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ARTICLE

Constructive Trusts in Malaysia: A Methodological Reappraisal

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Abstract
In recent times, Malaysian courts have resorted to a ritual incantation of unconscionability and the notion of a remedial constructive trust to justify a declaration of a constructive trust. This methodology is unhelpful for approaching constructive trusts and has led the law to develop in an unprincipled and unpredictable fashion. Our central thesis is that the key Malaysian decisions could have been decided on the basis of pre-existing legal principles upon which English and Commonwealth courts have declared a constructive trust. We argue that future courts ought to realign their methodology with the orthodox tradition of incremental development of the law in this area instead of resorting to broad notions of unconscionability and the remedial constructive trust.

Introduction

The constructive trust remains one of the most complex areas of the law of equity. This article examines the Malaysian jurisprudence on constructive trusts. Although the Malaysian law on constructive trusts originated from English law, the highest court has, in recent times, resorted to a ritual incantation of unconscionability and the notion of a remedial constructive trust to justify a declaration of a constructive trust. This methodology, in our view, is unhelpful and has led the law to develop in an unprincipled and unpredictable fashion. Our central thesis is that many of the key Malaysian decisions could have been decided on the basis of pre-existing legal principles upon which English and Commonwealth courts have declared a constructive trust. Unfortunately, the reasoning in Malaysian cases on constructive trusts has been unnecessarily convoluted, notwithstanding the availability of more straightforward avenues of deciding the dispute at hand.

In this article, we argue, first, that in the tradition of incremental development of the common law, judges ought to carefully consider pre-existing legal principles upon which constructive trusts have been declared. This legal methodology of relying on pre-existing case law should be the first port of call, rather than resorting to the general formula of unconscionability or the notion of the remedial constructive trust as the basis for finding a constructive trust. In advocating this approach, we are not arguing that Malaysian judges should blindly follow their English or Commonwealth counterparts. Certainly, Malaysian judges should be free to develop their own jurisprudence. The point that we are making is that the *methodology* by which many of the constructive trust cases

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have been decided should have been different: the courts should have applied pre-existing legal principles rather than having recourse to vague notions of unconscionability or the remedial constructive trust. In the second part of this article, we examine and critique several influential Malaysian Federal Court decisions. In doing so, we hope to demonstrate that these cases could – and should – have been decided by applying a more straightforward analysis, with reference to established categories of constructive trusts. We argue that these cases should therefore not be taken as authorities standing for the proposition that constructive trusts ought to be declared on the basis of general notions of unconscionability or on the basis of a remedial constructive trust. Next, we consider the distinction between 'institutional' and 'remedial' constructive trusts and discuss the reasons why Malaysian courts should avoid the remedial constructive trust. Finally, we examine a particular application of the constructive trust, namely the 'common intention constructive trust' doctrine. Here, we demonstrate how Malaysian judges have charted their own course in developing the law. We argue that this illustrates that Malaysian judges are developing a uniquely Malaysian jurisprudence to align the law with the norms and social mores of Malaysian society, a contextualisation of the law which is unique to Malaysia. We suggest that such contextualised development of the law of constructive trusts can best be advanced by using the methodology of applying pre-existing legal principles, rather than relying on the unhelpful notion of unconscionability or the remedial constructive trust.

Pre-existing legal principles or general formula?

As early as 1615, Lord Ellesmere said that '[t]he office of the Chancellor is to correct men's consciences for frauds, breach of trusts, wrongs and oppressions, of what nature soever they be, and to soften and mollify the extremity of the law'.[1] Vestiges of this historical notion of 'conscience' can still be detected in the modern law. In the context of constructive trusts, there have been various attempts to construct a general formula for situations in which constructive trusts will arise based on the idea of conscience. For instance, it has been said that the constructive trust is a mechanism which creates equitable property rights to satisfy the demands of justice and good conscience,[2] or that it arises in response to unconscionability on the part of the defendant.[3] While courts often repeat these formulae as though they were mantra, a more careful reading of many of the leading constructive trusts judgments will quickly reveal the legal principles upon which the decisions are ultimately based. As Lord Sumption JSC in *Bailey v Angove's Pty Ltd* rightfully observed:[4]

> Bingham J's point of departure in the *Neste Oy* case [1983] 2 Lloyd's Rep 658 was that the recipient of money may be liable to account for it as a constructive trustee if he cannot in good conscience assert his own beneficial interest in the money as against some other person of whose rights he is aware. As a general proposition this is plainly right. But it is *not a sufficient statement of the test*, because it begs the question what good conscience requires. Property rights are fixed and ascertainable rights. Whether they exist in a given case depends on settled principles, even in equity. Good conscience therefore involves more than a judgment of the relative moral merits of the parties (emphasis added).

In the modern day, equity reflects a distinct body of legal principles, consisting of discrete doctrines which guide and frame proceedings, including pleadings, defences, and judicial decisions. Courts have moved away from a *direct* appeal to notions of conscience or pure judicial discretion,

[1] *Earl of Oxford's* case (1615) 1 Ch Rep 1.

[2] *Carl Zeiss Stiftung v Herbert Smith & Co (No. 2)* [1969] 2 Ch 276 (CA) 301; *Eves v Eves* [1975] 1 WLR 1338 (CA).

[3] *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 (CA) 409; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) 705.

[4] *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 WLR 3179 [28].

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especially in the determination of private parties' property rights, as it perpetuates instability and uncertainty in the law. These conscience-based formulae are simply *generalisations* or conclusory remarks, and as the learned editors of *Snell's Equity* correctly point out, general statements should not be taken out of context and used as a legal test in ascertaining when a defendant would hold property subject to a constructive trust.[5] Instead, as Graham Virgo suggests, the determination of when a constructive trust will arise should be a task for legal principles established in the case law as opposed to a general appeal to notions of 'justice and good conscience'.[6] To this end, the correct approach would be to identify particular, pre-existing legal principles upon which constructive trusts have previously been recognised,[7] and apply them to the case at hand to determine if a constructive trust arises by way of analogy.

A parallel juxtaposition, specifically within the law of constructive trusts, has been the subject matter of extensive discussion and debate amongst Commonwealth jurisdictions within the last seventy years or so. This relates to the distinction between 'institutional' and 'remedial' constructive trusts.[8] We will unpack this distinction further below. At this stage, it is sufficient to observe that the imposition of an institutional constructive trust reflects an application of pre-existing legal principles found in pre-existing situations in which constructive trusts have arisen, whereas the imposition of a remedial constructive trust indicates a direct appeal to judicial discretion – which parallels reliance on justice, good conscience, or unconscionability directly as a reason for decisions. The remedial constructive trust is problematic, for the same reasons that reliance on a general formula for the imposition of constructive trusts should be avoided.

