GAINS-BASED REMEDIES IN THE SUPREME COURT OF CANADA

By

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1. Introduction

Loss-based remedies compensate the plaintiff for harm caused by the defendant’s wrongdoing and the most common example is damages. Gains-based remedies deprive the defendant of profits earned by wrongdoing. The most common examples are the constructive trust, which is a proprietary remedy, and the account of profits, which is a money claim. In *Pettkus v. Becker*,¹ the Supreme Court of Canada held that a constructive trust may be awarded to prevent unjust enrichment and in *LAC Minerals Ltd v. International Corona Resources Ltd.*,² the court apparently assumed that in the wake of *Pettkus v. Becker*, the prevention of unjust enrichment was now the only basis for constructive trust relief.

However, in *Soulos v. Korkontzilas*³ the court held that a constructive trust may be imposed either to reverse unjust enrichment or to deter wrongful conduct and that where the purpose is deterrence, it makes no difference whether the plaintiff has suffered any loss. *3469420 Canada Inc. v. Strother*⁴ is a parallel decision holding that an account of profits may be awarded for either unjust enrichment or deterrence reasons and that, where the purpose is deterrence, the plaintiff’s loss does not matter. In summary, *Soulos* and *Strother* seem to support the use of gains-based remedies for deterrence purposes and without reference to unjust enrichment.

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¹ [1980] 2 SCR 834
² [1989] 2 SCR 574.
On the other hand, the majority judgment in *Soulos* is not unequivocal, while both *Soulos* and *Strother* were subject to strong dissents. The upshot is that the question remains at least to some extent unsettled. Part 2, below discusses *Pettkus v. Becker* and its place in the Canadian law of unjust enrichment. Part 3 analyzes the *LAC Minerals* case and *Soulos*, with particular reference to the ambiguity in the *Soulos* majority judgment. Part 4 examines *Strother* with emphasis on observations in the minority judgment about the nature and function of the account of profits remedy. Part 5 concludes with an overall assessment of the cases from both a doctrinal and a policy perspective.

**2. The constructive trust to prevent unjust enrichment**

*Pettkus v. Becker* is the source in Canada of the constructive trust to prevent unjust enrichment. The case involved a dispute over the division of property between a man and woman who had lived together in a common law relationship for nearly 20 years. The property was in the man’s name, but the woman had made regular and substantial household contributions over the years. Prior to *Pettkus v. Becker*, the courts had relied on resulting trusts principles to resolve cases of this kind. However, the resulting trusts approach depended on proof of a common intention that a partner’s contributions entitled her to a *pro tanto* share of the disputed property and, in the absence of an express statement of intention, the courts had no choice but to fall back on implication or, perhaps more accurately, imputation: their task was to “glean ‘phantom intent’ from the conduct of the parties”. In *Pettkus v. Becker*, Dickson J., writing for the majority, excoriated the artificiality of the resulting trusts approach and rejected it in favour of an unjust enrichment analysis.

Dickson J. went on to articulate three key requirements for a finding of unjust enrichment. He said there must be: (1) an enrichment accruing to the defendant; (2) a corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment. In the present case, the defendant was enriched by the plaintiff’s

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5 [1980] 2 SCR 834.  
7 *Pettkus v. Becker* [1980] 2 SCR 834 at 843 *per* Dickson J.  
contributions to their joint household over the years, the plaintiff was correspondingly
deprived by the defendant’s refusal of a quid pro quo and there was an absence of
juristic reason for the enrichment because at the time of making her contributions the
plaintiff reasonably expected a share of the disputed assets and the defendant should have
realized she had this expectation. To reverse the unjust enrichment, the court awarded the
plaintiff a constructive trust for a share of the disputed property proportional to her
contributions.

Pettkus v. Becker was a family property case, but the constructive trust to prevent unjust
enrichment clearly has a wide range of other applications as well, including commercial
disputes. In Peter v. Beblow, Cory. J. suggested that the courts may need to limit the use
of the remedy in commercial cases, but McLachlin J. in the same case doubted “the
wisdom of dividing unjust enrichment cases into two categories – commercial and family
– for the purpose of determining whether a constructive trust lies.” No doubt as a
consequence of this statement, claims for constructive trust relief have become quite
common in commercial litigation. However, the importance of Pettkus v. Becker extends beyond the constructive trust. Pettkus v. Becker is one of three seminal cases in
the Canadian law of restitution. The other two are Deglman v. Guaranty Trust of
Canada and Garland v. Consumers’ Gas Co. In Deglman, the Supreme Court for the
first time acknowledged unjust enrichment as a source of obligations in the common law.
Pettkus v. Becker’s contribution was to provide a framework for analyzing unjust
enrichment claims, while in Garland, the court confirmed that the Pettkus v. Becker

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9 Query whether the inquiry into the parties’ reasonable expectations is any less elusive than the “judicial quest for [a] fugitive common intention” which the court rejected in Pettkus v. Becker: ibid. at p.842. Pettkus v. Becker has a tragic postscript. The defendant played hard ball and the plaintiff was unable to collect from him. She ended up committing suicide. In a suicide note, she protested against the legal system which gave her a remedy but failed to help her enforce it: Oosterhof on Trusts: Text, Commentary and Materials (6th ed., Thomson Carswell, Toronto, 2004), p.613.

10 [1993] 1 SCR 980 at 1022.
11 Ibid. at p. 996.
approach and, in particular, the inquiry into “juristic reason”, applies not just in constructive trust cases but to unjust enrichment claims at large.\textsuperscript{15}

There have been parallel developments in English law, where the House of Lords on several occasions has acknowledged unjust enrichment as a distinct source of obligations.\textsuperscript{16} \textit{Pettkus v. Becker} has received a somewhat negative press in Australia, including one early assessment which unkindly dismissed it as “fog on stilts,” in reference to the apparent indeterminacy of the unjust enrichment concept.\textsuperscript{17} In \textit{Roxborough v. Rothmans of Pall Mall Australia Ltd},\textsuperscript{18} a case involving a claim for restitution of unlawfully imposed taxes, Gummow J., the co-author of the “fog on stilts” quip and now on the High Court, launched a spirited attack on the restitution movement, saying that unjust enrichment was an example of “top-down reasoning”, “whereby a theory about an area of law is invented or adopted and then applied to existing decisions to make them conform to the theory and to dictate the outcome in new cases.”\textsuperscript{19} Top-down reasoning puts the theory first so that the theory drives the cases. This is antithetical to the common law tradition where the influence is the other way round.\textsuperscript{20} Furthermore, he said, if unjust enrichment is transformed into a definitive legal principle,

