ).

⁴⁰ *Muschinski v Dodds* (n 31) 615 (Deane J).

⁴¹ *Ibid.*

and deduction'.⁴² Indeed, it will be recalled that in *Muschinski v Dodds*, Deane J developed the joint-endeavour constructive trust by analogy with the well-established law of partnership.⁴³

What exactly does it mean to say that the constructive trust is a 'remedy'? With reference to the remedial constructive trust, Birks exposed the 'instability of the term "remedy"'.⁴⁴ The remedial constructive trust is not a remedy for a wrong in the sense used by the common lawyer, as though there is some seriatim relation between action and remedy. The inquiry is not so atomised. As Scott said, '[the defendant] is not compelled to convey the property because he is a constructive trustee; it is because he can be compelled to convey it that he is a constructive trustee'.⁴⁵ The 'constructive trust' is a tautology for the equities that are being vindicated.⁴⁶

FTI submits that there is no authority recognising a constructive trust as a remedy for the tort of trespass to land.⁴⁷ That may be true, but it is true in no relevant sense. It would seem wrong to say that the constructive trust imposed upon a survivor who departs from a mutual will is a remedy for breach of contract,⁴⁸ or that the constructive trust imposed on murderers is a remedy for the tort of battery. The constructive trust vindicates not the form of action, which may happen to be tort or contract or both, but the equities arising on the facts of the case.⁴⁹ To speak of tort is to introduce a red herring. When the question is viewed in that way, the orders made by the Full Federal Court do not evoke the infernal vision of a constructive trust as a remedy for a tort.

Nor might it matter that '[i]f such conduct *is* actionable in tort, then it is difficult to see what peculiarly equitable principle such conduct can engage'.⁵⁰ Is not the fiduciary relationship almost always based on, even informed by, contractual terms?⁵¹ With reference to *Black v S Freedman & Co* ('*Black v S Freedman*'),⁵² Leeming JA has observed that any resistance to overlapping equitable and common law claims for theft would be ahistorical.⁵³ Was not the constructive trust ordered in *Black v S Freedman* one 'arising from' or 'imposed to remedy' a tort, still more a

⁴² Ibid.

⁴³ Ibid 619.

⁴⁴ Peter Birks, 'Can Sense Be Made of the Remedial Constructive Trust?' (University of Western Australia Law School, 22 September 1999).

⁴⁵ *Scott on Trusts* (n 23) vol 5, §462. See also Austin Wakeman Scott, 'Constructive Trusts' (1955) 71(1) *Law Quarterly Review* 39, 41.

⁴⁶ John Norton Pomeroy, *A Treatise on Equity Jurisprudence* (AL Bancroft & Co, 1st ed, 1881) vol 1, §155.

⁴⁷ 'FTI HCA Submissions' (n 9) [15].

⁴⁸ M Cope, *Constructive Trusts* (Law Book Co, 1992) 528–30; *Birmingham v Renfrew* (1937) 57 CLR 666, 686–8, 690 (Dixon J).

⁴⁹ This corresponds to Birks' third sense of 'remedy' — a remedy for a general factual grievance: Birks (n 44).

⁵⁰ 'FTI HCA Submissions' (n 9) [34] (emphasis in original).

⁵¹ *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1, 36 [91], quoting *Hospital Products* (n 33) 97 (Mason J).

⁵² *Black v S Freedman* (n 15).

⁵³ *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732, 743–4 [48]–[51]. Hence the disfavour in which *Derry v Peek* [1889] 14 App Cas 337 was held in *Nocton v Lord Ashburton* [1914] AC 932.

crime?⁵⁴ And why should it matter that the tort happened to be conversion or deceit, rather than trespass to land?⁵⁵ (It will be seen below that this raises an assumed requirement of continuity of property.)