Unfortunately, Malaysian jurisprudence on constructive trusts reveals an inclination towards relying on vague notions of unconscionability and invoking the remedial constructive trust as the first port of call in terms of legal reasoning. For instance, in *RHB Bank Bhd v Travelsight (M) Sdn Bhd*[9], Jeffrey Tan FCJ observed:[10]

> [30] … "a constructive trust (in the remedial sense) arises whenever the circumstances are such that it would be unconscionable of the owner of the legal title to assert his own beneficial interest and deny the beneficial interest of another. It arises from circumstances which are, ex hypothesi, known to the legal owner, for if they were not his conscience would not be affected" ("Restitution and Constructive Trusts" 1988 Law Quarterly Review Vol 114 p. 399, per Millett LJ at 400). "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee" *(Beatty v. Guggenheim Exploration Co*, 122 NE 378, at p. 388 (NY 1919) per Cardozo J).

In a similar vein, Zulkefli Ahmad Makinudin PCA stated the following in *Perbadanan Kemajuan Pertanian Selangor v JW Properties Sdn Bhd* (the *Api-Api* case):[11]

[5]Steven Elliott KC et al, *Snell's Equity* (35th edn, Sweet & Maxwell 2025) [26-002].

[6]Graham Virgo KC, *The Principles of Equity & Trusts* (5th edn, Oxford University Press 2023) 286; *Snell's Equity* (n 5) [26-002].

[7]Virgo (n 6) 286. See also Ying Khai Liew, *Rationalising Constructive Trusts* (Hart Publishing 2017) 25–33.

[8]See, generally, Ying Khai Liew, 'Reanalysing Institutional and Remedial Constructive Trusts' (2016) 74 Cambridge Law Journal 528.

[9]*RHB Bank Bhd v Travelsight (M) Sdn Bhd* [2015] 1 CLJ 309.

[10]*RHB Bank* (n 9) [30].

[11]*Perbadanan Kemajuan Pertanian Selangor v JW Properties Sdn Bhd* (2017) MLJU 1107 ('the *Api-Api* case') [58]–[59] (noted Harmahinder Singh, Iqbal Singh, Safinaz binti Mohd Hussein & Nur Khalidah binti Dahlan, 'The Api-Api Constructive Trust Test: Coming Out of the Murky Into Dangerous Waters?' (2018) 8 International Journal of Asian Social Science 1068).

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> [58] … it has been established as a principle of law that constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of the property (usually but not necessarily the legal owner) to assert his own beneficial interest in the property and deny the beneficial interest of another.
> …
> [59] It has also been held that a constructive trust is a trust which is imposed by equity in order to satisfy the demands of justice and good conscience without reference to any express or presumed intention of the parties. A constructive trust is a remedial device that is employed to prevent unjust enrichment. It has the effect of taking the title to the property from one person whose title unjustly enriches him, and transferring it to another who has been unjustly deprived of it.

Likewise in *Takako Sakao v Ng Pek Yuen*,[12] Gopal Sri Ram FCJ extensively cited with approval a passage from the judgment of Millett LJ (as he then was) in *Paragon Finance* for his explanation of the concept of a constructive trust:[13]

> In *Paragon Finance plc v. DB Thakerar & Co* [1999] 1 All ER 400, Millett LJ (later Lord Millett) explained the concept of a constructive trust in terms that is [*sic*] difficult to improve:
>
> > A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case (and this is the class with which we are presently concerned), however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust. Well known examples of such a constructive trust are *McCormick v. Grogan* [1869] 4 App. Cas. 82 (a case of a secret trust) and *Rochefoucauld v. Boustead* [1897] 1 Ch. 196 (where the defendant agreed to buy property for the plaintiff but the trust was imperfectly recorded). *Pallant v. Morgan* [1953] Ch. 43 (where the defendant sought to keep for himself property which the plaintiff trusted him to buy for both parties) is another. In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property.

Taken on its own, making generalised observations about constructive trusts in terms of good conscience or unconscionability is not a source of concern, so long as they are taken simply to be general observations about the law and do not lead *directly* to the disposition of cases. However, trouble arises where constructive trusts are *justified* in these terms, an approach which lacks rigour and predictability, and is apt to mislead. As Lord Sumption said in *Bailey v Angove's Pty Ltd*, 'it begs the question what good conscience requires'.[14] More importantly, such an approach is inconsistent with the common law legal method by overlooking the presence of rich pre-existing equitable jurisprudence in England and Wales and the Commonwealth, on the various situations where a constructive trust has been declared.

[12] *Takako Sakao v Ng Pek Yuen* [2010] 1 CLJ 381.
[13] *Takako* (n 12) [15].
[14] *Angove's* (n 4) [28].

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According to case law, the situations in which a constructive trust may be declared include:

(a) retention of property by a vendor after the vendor had entered into a specifically enforceable contract for the disposition of an interest in the property;[15]
(b) the acquisition of property expressly subject to a third party's interests;[16]
(c) breach of a fiduciary duty;[17]
(d) a *Pallant v Morgan* equity;[18]
(e) where the defendant is aware that the claimant paid money to the defendant by mistake, and money remains identifiable in a segregated fund; [19]
(f) the satisfaction of an equity that arises pursuant to a claim in proprietary estoppel;[20]
(g) a secret trust;[21]
(h) an acquisition of property due to the defendant's fraudulent conduct;[22]
(i) the rule in *Re Rose*;[23]
(j) where a gift made as a *donatio mortis causa* fails;[24]
(k) a traceable equitable proprietary interest vesting in the plaintiff which is in the hands of the defendant;[25]
(l) acquisition by a trustee of property in breach of trust;[26] and
(m) a common intention to share property coupled with the plaintiff's detrimental reliance.[27]

Other Commonwealth countries have also found constructive trusts to arise in other situations. For example, in Canada a constructive trust may arise where there has been a breach of confidence;[28] and in Australia, the constructive trust has been declared in situations of an unforeseen failure of a joint endeavour.[29]

Having set out these pre-existing categories where a constructive trust has been declared, the better approach when confronted with a plea of a constructive trust is for courts to consider carefully

[15] *Lysaght v Edwards* (1876) 2 Ch D 499, (Ch) applied in *Takako* (n 12) [20]. See also PG Turner, 'Understanding the Constructive Trust Between Vendor and Purchaser' (2012) 128 Law Quarterly Review 582.

[16] *Binions v Evans* [1972] Ch 359 (CA). See also Ben McFarlane, 'Constructive Trusts Arising on a Receipt of Property *Sub Conditione*' (2004) 120 Law Quarterly Review 667.

