MUSCHINSKI V DODDS AND THE JOINT ENDEAVOUR PRINCIPLE: THE EPHEMERAL DISTINCTION BETWEEN INSTITUTIONAL AND REMEDIAL

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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 paper 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.

I INTRODUCTION

In 1985, the High Court of Australia delivered its judgment in Muschinski v Dodds.¹ This case is credited with contributing to the development of the remedial constructive trust.² In doing so, the High Court, particularly in the judgment of Deane J, drew analogy from partnership law to provide a principled basis to award a constructive trust for a joint endeavour that failed without attributable blame in circumstances not contemplated by the parties.

In the thirty-plus years since, Muschinski v Dodds has been cited in a wide variety of contexts to award a constructive trust for a failed joint endeavour. However, after the High Court case of Giumelli v Giumelli³ in 1999 which urged a remedy short of the imposition of a trust if a lesser remedy would be sufficient, the use of the constructive trust as a remedial device has fallen out of favour. The current preference is to instead find the minimum equity to do justice when a joint endeavour fails unexpectedly.

A prominent example of this shift in approach is the Supreme Court of New South Wales decision of Henderson v Miles (No 2)⁴ heard in 2005. This case omits all discussion of constructive trusts entirely. Instead, the court considered what the minimum equity to do justice

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¹ Muschinski v Dodds (1985) 160 CLR 583.
⁴ Henderson v Miles (No 2) [2005] NSWSC 867.
would be to remedy the failed joint endeavour before it and decided upon an equitable charge to secure an amount of equitable compensation. In doing so, the equity present in Muschinski v Dodds was termed the ‘windfall equity’.\(^5\)

This would be fine, if the ‘windfall equity’ was a natural progression of the law as espoused in Muschinski v Dodds. However, it is not. Chief Justice Young, who delivered the judgment in Henderson v Miles (No 2), cites Henderson v Miles (No 2) in a book he co-authored as an example of constructive trusts arising from windfalls.\(^6\) This case is also referred to by Dal Pont, along with Muschinski v Dodds, in the context of constructive trusts and cohabitation.\(^7\) Apart from these texts, there is a dearth of literature on Henderson v Miles (No 2) and the ‘windfall equity’.

Indeed, literature tends to focus on the constructive trust when considering Muschinski v Dodds. The circumstances that gave rise to a constructive trust in Muschinski v Dodds, being the failure of a joint endeavour in circumstances not contemplated by the parties, are rarely (if ever) discussed independently of constructive trusts.

The question to be asked is what is the relevance of a constructive trust in a failed joint endeavour? Is it purely remedial, or does it have a place institutionally within a joint endeavour? This paper will discuss how the principles in Muschinski v Dodds have been applied to joint endeavours over the decades. It will be seen that the constructive trust is not merely remedial, but arises by conduct in a joint endeavour, which has institutional implications for those in a joint endeavour and other related third parties.

The paper will first look at the principles espoused in Muschinski v Dodds and will compare them to Henderson v Miles (No 2). The cases that cite Muschinski v Dodds and Henderson v Miles (No 2) will then be examined. From these cases, it will be shown that the principles in Muschinski v Dodds apply equally to loose family arrangements as they do to sophisticated commercial joint ventures, and in all of these circumstances, the exact same principles may be used to grant a constructive trust as a remedy as equally as they may recognise the institutional significance of a constructive trust in a joint endeavour.

Three problems will then be posited that need to be resolved. These include the cause of action that Muschinski v Dodds provides, the principles relating to constructive trusts in joint endeavours, and the scope of joint endeavours in general.

It will be argued that the scope of ‘joint endeavours’ is far wider than expected, encompassing far more than loose family arrangements. It will also be shown that constructive trusts are not merely remedial, but demand proper consideration within the context of the parties’ joint endeavour. Further, it will be seen that the estoppel cases as put forth in Henderson v Miles (No 2) and the minimum equity to do justice in Giumelli v Giumelli have distorted the law towards an approach that incorrectly favours a predominantly remedial view of the Muschinski v Dodds style of constructive trust.

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5 Ibid [19].
7 G E Dal Pont, Equity and Trusts in Australia (Lawbook Co, 6th ed, 2015) 1196.
II OVERVIEW OF MUSCHINSKI v DODDS: PRINCIPLES, PROBLEMS AND JOINT ENDEAVOURS

Discussion of Muschinski v Dodds cannot be done without examining the context in which it was decided. This was a novel case before the High Court which concerned a joint endeavour which broke down without attributable blame. Unlike Calverley v Green\(^8\) which was heard by the High Court one year previously, a resulting trust could not apply to the facts in Muschinski v Dodds. Neither were there any broken promises that could give rise to estoppel, nor could it be said that either party had acted unconscionably, caused the joint endeavour to end, or schemed to deprive the other party of any interest. The parties’ arrangement had simply ended in entirely uncontemplated circumstances.

With the resulting trust argument dismissed, the High Court ultimately found a constructive trust in favour of Ms Muschinski. The High Court delivered five separate judgments: three in favour and two in dissent. Justice Deane delivered the leading judgment which has since been cited with approval (particularly two years later in the High Court case of Baumgartner v Baumgartner\(^9\)). The leading judgment of Deane J in Muschinski v Dodds was developed by drawing upon general equitable principles that also find expression in partnership law.

The case concerned Ms Muschinski and Mr Dodds. They were in a de facto relationship and sought to purchase a house together in which they would live and from which Ms Muschinski would run a crafts business. Ms Muschinski contributed 10/11ths of the purchase price and Mr Dodds provided the balance of 1/11th. Despite this imbalance of contributions, the couple took legal title to the property as tenants in common in equal shares. This was done on the understanding that Mr Dodds would contribute to the property in the form of renovations, as he did not want to undertake any work to the property unless he had a legal interest in it beyond his 1/11th contribution.

At some point after purchasing the property, the parties’ relationship broke down and the parties separated. Mr Dodds had not made any contributions to the property as contemplated beyond his 1/11th contribution to the purchase price. Despite this, he asserted his legal half-interest in the property against Ms Muschinski.

Ms Muschinski claimed two remedies: a resulting trust first, and a constructive trust in the alternative. The presumption of a resulting trust was rebutted as Ms Muschinski had clearly intended for Mr Dodds to take a disproportionate legal interest in the property.\(^10\) The court was not unanimous as to the argument for a constructive trust. In dissent, Brennan and Dawson JJ characterised the case as amounting to a gift with a condition that was not performed. As a constructive trust is not available as a remedy for gifts whose conditions have not been performed, her claim was considered to be “on the grounds of fairness” only and was dismissed.\(^11\) Chief Justice Gibbs thought the case should be considered in terms of equitable

\(^8\) Calverley v Green (1984) 155 CLR 242.
\(^9\) Baumgartner v Baumgartner (1987) 164 CLR 137.
\(^11\) Ibid 608 (Brennan J), 624–625 (Dawson J).
contribution but, as this was not argued, he deferred to the judgment of Deane J.\textsuperscript{12} Justice Mason also followed the judgment of Deane J.\textsuperscript{13}

Justice Deane found that there should be relief by way of a constructive trust, as a constructive trust would arise when:

\begin{quote}
the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise by enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it. The content of the principle is that, in such a case, equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do.\textsuperscript{14}
\end{quote}

Justice Deane developed principle by analogy to partnership cases in order to provide a principled basis to grant relief.\textsuperscript{15} He considered that, if the relationship was purely commercial, “there would be little room for argument” that Mr Dodds’s assertion of his legal half-interest, despite his contribution being disproportionately lower than his legal interest, would be unconscionable.\textsuperscript{16} This was because the substratum of the joint endeavour had fallen away and it would be inappropriate to “draw a line” in the sand to leave assets and liabilities lie where they fall.\textsuperscript{17} Mr Dodds’s legal interest was predicated on him contributing to the joint endeavour in the form of renovations. Without that work being undertaken, his disproportionate legal interest could no longer be supported.