B *Equity and Statute*

It would be too simplistic to say that a constructive trust could not be imposed in respect of such a well-regulated statutory right as copyright. The interaction between equity and statute is more sophisticated. A constructive trust over copyright is simply another example of equity presupposing the existence of a right but restraining the unconscientious assertion of it in a particular case.⁵⁶ Depending on the nature of the unconscientious conduct, those rights might even include the ‘moral rights’ afforded in Part IX of the *Copyright Act 1968* (Cth). So equity might restrain recourse to a statutory immunity of indefeasibility of title.⁵⁷ Even the most finely-regulated priority regime in a statutory winding up scheme might be reordered by an application of equitable accounting rules,⁵⁸ or the equitable lien.⁵⁹ All this is because it is generally presumed that statutory regimes operate ‘alongside and in harmony’⁶⁰ with equitable principles, each being ‘part of the legal order with which statute law must harmoniously operate’.⁶¹ Hence s 9(3) of the *Copyright Act 1968* (Cth), providing that the Act ‘does not affect the operation of the law relating to breaches of trust or confidence’. So, it may be doubted whether the constructive trust ordered in these circumstances interfered with the statutory policy of ‘encouraging creativity’ by facilitating ‘uses on some reasonable basis’ (assuming that that is even the correct level of abstraction at which to pitch the Act’s purpose).⁶²

C *Pre-Existing Relationship?*

Gummow and Hayne JJ in *Lenah Game Meats* recognised the possibility of a remedial constructive trust imposed where it would be ‘inequitable and against good conscience for the maker to assert ownership of the copyright against the plaintiff and to broadcast the film’.⁶³ These words recall those of Cardozo J in his classic exposition of the remedial constructive trust.⁶⁴

As FTI submits, the authorities cited by Gummow and Hayne JJ were concerned only with fiduciaries (mostly employees or directors) obtaining copyright by reason of their fiduciary office.⁶⁵ In those circumstances, it is plain that the

⁵⁴ ‘FTI HCA Submissions’ (n 9) [15].

⁵⁵ Cf *ibid.*

⁵⁶ *British Railways Board v Pickin* [1974] AC 765, 795–6 (Lord Wilberforce).

⁵⁷ *Bahr v Nicolay (No 2)* (1988) 164 CLR 604.

⁵⁸ *Harris Health Care Pty Ltd (in liq) v Hayes* (2024) 116 NSWLR 273.

⁵⁹ *Stewart v Atco Controls Pty Ltd (in liq)* (2014) 252 CLR 307.

⁶⁰ *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687, 698 (Kirby P).

⁶¹ *Ibid* 700 (Kirby P).

⁶² *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279, 297 [48].

⁶³ *Lenah Game Meats* (n 4), cited in *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177, 216 [84] (Kiefel CJ, Bell and Keane JJ).

⁶⁴ *Beatty v Guggenheim Exploration Co* (n 33) 386. See also George E Palmer, *The Law of Restitution* (2007 Cumulative Supplement, Wolters Kluwer) §1.3 n 15.a–15.b.

⁶⁵ ‘FTI HCA Submissions’ (n 9) [26].

constructive trust is simply an expression of the fiduciary's pre-existing obligation to account. FTI submits that one normative underpinning for a constructive trust is the existence of such a pre-existing relationship.⁶⁶ That attitude is also implicit in the distinction FTI attempts between tort and contract.⁶⁷

It may be accepted that constructive trusts have been more alive in the context of consensual relationships. However, equity has always been spurred not only by things of trust and confidence, but equally by fraud, accident, mistake and surprise.⁶⁸

It was the burden of Waters' thesis to reject the argument that the constructive trust fixes upon some antecedent relationship or pre-existing property right.⁶⁹ In a valuable and underappreciated monograph on the constructive trust, Waters invites us to shift our focus from 'relationship to event'.⁷⁰ An antecedent relationship — especially one of trust and confidence — is only one of many causes for equitable intervention by constructive trust; a relationship

is therefore not a beginning point of restitution, it is merely a proximity of the parties which makes an event, otherwise not of sufficient gravity to lead to a decree, of heightened significance and therefore comparable with the events which without that special relationship would justify a decree.⁷¹

That is to say, the existence of such a relationship simply makes it easier to conclude that the event was sufficiently egregious to justify equitable intervention.