[17] *Boardman v Phipps* [1967] 2 AC 46 (HL) 117; *Lee Hark Lam v Kebun Rimau Sdn Bhd* [2017] 1 CLJ 277; *Takako* (n 12).

[18] *Pallant v Morgan* [1953] Ch 43 (Ch). See also Nicholas Hopkins, 'The *Pallant v Morgan* Equity' [2002] The Conveyancer and Property Lawyer 35; Yip Man, 'The Pallant v Morgan Equity Reconsidered' (2013) 33 Legal Studies 549; Ying Khai Liew & Cristina Poon, 'The 'Pallant v Morgan Equity' in Australia: Substantive or Superfluous?' (2021) 21 Australian Property Law Journal 1.

[19] *Chase Manhattan Bank v Israel-British Bank* [1981] Ch 105 (Ch), as rationalised in *Westdeutsche* (n 3) 715.

[20] *Gillett v Holt* [2001] Ch 210 (CA).

[21] Liew (n 7) 79–95; *Chin Jhin Thien v Chin Huat Yean @ Chin Chun Yean* [2020] 4 MLJ 581.

[22] *Rochefoucauld v Boustead* [1897] 1 Ch 196 (CA), applied in *Sanmaru Overseas Marketing Sdn Bhd v PT Indofood Interna Corp* [2009] 3 CLJ 10; *Ng Tien v Chow Nim Yan* [1990] 1 CLJ 209.

[23] *Re Rose, Midland Bank Executor and Trustee Co Ltd v Rose* [1949] 1 Ch 78 (Ch); *Re Rose, Rose v IRC* [1952] 1 Ch 499 (CA) 505–506.

[24] Liew (n 7) 317–336; *Takako* (n 12) [20].

[25] *Foskett v McKeown* [2001] AC 102 (HL). The judgment used the term trust and not constructive trust.

[26] *Keech v Sandford* (1726) 2 Eq Cas Abr 741.

[27] *Stack v Dowden* [2007] 2 AC 432 (HL). It should be noted, however, that the Malaysian courts have not followed their English counterparts in the application of the common intention constructive trust doctrine. As the court in *Shirley Kathreyn Yap v Malcolm Thwaites* [2016] 5 MLJ 602 observed at [73]–[76], the doctrine of the common intention constructive trust should not be extended to an unmarried couple without proof of financial contributions under Malaysian law. This will be developed later below.

[28] *Lac Minerals v International Corona Resources* (1989) 61 DLR (4th) 14. But see Tang Hang Wu, 'Confidence and the Constructive Trust' (2003) 23 Legal Studies 135.

[29] *Muschinski v Dodds* (1985) 160 CLR 583. See also Ying Khai Liew, 'The 'Joint Endeavour Constructive Trust' Doctrine in Australia: Deconstructing Unconscionability' (2021) 42 Adelaide Law Review 73.

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whether the facts at hand fall within the pre-existing categories, rather than deciding the case through a direct and uncritical appeal to good conscience. A most basic example by way of analogy will suffice. The law, taken as a whole, aims to achieve – one hopes – 'fairness'. But a judge would hardly be engaging in proper legal reasoning if he or she decided cases before the court *simply* by appealing to what is 'fair'. Just like the conscience-based formulae, what is 'fair' is teased out through areas, doctrines, rules, and principles of law, which directly inform the outcome of particular cases. Similarly, where certain, ascertainable and pre-existing constructive trust doctrines may be utilised to dispose of a case; these should guide the court rather than any general conscience-based formula.

The Federal Court decisions

In this section, we subject three key Federal Court decisions[30] to careful analysis. These cases represent decisions of Malaysia's apex court and have been cited extensively in subsequent case law for their constructive trust propositions under Malaysian law.[31] The common theme running through these cases is that they all rely on notions of unconscionability or the remedial constructive trust as direct reasons for their decisions. However, we will demonstrate how these cases are simply applications of uncontroversial pre-existing legal categories of constructive trusts, and that therefore, the various observations on unconscionability and the remedial constructive trust are purely *dicta* and should be treated accordingly by future courts. In making this argument, we are not saying that Malaysian judges should simply accept Commonwealth jurisprudence unquestioningly as part of Malaysian law. Indeed, if local circumstances dictate, Malaysian judges should develop their own law that is more suited to Malaysian society. Thus, the use of Commonwealth jurisprudence in this way is not to slavishly follow laws from other countries, but as a reference to 'a globalized system of law that operates as a well-tested set of legal know-hows'.[32] Rather, our point is that the methodology by which constructive trusts are developed should proceed by reasoning from pre-existing legal categories rather than from vague general formulae.

RHB Bank Bhd v Travelsight (M) Sdn Bhd

The Federal Court's decision in *RHB Bank* is an influential case on remedial constructive trust in Malaysian jurisprudence. In this case, the purchaser, a travel agency called Travelsight (M) Sdn Bhd (Travelsight), entered into a sale and purchase agreement with the seller, Atlas Corporation Sdn Bhd (Atlas), to purchase a property in Kuala Lumpur (the 'Agreement'). The purchase was partly financed by RHB Bank, with Travelsight paying the balance. Crucially, Travelsight made full payment of the purchase price and took possession of the land. However, Travelsight later discovered that Atlas made a material misrepresentation regarding the size of the property.[33] Alleging a breach of contract, Travelsight filed an action against Atlas and sought a declaration that it had rightfully rescinded the agreement.[34] Subsequently, Travelsight paid up the loan facility to RHB Bank in full.

[30]Namely, *RHB Bank* (n 9); the *Api-Api* case (n 11); and *Takako* (n 12).

[31]For instance, *RHB Bank* (n 9) has been cited in the subsequent Court of Appeal decisions of *Theow Say Kow @ Teoh Kiang Seng, Henry v Graceful Frontier Sdn Bhd* [2020] 1 LNS 52 and *Lim Meow Khean v Pakatan Mawar (M) Sdn Bhd* [2021] 1 LNS 173 for its proposition that the constructive trust arises in circumstances involving unconscionability on the part of the defendant. Likewise, the *Api-Api* case (n 11) has been cited in the Court of Appeal decisions of *Theow Say Kow* and *IB Capital Sdn Bhd v Ivory Indah Sdn Bhd* [2021] 1 LNS 2348. Lastly, *Takako* (n 12) has also been recently cited in the Court of Appeal decisions of *Chong Chee Piao v Koh Wah Leong* [2023] 4 CLJ 675 and *Tan Keng Yong v Tan Hwa Ling* [2022] 3 CLJ 274.