It was upon this basis that Deane J justified the imposition of a constructive trust. It is important to note that the existence and breach of a fiduciary duty was not necessary to find a constructive trust,\textsuperscript{18} and such a trust could be construed regardless of intention.\textsuperscript{19} As quoted above, attributable blame does not appear to be a relevant element.

There appear to be two questions about the principles discussed in \textit{Muschinski v Dodds}. The first question is, after developing a ‘principled basis’ to award a remedy, is there now a general cause of action for the failure of a joint endeavour? The second question is, what is the relevance of a constructive trust in a joint endeavour? Is it merely a remedial response, or something more?

Until \textit{Giumelli v Giumelli} in 1999 which urged courts to consider a remedy that falls short of a trust, many cases that followed \textit{Muschinski v Dodds} resorted to a constructive trust as a remedy.

\textsuperscript{12} Ibid 598 (Gibbs CJ).
\textsuperscript{13} Ibid 598–599 (Mason J).
\textsuperscript{14} Ibid 620 (Deane J).
\textsuperscript{15} Ibid 615–616 (Deane J).
\textsuperscript{16} Ibid 621 (Deane J).
\textsuperscript{17} Ibid 618 (Deane J).
\textsuperscript{18} Ibid 616 (Deane J).
\textsuperscript{19} Ibid 617 (Deane J).
However, since *Giumelli v Giumelli*, the constructive trust is often not involved in these types of cases. Often, such as in *Henderson v Miles (No 2)*, there is no mention of constructive trusts at all.

This change in approach is concerning as the constructive trust in *Muschinski v Dodds* is appearing to be treated as purely remedial. In *Muschinski v Dodds*, Deane J made it clear that the perceived distinction between ‘remedial’ and ‘institutional’ constructive trusts is ephemeral. This is because a constructive trust arises by operation of law and does not need to be claimed as a remedy.

An example of this is *Zobory v Commissioner of Taxation (Cth)*. In this case an employee stole money from his employer. The Commissioner claimed that the employee should pay tax on the money he stole. The employee claimed that, due to his illegal activities, the money he stole was held on constructive trust and, as a constructive trustee, he was entitled to be exempt from paying tax on property he held on trust. He succeeded because he was not claiming the trust as a remedy, so he was not subject to the equitable maxim of ‘clean hands’ – he was simply saying that, by operation of law, he was a trustee, thus he was entitled to avail himself of the tax exemption for trustees. To hold otherwise would be to deny that his theft construed him as a trustee of those stolen funds, when his conduct clearly did cause him to become a constructive trustee.

However, the characterisation of *Muschinski v Dodds* as giving rise to a purely remedial constructive trust without a breach of fiduciary duty holds strong sway in the literature. The question is whether a constructive trust is purely remedial in relation to joint endeavours, or whether a constructive trust may arise by operation of law due to the parties’ conduct in a joint endeavour. If it is the latter, then constructive trusts are not purely remedial in joint endeavours and may have institutional significance to the carrying out of a joint endeavour.

This paper will show that constructive trusts cannot be called merely remedial in joint endeavours, and that they do have strong institutional characteristics that affect the conduct of joint endeavours and the appropriate remedial response. If this is the case, then cases that treat *Muschinski v Dodds* as a cause of action for failed joint endeavours but treat a constructive trust as purely remedial may be incorrectly ignoring the institutional relevance of constructive trusts to the joint endeavour in question.

There are even greater ramifications when a court considers a failed joint endeavour but ignores constructive trusts entirely in favour of the minimum equity to do justice. A prominent example of this occurring is the case of *Henderson v Miles (No 2)* which termed *Muschinski v Dodds* the ‘windfall equity’. This case does not mention constructive trusts at all.

III OVERVIEW OF *HENDERSON V MILES (NO 2): PRINCIPLES, PROBLEMS AND ESTOPPEL*

20 Ibid 614–615 (Deane J).
21 *Zobory v Commissioner of Taxation (Cth)* (1995) 64 FCR 86.
22 Ibid 93.
Chief Justice Young in the Supreme Court of New South Wales delivered his judgment in *Henderson v Miles (No 2)* in 2005. He applied the principles in *Muschinski v Dodds*, which he referred to as the ‘windfall equity’, in order to provide relief for a joint endeavour that failed. However, whereas *Muschinski v Dodds* focused on whether there was a principled basis to award a constructive trust, *Henderson v Miles (No 2)* took the principled basis as a given and directly devised the minimum equity to do justice without first considering whether a constructive trust applied.

This case concerned a mother and her daughter and son-in-law. The parties came to an arrangement whereby the mother would solely fund and build a house on land owned by the daughter and son-in-law. Among other things, the relationship between the parties soured and they could no longer live together. The mother then left the property and claimed to be entitled to a remedy due to the fact that the joint endeavour could not continue, and that the daughter and son-in-law now had the benefit of another smaller house built on their property that was funded solely by the mother.

Chief Justice Young considered that it would be contrary to justice and good conscience to retain a windfall upon the collapse of a joint endeavour,\(^{24}\) referring to *Muschinski v Dodds* and *Baumgartner v Baumgartner*. However, without any mention of constructive trusts, he considered that the minimum equity to do justice would be applicable.\(^{25}\) After considering the cases on estoppel raised by counsel for the mother, he distinguished the remedy here from estoppel,\(^{26}\) saying that here “is quite different: the promise has been fulfilled, but the resultant arrangement has come to an end in circumstances not contemplated by the parties, leaving the legal interests in one party who, if equity were not to intervene, would obtain an unconscionable benefit.”\(^{27}\) After calculating the amount lost by the mother to the daughter and son-in-law, he awarded this as equitable compensation supported by an equitable charge over the property.

The problem here is that, despite the fact that he based his judgment on the principles in *Muschinski v Dodds* and *Baumgartner v Baumgartner*, constructive trusts were not even mentioned in Young CJ’s judgment. It appears, for all intents and purposes, that the collapse of a joint endeavour without attributable blame was treated as a cause of action in its own right.

However, as clearly stated by the two High Court decisions of *Muschinski v Dodds* and *Baumgartner v Baumgartner*, these circumstances can give rise to a constructive trust. This conception of the principles in *Muschinski v Dodds* is further supported by a book co-authored by Young CJ, classifying these types of cases specifically as “constructive trusts arising from windfalls”,\(^ {28}\) but the book also says that constructive trusts apply where a lesser remedy will not suffice.\(^ {29}\)

\(^{24}\) *Henderson v Miles* [2005] NSWSC 710, [34].

\(^{25}\) Ibid [34].