The primacy given to relationship over event in much English case law might be attributed to an old tendency to see the constructive trust as an analogue of the express trust. As Waters said,

the predominance of the analogy-with-trust technique has resulted in [English] Equity placing prime significance on the relationship which has subsequently been abused rather than upon the nature of the wrongful act or unjust acquisition.⁷²

Even Lord Nottingham apparently thought that constructive trusts generally 'belong perhaps rather to the topic of the regulation of existing trusts ... than to the implication of altogether new trusts'.⁷³ For decades, *Lewin on Trusts* defined the constructive trust in tandem with the fiduciary relationship.⁷⁴ The attitude may be seen in the recent decision in *Byers v Saudi National Bank*, where a director's constructive trusteeship in respect of company assets they wrongfully transferred

⁶⁶ Ibid [27]–[28], [30].

⁶⁷ Ibid [15].

⁶⁸ *Shiloh Spinners Ltd v Harding* [1973] AC 691, 722 (Lord Wilberforce); *Hill v Van Erp* (1997) 188 CLR 159, 228 (Gummow J), quoting *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 46 (Megarry J) and citing Keeton & Sheridan, *Equity* (3rd ed, 1987) 37–8.

⁶⁹ Waters, *The Constructive Trust* (n 35).

⁷⁰ Ibid 43, 55, 66.

⁷¹ Ibid 25.

⁷² Ibid 42. See also DWM Waters, Mark R Gillen and Lionel D Smith, *Waters' Law of Trusts in Canada* (Thomson Carswell, 3rd ed, 2005) 458.

⁷³ *Lord Nottingham's Chancery Cases* (n 22) vol 2, 124.

⁷⁴ Ronald Cozens-Hardy Horne (ed), *Lewin's Practical Treatise on the Law of Trusts* (Sweet & Maxwell, 15th ed, 1950) 155 ('*Lewin on Trusts*'). See also C Montgomery White and MM Wells (eds), *Underhill's Law Relating to Trusts* (Butterworths, 11th ed, 1959) 205, 210; cf Waters, *The Constructive Trust* (n 35) 29.

was seen as resting on some antecedent ‘trust’ that miraculously sprung up in some *scintilla temporis* before transfer.⁷⁵ All this smacks of the old common law fallacy of rationalising cases of restitution (even for fraud) by implying a contract and thereby creating some fictional antecedent relationship to justify intervention.⁷⁶

Equity will have none of that. It does not fear the attaint that it creates property out of thin ether. It may proceed spontaneously from an event, without interposing some fictitious relationship or antecedent ‘duty’. As Waters has said, equity imposes constructive trusts in ‘situations where the relationship arose at the same time as the performance of the wrongful act’.⁷⁷ The thief may be in no antecedent relationship with the victim, still less one of trust and confidence. So too the murderer. Yet equity denies them the benefit of their gains. The reason is that, as Deane J anticipated in *Muschinski*, ‘[t]he old maxim that equity regards as done that which ought to be done is as applicable to enforce equitable obligations as it is to create them’.⁷⁸

Theft was the subject of *Black v S Freedman*.⁷⁹ It has been suggested that Griffith CJ expressed himself more narrowly than O’Connor J in *Black* and rested his conclusion on the basis that the employee was a fiduciary who had profited by reason of his fiduciary office.⁸⁰ Three points might stand in the way of that argument. First, it is only now generally accepted that every employee is a fiduciary.⁸¹ Second, Griffith CJ only referred to fiduciaries in a quotation and in response to a (curious) submission that equitable tracing rules differ as between real and personal property.⁸² Third, two years later in *Creak v Moore*, Griffith CJ framed the ratio in *Black v S Freedman* in terms quite divorced from fiduciaries.⁸³