“substance and dynamism may be restricted by dogma. In turn, the dogma will tend to generate new fictions in order to retain support for its thesis. It may also distort well settled principles in other fields, including those respecting equitable doctrines and remedies, so that they answer the newly mandated order of things. Then various theories will compete, each to deny the others. There is support in Australasian legal scholarship for considerable skepticism respecting any all-embracing theory in this field, with the treatment of the disparate as no more than species of the one newly discovered genus”.\textsuperscript{21}

\begin{footnotes}
\item[18] (2001) 208 CLR 516.
\item[20] \textit{Ibid.} at para.72.
\item[21] \textit{Ibid.} at para.74.
\end{footnotes}
In *Farah Constructions Pty Ltd v. Say-Dee Pty Ltd*, a case concerning recipient liability for breach of fiduciary duty, the High Court in a unanimous judgment quoted this statement with approval. It also said that “unjust enrichment is not a ‘definitive legal principle according to its own terms’”, “the restitution basis is unhistorical” and it “reflects a mentality in which considerations of ideal taxonomy prevail over a pragmatic approach to legal development”.

In the wake of these cases, the status of the restitution movement in Australia is comparable to the status Chaim Saiman ascribes to it in the United States. On the other hand, the intellectual approaches to the question in the two countries could not be more different. According to Saiman, the restitution movement in the United States has fallen victim to legal realism because realism shifts the focus from doctrinal exposition to extra-doctrinal justifications for legal outcomes. From a realist perspective, a case like *Pettkus v. Becker*, for example, is unexciting because the shift from common intention to unjust enrichment analysis makes absolutely no difference to the sub-text of the decision and the court’s real motivations. In Saiman’s words, “[the realist’s] skepticism is a subset of a more general suspicion of the explanatory power of inductive and deductive modes of legal reasoning and argument”. By contrast, the Australian High Court’s position is firmly rooted in doctrinalism. From the realist’s perspective, the restitution movement is simply irrelevant. However, from the High Court’s doctrinal perspective it is positively harmful because of its potentially distorting effect on settled doctrines and also because it is antithetical to the established common law tradition of reasoning by induction.

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The Australian position is at least in part a function of history. There is a strong New South Wales contingent on the High Court at present, as there has often been in the past. New South Wales has the particular distinction of being one of the last common law jurisdictions to enact Judicature Act reforms and it maintained separate common law and equity bars until the 1970s. The consequence was to perpetuate a keen sense of difference between common law and equity, grounded in their separate origins, and a commitment to maintaining the separation in the interests of doctrinal purity. To suggest a merger of common law and equitable doctrines, for example by allowing a common law defence to an equitable cause of action, is to commit the “fusion fallacy” - a crime hardly less reprehensible than killing or stealing.\(^{29}\) For unreconstructed traditionalists, the restitution movement is the fusion fallacy writ large. Adoption of unjust enrichment as the unifying theme cuts across established legal boundaries and it is inconsistent with maintaining the separation between common law and equity that the old-style equity lawyer is committed to. In other words, the two agendas are diametrically opposed. With these considerations in mind, it becomes easier to understand the High Court’s uncharacteristically heated reaction to the emerging restitution movement in Australia. Saiman characterizes law and economics as the right wing branch of legal realism in the United States.\(^{30}\) This may be an over-simplification but, in any event, the opposition to the restitution movement in Australia is a manifestation, not of right-wing attitudes as such, but of conservatism in its literal sense.

3. The constructive trust to prevent wrongdoing

The Australia High Court’s concern that, with the rise of the restitution movement, “substance and dynamism may be restricted by dogma”, \(^{31}\) while perhaps somewhat overstated, is not entirely groundless. In Canada, the Supreme Court, having developed the concept of unjust enrichment, shows signs now of being in thrall to its own creation. \textit{Pettkus v. Becker} decided that the prevention of unjust enrichment is a justification for

\(^{29}\) Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies (4\(^{th}\) ed. LexisNexis, Sydney, Australia, 2002), Chapter 2.

\(^{30}\) Op.cit., n.12, Part V.

\(^{31}\) See text at n.21, above.
constructive trust relief. A predictable question that arose in its wake was whether the prevention of unjust enrichment was now the only basis for the remedy. If this was the case, then how was *Pettkus v. Becker* to be reconciled with the long line of authority, dating back to *Keech v. Sandford*,32 in support of constructive trust orders to deter breach of fiduciary obligations?33

There are at least two possible approaches the court might have taken in response to this difficulty. The first would be to reconceptualize the older case law in unjust enrichment terms, while the second would be to concede that the prevention of unjust enrichment is not the constructive trust’s only function and that the prevention of wrongful conduct is an alternative and equally legitimate objective. As it happens, the court has done both. It took the first approach in *LAC Minerals Ltd v. International Corona Resources Ltd*34 and it took the second approach in *Soulos v. Korkontzilas*.35 In *LAC Minerals*, Corona was a junior mining company. It discovered that a property belonging to Mrs Williams sat on top of a valuable gold deposit. Corona did not have the resources to mine the deposit by itself and so it approached LAC, a senior mining company, in the hope of forming a joint venture. In the course of negotiations, Corona disclosed to LAC the information about Mrs Williams’ property. LAC went behind Corona’s back and purchased the property for itself and it spent a large amount of money on the property in the early stages of development. Corona sued LAC for breach of confidence and breach of fiduciary duty. By way of relief it asked for compensation or alternatively a constructive trust over the property. The case had a mixed history on its way up through the courts, but in the Supreme Court it was held unanimously that LAC was liable for breach of confidence, by a majority that it was also in breach of fiduciary obligation and by a differently constituted majority that Corona was entitled to constructive trust relief.

La Forest J., who delivered the leading judgment on the remedy question, proceeded on the assumption that, following *Pettkus v. Becker*, there must be a finding of unjust

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32 (1726) Sel.Cas.Ch.61, 25 E.R. 223 (Ch.D.)
33 See also *Regal (Hastings) Ltd v. Gulliver* (1942) [1967] 2 AC 134 (HLE); *Boardman v. Phipps* [1967] 2 AC 46 (HLE); *Canadian Aero Service Ltd v. O’Malley* [1974] SCR 592.
34 [1989] 2 SCR 574.
enrichment before the court can award a constructive trust. The problem in the present case was that, while the Williams property was clearly LAC’s gain, there seemed to be no corresponding deprivation suffered by Corona because the property was not Corona’s to begin with. La Forest J. got round the problem by holding, in effect, that what LAC deprived Corona of was not the property itself, but the opportunity to acquire the property and the resulting profits. However, this response is itself problematic because without LAC’s interception, Corona probably would not have acquired the Williams’ property by itself. It would have needed help from LAC to purchase and develop the property. Therefore, the most likely outcome is that the parties would have purchased the property jointly and shared the development costs. It is true that Corona had to pay LAC for the cost of the improvements as a condition of the remedy, but Corona ended up getting all the surplus. In other words, the constructive trust gave Corona more than it had lost and, while a supra-compensatory remedy might be justifiable on deterrence grounds it is inconsistent with the prevention of unjust enrichment.