\(^{26}\) Ibid [19].

\(^{27}\) Ibid [23].

\(^{28}\) Young, Croft and Smith, above n 6, 445–451.

\(^{29}\) Ibid 230–232, also discussing the principles in *Baumgartner v Baumgartner* (1987) 164 CLR 137.
It might be that *Henderson v Miles (No 2)* is not as persuasive a case as it seems in relation to constructive trusts due to the law it considers. This is an example of pleadings affecting the development of the law. An example of this is shown in *Muschinski v Dodds* as discussed earlier. In that case, Gibbs CJ wanted to find a remedy based on equitable contribution, but this was not argued. Likewise, Brennan and Dawson JJ characterised the case as a gift with a condition, but the claimed remedy of a constructive trust was not available for such a case as characterised.

Likewise, the court in *Henderson v Miles (No 2)* was presented with a large amount of case law on estoppel by Counsel for the mother, occupying a substantial amount of the judgment. Although Young CJ did consider this substantial amount of case law, he both prefaced and followed this discussion with warnings about the ‘windfall equity’ being different from estoppel, but still considered it a ‘general equity’ like the general equities of proprietary and promissory estoppel.

It should be noted that *Henderson v Miles (No 2)* was decided after *Giumelli v Giumelli*, so whilst it does not cite *Giumelli v Giumelli*, the impetus to find the minimum equity to do justice is apparent in the judgment. These involve references to cases and secondary materials on estoppel. Combined with *Giumelli v Giumelli* being an estoppel case itself, it is not difficult to see how heavily influenced by estoppel the remedy in *Henderson v Miles (No 2)* was, despite Young CJ distinguishing the case from estoppel.

Given how Young CJ considers *Henderson v Miles (No 2)* to be a case involving constructive trusts arising from windfalls in the text he co-authored, it appears that the treatment of the constructive trust, at least in *Henderson v Miles (No 2)*, was purely remedial. But is it purely remedial? If a constructive trust arises during a joint endeavour, then this cannot be ignored in favour of the minimum equity. After all, in the text he co-authored, it goes on to say that a constructive trust may be appropriate when no lesser remedy will suffice. This casts doubt on the ‘ephemeral’ distinction between institutional and remedial constructive trusts as stated by Deane J, giving credence to the literature on purely remedial constructive trusts. However, if a constructive trust gives rise to a proprietary right by operation of law without curial order, then what relevance does the constructive trust actually have in these cases involving failed joint endeavours? What is the consequence if the court considers the minimum equity to do justice without first considering whether a constructive trust arose? What are the ramifications of a constructive trust having an institutional character in these cases? These

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30 It should be noted that the author otherwise agrees with the outcome in *Henderson v Miles (No 2)* [2005] NSWSC 867, if not the process.

31 *Henderson v Miles (No 2)* [2005] NSWSC 867, [25]–[91].

32 Ibid [20]–[24], [92]–[95].

33 Ibid [19].

34 Ibid [20], [62]–[63], [69], [73], [84].


36 Young, Croft and Smith, above n 6, 230–232, also discussing the principles in *Baumgartner v Baumgartner* (1987) 164 CLR 137.
problems can be highlighted by examining the cases that cite and apply *Henderson v Miles (No 2)* and other cases that cite *Muschinski v Dodds*.

IV CASE HISTORY SINCE 1985

The cases that apply the principles in *Muschinski v Dodds* do so in a variety of different ways. Some of these cases include using these principles to justify a cause of action when a joint endeavour breaks down without attributable blame, and in other cases those principles are used to construe a trust to thwart the claim of third parties.

What is of interest is that many of these cases do not involve cohabitation between the parties akin to family arrangements. Instead, many cases involve what would otherwise be considered commercial joint ventures and the principles in *Muschinski v Dodds* have been used to ‘fill in the gaps’ of these commercial ventures. An analysis of these cases can be done by first looking at the cases that cite *Henderson v Miles (No 2)*, then the cases that cite *Muschinski v Dodds*.

A Cases that Cite *Henderson v Miles (No 2)*

Many of the cases in the years immediately following *Henderson v Miles (No 2)* do not add much of substance. Rather, they tend to cite it as authority that the minimum equity is desirable and that an equitable charge is appropriate, and further distinguishing these cases from estoppel.37

The line of cases that follow *Henderson v Miles (No 2)* begins to change in 2011 with *Tasevska v Tasevski*.38 This case takes a different approach. Rather than first claiming that an equitable charge is appropriate, Einstein J began with a consideration of whether a constructive trust may be imposed. He said that, since they are commonly imposed in these cases, that is the starting point.39 After considering the circumstances and finding that it would be unconscionable, he said that a constructive trust could be imposed.40 After considering the concept of attributable blame, he then considered what the minimum equity would be to remedy the unconscionability in this case. He found that a constructive trust forcing the sale of the house would not be appropriate, and instead found an equitable lien would be sufficient.41

This method of reasoning has been followed in some later cases that cite *Henderson v Miles (No 2)* such as *Drayson v Drayson*42 and *Austin v Hornby*,43 but these cases still begin with the question of whether a constructive trust would be imposed. The common theme among these cases is not necessarily whether a constructive trust exists and what its effect is; rather,

39 Ibid [63]–[65].
40 Ibid [70].
41 Ibid [80]–[90].
42 *Drayson v Drayson* [2011] NSWSC 965.
the question is “is a constructive trust the appropriate remedy?” Applying Deane J, the
distinction between ‘remedial’ and ‘institutional’ constructive trusts is ephemeral. Surely the
question is not whether a constructive trust would be imposed, but since constructive trusts
arise by operation of law, when did they arise? The cases following Henderson v Miles (No 2)
do not discuss this aspect.

The issue of treating a constructive trust as remedial, at first glance, does not have much
significance. However, there is one more case that cites Henderson v Miles (No 2) which
demonstrates the importance of this. This is the case of Stavrianakos v Western Australia44 in
the Supreme Court of Western Australia in 2016.

This case concerned ‘Tony’ who was arrested for possession of methamphetamines. His
property was subsequently confiscated, including the family home. This home was owned
outright by Tony. However, his family members intervened and sought to have an interest
recognised in the family home. What happened here is that, 20 years before being arrested,
Tony won the lottery. He spread his winnings around to his family, and part of that money was
used by him to purchase the family home. His family members, having enjoyed the benefit of
his lottery win over the years, claimed an interest in that and, by extension, the family home. It
was claimed that it would be unconscionable to treat Tony as the sole owner of the property
without accounting to any equitable interest the family members had in the house.

The family members mostly succeeded, and four-fifths of the surplus after sale was to be
distributed to some of the family members.45 The problem here is that the reasoning of the
courts in the cases addressed above would not apply to this situation. For example, what would
make it unconscionable for someone acting in a statutory capacity to undertake that statutory
duty to confiscate property? It was not Tony who was denying the interests of his family
members. The claim was between the family members and the State. How could the family
members claim that it would be unconscionable for the State to confiscate Tony’s property
according to statute, and thus be entitled to some remedy for this confiscation? It was not the
confiscation of Tony’s property that gave the family members an interest in his property. The
interest of the family members in Tony’s property must have existed before the confiscation.