That conclusion is consistent with the American position. Although at one time it was thought that there could be no such constructive trust because ‘a thief could not be a trustee’ given the absence of some relationship, that has been stigmatised as ‘a misconception’.⁸⁴ In the first American case of a constructive trust for theft it was said that

a confidential relation is not necessary to establish such [a constructive] trust The trusts of which we are speaking are not what are known as technical trusts, and the ground of relief in such cases is, strictly speaking, fraud, and not trust.⁸⁵

⁷⁵ *Byers v Saudi National Bank* [2024] AC 1191, 1214–15 [60]–[61] (Lord Briggs JSC); Aryan Mohseni, ‘Knowing Receipt and “Equitable Proprietary Rights”’ (2024) 98(12) *Australian Law Journal* 879, 881.

⁷⁶ *Sinclair v Brougham* [1914] AC 398. See also the criticisms in George E Palmer, *The Law of Restitution* (Little, Brown & Co, 1978) 12 §1.3; Waters, Gillen and Smith (n 72) 473.

⁷⁷ Waters, *The Constructive Trust* (n 35) 5.

⁷⁸ *Muschinski v Dodds* (n 31) 614.

⁷⁹ *Black v S Freedman* (n 15).

⁸⁰ John Tarrant, ‘Equitable Ownership after the *Judicature Act*’ (2007) 15(1) *Australian Property Law Journal* 26; ‘FTI HCA Submissions’ (n 9) [28].

⁸¹ *Anderson v Canaccord Genuity Financial Ltd* (2023) 113 NSWLR 151, 191 [150].

⁸² *Black v S Freedman* (n 15) 108–9.

⁸³ *Creak v Moore* (1912) 15 CLR 426, 432.

⁸⁴ Dan B Dobbs, *Dobbs’ Law of Remedies: Damages, Equity, Restitution* (West Publishing Co, 2nd ed, 1993) vol 2, 399.

⁸⁵ *Newton v Porter*, 69 NY 133 (1877).

That is why § 55 of the *Third Restatement of Restitution* notes that the metaphor of trust by analogy,⁸⁶ and all its effects, were ‘dissolved well over a century ago’ in America,⁸⁷ though it lingers in England and Wales.

It suffices to say that the American view is the current orthodoxy in Australia. With reference to the constructive trust imposed on the thief, it has been said that the constructive trust generally arises ‘not so much from breach of an antecedent duty under an established relationship, as from a particular, perhaps isolated, act which at once founds the duty and the breach’.⁸⁸

D *Pre-Existing Property Rights?*

Examples of constructive trusts in the absence of an antecedent relationship may be multiplied. They include receipt, with knowledge, of moneys mistakenly paid.⁸⁹ But those cases may be distinguishable because the constructive trustee received something the victim formerly owned. As FTI points out in its submissions to the High Court, the result of the orders of the Full Federal Court ‘is to confer on GMC a proprietary right that it never hitherto had, with respect to a recording that it never made’.⁹⁰

True it is that the result seems jarring. But it might be asked: what normative significance lies in continuity of property? Equity fixes not upon the property but on the conscience.⁹¹ As Edelman J has recently observed, equitable interests are ‘engrafted’ onto, not cut out of, an estate.⁹² It has been put in homelier terms that equitable property is not like a block of cheese.⁹³

Some have mooted the need for a ‘proprietary base’ before the imposition of a constructive trust.⁹⁴ For one thing, there is notorious circularity in the concept of a proprietary base.⁹⁵ For another, the notion of a proprietary base springs from the dogma that property should not be able to materialise out of a non-proprietary relationship, as though property and obligation are hermetically sealed categories in the manner of the civilians.⁹⁶ That was the fallacy under which *Lister & Co v Stubbs* laboured,⁹⁷ which the English Court of Appeal adopted in *Sinclair Investments (UK)*

⁸⁶ American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* (2011) § 55 cmt (b).

⁸⁷ *Ibid.*

⁸⁸ JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts* (LexisNexis Butterworths, 7th ed, 2006) 263 [1310].

⁸⁹ *Wambo Coal Pty Ltd v Ariff* (n 17); *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669.