La Forest J.’s reasoning in LAC calls to mind Roy Goode’s rationalization of the Keech v. Sanford line of cases in unjust enrichment terms. These cases all involve a fiduciary’s misuse of position to make a profit for himself. As in LAC, it is not immediately obvious where the unjust enrichment lies because the profits were not the plaintiff’s to begin with. However, according to Goode, the problem is resolved by shifting the focus from the actual profits to the opportunity of acquiring them. Goode used the expression “deemed agency gains” to describe the defendant’s profits: deemed agency gains are “gains which derive not from appropriation of property previously held by P but from activity undertaken by D for his own benefit which he was under an equitable duty, if he undertook it all, to pursue for P, so that D in effect acted as P’s constructive agent and the resulting gains will be treated in equity as if they had in effect been procured for P”. To avoid over-compensating the plaintiff, Goode argued that the constructive trust in deemed agency cases should always be conditional on the plaintiff reimbursing the defendant for

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38 Ibid. at p.219.
her time, money and other inputs into the profit-making venture.\textsuperscript{39} Goode’s primary concern was with the bankruptcy implications of the constructive trust. If the plaintiff suffers no deprivation, a constructive trust over the defendant’s gains would remove property from the defendant’s bankruptcy estate, thus benefiting the plaintiff at the expense of the unsecured creditors. On the other hand, if the constructive trust is limited to cases of unjust enrichment, the remedy leaves the defendant’s estate no worse off than it would have been but for the restitution-inducing event.\textsuperscript{40}

In \textit{Soulos v. Korkontzilas}, the plaintiff employed the defendant real estate agent to purchase a property on his behalf. The defendant purchased the property for himself instead and concealed his action by telling the plaintiff that the vendor had changed his mind about selling the property. The plaintiff sued the defendant for breach of fiduciary duty, claiming a constructive trust over the property. Specifically, the plaintiff asked for the property to be transferred to him for the price the defendant had paid, subject to certain adjustments. The market price of the property had fallen since the date of the defendant’s purchase, but both parties claimed to want the property because it held special significance for them as members of the Greek community. The defendant argued that there must be unjust enrichment before the court can award a constructive trust and, in the present case, there was no gain to the defendant because the market value of the property had fallen. Likewise, the plaintiff was not deprived. On the contrary, the defendant’s actions saved him from a bad bargain.

In the Supreme Court McLachlin J., writing for the majority, rejected the defendant’s argument on two grounds. First, she said, the constructive trust remedy is not limited to cases of unjust enrichment. It is also available to deter breach of fiduciary obligation and other wrongful conduct. Secondly, there was unjust enrichment, given the plaintiff’s desire to own the property for non-monetary reasons.\textsuperscript{41} The conditions for constructive

\textsuperscript{39} \textit{Ibid.} at p.226.
\textsuperscript{40} \textit{Ibid.}
\textsuperscript{41} [1997] 2 SCR 217 at pp 242-243. Sopinka and Iacobucci JJ dissented, holding that: (1) the constructive trust remedy depends on proof of unjust enrichment; (2) the trial judge had rejected the plaintiff’s contention that the property held special value for him and there was no basis for disturbing this finding; and (3) there was no unjust enrichment because the plaintiff had suffered no loss.
trust relief in wrongful conduct cases are that: (1) the defendant was under an equitable obligation; (2) the assets in the defendant’s hands resulted from deemed or actual agency gains of the defendant; (3) the plaintiff has a legitimate reason for seeking a proprietary remedy; and (4) there are no other factors that would make it unjust to award a constructive trust.42 It will be apparent that the second of these conditions is inappropriate if the purpose of the remedy is, as this part of the judgment presupposes, to deter wrongful conduct. The only reason for requiring proof of deemed or actual agency gains is to rationalize the remedy in unjust enrichment terms. However, the need for this exercise disappears once deterrence is recognized as an alternative basis for the remedy. Needless to say, McLachlin J.’s deemed agency gains limitation has led to quite a bit of confusion in later, lower court decisions.43 Moreover, it could be read as suggesting ambivalence about the legitimacy of the constructive trust’s deterrence function and this impression is reinforced by her more recent statements, discussed in Part 4, below.

The second ground of the majority’s judgment is open to criticism because it is imprecise as to the nature of the enrichment. The plaintiff’s deprivation was the non-monetary value he placed on the property. But what was the defendant’s enrichment? McLachlin J. did not address this question, but presumably it was the non-monetary value the defendant placed on the property. This can’t be the end of the story, though, because unjust enrichment depends on a correspondence between the defendant’s enrichment and the plaintiff’s deprivation and there appears to have been no basis for assuming that the parties valued the property equivalently. Goode’s main concern was with the bankruptcy implications of the constructive trust and the court’s decision may perhaps be justifiable from this perspective. If the defendant had become bankrupt, the constructive trust would probably not have prejudiced the unsecured creditors. This is because they, unlike the defendant himself, presumably had no special attachment to the property and so removal of the property from the estate would not diminish the pool of assets available for distribution. On the contrary, given the plaintiff’s undertaking to pay an amount equivalent to the price the defendant paid for the property, the property’s removal may

42 Ibid. at p.241, citing Goode, op.cit. n.37 as the source.
actually have increased the asset pool by ridding the estate of a bad bargain. On the other hand, there is no indication in the judgment that the majority was thinking along these lines.

The deemed agency gains requirement in *Soulos* suggests some ambivalence about the policy justification for constructive trust relief in wrongful conduct cases and this creates uncertainty at the doctrinal level. For example, given that the deemed agency gains requirement reflects Goode’s conception of the constructive trust, it means that in a deemed agency gains case, that is to say, a case in the *Keech v. Sandford* mould, the court must give the defendant an allowance.\(^4^4\) By contrast, the conventional wisdom is that the court has a discretion and it may deny the allowance if the defendant acted dishonestly.\(^4^5\) A discretionary allowance makes sense from a deterrence perspective, but it cannot be rationalized in unjust enrichment terms. The reverse is true of a non-discretionary allowance.