In short, a ‘remedial’ constructive trust is not relevant here. There is more to it than simply
finding something unconscionable and then granting a remedy. An equitable interest must have
arisen well before the confiscation of the property to provide a basis for a remedy, as the act of
confiscating property according to statute does not suddenly become unconscionable without
a reason. Clearly, the family members must have had some legitimate proprietary interest in
Tony’s property before it was confiscated, otherwise there would be nothing unconscionable
for Equity to remedy. An ‘institutional’ constructive trust must have arisen at some point well
before confiscation. It was this ‘institutional’ constructive trust that arose by operation of law
that is relevant. It is not merely remedial.

The point here is then, at what point is a trust construed during a joint endeavour? A trust does
not appear to be construed at the time of the collapse of the joint endeavour. After all, it was

44 Stavrianakos v Western Australia [2016] WASC 64.
45 Ibid [331].
the confiscation of Tony’s property that caused the joint endeavour with his family members to collapse. If the constructive trust arose at the time of collapse, then how did the family members’ claim take priority over the statutory confiscation of the property? An effect cannot precede its cause. The answer is that a trust must have been construed over the property the subject of the joint endeavour at a time before the collapse of the joint endeavour. This would explain why the family members can take earlier priority and why it would be unconscionable for the State to not account for the family members’ interest in the property.

If this is so, then courts have been remiss in not considering the institutional aspects of a constructive trust. Have courts failed to address the institutional impact of constructive trusts in joint endeavours? Examples of this can be seen in the other cases that cite *Muschinski v Dodds*.

### B Cases that Cite Muschinski v Dodds

As has been seen, the cases that cite *Henderson v Miles (No 2)* often treat the principles in *Muschinski v Dodds* as a direct cause of action when a joint endeavour breaks down without attributable blame for which any suitable remedy may be found. However, from the other cases that cite *Muschinski v Dodds*, it will be seen that this is not correct: it seems that constructive trusts can, and often do, arise over the property of a joint endeavour during the life of the joint endeavour which has institutional ramifications that courts may be missing.

The first example is *Re Osborn*46 decided in 1989. This case concerned a couple who lived in a de facto relationship for 20 years. The man had owned his house solely, but then transferred part of his interest to his partner, taken as joint tenants, in consideration for “financial, emotional and nursing support”. The man soon after became bankrupt and the trustee in bankruptcy sought to have this transaction overturned for lack of consideration. The trustee was successful and the transfer was overturned, but the woman claimed a constructive trust to support her interest. The court recognised that, due to *Muschinski v Dodds* and *Baumgartner v Baumgartner*, the woman’s claim had merit, but noted that there must be unconscionable conduct and not mere unfairness.47 The court did not consider that the man had acted unconscionably in any way, nor did the trustee in bankruptcy act unconscionably by undertaking its statutory function.48 The woman’s claim failed due to being unable to show any unconscionability.

Two unrelated cases were contemporaneously decided in 2001 which show why *Re Osborn* is no longer good law, with the latter case explicitly overruling *Re Osborn*. These two cases are *Clout v Markwell*49 and *Parsons v McBain*.50

*Clout v Markwell* concerned a married couple. The husband and wife agreed that the husband would purchase a house with his funds in his name only. The wife would contribute with domestic duties to the property and, upon its sale, she would receive compensation

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47 Ibid 552.
48 Ibid 553–554.
49 *Clout v Markwell* [2001] QSC 91.
50 *Parsons v McBain* (2001) 109 FCR 120.
commensurate with the work she invested into the property. After some time had passed, the property was sold, and the husband distributed a large portion of the proceeds to the wife as they had agreed. At some point after the sale and distribution of sale proceeds, the husband became bankrupt. The trustee in bankruptcy sought to overturn the distribution of the sale proceeds that went to the wife.

If Re Osborn was any indication, the trustee should have succeeded. However, the trustee failed. The court found that a common intention constructive trust existed and, even if that was wrong, a constructive trust based on Muschinski v Dodds would still exist. The effect of this was that, due to the constructive trust existing over the sale proceeds, that property was excluded from being divisible amongst creditors.\(^5^1\) It appears that the existence of a constructive trust is what would make it unconscionable for the trustee to deal with it. This is because the trustee takes the bankrupt’s property “subject to all the liabilities and equities which affect it in the bankrupt’s hands”.\(^5^2\) If it would be unconscionable for the husband to deny his wife’s interest, it would likewise be unconscionable for the trustee to deny the wife’s interest. Clearly, the wife’s interest arose and was supported by a constructive trust before the trustee in bankruptcy acted. The constructive trust was not a mere remedial response.

In much the same way, Parsons v McBain also affirms that a constructive trust is not a ‘mere remedy’: it can and does affect title to property.\(^5^3\) The court explicitly overruled Re Osborn by saying that, in that case, the court considered a constructive trust was remedial but was only effective upon curial order.\(^5^4\) This line of incorrect thinking may be influenced by Muschinski v Dodds in which the constructive trust was held to take effect at the time the order was made to prevent it from interfering with the legitimate claims of third parties.\(^5^5\) The court in Parsons v McBain affirmed that, although a constructive trust arises at the moment the facts construe its existence, the discretion of the court to alter its date of effect only relates to whether or not it may be defeated by or deferred to another claim.\(^5^6\)

This is important because it is clear that a constructive trust in these circumstances does not arise upon curial order. For example, in Francey,\(^5^7\) property was purchased by a company and then later transferred to a natural person. The intention was that the property would always be beneficially owned by the natural person, so it was not possible to charge transfer duty on both transfers. Francey would not have been successful if a constructive trust had not arisen prior to the dispute.

\(^5^1\) Clout v Markwell [2001] QSC 91, [20]–[21].
\(^5^2\) Ibid [21].
\(^5^3\) Parsons v McBain (2001) 109 FCR 120, 123–124 [8]–[9].
\(^5^4\) Ibid 125–126 [12]–[13].
\(^5^5\) Muschinski v Dodds (1985) 160 CLR 583, 623 (Deane J).
\(^5^6\) Parsons v McBain (2001) 109 FCR 120, 126 [14]–[16].
No actual wrongdoing is necessary to give rise to a constructive trust, either. Agnew\textsuperscript{58} is a perfect example of this. Agnew told his sons that they would take over the family farm eventually, and the sons performed work based on this promise. However, Agnew never did transfer legal title, nor did the sons draw a wage from the farm, consistent with an understanding that, for all intents and purposes, his sons did in fact own the farm as he had promised them. When he applied for an age pension, he was denied because the Department of Social Security included the farm in his assets test. Agnew claimed that his sons were the beneficial owners and that he held it on constructive trust for his sons. Although he never denied the sons’ interest in the farm, if he had, his sons would have had a claim in equitable estoppel. It was not wrongdoing here, but conduct, that gave rise to the constructive trust.\textsuperscript{59} The trust arose when he promised his sons beneficial ownership and acted in such a way consonant with that. He did not deny this, nor did he act unconscionably, and yet a constructive trust arose to protect the sons’ interest without any positive unconscionable act or curial order being necessary.

It seems that, when considering a claim based on \textit{Muschinski v Dodds}, it is assumed that unequal contributions may be presumed to be held on trust in proportion to those contributions, at least if the joint endeavour concerns a marriage.\textsuperscript{60} It appears that it is this presumption which gives rise to a constructive trust at the moment that unequal contributions are made to a joint endeavour. The constructive trust clearly then predates any curial order.