⁹⁰ ‘FTI HCA Submissions’ (n 9) [35].

⁹¹ See, eg, *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414, 438 (Deane J).

⁹² *Federal Commissioner of Taxation v Carter* (2022) 274 CLR 304, 321 [41].

⁹³ *Re Holmden’s Settlement Trusts* [1966] Ch 511, 526 (Bagnall QC, *arguendo*).

⁹⁴ See Roy Goode, ‘Proprietary Restitutionary Claims’, in WR Cornish, Richard Nolan, J O’Sullivan and G Virgo (eds), *Restitution: Past, Present, and Future — Essays in Honour of Gareth Jones* (Hart Publishing, 1998) 63.

⁹⁵ JD Heydon, MJ Leeming and PG Turner (eds), *Meagher, Gummow and Lehane’s Equity Doctrines and Remedies* (LexisNexis, 5th ed, 2015) 118 [4-110].

⁹⁶ David Wright, ‘Professor Birks and the Demise of the Remedial Constructive Trust’ (1999) 7 *Restitution Law Review* 128, 131. Compare Peter Birks, *Introduction to the Law of Restitution* (Clarendon Press, 1985) 378 with William Gummow, ‘Unjust Enrichment, Restitution and Proprietary Remedies’ in PD Finn (ed), *Essays on Restitution* (Law Book Co, 1990) 67, 80–1.

⁹⁷ *Lister & Co v Stubbs* (1890) 45 Ch D 1, 15 (Lindley LJ).

Ltd v Versailles Trade Finance Ltd,⁹⁸ and which the Full Court of the Federal Court of Australia disavowed in *Grimaldi v Chameleon Mining NL (No 2)*.⁹⁹

Ex nihilo nihil fit is not an equitable maxim. Although the notion of a proprietary base might satisfy the common lawyer accustomed to the doctrine of finite and exhaustible estates, equity brings ‘particular sophistications’ to our conceptions of ‘property’.¹⁰⁰ Property is as much a consequence as a cause of equity’s intervention. To insist on some continuous chain of property overlooks that the imposition of a constructive trust is ‘an exercise in *creation*’ of proprietary interests — a point made lucidly, as it happens, in the context of a constructive trust over copyright.¹⁰¹ So Waters said: ‘[i]t matters not whether the claimant has a pre-existing legal or equitable right of a proprietary nature in the specific property awarded; “[t]he imposition of a constructive trust can both recognize and create a right of property”’.¹⁰²

To insist on the existence of prior ownership also recalls the false notion that a constructive trust can only arise where there has been an enrichment ‘at the expense of’ another. In *Stephenson Nominees Pty Ltd v Official Receiver*, Gummow J explained how that underexplains the operation of the constructive trust: it is ‘not because pre-existing property of the plaintiff has been followed’.¹⁰³ Ever since the *First Restatement of Restitution*, it was recognised that, even in the absence of a relationship, a constructive trust need not be over property the defendant owned, citing cases where ‘the defendant wrongfully prevents the plaintiff from acquiring property and acquires the property for himself’.¹⁰⁴ (As will be seen, this anticipates *Pallant v Morgan*.¹⁰⁵) Hence the carefully crafted words of § 55 of the *Third Restatement of Restitution*: ‘at the expense of the claimant or in violation of the claimant’s rights’.¹⁰⁶ Hence also the warning sounded by the Reporters of the *Third Restatement* against truncating the constructive trust by reference to ‘bureaucratic’ preconditions such as ‘a confidential or fiduciary relation’, or ‘a transfer’.¹⁰⁷

Moreover, prior ownership of ‘property’ begs the question of what one means by ‘property’. In Australia, as in the United States, a murderer becomes a constructive trustee of property they receive under the deceased’s will.¹⁰⁸ The

⁹⁸ *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2012] Ch 453, 481–2 [88].

⁹⁹ *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, 420 [574]; see also at 418–19 [569].

¹⁰⁰ *Yanner v Eaton* (1999) 201 CLR 351, 388 [85] (Gummow J).