[32]Kwai Hang Ng & Bryanna Jacobson, 'How Global is the Common Law? A Comparative Study of Asian Common Law Systems–Hong Kong, Malaysia, and Singapore' (2017) 12 Asian Journal of Comparative Law 209.

[33]*RHB Bank* (n 9) [2].

[34]ibid.

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The court granted the declaration sought by Travelsight and ordered a refund of all monies paid, but Atlas failed to comply with the order. Travelsight then sought a release of the property by RHB Bank, but was informed that RHB would not execute the deed of release as Travelsight's right to the property was lost upon rescission of the agreement. The Federal Court ultimately decided that since Atlas did not refund the purchase price, there was a constructive trust over the property in favour of Travelsight.[35] In reaching this outcome, Jeffrey Tan FCJ discussed the dichotomy between an institutional constructive trust and a remedial constructive trust. Controversially, Tan FCJ said, 'we perceive that the notion of a remedial constructive trust is already part of English law'.[36] In the present context, the learned judge said:

> It could be reasonably assumed that the circumstances that would have been known to Atlas and liquidators were: (i) the full purchase price had been paid; (ii) the property belonged to Travelsight as purchaser and RHB as assignee; (iii) the order dated 15 November 2002 validated rescission and ordered a refund of the purchase price; and, (iv) the purchase price had not been refunded. Given those latter circumstances that would have been known to them, it could be further assumed that Atlas and liquidators should have known that the property was not that of Atlas to deal and dispose as its own. Fairly said, the circumstances that would have been known to Atlas and liquidators were such that it would be unconscionable of Atlas and liquidators to treat the property as its unencumbered asset and deny the beneficial interest of Travelsight and RHB. The circumstances were such that gave rise to a constructive trust, in the remedial sense, which equity imposed on Atlas and liquidators, to deal not with the property as its beneficial property (on the duty imposed by equity to account to the true owner of money or property, see also *Koh Siew Keng & Anor v. Koh Heng Jin* [2008] 3 CLJ 450; [2008] 3 MLJ 822).

With respect, there was no need for the Federal Court to resort to the remedial constructive trust and rely on the vague language of unconscionability to decide the matter. Instead, given that Travelsight had entered into a valid contract for sale of real estate, the property belonged to Travelsight *qua* purchaser by way of a constructive trust,[37] even if the property was yet to be registered in its name pending issuance of a document of title. This is an uncontroversial example of a vendor-purchaser constructive trust, where a purchaser of land has an equitable interest in the property by way of a constructive trust even before the property is conveyed and registered in the purchaser's name. The difficulty in this case, however, was whether the constructive trust was affected by Travelsight's application for an order of rescission. This is known as recission in equity, which is a form of equitable relief granted at the court's discretion.[38] Where a contract is rescinded in equity, a condition is typically imposed to restore parties to their original positions.[39] In the present case, rescission was granted on the condition that Atlas repays Travelsight's money,[40] but this never occurred as Atlas refused to refund the purchase price.[41] In such a scenario, a bar to rescission applies unless *restitutio in integrum* – the restoration of parties to the position in which they were before the contract was made – has been satisfied.[42] In equity, this bar is justifiable by reference to the maxim that 'those who seek equity must do equity'.[43] Furthermore, while equity does not

[35]ibid [31].

[36]ibid [21]. This is not an accurate statement of English law. See *Re Polly Peck International Plc (No 2)* [1998] 3 All ER 812 (noted Peter Birks, 'The End of the Remedial Constructive Trust' (1998) 12 Trust Law International 202).

[37]*Lysaght* (n 15), applied in *IB Capital* (n 31); *Temenggong Securities Ltd v Registrar of Titles, Johore* [1974] 1 LNS 175.

[38]Virgo (n 6) 12.

[39]ibid.

[40]*RHB Bank* (n 9) [13].

[41]ibid.

[42]Virgo (n 6) [21.6.4(i)].

[43]*O'Sullivan v Management Agency and Music Ltd* [1985] 1 QB 428 (CA) 458.

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require *precise restitutio in integrum*, it still requires *substantial restitutio in integrum*, or the exercise of one's powers to do what is practically possible to restore parties to substantially the status quo.[44] Given that Travelsight was not repaid, the bar to rescission applies such that the contract was not technically rescinded. Indeed, the Federal Court made the point that the purchase price was not refunded. Therefore, the original vendor-purchaser constructive trust stands between Travelsight and Atlas, and the concept of a remedial constructive trust was an unnecessary gloss to the legal reasoning.

The Api-Api *case*[45]

In the *Api-Api* case, the appellant, Perbadanan Pertanian Negeri Selangor, a statutory body and agency of the State of Selangor, was granted approval by the Selangor State Government for the alienation of a piece of land in the Mukim of Api-Api (which will be referred to in this article as the 'Api-Api Land'). The appellant then sold and delivered vacant possession of the Api-Api Land to a company, PKPS Aquaculture Sdn Bhd (PKPS Aquaculture). Subsequently, PKPS Aquaculture sold the land to the respondent, JW Properties Sdn Bhd. There was also a deed of assignment where PKPS Aquaculture assigned all its rights, title, and interest in the Api-Api land to the respondent. It was only after PKPS Aquaculture's sale and assignment of the rights over the Api-Api land to the respondent that the document of title to the land was issued. However, it was issued under the appellant's name as the registered owner. It should be noted that the respondent had paid the appellant the full purchase price and had entered into occupation of the land in 1997. Subsequently, the Api-Api land was designated for acquisition by the Selangor Land Administrator in 2011, and a question arose as to which party should compensated following the Land Administrator's acquisition. This led to the ancillary question of whether the land belonged to the respondent in equity, even though the sale by PKPS Aquaculture was subject to consent of a third party – namely, the State Authority. The Federal Court saw it necessary to consider the declaration of the remedial constructive trust as a device to prevent unjust enrichment,[46] following its previous acceptance of the doctrine in *RHB Bank*.

With respect, the introduction of terms such as 'unconscionable conduct', 'demands of justice', and 'good conscience', as in the previous case of *RHB Bank* above, serves to provide confusion rather than guidance due to the innate ambiguity of said language. Furthermore, it is unclear why the court saw it necessary to resort to the concepts of remedial constructive trust and unjust enrichment in this regard, when the matter could be resolved with reference to established case law. First, where there is an agreement between a purchaser and vendor of land which provides that the contract is subject to a particular condition, such as planning permission or satisfactory replies to legal requisitions, the preferred construction to such conditional clauses is to treat the parties as having a contract between them, instead of interpreting the said clauses as condition precedents to forming a contract.[47] Furthermore, case law adopts a broad view towards the notion of the purchaser's interest, such that it encompasses not just the primary sense of compelling the performance of a contract by way of specific performance but also the extended sense of conferring protection by injunction (or otherwise) of rights acquired by the respondent under the contract for sale and deed of assignment of the rights to the Api-Api land.[48] Hence, in the *Api-Api* case, notwithstanding the

[44] *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 (HL) 1278.