It is also unclear, in the wake of *Soulos*, what should happen in a wrongful conduct case where there are no actual or deemed agency gains. Bribe-taking is the paradigm case. In *Lister v. Stubbs*,\(^4^6\) the plaintiff employed the defendant as a purchasing officer. The defendant took a bribe from one of the plaintiff’s suppliers and invested the bribe money. The plaintiff claimed a constructive trust over the defendant’s investments. The court denied the constructive trust and limited the plaintiff to an account of profits for the amount of the bribe money itself. According to Goode, the refusal of a constructive trust was “clearly correct”, because there was no unjust enrichment.\(^4^7\) More precisely, there were no deemed agency gains:

> “the bribe was not a form of benefit which it was D’s duty to obtain for P; it resulted from conduct in which D ought not to have engaged at all. The distinction is between

\(^{4^4}\) See text at n.39, above.
\(^{4^6}\) (1890) 45 Ch.D. 1 (C.A.)
a benefit which P would have obtained if D had fulfilled his duty and a benefit which would never have been conferred at all if D had observed that duty”.48

However, in the more recent case of Attorney-General for Hong Kong v. Reid,49 the Privy Council declined to follow Lister v. Stubbs, asserting that “a fiduciary must not be allowed to benefit from his own breach of duty”.50 Reid’s case clearly supports the deterrence theory of constructive trust liability and by implication it rejects Goode’s unjust enrichment theory. Where does the law in Canada stand, post-Soulos? On the one hand, the Soulsos majority’s apparent endorsement of the deterrence theory implies support for Reid’s case. On the other hand, the deemed agency gains restriction implies support for Goode’s unjust enrichment theory and Lister v. Stubbs.

4. The account of profits

(a) Introduction

3469420 Canada Inc. v. Strother51 was a case involving a lawyer’s fiduciary obligations to his client. The client had engaged Strother to provide advice about film production tax shelter investments. There was a change in the tax laws aimed at defeating this kind of tax shelter and Strother advised the client there was no way round the new rules. Some time later, Strother discovered a loop-hole but, instead of telling the client, he exploited it himself. The client sued Strother and his firm alleging breach of fiduciary duties and claiming an account of profits. The trial judge dismissed the claim,52 but this decision was reversed by the British Columbia Court of Appeal.53 A further appeal to the Supreme Court resulted in a 5-4 split in the plaintiff’s favour. The main point of disagreement was the scope of the defendant’s retainer; the majority held that the retainer obliged the defendant to keep the plaintiff informed of new developments, while the minority held

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48 Ibid. at p.231.
50 Ibid at p. 336.
the opposite. However, there was also disagreement over the remedy. The trial judge found that the plaintiff had suffered no loss because, by the time of Strother’s alleged wrongful conduct, it had already wound down its film production tax shelter business and was not in a position to revive it. Consequently, it could not have taken advantage of the new developments even if Strother had disclosed the information to it. The orthodox teaching is that an account of profits may be awarded for either unjust enrichment or deterrence reasons and where deterrence is the objective, the plaintiff’s loss is neither here nor there. The majority judgment in *Strother* reflects this orthodoxy:

“[w]here, as here, disgorgement is imposed to serve a prophylactic purpose, the relevant causation is the breach of a fiduciary duty and the defendant’s gain (not the plaintiff’s loss). Denying Strother profit generated by the financial interest that constituted his conflict teaches faithless fiduciaries that conflicts of interest do not pay. The *prophylactic* purpose thereby advances the policy of equity, even at the expense of a windfall to the wronged beneficiary.”

On the other hand, the minority, led by McLachlin C.J.C, went out of its way to question the legitimacy of using the account of profits remedy for solely deterrence purposes. Without deciding the issue, McLachlin C.J.C made the following points: (1) it is open to question whether the account of profits remedy is available in a case where the breach of fiduciary obligations relates not to the management of the plaintiff’s assets, but to an opportunity that arises to the defendant in his fiduciary capacity; (2) the account of profits remedy should be sparingly applied because “the effect may be to give the plaintiff priority over other creditors”, should the defendant be insolvent; (3) it may be anomalous to award the plaintiff an account of profits for breach of fiduciary duty in cases where, as in *Strother* itself, “the fiduciary duty arises from the same facts as a concomitant contractual duty”; and (4) there is a “tension between the need to deter

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fiduciaries from abusing their trust on the one hand, and the goal of achieving a remedy that is fair to all those affected, on the other”. It is true that these remarks are *obiter*, but they are still noteworthy because they contrast so sharply with McLachlin J’s60 take on the remedies question in *Soulos*.

(b) The account of profits remedy for diversion of commercial opportunities

McLachlin C.J.C.’s suggestion that an account of profits may not be the appropriate remedy in cases where the defendant diverts to himself a business opportunity encountered in his fiduciary capacity is contrary to the *Keech v. Sandford* line of cases. She bases her suggestion on the following statement by David Hayton in an Australian book of equity essays:61

> “Where the trustee’s profit is not made out of the trust property but out of an opportunity that arises to him in his office as trustee, … many have questioned whether it is equitable or fair that the trust beneficiaries should have a proprietary interest in that profit (rather than a mere personal claim).”

However, the reference in this passage is to proprietary remedies, such as the constructive trust, whereas the account of profits is a personal remedy. In any event, Hayton goes on to say, in a passage McLachlin C.J.C does not refer to:62

> “There is no justification to distinguish between misuse of property and misuse of office (whether honestly or dishonestly), while distinguishing them may well be capricious. In the vernacular, ‘beneficiaries are entitled to expect not to be ripped off by their trustee, or if he tries to rip them off, then they are entitled to expect that his profits become part of the trust fund’”.

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59 *Ibid.*. She also suggested that “where extra deterrence is required, it [may] be better achieved by remedies such as exemplary damages, which, unlike account, can be tailored to the particular situation”: *ibid.* For discussion, see Duggan, *op.cit.*, n.54 at pp 27-28 and 30-33.