¹⁰¹ *Acorn Computers Ltd v MCS Microcomputer Systems Pty Ltd* (1984) 6 FCR 277, 282 (emphasis added) (Smithers J).

¹⁰² Donovan WM Waters, ‘The Nature of the Remedial Constructive Trust’ in Peter Birks (ed), *Frontiers of Liability* (Oxford University Press, 1994) vol 2, 165, 183, citing *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, 676. See also *Muschinski v Dodds* (n 31) 614 (Deane J).

¹⁰³ *Stephenson Nominees Pty Ltd v Official Receiver* (1993) 16 FCR 536, 552; H Jefferson Powell, ‘“Cardozo’s Foot”: The Chancellor’s Conscience and Constructive Trusts’ (1993) 56(3) *Law and Contemporary Problems* 7, 15 n 53.

¹⁰⁴ American Law Institute, *Restatement (First) of Restitution* (1937) § 160 cmt (d).

¹⁰⁵ *Pallant* (n 16).

¹⁰⁶ *Restatement (Third) of Restitution and Unjust Enrichment* (n 86) § 55 (emphasis added).

¹⁰⁷ *Ibid* § 55 cmt (a).

¹⁰⁸ *Rasmatis v Jurewitsch* [1970] 1 NSW 650; John L Toohey, ‘Killing the Goose that Lays the Golden Eggs’ (1958) 32(1) *Australian Law Journal* 14, 14; Cope (n 48) 555–8.

deceased never had a *Livingston* right in their own assets.¹⁰⁹ Yet, pending administration, that is precisely what the murderer holds on constructive trust. Ames made a similar point. Consider a conveyance to B for life and remainder to C. C kills B and is made constructive trustee, yet, as Ames asked, ‘[h]ow will the murder affect the rights of the parties in the property?’: B only ever had the life estate, not the remainder.¹¹⁰ In the United States, Dobbs gave the example where A murders B, who had an expectation to inherit from C, but which inheritance instead goes to A by his ‘interference’ or interception. In that case, B never had any interest — apart from a mere *spes* — in the property now held on constructive trust by the murderer. Nor were A and B relevantly in any relationship. Yet it is the fraudulent ‘interference with one’s expected acquisition of property [which] may be accomplished through murder’ that attracts equity’s intervention.¹¹¹

That mode of reasoning recalls the so-called ‘*Pallant v Morgan* equity’ from which Jackman J reasoned. Where A fraudulently prevents B from bidding for property (on the assumption that A would buy the property and hold it for B), A holds the property on constructive trust for B. Neither A nor B had an interest in the property to start with.

However, it might be said that the *Pallant* equity rests on ‘either a contractual or a fiduciary or some other consensual basis’.¹¹² So long as one fixes on the facts of *Pallant*, which plainly involved an undertaking to act in another’s interests, that may be right. But as Lord Briggs has observed with reference to ‘the *Pallant v Morgan* Equity’, there is an analytical problem with describing an idea by reference to the name of a case.¹¹³ That is because the equity vindicated by the constructive trust in *Pallant* might enjoy a larger pedigree.

Where one person frustrates a conveyance to another and takes the conveyance instead, Lord Eldon grounded the jurisdiction not on trust or confidence but in fraud: ‘the party comes here saying he has neither a legal nor equitable title, but he was prevented by the fraud of the [d]efendants from having a legal title, desiring this Court, on account of that fraud, to make him a good legal title’.¹¹⁴

Lord Eldon reasoned by analogy with cases where A, in no relationship with C, fraudulently intercepts B’s transfer to C. Clearly enough, neither A nor C had the property in the first place. The Lord Chancellor reasoned by analogy with Lord Thurlow’s decision in *Luttrell v Olmius*:¹¹⁵ where a defendant who fraudulently prevents a tenant in tail from executing a deed of recovery to bar the entail (such that

¹⁰⁹ *Commissioner of Stamp Duties (Qld) v Livingston* (1964) 112 CLR 12.