[45] The *Api-Api* case (n 11).

[46] ibid [59].

[47] *Wood Preservation v Prior* [1969] 1 WLR 1077 (Ch) 1090. The third and fourth construction of a conditional clause in Goff J's dictum is to be preferred, with support from the Privy Council decision of *Graham v Pitkin* [1992] 1 WLR 113 (PC) 406. See also Kevin Gray & Susan Francis Gray, *Elements of Land Law* (5th edn, Oxford University Press 2009) [8.1.72].

[48] *Stern v McArthur* (1988) 81 ALR 463, 485. Applied in *Golden Village Multiplex Pte Ltd v Marina Centre Holdings Pte Ltd* [2002] 1 SLR(R) 169. But criticised by Tan Sook Yee & Kelvin Low, 'Equity and Trust' (2002) 3 Singapore Academx of Law Annual Review 202; JF Keeler, 'Some Reflections on *Holroyd v Marshall*' (1969) 3 Adelaide Law Review 360.

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need for third party consent, the respondent could in fact have availed itself to the deed of assignment, which it could then enforce against the appellant by mandating the appellant to obtain State consent. Indeed, Zulkefli Ahmad Makinudin PCA rightly quoted the Australian decision of *Stern v McArthur*[49] that the court can order the vendor to take steps to obtain a third party's consent and transfer the land to the purchaser. The High Court of Australia said in *Stern v McArthur*[50] that in these circumstances, in substance, the relationship between vendor and purchaser is that of trustee and beneficial owner. In other words, the land already belonged in equity to PKPS Aquaculture (and therefore to the respondent via the deed of assignment) by way of a constructive trust,[51] even though title was not formally transferred to PKPS Aquaculture. It follows that PKPS Aquaculture is entitled to the sums by way of compulsory acquisition. Second, there is established case law supporting the view that a caveat may be properly lodged in respect of a contract subject to a condition, such as subdivision approval or ministerial consent, even before the condition is fulfilled.[52] These cases again suggest that a proprietary interest arises in favour of a purchaser even when third party consent is required. By understanding the *Api-Api* case as one where the constructive trusteeship arises by virtue of a vendor-purchaser relationship, the court's reference to a general notion of unconscionability and the remedial constructive trust to resolve the matter at hand may be interpreted as mere *dicta*.

Takako Sakao v Ng Pek Yuen

Finally, the case of *Takako* involved a dispute between two people in a business venture. The appellant alleged that there was a mutual understanding with the first respondent that both would purchase and register a building in their joint names in equal shares. However, following the appellant's contribution of a sum towards the purchase price, the first respondent purchased the property and registered it solely in her name. Subsequently, the first respondent sold the property to the second respondent, a private limited company owned by the first respondent's husband, and the appellant responded by lodging a caveat to protect her interest in the property. An issue arose as to whether the appellant could enforce any trust that arose in her favour by way of her contribution towards the purchase price. To this end, Gopal Sri Ram JCA cited Millett LJ (as he then was) for his explanation of the concept of a constructive trust in *Paragon Finance* and held that the appellant and first respondent were business partners. Since they were partners, they were fiduciaries to each other. The appellant was entitled to a half share in the trust property as a beneficiary under a constructive trust,[53] in view of the appellant's purchase price contributions to the building.

Whilst Gopal Sri Ram JCA's reasoning as to the fiduciary relationship giving rise to a constructive trust is plausible, in view of existing case law where a breach of fiduciary duty has given rise to a constructive trust,[54] the *Takako* decision could likewise be understood by way of a more straightforward analysis. In particular, the facts seem similar to the '*Pallant v Morgan* equity',[55] where

[49]*Stern* (n 48) 485.

[50]ibid.

[51]*Lysaght* (n 15), applied in *IB Capital* (n 31); *Temenggong Securities* (n 37).

[52]Brendan Edgeworth, *Butt's Land Law* (7th edn, Thomson Reuters 2017) [12.990]; *Jessica Holdings Pty Ltd v Anglican Property Trust Diocese of Sydney* (1992) NSWLR 140. See also Kwai Lian Liew, 'Conditional Contracts and Caveatable Interests: A Mutual Exclusion?' (1995) 14 University of Tasmania Law Review 63. The Malaysian courts have on occasion held that conditional contracts for the sale of land can nevertheless constitute a binding agreement which can be specifically enforced by one party against the other, and therefore sustain a caveat. To this end, see generally Visu Sinnadurai, 'Conditional Contracts for the Sale of Land' (1983) 10 Journal of Malaysian and Comparative Law 45.

[53]*Takako* (n 12) [16], [20].

[54]*Keech* (n 26); *Boardman* (n 17). See also the similarities with Lord Etherton's rationalisation of the *Pallant v Morgan* equity in *Crossco No 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619, [2012] 2 All ER 754 [74]–[97].

[55]*Pallant v Morgan* [1953] Ch 43. See also Nicholas Hopkins, 'The *Pallant v Morgan* Equity' [2002] The Conveyancer and Property Lawyer 35; Yip Man, 'The *Pallant v Morgan* Equity Reconsidered' (2013) 33 Legal Studies 549; Ying Khai Liew &

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the claimant and defendant had entered into some kind of joint venture to acquire property pursuant to that joint venture. A constructive trust was declared because it would be unconscionable for the defendant acquiring the property to deny that the claimant has a beneficial interest in the property. This would, in turn, fall within the pre-existing categories of events giving rise to a constructive trust, as the appellant has an equitable interest via the '*Pallant v Morgan* equity'.[56]

Furthermore, the reliance placed by the Federal Court in *Takako* on *Paragon Finance*, observed earlier,[57] appears to be misconceived. The excerpt from *Paragon Finance* dealt with the question of whether the solicitors, in that case, were trustees for the purposes of the *English Limitation Act 1980* (the 'Act').[58] Thus, the court in *Paragon Finance* was tasked with making an inquiry into the distinction between class one and class two constructive trusts in relation to the time bar on the solicitor's claim, finding ultimately that the limited period applied to the solicitors such that their new claims would have to be brought within the time bar stipulated under the Act.[59] Crucially, in the relevant excerpt, Millett LJ was not intending to rationalise definitively the constructive trust; he was concerned primarily with explaining the two situations in which one may be a called a 'trustee' under a constructive trust. Hence, in relying on the excerpt for a general definition of a constructive trust, the court in *Takako* had taken Millett LJ's statement out of context, and therefore reliance on this case was misconceived. With respect, it is suggested that save for when a time bar is in issue, Malaysian courts should no longer refer to *Paragon Finance* as a general statement on the law of constructive trust.