\textbf{C Problems}

The conception of a ‘remedial’ constructive trust arising at the date of order has led some commentators astray. For example, Bant and Bryan suggest that, if \textit{Muschinski v Dodds} were decided today, the appropriate remedy should have been an equitable charge as proposed by Gibbs CJ as a constructive trust would not be appropriate for a simple taking of accounts.\textsuperscript{61} Wright also gives an example of a court ordering that a constructive trust does not exist when another party has a higher priority, and instead ordering an equitable lien.\textsuperscript{62}

With due respect to the authors, this is ignoring the potential institutional aspects of the constructive trust. If it is recognised that a constructive trust first arises in a joint endeavour before the breakdown, and not as a remedial device after the fact, then \textit{Muschinski v Dodds} is not a ‘date of judgment’ constructive trust. It is instead a case where a constructive trust is recognised and its date is modified to protect third parties (if any) as noted in \textit{Parsons v McBain}. Likewise, it is not a matter of saying that a constructive trust ‘does not exist’, but rather, another party has a higher priority. The court could then, in preferring the minimum equity to do justice, award an equitable charge or lien if it would suffice, but this is not the

\textsuperscript{58} Agnew v Secretary, \textit{Department of Social Security} [1999] FCA 837; Secretary, \textit{Department of Social Security v Agnew} (2000) 96 FCR 357.

\textsuperscript{59} Secretary, \textit{Department of Social Security v Agnew} (2000) 96 FCR 357, 365–366 [18]–[20].

\textsuperscript{60} Prentice v Cummins (2003) 134 FCR 449, 466 [60].

\textsuperscript{61} Elise Bant and Michael Bryan, ‘Constructive trusts and equitable proprietary relief: Rethinking the essentials’ (2011) 5 \textit{Journal of Equity} 171, 190–191.

\textsuperscript{62} David Wright, ‘Third Parties and the Australian Remedial Constructive Trust’ (2014) 37(2) \textit{University of Western Australia Law Review} 31, 53.
starting point: the proper starting point is by recognising the trust, and then considering whether a lesser remedy will suffice or if the constructive trust’s operate date should be altered.

Dal Pont also draws a distinction between a remedial and institutional constructive trust. He says that the constructive trust in Muschinski v Dodds was not an ‘avenue (or trigger)’ for relief, but a remedy in itself. Although he notes that a constructive trust may be recognised by court order, he also says that it may be created by court order. He says that this remedial response arises to prevent unconscionable conduct, in contrast to a breach of fiduciary duty wherein it arises upon breach, and that this maintains the distinction between remedial and institutional constructive trusts respectively.

Given the analysis of cases in this paper, Dal Pont’s view of the Muschinski v Dodds constructive trust as ‘remedial’ is not sustainable. Whilst it is true that the type of constructive trust in Muschinski v Dodds does indeed allow a constructive trust as a remedy for an unconscionable retention of property, this is not all. The exact same principles are also used to justify a constructive trust at a time well before any unconscionable behaviour arises. This is evidenced by the cases where a constructive trust is found to predate the rights of third parties, without any unconscionable conduct on behalf of the person actually controlling the property being necessary.

These constructive trusts arise to prevent unconscionable conduct, but they do not arise as a remedy upon the date the alleged unconscionable conduct arose: they arise at a time where it would be unconscionable to assert an interest in the property in question. A distinction between ‘remedial’ and ‘institutional’ constructive trusts in failed joint endeavours cannot be maintained. It appears that the principles in Muschinski v Dodds, at least in relation to joint endeavours, construes a trust that cannot be neatly categorised as ‘remedial’ or ‘institutional’: the distinction is ephemeral.

What does this mean for the principles in Muschinski v Dodds? Do they give rise to a cause of action for which any suitable remedy may be given? Or do they construe a trust? If the principles construe a trust to exist due to the fact that the parties are in a joint endeavour together and have attained an equitable interest due to that joint endeavour, then this raises a problem for the cases that do not discuss constructive trusts as they are avoiding discussing a crucial aspect of the case. The constructive trust may not be remedial, but may be endemic in the operation of joint endeavours.

V THE SCOPE OF THE PRINCIPLES IN MUSCHINSKI V DODDS

The principles in Muschinski v Dodds are much wider in scope than the case initially appears to say. They do not only apply to parties who cohabit: any party involved in a ‘joint endeavour’ may have resort to the principles in Muschinski v Dodds, whether it is a loose family
arrangement or a commercial venture. Further, not only do the principles assist those in joint endeavours that break down, but they also construe trusts – not as a mere remedial device, but also as an institution to thwart third party claims.

These different uses of the principles in Muschinski v Dodds will be addressed now. In particular, although Muschinski v Dodds and Baumgartner v Baumgartner are the only High Court cases on the topic and both involved de facto relationships, there is another case that made it to the High Court, seeking special leave to appeal before being denied. This was the West Australian case of Lloyd v Tedesco.\(^\text{68}\)

This case concerned a party to a de facto relationship claiming a constructive trust under the principles espoused in Muschinski v Dodds and Baumgartner v Baumgartner, but the case failed at the threshold for failing to establish the existence of a joint endeavour. The court considered that a de facto relationship, without something else, could not be a joint endeavour.\(^\text{69}\) Special leave to appeal to the High Court was sought, but was refused. While before the High Court, it was noted that although legislation is increasingly subsuming law related to de facto relationships, there may be other instances not covered by statute where Equity may still apply.\(^\text{70}\)

A Joint Endeavours in Family Issues

The legislation in question that includes de facto relationships in family law was the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth) (‘the Amendment’). Although this allowed parties in de facto relationships to avail themselves of the Family Law Act 1975 (Cth) to wind up their property from around 2009 onwards, this did not stop the principles in Muschinski v Dodds from being relevant. This can be seen by examining cases heard in the family law jurisdiction up to and including 2008, and all cases from 2009 onwards.

There are 16 cases before 2009. Apart from two cases in 2008,\(^\text{71}\) the cases up to and including 2008 concern property settlement proceedings between husband and wife, and the property rights of a third party, whether or not formally part of the proceedings. These third parties who have interests in the property settlement occur across the full spectrum of familial relationships.

\(^{68}\) Lloyd v Tedesco (2002) 25 WAR 360.


\(^{71}\) These two cases are Jacobs v Vale [2008] FMCAfam 641 which involved a bare claim of unconscionability unsupported by legal principle, and Moore v Moore [2008] FamCA 32 which involved a second set of property proceedings between a former husband and wife, concerned with property that the husband and wife had jointly expended money on after the first property settlement order.
The cases include a family trust,\textsuperscript{72} parents,\textsuperscript{73} a mother,\textsuperscript{74} children,\textsuperscript{75} a brother,\textsuperscript{76} parents and children,\textsuperscript{77} family friends,\textsuperscript{78} an uncle,\textsuperscript{79} and a deceased estate.\textsuperscript{80}

In all of these cases, there is more than simply the interests between the parties in a de facto or married relationship: the interests of other parties are also tied up in the proceedings, whether or not those other parties formally intervene in the proceedings. The principles in \textit{Muschinski v Dodds}, in these cases, are used to protect the interests of others by construing a trust over property, protecting it from being subject to the family law proceedings.