¹¹⁰ James Barr Ames, ‘Can a Murderer Acquire Title by his Crime and Keep It?’ in *Lectures on Legal History and Miscellaneous Legal Essays* (Harvard University Press, 1913) 310, 320; *Restatement (First) of Restitution* (n 104) § 188 cmt (c); Cope (n 48) 564.

¹¹¹ Dobbs (n 84) vol 2, 615.

¹¹² ‘FTI HCA Submissions’ (n 9) [25].

¹¹³ Lord Briggs of Westbourne, ‘Equity in Business’ (Speech, Denning Society Annual Lecture, Lincoln’s Inn, 8 November 2018) 5–6 [8]. See also *Harris Health Care Pty Ltd (in liq) v Hayes* (n 58) 302 [110].

¹¹⁴ *Mestaer v Gillespie* (1805) 32 ER 1230, 1236.

¹¹⁵ *Ibid.*

the land is then devised to the defendant instead of the plaintiff) the defendant holds the estate they then receive on constructive trust for the plaintiff.¹¹⁶

The Lord Chancellor also reasoned by analogy with cases of what equity called malicious ‘spoliation or suppression’¹¹⁷ where, for example, A destroys or conceals T’s will so that A may take on an intestacy what B might have received by proving the will. Equity shrives A’s conscience by making them a constructive trustee for B. As Perry explained,

If a person, by his promises, or by any fraudulent conduct, with a view to his own profit, prevents a deed or will from being made in favor of a third person, and the property intended for such third person afterwards comes to him who fraudulently prevented the execution of the will or deed, he will be held to be a trustee for the person defrauded to the extent of the interest intended for him ... and where a person fraudulently intercepts a gift intended for another by promising to hand it over if it is left to him, equity will compel an execution of the promise by converting such person into a trustee.¹¹⁸

In America, those acts of ‘interception’ were not confined to established notions of misrepresentation or undue influence and might include the defendant concealing clauses in a will, misreading it or ‘pretending to destroy [the testator’s] will at his direction while actually preserving it’.¹¹⁹ In none of these cases is there a pre-existing relationship or property vis-à-vis plaintiff and defendant.¹²⁰

In language foreshadowing *Pallant*, Perry concluded: ‘if a purchaser by fraud prevents other purchasers from attending a sale ... in order to prevent competition and gets the property into his own name at a less price, he will be a trustee’.¹²¹

In all such cases it has been said that:

the devisee or grantee is charged as trustee for such third person, notwithstanding that the former sustained no fiduciary relation towards the latter, and although the latter had no claim to the property which he could have enforced against the testator or grantor.¹²²

This is no American invention. The basis of *Pallant* in fraud rather than a pre-existing fiduciary relationship was confirmed by the NSW Court of Appeal in *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd*.¹²³ Hence, perhaps, why

¹¹⁶ As explained in Ames (n 110) 315–16.

¹¹⁷ Justice Story, *Commentaries on Equity Jurisprudence* (Stevens and Haynes, 1st Eng ed, 1884) §254, citing *Tucker v Phipps* (1746) 3 Atk 359; 26 ER 1008, 1008. See also the authorities collected in Jairus Ware Perry, *A Treatise on the Law of Trusts and Trustees*, ed Edwin A Howes Jr (Little, Brown & Co, 6th ed, 1911) vol 1, §181; Carter Pitkin Pomeroy and John Norton Pomeroy Jr, *Equity Jurisprudence* (Bancroft-Whitney Co, 2nd ed, 1892) vol 2, §1054 (‘Pomeroy (2nd ed)’).

¹¹⁸ Perry (n 117) vol 1, §181, see also vol 1, §172. See further George Tucker Bispham, *The Principles of Equity: A Treatise on the System of Justice Administered in Courts of Chancery* (Banks Law Publishing Co, 6th ed, 1902) 309–10; Pomeroy (2nd ed) (n 117) vol 2, §1054.

¹¹⁹ *Restatement (First) of Restitution* (n 104) § 184 cmt (a).