Institutional and remedial constructive trusts

In deciding whether a constructive trust arises, Malaysian judges often rely on the dichotomy between the institutional and remedial constructive trusts. For example, Tan FCJ in *RHB Bank* considered in detail the English authorities on the distinction between a remedial and institutional constructive trust, before concluding that the remedial constructive trust should be accepted under Malaysian law.[60] Likewise in the *Api-Api* case, Zulkefli Ahmad Makinudin PCA described the constructive trust as a 'remedial device' that is employed to prevent unjust enrichment.[61] Several Court of Appeal decisions, such as *IB Capital Sdn Bhd v Ivory Indah Sdn Bhd*[62] and *Zaharah A Kadi v Ramunia Bauxite Pte Ltd*,[63] have also discussed in detail the distinction between an institutional and remedial constructive trust in determining whether a constructive trust was established on the facts.

The classic definition of the distinction between institutional and remedial constructive trusts is found in Lord Browne-Wilkinson's judgment in *Westdeutsche Landesbank Girozentrale v Islington London BC* (a passage that was cited with approval by Tan FCJ in the *RHB Bank* case):[64]

> Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such trust having arisen (including the possibly unfair consequences to third parties who in the interim have received the trust

Cristina Poon, 'The 'Pallant v Morgan Equity' in Australia: Substantive or Superfluous?' (2021) 21 Australian Property Law Journal 1.

[56] *Pallant v Morgan* [1953] Ch 43.

[57] See the main text following n 12 above.

[58] *Paragon Finance* (n 3) 404. See also Mary George & Sujata Balan, *Malaysian Trust Law* (2nd edn, Sweet & Maxwell 2021) [12.020]. See also Ying Khai Liew, 'Constructive Trusts and Limitation Periods in Malaysia', in Ying Khai Liew & Matthew Harding (eds), *Asia-Pacific Trusts Law: Theory and Practice in Context* (vol 1, Hart Publishing 2021) 77.

[59] *Paragon Finance* (n 3) 404. See also George & Balan (n 58) [12.020].

[60] *RHB Bank* (n 9) [17]–[30].

[61] The *Api-Api* case (n 11) [59].

[62] *IB Capital* (n 31).

[63] *Zaharah A Kadi v Ramunia Bauxite Pte Ltd* [2011] 1 LNS 1015.

[64] *Westdeutsche* (n 3) 714–715.

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> property) are also determined by rules of law, not under a discretion. A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court.

It is well-known that English law does not recognise remedial constructive trusts.[65] The reasons usually given are that such a practice is unprincipled,[66] 'without recourse to further rationalisation',[67] and serves as an affront to the common law view of property rights and interests,[68] since only with the authority of Parliament can a court 'grant a proprietary right to A, who has not had one beforehand, without taking some proprietary right away from B'.[69] A moment's thought would reveal the validity of the underlying concern: a direct appeal to judicial discretion without more, simply to do justice between the parties before the court, to grant the plaintiff a right in the defendant's property, would risk uncertainty and unpredictability and undermine the priorities on insolvency that Parliament has statutorily codified.[70] Furthermore, clear rules are needed to determine whether equitable proprietary entitlements arise in the circumstances before the courts, and the remedial constructive trust is antithetical to such certainty and clarity.[71]

In contrast to England and Wales, jurisdictions such as Australia,[72] Canada,[73] Singapore,[74] Hong Kong,[75] and New Zealand[76] have explicitly recognised remedial constructive trusts. However, their experiences serve as major warning signs against an uncritical acceptance of the remedial constructive trust. In Canada, for example, the use of the remedial constructive trust has unfortunately led to the imposition of constructive trusts in an unprincipled and unjustified manner.[77] In Australia, a careful examination of the cases reveals the reality that remedial constructive trusts are hardly ever imposed, and that the vast majority of cases are decided on the basis of pre-existing categories of institutional constructive trusts.[78] And in Singapore, the remedial constructive trust has been imposed in a strictly limited situation, namely unjust enrichment claims where the defendant is guilty of 'fraud'.[79] Importantly, the Singapore Court of Appeal has rejected a wider use of the remedial constructive trust:[80]

> The Appellant submitted that [a remedial constructive trust] may be imposed as a 'discretionary tool for fairness and justice'. … In our view, it cannot be the case that vague notions of fairness or justice are the sole yardsticks in the exercise of the court's discretion. … Like

[65]See, eg, *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (In Administration)* [2011] EWCA Civ 347, [2012] Ch 453 [37]; *Crossco* (n 54) [84]; *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250 [47]; *Angove's* (n 4) [27].

[66]*Lonrho plc v Fayed (No. 2)* [1992] 1 WLR 1 (Ch) 9; *London Allied Holdings Ltd v Lee* [2007] EWHC 2061 (Ch) [273].

[67]*Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC) 104.

[68]Virgo (n 6) 310.

[69]*Re Polly Peck* (n 36) 831.

[70]Virgo (n 6) 310. See also *Re Polly Peck* (n 36) 827.

[71]Virgo (n 6) 310.

[72]*Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6 [569].

[73]*Moore v Sweet* [2018] 3 SCR 303.

[74]*National Bank of Oman v Bikash Dhamala* [2021] 3 SLR 943; *Koh Cheong Heng v Ho Yee Fong* [2011] 3 SLR 125. It should be noted, however, that these two cases were decided at the High Court level. See also Yip Man, 'Singapore: Remedialism and Remedial Constructive Trust' (2014) 20 Trusts and Trustees 373.

[75]See generally Hui Jing, 'The Remedial Constructive Trust Approach in the Hong Kong Law of Proprietary Estoppel' [2023] The Conveyancer and Property Lawyer 30.

[76]*Powell v Thompson* [1991] 1 NZLR 597.

[77]See, eg, Tang Hang Wu, 'Confidence and the Constructive Trust' (2003) 23 Legal Studies 135.

[78]See Ying Khai Liew, 'Constructive Trusts and Discretion in Australia: Taking Stock' (2021) 44 Melbourne University Law Review 963.

[79]*National Bank of Oman* (n 74). See also Tang Hang Wu, 'The Constructive Trust in Singapore: Five Persistent Puzzles' (2010) 22 SALJ 136. Cf, *Zaiton bte Adom v Nafsiah bte Wagiman and another* [2023] 3 SLR 533, where the judge suggested that a claimant must still be able to establish a recognised cause of action before asserting a remedial constructive trust.

[80]*Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 [170].