For cases in 2009 and after, the cases surprisingly do not differ much in this regard. Of these approximately 43 cases to 2017, only eight of them do not relate to third parties. These eight cases involve a trust,\textsuperscript{81} rights of contribution,\textsuperscript{82} and whether contributions may be considered gifts.\textsuperscript{83} Of the remaining 35 cases, much like the pre-2009 cases, these involve third parties such as sisters,\textsuperscript{84} grandparents,\textsuperscript{85} children,\textsuperscript{86} former spouses,\textsuperscript{87} parents and siblings,\textsuperscript{88} mothers,\textsuperscript{89} parents,\textsuperscript{90} brothers,\textsuperscript{91} fathers,\textsuperscript{92} and even the entire family.\textsuperscript{93} Family businesses also begin to take prominence in the case law, such as family farms. Third parties in this regard also include family farms or other businesses with family interests,\textsuperscript{94} other businesses between the spouses or de facto partners,\textsuperscript{95} and other third-party claims against property.\textsuperscript{96}

\textsuperscript{72} Balnaves v Balnaves (1988) 12 Fam LR 488.
\textsuperscript{73} Toohey v Toohey [1991] FamCA 52; A v M [2004] FMCAfam 431.
\textsuperscript{75} B v B [2001] FMCAfam 13; FB v UB [2006] FMCAfam 289.
\textsuperscript{76} Chiu v Wei [2006] FamCA 788.
\textsuperscript{77} Sikorski v Sikorski [2007] FamCA 487.
\textsuperscript{78} B v B [2008] FCWA 46.
\textsuperscript{79} Miner v Gilchrist [2008] FamCA 917.
\textsuperscript{80} Solare v Hearst [2008] FamCA 1027.
\textsuperscript{81} Dees v Dees [2010] FMCAfam 682; Mitchell v Keener [2013] FCCA 705; Burt v Merrill [2015] FamCA 155; Randall v Pavot [2016] FCCA 1620; Ding v Ding (No 2) [2017] FamCA 863.
\textsuperscript{82} Dace v Dace [2015] FCCA 1229; Dace v Dace [2015] FamCAFC 215.
\textsuperscript{83} Venson v Venson (No 2) [2010] FamCA 963.
\textsuperscript{85} Landon v Landon (No 3) [2009] FamCA 1300.
\textsuperscript{86} Winch v Winch (No 2) [2010] FamCA 461; Coopers v Coopers [2013] FamCA 924; Dekker v Dekker [2014] FCWA 61; Galvan v Galvan [2015] FamCA 1092.
\textsuperscript{87} Mercer v Mercer [2010] FMCAfam 269; Morse v Duarte [2017] FamCA 1039.
\textsuperscript{88} Sofous v Cethenes [2012] FamCA 188.
\textsuperscript{91} Krasaroski v Krasaroski [2012] FamCA 668.
\textsuperscript{92} Akbar v Mali [2013] FamCA 1010.
\textsuperscript{93} Handley v Tenneson [2014] FamCA 441.
\textsuperscript{95} Pander v Popa [2013] FCCA 2177; Rowlands v Arden [2016] FCCA 2993; Poulsen v Poulsen [2017] FamCA 387.
\textsuperscript{96} Slymms v Wisteria (No 2) [2011] FamCA 507; Baghti v Baghti [2012] FamCA 711.
It seems that the foresight in *Lloyd v Tedesco* that the principles in *Muschinski v Dodds* would continue to apply was accurate. At least in relation to family cases, the vast majority of these family law cases that cite *Muschinski v Dodds* do so in relation to the property of third parties. In this regard, a constructive trust is usually raised to protect property – it is not raised as a remedy, but is used for its institutional aspects to make it clear that the property should not be involved in the family law proceedings.

**B Joint Endeavours in Commercial Issues**

Of interest in the family law cases is the increasing prevalence of family businesses and other commercial interests. This is not surprising. This is because the principles in *Muschinski v Dodds* were derived from the same general principles that support partnership law. Clearly, if the principles in *Muschinski v Dodds* are derived from more commercially-oriented principles, then joint endeavours must also include commercial cases as well, not just cases that involve family members or cohabitation. However, if a case may be able to be resolved by recourse to an existing contract and the intentions expressed therein, the less the principles in *Muschinski v Dodds* have relevance.

An analysis of the cases that cite *Muschinski v Dodds* reveals this to be true. The *Rugby League* cases where News Ltd procured a breach of fiduciary duty by various member clubs of the Australian Rugby League (‘ARL’) demonstrate this. News Ltd encouraged ARL clubs to join their new ‘Superleague’. The clubs that defected were held to be in breach of trust. This was because, as part of a joint venture, they held their assets on trust for other members of the joint venture, and to use them in a way inconsistent with the joint venture constituted a breach.

This is by no means the only example. *Surfers Paradise Investments Pty Ltd v United Investments Pty Ltd* involved property development in which it was alleged a constructive trust arose. What was in question was whether the alleged constructive trust gave rise to a caveatable interest, which it did. It did not depend on curial order. Similarly, *Flint v Sorna Pty Ltd* involved mining tenements that were purchased for a joint venture, but they were intended to be held on trust. The applicable legislation did not permit such a transfer without it being in writing so a trust could not apply. However, despite a trust not being applicable, the party who would otherwise have been entitled to a trust still had a personal right against the other party who would have been held to be a constructive trustee. The personal right against the other party survived despite the proprietary right not being enforceable.

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97 *Muschinski v Dodds* (1985) 160 CLR 583, 620–621 (Deane J). See also *Henderson v Miles (No 2)* [2005] NSWSC 867, [14].

98 See, eg, *Ferryboat Pty Ltd v Gray* [1999] TASSC 126, [44] and *WMJ Attractions Pty Ltd v Ireland* [2008] QSC 140, [35], [39].


100 *News Ltd v Australian Rugby Football League Ltd* (1996) 58 FCR 447, 545–546.

101 *Surfers Paradise Investments Pty Ltd v United Investments Pty Ltd* [1997] QSC 179.

Two other commercial cases are of interest due to how they contrast with one another. *John Nelson Developments Pty Ltd v Focus National Developments Pty Ltd*\(^{103}\) involved a sophisticated contractual joint venture between corporate entities in a commercial context. The parties agreed on how the venture would be dealt with in the event that it failed at an early stage. However, the venture broke down just after they had taken out a loan for the development, which was one thing not accounted for in their agreement. Ultimately, the principles in *Muschinski v Dodds* were applicable to determine how the joint venture should end.\(^{104}\)

The other example is *Arrow Custodians Pty Ltd v Pine Forests of Australia Pty Ltd*\(^{105}\) which involved several thousand joint tenants of lots in a pine plantation. The plantation entered liquidation and a co-owner, having made extra contributions to rates, wanted to be paid extra money in preference to other owners. It was claimed that, unless that party was repaid the contributions that they made to the rates, the other owners would receive a benefit without having to bear the burden of paying those rates themselves. However, there already existed a mechanism by which the joint venture would be unwound.\(^{106}\) It was held that the co-owner could not claim something that was contrary to the arrangement between the parties.