¹²⁰ As noted in *ibid*, § 184 cmt (f).

¹²¹ Perry (n 117) vol 1, §172.

¹²² *Rollins v Mitchell*, 53 NW 1020, 1022–3 (Minn, 1892).

¹²³ *White City Tennis Club Ltd v John Alexander's Clubs Pty Ltd* (2009) 261 ALR 86, 100 [64], 104 [83].

Young, Croft and Smith refer to ‘cases where the fraud or other wrongdoing is the cause of the plaintiff failing to acquire property it might otherwise have acquired’.¹²⁴

Whether or not these cases be the origins of the basis of Harman J’s reasoning in *Pallant* itself, the point remains that there is no reason why an antecedent relationship or a pre-existing property right stand like a colossus astride the path to constructive trusteeship.

All this was anticipated by Pomeroy in a passage endorsed by the Supreme Court of the United States:

Whenever the legal title to property is obtained through means or under circumstances ‘which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same *although he may never, perhaps, have had any legal estate therein*’.¹²⁵

E *Discretion*

It might be argued that a constructive trust should have been refused if the footage disclosed an iniquity. That is a mode of reasoning familiar to the equitable duty of confidence. However, no finding was made that the footage depicted any crime, civil wrong or serious misdeed of public importance.¹²⁶

It might also be argued, consistently with *Lange*,¹²⁷ that the implied freedom of communication ought to inform the ‘defences’ or discretionary considerations relevant to a refusal of constructive trusteeship in equity. However, the conclusion in *Farm Transparency* might stand in the way of that argument.¹²⁸

The availability of alternative remedies is a consideration familiar to equity’s auxiliary jurisdiction. But it is not the preserve of the auxiliary jurisdiction. Even in equity’s exclusive jurisdiction, the Court must consider whether the equities of the case may be met by less burdensome relief. That relief might be a monetary account.¹²⁹ It might even be legal relief, such as debt or the \$130,000 damages awarded here.¹³⁰ It might even, in this case, have been an order for delivery up and destruction instead of a constructive trust.¹³¹ And in future, it is likely that courts in

¹²⁴ PW Young, Clyde E Croft and Megan Smith, *On Equity* (Thomson Reuters, 2009) 452, citing *Homeward Bound Hold Mining Co (NL) v McPherson* (1896) 17 LR (NSW) Eq 281; *Avondale Printers & Stationers Ltd v Haggie* [1979] 2 NZLR 124.

¹²⁵ Pomeroy (2nd ed) (n 117) vol 2, §1053 (emphasis added), quoted in *Moore v Crawford*, 130 US 122, 128 (Fuller CJ) (1889).

¹²⁶ *GMC (FCA)* (n 5) [106]; cf *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 456.

¹²⁷ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

¹²⁸ Cf *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537, 613–14 [239]–[240] (Edelman J).

¹²⁹ *Hospital Products* (n 33) 114.

¹³⁰ See *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371; *Restatement (First) of Restitution* (n 104) § 16(e).

¹³¹ *Ormonoid Roofing and Asphalts Ltd v Bitumenoids Ltd* (1930) 31 SR (NSW) 347, 361–2 (Harvey CJ in Eq); cf Waters, Gillen and Smith (n 72) 485–6.

such cases may need to take account of statutory remedies for the new tort of invasion of privacy in Schedule 2 to the *Privacy Act 1988* (Cth).

To that extent, Australian courts have counselled that the constructive trust should be deployed only where necessary.¹³² That is a matter of discretion. Discretion should not be feared. If anything, the very existence of that discretion should temper the above fears that the remedial constructive trust is too invasive a creature, or that it may be inconsistent with the policy of the statute at hand. The remedy itself, being of variable and not fixed content, can accommodate both concerns, without being shut off entirely.

¹³² *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566, 585 [42]; *Giumelli* (n 26) 113–14 [10]; *Grimaldi v Chameleon Mining NL (No 2)* (n 99) 405 [511].