60 As she then was.


In a work which McLachlin C.J.C does not cite, James Edelman demonstrates that gains-based money remedies fall into two categories which he calls “restitutionary damages” and “disgorgement damages”. Restitutionary damages is a remedy “which operates to reverse wrongful transfers of value from a claimant to a defendant”. The clearest example is the right to restitution that arises in mistaken payment cases. The rationale is that “because the transfer was procured by the defendant’s wrong the law should not recognize the validity of the transfer of the money or benefit transferred and should reverse the transfer from the claimant to the defendant”. “Disgorgement damages operate to strip a defendant of profit made by wrongful conduct”. Examples in the fiduciary context include Boardman v. Phipps and Canadian Aero Service v. O’Malley. The rationale is deterrence. The main difference between restitutionary damages and disgorgement damages is that, in the case of disgorgement damages “whether a transfer of value occurs or not is irrelevant. There might be no transfer of value. The value might be generated from a third party or through the defendant’s own skill and initiative. For example, consider the case where a defendant trustee wrongfully uses information obtained while acting in a fiduciary capacity and makes a personal profit. The amount of the profit might be primarily the result of the defendant’s skill and experience. The defendant’s actions might exploit an opportunity which the claimant could never have acquired or even be to the benefit of the claimant, enhancing the claimant’s wealth as well as the defendant’s. But when disgorgement damages are available this gain must be given up”.

This statement contradicts McLachlin C.J.C’s suggestion in Strother that the account of profits remedy may be inappropriate “in a case where the breach did not arise from the management of property, where it did not cause the plaintiff any loss and where, viewing the same case through the lens of contract law, the plaintiff would have recovered nothing”. McLachlin C.J.C’s error was to elide the two categories of gains-based

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64 Ibid. at p.1.
65 Ibid. at p.80.
66 Ibid. at p.1.
68 (1973) 40 D.L.R. (3d) 371 cited in Edelman, loc.cit.n.64.
69 Ibid. at p.82.
70 Ibid. at p.72.
damages Edelman identifies. By contrast, the majority in *Strother* noted that the account of profits remedy “may be directed to either or both of two equitable purposes”, the one “prophylactic” and the other “restitutionary”\(^{72}\) and these statements square with Edelman’s analysis.

**(c) The insolvency implications of the account remedy**

McLachlin C.J.C suggests that the account of profits remedy should be sparingly applied because “the effect may be to give the plaintiff priority over other creditors”, should the defendant be insolvent. Again, this statement confuses proprietary and personal remedies. While proprietary remedies such as the constructive trust may have the effect McLachlin C.J.C contends for, the account of profits does not because it is only a money claim and so it gives the plaintiff no stake in any of the defendant’s assets. If the defendant becomes bankrupt, the plaintiff’s only recourse will be to lodge a proof of claim for the amount of the judgment and to share *pro rata* with the other unsecured creditors in any dividend distribution.

The personal nature of the account of profits remedy lies at the heart of the debate over the relative merits of *Lister v. Stubbs*\(^ {73}\) and *Attorney-General for Hong Kong v. Reid*.\(^ {74}\) In *Lister v. Stubbs*, the court held that the defendant was in breach of fiduciary duty for accepting bribes. However, it refused to order a constructive trust over investments the defendant had purchased with the bribe money, confining the plaintiff instead to an account of profits equivalent to the value of the bribes. The court relied on bankruptcy considerations in support of its conclusion and, by implication, concluded that the need to preserve the integrity of the bankruptcy distribution system was more important than the deterrence of defaulting fiduciaries. By contrast, in *Reid’s* case, where the facts were comparable, the Privy Council awarded the plaintiff a constructive trust over the second-generation profits, citing deterrence considerations in support of its conclusion and downplaying the bankruptcy implications. If the account of profits was a proprietary

\(^{72}\) *Ibid.* at paras 74 and 75.

\(^{73}\) (1890) 45 Ch.D. 1.

\(^{74}\) [1994] 1 A.C. 324 (J.C.).
remedy, as McLachlin C.J.C seems to think, the court in *Lister v. Stubbs* would have achieved nothing on the bankruptcy front by denying constructive trust relief: either way, the plaintiff would have had priority over the defendant’s unsecured creditors.\(^75\)

In *Reid’s* case, the defendant had invested the bribe money in real estate. The reason the plaintiff asked for constructive trust relief was because it wanted to lodge a caveat and it needed a proprietary basis for doing so. Suppose that instead the plaintiff had asked for an account of profits representing the value of the land. Would the court have had jurisdiction to grant the remedy? *Lister v. Stubbs* suggests that the answer may be “no”: the plaintiff is entitled to an account of profits only for the amount of the bribe money itself and the second generation profits are too remote. In *Reid’s* case, Lord Templeman reached the same conclusion relying on some extra-judicial statements by Sir Peter Millett.\(^76\) However, it makes no sense to say, in the name of deterrence, that the plaintiff is entitled to a constructive trust over the second-generation profits but that he cannot claim the money equivalent by way of a personal remedy. The better view is that, at least in cases of deliberate wrongdoing, the plaintiff should have the choice of remedy, subject

\(^{75}\) McLachlin C.J.C seems to have got the idea that the account of profits is a proprietary remedy from Sarah Worthington’s book, *Equity* (Oxford University Press, Oxford, 2003). According to Worthington:

> “the fiduciary holds the profits of his breach of trust for his principal from the moment they are obtained. The principal then has preferred status on the fiduciary’s insolvency, and this is inevitably controversial. Nevertheless, the analysis supporting this proprietary status is both simple and historically compelling. Disgorgement requires the fiduciary to pay over the profits of his disloyalty to the principal. [A] proprietary reaction in these circumstances is consistent with Equity’s treatment of other Equitable obligations that demand payment over to the claimant. If the defendant has the asset in question in his hands, Equity always regards the obligation as specific, and as entitling the claimant to treat the asset as already her own in Equity; it never regards the obligation as merely a personal obligation to pay over the value in money” (at p.124).

McLachlin C.J.C’s citation is to the first edition of Worthington’s book, which has no footnotes. A second edition was published in 2006 (*Equity (2nd Ed., Oxford University Press, Oxford, 2006)*), and this does include footnotes so it is now possible to identify the sources on which Worthington relied for the statement quoted above. The authority she cites in support of the first sentence is *Reid’s* case. However, as indicated above, the remedy the plaintiff sought and obtained in that case was a constructive trust, not an account of profits. Moreover, Worthington’s claim that her analysis is “both simple and historically compelling” is now qualified by a footnote stating that “other views have held sway” and citing *Lister v. Stubbs* (p. 135, n.20, emphasis added). The new footnote says it all.

to the court’s discretion to disallow a proprietary claim if the circumstances demand.\textsuperscript{77} This conclusion is inconsistent with Worthington’s analysis which submerges the personal remedy in the proprietary claim.\textsuperscript{78} However, it is consistent with the \textit{Pettkus v. Becker}\textsuperscript{79} line of cases in Canada which stresses the remedial character of the constructive trust and the court’s discretion to award a money remedy instead.