From these two examples, it is clearly shown that the principles in *Muschinski v Dodds* will apply to commercial joint ventures and partnerships as well as to any other form of joint endeavour, no matter how loosely arranged. This concept of Equity ‘filling in the gaps’ of contracts is well-established in the case law that cites *Muschinski v Dodds*.\(^{107}\) It is also apparent that Equity will step in even if there is no contract at all, even if the parties’ arrangement falls far short of a partnership.\(^{108}\)

This speaks of a general application of the principles in *Muschinski v Dodds* beyond any one conception of what a ‘joint endeavour’ might be. It appears as if there are multiple principles at play, including a cause of action.

VI  **Both Principle and Cause of Action? Three Problems**

From the cases discussed, it appears that the principles in *Muschinski v Dodds* do not give rise to any one principle. This confusion stems from the case law not making this distinction apparent. There are three examples that can be discussed which highlight how simply referring to “the principles” in *Muschinski v Dodds* has led to wildly different results.

The first example is *Henderson v Miles (No 2)* which treated the principles in *Muschinski v Dodds* as giving rise to a cause of action for which the minimum equity to do justice was the appropriate remedy. This did not apparently involve constructive trusts in any way. A joint

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\(^{103}\) *John Nelson Developments Pty Ltd v Focus National Developments Pty Ltd* [2010] NSWSC 150.

\(^{104}\) Ibid [326]–[338].

\(^{105}\) *Arrow Custodians Pty Ltd v Pine Forests of Australia Pty Ltd* [2008] NSWSC 839.

\(^{106}\) Ibid [47]–[67].

\(^{107}\) See, eg, *Gibson Motor Sport Merchandise Pty Ltd v Forbes* [2005] FCA 749; *McCauley v McInnes* [2012] ACTMC 2; *Daoud v Boutros* [2013] NSWSC 687.

\(^{108}\) See, eg, *Minter v Minter* [2000] NSWSC 100, [106].
endeavour collapsed without attributable blame, and one party lost a fund to another, so therefore a remedy was available.

The second example is Stavrianakos v Western Australia, which also cited Henderson v Miles (No 2). This case treated the principles in Muschinski v Dodds as authority to construe a trust decades in the past in order to thwart a claim by a third party twenty years later. A number of insolvency cases bear this out as well, such as Clout v Markwell discussed earlier.

The third example consists of the various cases that involve commercial joint ventures and partnerships as discussed earlier. These cases should ordinarily be answered by contract and partnership law, but when that avenue would otherwise be lacking, the principles in Muschinski v Dodds are often called upon to ‘fill in the gaps’.

These three examples are all based upon the principles in Muschinski v Dodds, yet they all reach different outcomes. As they share the same source, they are clearly related, but little effort has been made in the case law to elucidate the difference. This paper will now address these three examples and posit a resolution to this confusion.

A Cause of Action for Failed Joint Endeavours

It is clear from Henderson v Miles (No 2) that Muschinski v Dodds gives rise to a cause of action. This cause of action is enlivened when a joint endeavour fails without attributable blame and one party retains property in circumstances where that retention was not contemplated by the parties. This unconscionable retention of benefit leads to a remedy.

The problem here is that the High Court in Muschinski v Dodds, in granting relief for a failed joint endeavour, developed the law regarding constructive trusts as a remedy at the same time. The distinction between ‘remedial’ and ‘institutional’ constructive trusts was declared by Deane J to be ephemeral but, as can be seen from cases after Giumelli v Giumelli, cases often treat the constructive trust as a remedial response and opt for a lesser remedy. This is done without considering its institutional aspects and, in cases like Henderson v Miles (No 2), this is often done without considering whether a constructive trust may have arisen in any capacity whatsoever.

A part of this distinction between remedial and institutional is highlighted by the fact that Re Osborn, as discussed earlier, is no longer good law. It is clear that a constructive trust arises by operation of law when the facts and circumstances construe its existence, and not by curial order. Another unfortunate aspect of Muschinski v Dodds is the choice to set the date of operation of the constructive trust at the time the order was made. The choice to alter the date of operation of the constructive trust has only contributed to the perception that there is a distinction between remedial and institutional constructive trusts. This choice should not be taken to mean that constructive trusts are remedial and take effect upon curial order. As discussed earlier in Parsons v McBain, the decision to alter the date of effect of a constructive trust is a matter of discretion for the courts in order to protect other legitimate interests, which was the reason why the High Court in Muschinski v Dodds altered the date of effect of the

constructive trust. If a constructive trust arises, it does so by operation of law – the remedial aspect does not make the constructive trust a remedy available at large, nor does it mean it only takes effect upon curial order.

Without a distinction between ‘institutional’ and ‘remedial’ constructive trusts, it appears that a constructive trust arises due to some action taken during the joint endeavour. If the principles in Muschinski v Dodds give rise to a cause of action for a failed joint endeavour, then they also provide principles to construe a trust during the joint endeavour.

B Principles to Construe Trusts in Joint Endeavours

The discrepancy here is in courts awarding remedies for failed joint endeavours without addressing the applicability of constructive trusts, such as in Henderson v Miles (No 2). If a trust arises during the joint endeavour, then surely that must have an effect, not only on the remedy, but also on the relations between the parties during the joint endeavour.

The constructive trust is no mere remedial response. Since Re Osborn was overruled, it is clear that a constructive trust arises well before the breakdown of a joint endeavour.110 In fact, at least in one case, a joint endeavour was threatened with collapse, but the appropriate remedy was to recognise that a constructive trust existed and that the parties should continue their arrangement.111 The joint endeavour in this case did not actually ‘break down’, yet it was still recognised that a constructive trust arose during the joint endeavour, and that recognition was sufficient to keep the joint endeavour alive and to ward against third party claims.

The principles in Muschinski v Dodds therefore do not simply give rise to a cause of action for failed joint endeavours. Trusts are construed at some point during a joint endeavour, and these trusts are integral to the cause of action. Although Henderson v Miles (No 2) did not mention constructive trusts, perhaps they were still relevant in some way, as the book co-authored by Young CJ classified Henderson v Miles (No 2) as a case regarding constructive trusts arising from windfalls despite the case never mentioning constructive trusts.112 It would seem odd to classify that case as a constructive trust case despite the case not involving constructive trusts in any capacity whatsoever unless the principles at hand involved constructive trusts in some way.

At least from this perspective, there are two consequences that arise for the principles in Muschinski v Dodds. The first consequence is that constructive trusts may arise during joint endeavours: at least for personal relationships, this is positively the case where disproportionate contributions are held on trust for the benefit of the contributor.113 The second consequence is that, if a joint endeavour breaks down, a cause of action may exist.

It seems that the trust that was construed to exist during the joint endeavour may make its presence known when deciding a remedy if the joint endeavour breaks down. However, due to Giumelli v Giumelli, a lesser remedy may be chosen. The problem here is that there has been

insufficient discussion in the case law as to how this constructive trust affects the rights and liabilities of the parties to a joint endeavour.

C Principles to Assist Joint Endeavours, However Classified

The question then becomes, what is a joint endeavour? The cases in the years following Muschinski v Dodds often treat its principles as relating to de facto relationships. This is because, at the time, de facto relationships could not be dealt with by the Family Law Act 1975 (Cth), being left to individual State and Territory legislation and common law and Equity. The other High Court case of Baumgartner v Baumgartner also involved a de facto relationship.

