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Articles

Where a third party has received assets, or their traceable proceeds, in breach of trust or fiduciary duty, a claimant may use one of many 'overlapping claims' in order to obtain relief. In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, the High Court rejected a restitution-based strict liability claim that would overlap with knowing receipt. However, the recent decisions in *Fistar v Riverwood Legion and Community Club Ltd* and *Great Investments v Warner* seemed to impose precisely the kind of strict liability the High Court had rejected. This article analyses the various overlapping claims to determine whether the imposition of restitution-based strict liability was justified. It is predominantly concerned with the conceptual foundations and practical implications of the overlapping claims, but also applies this analysis to third parties with registered Torrens interests because the third-party recipient in *Fistar v Riverwood Legion and Community Club Ltd* was a volunteer protected by indefeasibility. This protection under NSW land law, which does not exist in Victoria, was held to be an answer to a proprietary claim, but not a personal claim. Knowing receipt was unable to be made out, and so the only available recourse to the plaintiff was a personal restitution claim. This article suggests that NSW Torrens legislation inadvertently developed restitution law through *Fistar v Riverwood Legion and Community Club Ltd* and subsequent cases, and this should not be overlooked. It therefore also considers whether personal claims, such as knowing receipt and personal restitution claims, should be available as against a registered proprietor. Ultimately, it concludes that imposing restitution-based strict liability is unjustified in light of *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, and allowing personal restitution claims as against a registered proprietor would undermine Torrens legislation policy and lead to incoherence in the law.

A review of South Australian real estate litigation in 2018 reveals decisions from all three levels of the judiciary — District Court, Supreme Court, and Full Court of the Supreme Court — which can be divided into two categories: those dealing with the nature and protection of property in land, and those considering the operation of and protections afforded by the Torrens title system as established by the Real Property Act 1886 (SA). The first category can be further divided into two groups: those which deal with the nature of property in land itself, and those concerning the state's compulsory acquisition of land. Similarly, the second category of decisions, the Torrens title cases, can be divided into three classes — those involving the nature of interests capable of protection within the system, the indefeasibility of title and exceptions to it, and when an interest in land may be caveated. But taken together, these cases also suggest that in order to understand the content of private property in land,

one must dig deeper so as to uncover what lies below the surface of the cold, impersonal, language of rights as expressed in law; moreover, no legal result — part of the hard logic of rights — is preordained. Rather, interpretations of legislation are just that: interpretations. Thus, while policy responses to the social realities of property may remain the province of legislatures, calling attention to them and suggesting that the legislature respond accordingly must surely be the preserve of judges. It is important to keep all of this in mind when examining the pronouncements of courts and legislatures in an attempt to determine what private property in land really means.

The 1985 High Court case of *Muschinski v Dodds* provided relief by way of a constructive trust when a joint endeavour broke down without attributable blame in circumstances not contemplated by the parties. This has spurred extensive literature on remedial constructive trusts. Unfortunately, there has been a dearth of literature on the relevance of institutional constructive trusts in joint endeavours. In the 2005 Supreme Court of New South Wales case of *Henderson v Miles [No 2]*, these same principles provided relief for a failed joint endeavour, but constructive trusts were not mentioned — yet the case is cited as an example of constructive trusts arising from windfalls. This article discusses the relevance of constructive trusts in joint endeavours and, through a case analysis, shows that the distinction between remedial and institutional constructive trusts is ephemeral: constructive trusts arise by operation of law in joint endeavours. They are no mere ‘remedial’ response.