McLachlin C.J.C’s reservations in \textit{Strother} about the appropriateness of gains-based remedies for breach of fiduciary duty suggest that she may be having second thoughts about the correctness of her leading judgment in \textit{Soulos}, though she did not refer to \textit{Soulos} in her \textit{Strother} judgment. \textit{Soulos}, like \textit{Strother}, involved a breach of fiduciary duty which caused the plaintiff no identifiable loss and, in both cases, the plaintiff sought a gains-based remedy (an account of profits in \textit{Strother} and a constructive trust in \textit{Soulos}). Assuming, for the sake of argument, that the account of profits is a proprietary remedy, then the concerns McLachlin C.J.C expressed in \textit{Strother} about the bankruptcy implications of the account of profits remedy apply with equal force to the constructive trust. The correctness of the decision in \textit{Soulos} depends on two separate questions: (1) whether gains-based remedies are appropriate at all if the plaintiff has suffered no loss; and (2) whether proprietary remedies are appropriate, having regard to the potential bankruptcy implications. The answer to the first question turns on whether deterrence, as distinct from preventing unjust enrichment, is a legitimate function of gains-based remedies and the answer to the second question depends on a trade-off between deterrence and bankruptcy considerations.\textsuperscript{80} The point for present purposes is that there are two separate questions in play and the problem with McLachlin C.J.C’s analysis in \textit{Strother} is that she runs them together.

\begin{itemize}
\item \textsuperscript{77} See Edelman, \textit{op.cit.} n.64 at pp 108-111 and sources there cited.
\item \textsuperscript{78} See n.75, above.
\item \textsuperscript{79} \cite{becker} 2 S.C.R. 834.
\item \textsuperscript{80} As to which, see, \textit{e.g.}, Anthony Duggan, “Constructive Trusts from a Law and Economics Perspective” (2005) 55 \textit{University of Toronto Law Journal} 217 and David M. Paciocco, “The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors” (1989) 68 \textit{Canadian Bar Review} 315.
\end{itemize}
(d) The contract-fiduciary overlap

In Strother, McLachlin C.J.C suggested that the account of profits remedy may be inappropriate in cases, like the present one, where the plaintiff has overlapping causes of action for breach of contract and breach of fiduciary obligation. Why, she asks, should the plaintiff be entitled to an account of profits if he sues in equity when, if he had sued for breach of contract he would have recovered nothing?81 Citing Canson Enterprises Ltd v. Boughton & Co.,82 she raises the question “whether the remedy of account, like equitable compensation, should be harmonized with common law remedies where the facts support concurrent equitable and legal claims”.83 This last statement assumes that damages is the only money remedy for breach of contract. On the contrary, in Attorney-General v. Blake,84 the House of Lords held that in appropriate circumstances the plaintiff in a contract action may claim an account of profits. 85 Of course it would be open to the Supreme Court to hold that Blake’s case should not be followed in Canada, but McLachlin C.J.C does not mention Blake and there is no hint in her judgment that disapproving the case is what she had in mind.

In Harris v. Digital Pulse Pty Ltd,86 the New South Wales Court of Appeal gave a similar reason for holding that punitive damages should not be available for breach of fiduciary obligation that was also a breach of contract. In Australia, punitive damages, or exemplary damages as they are called there, cannot be awarded for breach of contract and a majority of the court in Digital Pulse held that it would be anomalous if the plaintiff could succeed in obtaining punitive damages by suing for breach of fiduciary obligation rather than for breach of contract. This view is open to question. In Digital Pulse, the plaintiff’s punitive damages claim depended on the fiduciary relationship, not the contract. Allowing punitive damages for a breach of fiduciary obligation which also

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83 2007 SCC 24 at para.158.
85 For discussion, see Mitchell McInnes, “Account of Profits for Common Law Wrongs” in Degeling and Edelman, op.cit. n.62 405 at p.409..
happens to be a breach of contract is not the same as allowing punitive damages for breach of contract at large. Furthermore, allowing punitive damages for breach of fiduciary obligation except where there also happens to be a breach of contract is itself anomalous; the case for punitive damages rests on the need to deter fiduciary wrongdoing and that imperative does not disappear just because the parties are in a contractual relationship. The same goes for *Strother*. In cases like *Strother*, the account of profits remedy serves the same deterrence function as punitive damages and the fact that the fiduciary relationship happens to be grounded in a contract between the parties should make no difference.

(e) Deterrence and the prevention of unjust enrichment

In *Strother*, McLachlin C.J.C referred to a debate taking place “throughout the Commonwealth” about the appropriate remedies for breach of fiduciary duties and that, “underlying this debate is the tension between the need to deter fiduciaries from abusing their trust on the one hand, and the goal of achieving a remedy that is fair to all those affected, on the other”. In other words, is deterrence a legitimate goal for gains-based remedies in the absence of unjust enrichment?

This is the same as the question the court had earlier addressed in *Soulos*. There the court apparently concluded that the answer was “yes”, although the suggestion that the constructive trust depends on proof of actual or deemed agency gains cuts in the other direction. McLachlin C.J.C’s reservations in *Strother* about the deterrence function of the account of profits remedy contrast sharply with her appeal to deterrence considerations as a justification for the constructive trust in *Soulos*. On the other hand, they are perfectly reconcilable with her support for the deemed agency gains requirement. In summary, McLachlin C.J.C.’s judgment in *Soulos* is ambiguous and the *Strother* minority judgment reinforces the ambiguity of her position.

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88 2007 SCC 24 at para. 156.
Bribe-taking involves fiduciary wrong-doing, but without actual or deemed agency gains. *Soulos* leaves the status of *Reid’s* case uncertain in Canada and *Strother* does not make matters any clearer. The *Strother* majority judgment has no direct bearing on the question. While the majority held that an account of profits may serve a deterrence function even without proof of unjust enrichment, the same is not necessarily true for the constructive trust having regard to the proprietary character of the remedy and the bankruptcy implications which flow from this.89 The minority judgment in *Strother* is inconsistent with *Reid’s* case. Furthermore, it could be read as suggesting, contrary to *Lister v. Stubbs*, that the plaintiff should not even be entitled to a money remedy given the absence of unjust enrichment. McLachlin C.J.C did not refer to the bribe cases in *Strother* and the likelihood is that the implications of her remarks did not occur to her. Nevertheless, when and if the Supreme Court is confronted with a bribe case, she will have to nail her colours to the mast. Support for *Reid’s* case will require reaffirmation of her commitment to the deterrence objective of gains-based remedies for breach of fiduciary duty. On the other hand, a conversion to the unjust enrichment school of thought would force her to the conclusion that *Reid’s* case was wrongly decided.