Other cases such as Parij v Parij114 in South Australia seemed to treat Muschinski v Dodds and Baumgartner v Baumgartner as a form of ‘quasi-family law’, with the court having regard to analogous principles in family law, such as the High Court case of Mallet v Mallet.115 This was highlighted as a problem in Lloyd v Tedesco, noting that the statutory family law regime confers a high degree of discretion on courts not otherwise granted by Equity, and that it would be erroneous to develop the principles in Muschinski v Dodds in such an analogous way to family law.116 This caution seems justified, given how the principles in Muschinski v Dodds appear to have taken on a wide effect beyond de facto relationships.117

An example of this wider effect is the case in Henderson v Miles (No 2) which involved a mother and her daughter and son-in-law. As the Family Law Act 1975 (Cth) only concerns married and de facto couples, other family members cannot avail themselves of family law unless there is already a case before the family law courts in which they may intervene. This still leaves a lot of various family arrangements, such as family businesses, up to common law and Equity.

However, the increase in cases citing Muschinski v Dodds in relation to family businesses also speaks to a broader trend in the commercial sphere generally. The principles in Muschinski v Dodds also find expression in purely commercial cases with no resemblance to any family arrangement or cohabitation.

What is the true scope of a joint endeavour? A simple familial relationship is insufficient; there must be something more for an arrangement to become a joint endeavour.118 This requirement for ‘something more’ bears a striking parallel to the requirement for a joint venture contract to have ‘something more’ before it attracts a fiduciary character. It must be noted that the term ‘joint venture’ has no legal significance; it has no settled common law meaning.119 It appears that the only significance that alters the content of a ‘joint venture’ relationship is the existence of a fiduciary relationship. This can be seen in United Dominions Corporation Ltd v Brian Pty

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119 United Dominions Corporation Ltd v Brian Pty Ltd (1985) 157 CLR 1, 10 (Mason, Brennan and Deane JJ), 14 (Dawson J); R & R Fazzolari Pty Ltd v Parramatta City Council (2009) 237 CLR 603, 626 [74] (Gummow, Hayne, Heydon and Kiefel JJ).
where the contractual joint venture was characterised as a partnership due to its nature rather than its form, and it is this characterisation which imposed fiduciary duties upon the parties akin to a partnership. Another joint venture case before the High Court was *John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd.* The parties referred to the arrangement as a ‘joint venture’, however, no breach of fiduciary duty was found because, despite the label of a joint venture, the parties did not owe each other other fiduciary duties. There was nothing to distinguish the joint venture from any other simple contractual relationship without fiduciary duties, and there was no reason to impose a fiduciary character to their arrangement.

This is an interesting point. The principles in *Muschinski v Dodds*, despite initially applying to de facto relationships, were clearly derived from the same equitable principles that underpin partnership law. It was this analogous reasoning that allowed Ms Muschinski to claim relief for her failed joint endeavour. These same principles are also called in aid of parties to commercial joint ventures when their contract does not contemplate a circumstance that ends the venture.

For the principles in *Muschinski v Dodds* to apply, there must be a joint endeavour, and it is clear that a simple familial relationship is not enough. Likewise, for a contractual joint venture to have any legal significance beyond being a simple contractual relationship, there must be some factor that gives rise to fiduciary duties akin to partnership law.

Does *Muschinski v Dodds* therefore provide principles to assist parties to any joint endeavour, no matter the form it takes, whether it is a contractual joint venture, a partnership, or a loose family arrangement? Although it was noted in *Muschinski v Dodds* that a breach of fiduciary duty was not required to grant relief by way of a constructive trust for a failed joint endeavour, a breach of fiduciary duty is likewise unnecessary to grant relief if a contractual joint venture fails unexpectedly. As the principles in *Muschinski v Dodds* were derived from the same general equitable principles that underpin partnership law, the fact that fiduciary duties exist in partnerships cannot be simply overlooked when considering a joint endeavour in light of the principles in *Muschinski v Dodds*.

It seems highly likely that what makes an arrangement a ‘joint endeavour’ for the purposes of the principles in *Muschinski v Dodds* is not distinguishable from what gives a contractual ‘joint venture’ a fiduciary character. Perhaps the reason why a simple contract attracts a fiduciary character is the same reason that gives the ‘something more’ to turn a simple relationship into a joint endeavour for the purposes of the principles in *Muschinski v Dodds*. This would neatly harmonise these disparate conceptions of what a joint endeavour may be.

If this is the true scope of a ‘joint endeavour’ and the principles within *Muschinski v Dodds*, then there is far more to these cases than simply finding a cause of action for a failed joint
endeavour and construing trusts. These joint endeavours, apart from construing a trust to exist when disproportionate contributions are made, may also involve fiduciary duties between the parties. This means that cases may have not only been overlooking the institutional aspects of constructive trusts when applying the principles in *Muschinski v Dodds*, but they may have also been overlooking the possibility for fiduciary duties to exist in these joint endeavours, too.

**VII Conclusion**

If this is the true scope of the joint endeavours that the principles in *Muschinski v Dodds* deal with, then courts are not considering constructive trusts and fiduciary duties in circumstances where they appear integral to the joint endeavour in question. There may be more than one cause of action here: it is possible that breaches of fiduciary duty and breaches of trust may be present, but not considered.

Rather than simply providing a cause of action for when a joint endeavour breaks down unexpectedly without attributable blame, it appears that there is a body of law here that applies to all joint endeavours, whether they take the form of a loose family arrangement, a sophisticated contractual joint venture, or a partnership. The applicability of Equity here may only depend on how sophisticated the parties’ arrangement is.

If this is the case, there needs to be a full analysis and restatement of the law in this area. The three disparate areas discussed in the previous section may not be disparate at all. They require an analysis and restatement to identify and state the unifying themes and the consequences that flow from recognising constructive trusts and fiduciary duties in joint endeavours generally. Such a restatement will need to address three aspects.

The first aspect to address is what the scope and definition of ‘joint endeavour’ is and to reconcile this with the term ‘joint venture’. This is because the principles in *Muschinski v Dodds* have been shown to be equally at home in loose family arrangements as they are in sophisticated commercial contracts, but in either case, a joint endeavour must be shown to exist as a matter of fact. This is especially important because both ‘joint endeavour’ and ‘joint venture’ are not legal terms of art, yet they are often used to denote something of legal importance. A restatement must provide guidelines to help identify the existence of a joint endeavour.

The second aspect a restatement must deal with is the scope of the cause of action in *Muschinski v Dodds*. This could be termed the ‘windfall equity’ and operates when a joint endeavour has failed unexpectedly without attributable blame and where one party to the joint endeavour unconscionably asserts title to property to the exclusion of another party. The scope and bounds of this cause of action, including when, where, and how it steps in to assist parties must be discovered. It must also be reconcilable with joint endeavours of all varieties, from loose family arrangements to sophisticated commercial contracts.

The third and final aspect is to address when a constructive trust arises and how it operates within a joint endeavour. A restatement will need to provide a unified explanation for how a constructive trust arises during a joint endeavour in such a way as to both provide relief when a joint endeavour breaks down and to provide a proprietary interest at a time well before any
breakdown of a joint endeavour so as to provide a greater priority than other third party claims. This may be termed the ‘joint endeavour principle’.