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> unconscionability, 'fairness and justice' are more properly conclusions which are arrived at the end of principled legal analysis, and not as a substitute for that legal analysis. If the function of a court is to arrive at its decision based solely on the requirements of 'fairness' and 'justice', this would clearly be an unsatisfactory position, not least because it gives the court *carte blanche* to do whatever it likes without reference to case law or to any legal principle or doctrine.

As our discussion above has indicated, Malaysian courts have embraced the remedial constructive trust, simply to achieve 'justice and good conscience', and without imposing any effective limits on it. With respect, this is unfortunate. In addition to all the risks that attend the remedial constructive trust, which we have mentioned earlier, using the remedial constructive trust in such an expansive manner also obscures the essential question of how the law should evolve and admit new categories of situations where the declaration of a constructive trust is appropriate. Instead, it would be more useful for the Malaysian cases simply to identify the particular category of case in which the constructive trust has previously been recognised, and decide accordingly whether the circumstances of the case warrant the finding of a constructive trust.

The common intention constructive trust in Malaysia: A conscious departure

However, we must not be taken to suggest that Malaysian cases should adopt the pre-existing categories of constructive trusts developed under English law uncritically and slavishly. It is of course open to Malaysian courts to develop the law of constructive trusts in an autochthonous manner if local circumstances dictate it; indeed, this should be encouraged. As the Court of Appeal in *Tengku Abdullah Ibni Sultan Abu Bakar v Mohd Latiff Shah Mohd* aptly stated:[81]

> In our judgment, it would be quite wrong, and indeed wholly out of place, to decide a Malaysian case solely by reference to English or other Commonwealth decisions. Indeed, the more recent decisions of the English Courts demonstrate that their concept of the doctrine and the relationships to which it may be extended do not accord to the standards of our society.

Indeed, the Malaysian cases have departed from their English counterparts, insofar as they have refused to extend the doctrine of the common intention constructive trust to an unmarried couple without proof of financial contributions.

By way of background, the 'common intention constructive trust' is a doctrine that is primarily applied today to determine the beneficial interest that unmarried couples have in a home when they break up. It is necessary to demonstrate two elements: first, that the parties had a common intention concerning the beneficial interest each is to have in the property; second, that the plaintiff had detrimentally relied on that common intention. The common intention can be demonstrated by evidence of express discussion, but this is a rare case: unless couples decide at the outset to declare an express trust in respect of their beneficial interests in the property at the time it is acquired (in which case the constructive trust is rendered irrelevant), it is unlikely that they would have expressly discussed the topic throughout the course of their relationship. The vast majority of cases, the courts will infer a common intention from the words and conduct of the parties throughout their relationship.

English law has developed a unique approach to implying common intention: courts are willing to draw on an expansive range of factors throughout the course of the couple's relationship. Thus, as Baroness Hale held in *Stack v Dowden*:[82]

[81] *Tengku Abdullah Ibni Sultan Abu Bakar v Mohd Latiff Shah Mohd* [1997] 2 CLJ 607, 653.
[82] *Stack* (n 27) [69].

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> Many more factors than financial contributions may be relevant to divining the parties' true intentions. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses. When a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only one is owner of the home. The arithmetical calculation of how much was paid by each is also likely to be less important. It will be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally. The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay. In the cohabitation context, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection.

It is observable that many of these factors concern the *relationship* of the parties rather than directly relating to the acquisition of or contribution to the *property*. In other words, English courts use a *property law* doctrine – the common intention constructive trust – as a means for coming to what is in substance a *relationship* or *family law*-like decision. The reason for this development is the significant increase in cohabitation in England and Wales,[83] coupled with a lack of Parliamentary intervention to provide courts with powers to redistribute property in such a situation – such redistributive powers are, of course, available where married couples divorce. In essence, then, the English courts view cohabitation as closely analogous to marriage, so much so that they are willing to develop the law of constructive trusts so that they can treat cohabitation break-ups in a similar way to divorces.

In contrast to England and Wales, Malaysian cases have shown greater reluctance in applying the common intention constructive trust. The leading judgment is the Malaysian Federal Court case of *Shirley Kathreyn Yap v Malcolm Thwaites*.[84] This case involved a romantic relationship between an unmarried couple which eventually broke down. The woman in this relationship (Shirley) is a widow who was married into a wealthy family. The man (Malcolm) was a professional horse trainer. After Shirley's husband passed on, the two of them had a cohabiting relationship of nineteen years – wherein Malcolm made Shirley the registered manager of ten stables and the sole proprietor of a horse-racing business he had set up. As the registered manager and business owner, all the monies from the horse-racing winnings were paid to Shirley. These monies were allegedly used by Shirley to buy numerous properties in her sole name. After the relationship broke down, Malcolm brought proceedings against Shirley, seeking (1) an accounting of all the monies from horse-racing which were credited to her, and (2) an equitable interest in the properties she bought, under a constructive trust. However, at the end of the trial, Malcolm abandoned his prayer for an accounting.[85]

Despite this, the Malaysian High Court went on to issue a judgment in favour of Malcolm: (1) ordering Shirley to pay SGD 7,911,402 and RM 5,436,958 – representing the horse-racing winnings – to Malcolm; and (2) awarding Malcolm a half share in the properties purchased by

[83] *Stack* (n 27) [44]. Here Baroness Hale notes that the 2001 census recorded over two million cohabiting couples, a 67 per cent increase over the previous ten years. The number is surely much higher today.

[84] *Shirley Yap* (n 27). For a review of decisions prior to this case, see Buvanis Karuppiah, 'Property Division of Unmarried Cohabitants in Malaysia' (2017) 21 Journal Undang-undang dan Masyarakat 15.

[85] *Shirley Yap* (n 27) [50].

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Shirley.[86] In relation to (2), the trial judge likened the facts of the case to *Aspden v Elvy*[87] and held that there was a similar common intention constructive trust based on the inferred intention of the parties.[88] This decision was subsequently upheld by the Court of Appeal.

In a judgment issued by Raus Sharif PCA (with Richard Malanjum CJ, Hasan Lah FCJJ, Ramly Ali FCJJ, and Aziah Ali FCJJ), the Federal Court overturned the judgment of the courts below. In relation to (1), his Honour rejected the order for payment of the horse-racing winnings on the ground that the claim was based on an accounting order which was later abandoned, leaving no relevant cause of action on the face of the pleadings.