5. Conclusion

The opponents of restitution on the Australian High Court say that “the restitution basis is unhistorical” and that “it reflects a mentality in which considerations of ideal taxonomy prevail over a pragmatic approach to legal development.”90 These views are doctrinally-oriented and so they may not strike much of a chord with a North American audience of legal realists. Nevertheless, the skeptics have a point, as the cases discussed above indicate.

*Pre-Pettkus v. Becker*, gains-based remedies were the province of equity, not the law of restitution. It was well-established in equity that both the account of profits and the constructive trust had not only a restitutionary function, but a deterrence—or prophylactic

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89 See text at n.40, above.
90 See text at nn 23-26, above.
-function as well. *Pettkus v. Becker* obscured this point by articulating a new basis for constructive trust relief which took no account of the remedy’s deterrence function. The court has subsequently struggled to address the problem in two different ways, first by attempting to reconceptualize the older cases in unjust enrichment terms and secondly, by conceding that deterrence is a separate and legitimate basis for the remedy. The first approach is evident in the *LAC Minerals* case and also in the *Soulos* deemed agency gains requirement for constructive trust relief. The second approach is evident in other parts of *Soulos*. These responses are inconsistent with one another and the tension between them remains unresolved. The account of profits remedy has fared somewhat better. It would have been tempting to conclude, *post-Pettkus v. Becker*, that, by analogy with the constructive trust, an account of profits depends on proof of unjust enrichment. Fortunately, the majority in *Strother* resisted the temptation and clung to orthodoxy. On the other hand, the minority took the bait and, by doing so, demonstrated the power of dogma to distort settled principles “so that they answer the newly mandated order of things”.91 Of course, this is a minority position and it might be no more than a curiosity were it not for the fact that the Chief Justice wrote the judgment and it was subscribed to by three other members of the court. For these reasons it would be premature to celebrate orthodoxy’s triumph over the new order.

For the realist, of course, policy matters more than orthodoxy. As matters presently stand *post-Strother*, an account of profits can be awarded for deterrence reasons alone and without proof of unjust enrichment. Is this outcome justifiable in policy terms? Gains-based remedies in tort are potentially inefficient because they give the defendant an incentive to spend more on precautions to avoid liability than the plaintiff’s expected loss.92 Likewise, gains-based remedies in contract are generally speaking uneconomical because they discourage efficient breach.93 On the other hand, different considerations apply in the fiduciary context. Deterrence of fiduciary misconduct is important to preserve the integrity of fiduciary relationships and a loss-based remedy will be

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91 See text at n.21, above.
insufficient deterrence if the defendant’s gain exceeds the plaintiff’s loss. To see why, consider the following case based loosely on the facts of *Soulos v. Korkontzilas*:

D obtains for himself a contract with T which he was under a fiduciary obligation to obtain for P. P values the contract at $4 and D values it at $7. Assuming a probability of 1 that P will discover D’s wrongdoing and successfully sue for recovery, D’s expected gain is $7. His expected loss is $4 if P’s remedy is a loss-based one, but it rises to $7 if P’s remedy is a gains-based one. ⁹⁴

Allowing for P’s successful suit, D will still be ahead if P is limited to a loss-based remedy, but not if P can sue for a gains-based remedy instead. Note that a gains-based remedy does no more than prevent unauthorized takings: it does not preclude the parties from trading entitlements and, in fact, it encourages bargaining. In the above example, a gains-based remedy makes it unprofitable for D to misappropriate the contract, but it would still be profitable for D to buy the contract from P at any price up to $7 while P, for her part, should be willing to sell for any price over $4. Fiduciary law permits transactions like this provided P freely consents and the terms are fair. ⁹⁵ In summary, “just as restitution plus an additional penalty induces the would-be thief to enter into market transactions instead, the profits remedy induces the parties to contract explicitly. It is a contract-inducing, not a contract-frustrating, approach”. ⁹⁶ Of course, this is a law and economics perspective and other theoretical perspectives may lead to different

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⁹⁴ See Duggan, *op.cit.* n.87 at p.311. Fiduciary relationships typically involve high agency costs which make the defendant’s wrongdoing hard to detect. Fiduciary law addresses this problem in part by relaxing the burden of proof on the plaintiff. This increases the probability of detection and successful litigation and in most cases makes additional measures, such as punitive damages, unnecessary: Robert J. Cooter and Bradley J. Freeman, “The Fiduciary Relationship: Its Economic Character and Legal Consequences” (1991) 66 *New York University Law Review* 1045.

⁹⁵ There is a risk that a reviewing court may wrongly conclude that P did not properly consent or that the terms are unfair. However, this does not make the gains-based remedy inefficient. To see why, consider the following variation on the example in the text:

P values the contract at $4, whereas D values it at $7. D is prepared to pay P $4 if P lets D take the contract. D’s total costs of negotiating with P and T are $1. There is a ¼ *ex ante* probability that P will end up suing D and that the court will wrongly reject D’s justification of the deal. On these figures, D’s expected loss is 25 cents ($1 x ¼). His expected gain is $2.25 ($7-$4) x (1-1/4). Since D’s expected gain exceeds his expected loss, he is likely to go ahead with the transaction: see Duggan, *op.cit.* n.87 at p 312.

⁹⁶ Easterbrook and Fischel, *op.cit.* n.93 at p.444.
conclusions. For example, it is much harder to justify gains-based remedies from a corrective justice perspective in cases where there is no corresponding loss to the plaintiff. These different ways of thinking perhaps underlie the disagreement between the majority and the minority in *Strother* over the remedies question, though neither judgment is cast in explicitly theoretical terms.

*Soulos* is ambiguous on the availability of constructive trust relief for deterrence reasons and without proof of unjust enrichment. In this respect, the decision reflects the tension in the earlier case law, including *Lister v. Stubbs* and *Reid’s* case. As it happens, the question involves a difficult trade-off between deterrence and bankruptcy considerations and the indecision in the cases reflects the difficulty of the choice. Bribe-taking is the paradigm case of fiduciary wrongdoing without unjust enrichment. In the bribe cases, the plaintiff’s loss bears no necessary relation to the defendant’s gain and, as in *Reid’s* case itself, it may be unquantifiable.\(^97\) This means that a loss-based remedy is likely to result in systematic under-compensation. Given the risk of under-compensation, the plaintiff’s likely *ex ante* preference will be for a remedy to deter the defendant’s wrongdoing so the compensation issue does not arise. For effective deterrence, the remedy must capture all the defendant’s gains. An account of profits limited to the amount of the bribe money, as in *Lister v. Stubbs*, falls short in this regard. An account of profits that extends to the defendant’s second-generation profits would be an improvement, but even this might result in under-deterrence if the defendant has a special attachment to the disputed property or there is a chance that the property will increase in value after the judgment date.

The only sure-fire way of extracting all the defendant’s gains is to impose a constructive trust on the bribe money and its traceable proceeds. *Ex ante*, the availability of the constructive trust remedy makes both the plaintiff and the defendant better off because, by making the defendant more trustworthy, it increases the value of his services to the plaintiff and presumably also the amount the plaintiff is willing to pay for them.

\(^97\) [1994] 1 AC 324 at p. 331 *per* Lord Templeman.
It is sometimes argued that the cost of the constructive trust is the costs the unsecured creditors bear if the defendant becomes bankrupt.\textsuperscript{98} However, this is an \textit{ex post} perspective. \textit{Ex ante}, the creditors may be better off because, by making the defendant more trustworthy, the constructive trust improves his employment prospects and, presumably, his income-earning potential and the capacity to repay his debts.\textsuperscript{99} The real cost of the constructive trust remedy is arguably that it may increase the cost of bankruptcy proceedings by encouraging strategic claims which may be costly to process and administer and which may lead to the outlay of scarce estate resources on expensive litigation. These considerations all point towards a default rule, but the question is what the default rule should be.\textsuperscript{100} \textit{Lister v. Stubbs} supports a default rule denying the constructive trust remedy but leaving the parties free to opt in if they want to. \textit{Reid’s} case supports a default rule allowing the remedy but leaving the parties free to opt out. In choosing between the two approaches, the aim should be to minimize the aggregate costs of transacting around the default rule. This in turn depends on the difficult question of whether parties at large are more likely than not to want the constructive trust remedy and, given the empirical nature of the inquiry, it is not surprising that the courts may differ.

Contrast the corrective justice perspective on constructive trusts with the economic approach described above. From an economic perspective, since the primary goal of all remedies is deterrence rather than compensation or restitution, the presence or absence of unjust enrichment makes no difference: either way, the question is whether the deterrence benefits of the remedy exceed the bankruptcy costs. On the other hand, from a corrective justice perspective, the presence or absence of unjust enrichment makes all the difference. Emily Sherwin argues that a constructive trust may be imposed even if the


\textsuperscript{99} See Duggan, \textit{op.cit.} n.80 at p.230.

defendant is bankrupt, but only for the purpose of restitution.\textsuperscript{101} In the bankruptcy context, the question is whether the defendant’s unsecured creditors, rather than the defendant herself, have been unjustly enriched at the plaintiff’s expense. This question depends on whether the plaintiff was an involuntary creditor: in other words, did the plaintiff voluntarily accept the risk of the defendant’s bankruptcy? If not, then the plaintiff should have priority.\textsuperscript{102}

On the other hand, Sherwin goes on to say, a constructive trust should never be awarded against a bankrupt defendant if the purpose is deterrence. The reason is that if the defendant is bankrupt, the remedy impacts on the defendant’s creditors, rather than the defendant herself and this is pointless from a deterrence perspective.\textsuperscript{103} Sherwin accepts the case for constructive trust relief on deterrence grounds outside bankruptcy and her analysis implies that the award should be defeasible if the defendant becomes bankrupt subsequently. The difficulty is that changing creditors’ relative entitlements in bankruptcy encourages opportunism: a creditor may put the debtor into bankruptcy not for the purpose of maximizing returns to the creditors at large, but simply as a mechanism for avoiding the constructive trust. Sherwin concedes this point, but she argues, contentiously, that corrective justice considerations are more important.\textsuperscript{104} Perhaps with these difficulties in mind, Goode maintains that the courts should never grant constructive trust relief without proof of unjust enrichment, even outside the defendant’s

\textsuperscript{101} Emily L. Sherwin, \textit{op.cit.} n.95.
\textsuperscript{102} There is a substantial element of indeterminacy here. For example, if the defendant tricks the plaintiff into a transfer of the disputed asset, it could be argued that the plaintiff is an involuntary creditor because the defendant’s duplicity subverted the plaintiff’s choice. On the other hand, it could be argued that the risk of fraud is an incident of contracting and, while it justifies a remedy, it does not justify giving the plaintiff priority in the defendant’s bankruptcy. According to Sherwin, the question turns on a number of variables including the nature of the fraud and the plaintiff’s commercial sophistication and the “constructive trust claimant’s position as an involuntary creditor is a question of degree”: \textit{op.cit.} n.95 at p. 352. In any event, some might say that preferred creditor status is a matter best left to the legislature because there may be other types of involuntary creditor who are more deserving than constructive trust claimants in the type of case before the court.
\textsuperscript{103} Sherwin, \textit{op.cit.} n.95 at pp 337-339.
\textsuperscript{104} \textit{Ibid}, at pp 361-364.
bankruptcy. The trouble is that this leaves the constructive trust’s deterrence potential untapped even in cases where, as events turn out, there are no bankruptcy implications.

To summarize, law and economics scholars and corrective justice theorists are sharply divided on the proper function of remedies and the ambivalence in the case law at least partly tracks these different ways of thinking. Furthermore, even within each of the two schools of thought, there is room for disagreement over questions such as how much weight to give bankruptcy considerations in determining the appropriateness of constructive trust relief. Given these differences, the unsettled state of the case law is hardly surprising. For the purposes of this paper, though, it is not case outcomes that matter so much as the method of analysis. To underscore Saiman’s point, economic analysis and other explicitly policy-oriented perspectives are standard in the United States, but they are foreign to common law jurisdictions outside North America and, even in Canada, they are not very prevalent. On the other hand, Canada has moved away from the heavy emphasis on doctrinalism that still characterizes Australian legal discourse. This may explain why Canadian lawyers and judges seem to care more about restitution than their counterparts in both Australia and the United States.

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106 Of course, the criminal law is a fallback, but not all actionable wrongs are criminal offences and offences are not always prosecuted. The literature on the relative merits of public and private law enforcement is substantial. Contributors include Hobbes, Rousseau, Weber Becker and Stigler. For a useful survey, see Kent Roach and Michael J. Trebilco, “Private Enforcement of Competition Laws” (1996) 34 Osgoode Hall Law Journal 461.