Raus Sharif PCA rejected the lower courts' reliance on the case of *Aspden v Elvy*. *Aspden v Elvy* was an English High Court case that similarly dealt with a dispute between an unmarried couple over the beneficial ownership of a property registered in one of the partner's sole names. Behrens J held that the unregistered partner was entitled to a 25 per cent beneficial interest in the property under a common intention constructive trust, on the basis of his financial contributions to the improvement of the property. Raus Sharif PCA, however, rejected the lower courts' reliance on *Aspden v Elvy* on two distinct grounds. First, unlike in *Aspden v Elvy*, Malcolm had made no financial contributions to the purchase of the properties. Second, *Aspden v Elvy's* application of the common intention constructive trust to an unmarried cohabiting couple was based on common law principles in England and Wales. In Malaysia, the treatment of unmarried cohabiting couples was said to be demonstrably different. For instance, Raus Sharif PCA cited the case of *Tengku Abdullah Ibni Sultan Abu Bakar v Mohd Latiff bin Shah Mohd*,[89] where the Court of Appeal refused to follow the English position and extend the doctrine of undue influence to non-marital relationships 'on grounds of public policy'.[90] In essence, the Court of Appeal held that the English 'concept of [undue influence] and the relationships to which it may be extended do not accord to the standards of [Malaysian] society'.[91] Raus Sharif PCA also relied on the case of *Sivanes a/l Rajaratnam v Rani Usha a/p Subramaniam*,[92] which categorically rejected the recognition of a cohabiting relationship as a 'matrimonial relationship' with rights and obligations provided by law to a married couple.

Raus Sharif PCA added 'that the intention behind the Law Reform (Marriage and Divorce) Act 1976 was clearly not to provide reliefs in respect of unregistered marriages, unless a claim by one party against the other can be sustained on a cause of action not arising from the impugned relationship'. On that basis, his Honour held that 'there was no basis in law for [Malcolm], who was not married to [Shirley], to claim an equitable interest in any of [Shirley's] properties acquired by [her] during the period of their de facto relationship'.[93] Raus Sharif PCA stated the law in Malaysia as follows:

> Under our law an unmarried party co-habiting in a de facto husband and wife relationship cannot claim an equitable interest in a property that is not jointly purchased or jointly owned without any proof of financial contribution.

This holding is significant for two reasons. First, it is an explicit acknowledgement of the policy behind the development of the common intention constructive trust in Malaysia: it reflects a clear

[86]ibid [49].
[87]*Aspden v Elvy* [2012] EWHC 13877 (Ch).
[88]*Shirley Yap* (n 27) [29].
[89]*Tengku Abdullah* (n 81).
[90]ibid [73].
[91]ibid [73].
[92]*Sivanes a/l Rajaratnam v Rani Usha a/p Subramaniam* [2002] 3 MLJ 273.
[93]ibid [76]. See also Kelvin Low, 'Victoria Meets Confucius in Singapore: Implied Trusts of Residential Property', in Ying Khai Liew & Matthew Harding (eds), *Asia-Pacific Trusts Law Volume I Theory and Practice in Context* (Hart Publishing 2021) 97; Yip Man, 'Comparing Family Property Disputes in English and Singapore Law: "Context is Everything"' (2021) 41 Legal Studies 474; Tang Hang Wu, 'Broken Kinship: Family Property Disputes and the Common Intention Constructive Trust in Singapore' (2024) 38 International Journal of Law, Policy and the Family 1 for an explanation why the common intention constructive trust has developed differently in Singapore.

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focus on marriage as the archetypal familial relationship and draws a sharp distinction with co-habitation, which is not even taken to be analogous to marriage. It is observable that this is a major departure point from England and Wales where, as we have observed earlier, the courts implicitly view both types of relationships as highly analogous. Secondly, Raus Sharif PCA's judgment significantly narrows the scope of application of the common intention constructive trust by holding that there is only one factor – financial contribution – upon which a common intention may be inferred. Again, this is a major departure point from English law where, as earlier observed, courts can draw from a wide range of factors to determine the parties' common intention. Taken together, Raus Sharif PCA's decision is a clear manifestation of how Malaysian judges are appealing to the norms and social mores of Malaysian society, which is reflected in the development of legal doctrine. In this instance, the court is frowning on unmarried co-habitation by refusing to apply English doctrines of equity to confer proprietary rights on unmarried couples.

Given that Malaysian judges are manifestly willing to forge a uniquely 'Malaysian' law of equity in this context, it is necessary to reflect on the methodology that courts should adopt to ensure that such tailored legal rules can most efficiently be advanced within the Malaysian legal system.[94] We suggest that adapting the law to the local Malaysian conditions need not – and should not – be done by relying on broad, unhelpful statements on unconscionability and the remedial constructive trust. To do so would obfuscate the rationales, policies, and principles upon which the relevant doctrine is developed, and, worse still, render the contextualised application of the law a one-off occasion. That is to say, if one court contextualises a constructive trust doctrine to local conditions, but does so by reference to unconscionability or the remedial constructive trust, then later courts in cases with similar facts will have no legal principle to draw on from that previous case. Indeed, the message may even be that the later courts should exercise a wide-ranging discretion themselves to depart from the previous locally-tailored approach. This is surely not a desirable outcome. Therefore, we suggest that any constructive trust doctrine that is modified to suit the local needs should be treated firmly as a category of *institutional* constructive trusts. This will ensure that the doctrine will be applied consistently and in a principled manner in materially alike cases in the future.

Conclusion

We began this article by noting that the constructive trust is one of the most complex areas of the law of equity. Yet, its complexity need not hinder its usefulness in resolving private law disputes. More to the point of this article, its complexity ought to provide no excuse for jettisoning a development of the law based on ascertainable legal categories in favour of haphazard, catch-all formulae. Such a methodology would cause much uncertainty among parties to a dispute, increasing costs and protracting litigation. More fundamentally, to do so would cause the law to develop in an erratic way, void of proper rationalisation for decisions reached by courts. And specifically in the context of Malaysian law, to do so would jeopardise the efforts of Malaysian courts of developing a uniquely Malaysian jurisprudence in this area of law. For these and other reasons we have explored in this article, we submit that Malaysian courts should reappraise their methodology and realign their approach to resolving disputes by paying heed to pre-existing situations in which constructive trusts have been declared, both in Malaysian jurisprudence and abroad, and avoid resting decisions on vague notions of unconscionability or the notion of a remedial constructive trust.

[94]For Malaysian innovations in trust law see, eg, Tang Hang Wu, 'Innovations within Malaysian Trusts Law: Labuan's Trusts Law and the *Hibah Trust*', in Ying Khai Liew & Ying Chieh Wu (eds), *Asia-Pacific Trusts Law: Adaptation in Context* (vol 2, Hart Publishing 2022) 93; Tang Hang Wu, 'The Islamisation of the English Trust: The Hibah Trust in Malaysia' (2023) 18 Asian Journal of Comparative Law 303.

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