RIGHT TO TRACE ILL-GOTTEN GAINS

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Constructive Trusts

Mr Justice Pincus has spoken on the impact upon banks of constructive trusts and the possible liability placed upon banks for monies wrongly obtained by others in breach of trust or in breach of a fiduciary obligation. The other side of the coin for banks is the possible use by banks of the developing notion of constructive trusts as a remedy to recoup ill-gotten gains had at the banks' expense. The standard tracing claims (e.g. Taylor v. Plumer (1815) 3 M&S 562; 105 ER 721) are well known and these are the situations where constructive trusts are institutional devices rather than invoked by the courts as remedial devices.

There is an increasing use of constructive trusts as a remedial device to preclude the retention of beneficial ownership in property to the extent it would be contrary to equitable principle: Muschinski v. Dodds (1985) 62 ALR 429, at p. 451 (Deane J.). Although this case had nothing to do with banks, the High Court purported to be stating general equitable principles. The use of constructive trust as a remedial device has again been endorsed recently in Baumgartner v. Baumgartner (1987) 76 ALR 75, where a constructive trust was imposed by the Court in order to prevent an assertion of ownership which would have been unconscionable conduct (at p. 84). The expanding use of constructive trusts as a remedial device is evident in other common law jurisdictions such as Canada (see Pettkus v. Becker (1980) 117 DLR (3d) 257) and in New Zealand (see Haywood v. Giordani [1983] NZLR 140), although apparently not in England, at least expressly (but see Chase Manhattan Bank N.A. v. Israel British Bank London [1981] Ch 105).

This opens new frontiers for those seeking to trace ill-gotten gains where it is inevitable that the recipient of the gain (assuming there is no third party intervention) will not be holding the moral high ground. In most cases (if not all) where there is an ill-gotten gain, it is likely that the gain will be recoverable in accordance with the general principle denying to a person a benefit which unjustly enriches him at the expense of another: the whole notion of "unjust enrichment" seems to have at least the tentative endorsement of the High Court following

Pavey & Matthews Pty Ltd v. Paul (1987) 162 CLR 221.

An interesting point is whether the courts will go on and use constructive trusts as a remedial device to provide for restitutionary proprietary claims in the case of unjust enrichment. Deane J. in Muschinski v. Dodds at p. 453, noted that in the United States, a general doctrine of unjust enrichment has long been recognised as providing an acceptable basis in principle for the imposition of a constructive trust and "it may well be that the development of the law in this country on a case by case basis will eventually lead to the identification of some overall concept of unjust enrichment as an established principle constituting the basis of decision of past and future cases".

Some obvious examples of where a bank may seek recovery or to trace ill-gotten gains, and where the imposition of a constructive trust would assist recovery, are:

1. Where money is stolen - there is also authority for the view that overpayments from automatic teller machines in some circumstances may constitute theft (see Kennison v. Daire (1986) 40 ALJR 249; R v. Evernett (Qld.) CCA, unreported, 3.4.87).

2. Recovery of gains made by misuse of stolen credit cards where the liability of the lawful cardholder to the bank is strictly limited - this may be more of an insurance question but the principle remains the same.

But what is the situation where the conduct falls short of theft, for example money duped out of a bank, for example by a man who pretends he has attributes he has not, or who alleges that he has assets he does not own? It is not impossible to imagine Muschinski being used, in extreme circumstances, to cases where money borrowed for Purpose A is used for Purpose B. One needs to imagine an extreme situation to see the benefit of the remedy, and to highlight the extreme difficulties in enforcing the remedy. However, once the remedy is established in an extreme situation it could well become the norm, as for example have Mareva injunctions.

If the concept of unjust enrichment is taken to its logical conclusion, and there is every reason to suspect that it will be taken that far, these are cases in which proprietary relief ought to be granted. Given that the requirement of a pre-existing fiduciary relationship as a pre-requisite to tracing in equity seems to be now unnecessary (Muschinski v. Dodds at pp. 452-3), the plaintiffs are also relieved of the need for judges to resort to fictitious analysis in order to achieve an equitable result (as seems to be the case in Chase Manhattan v. Israel British Bank where it was held that money paid under a mistake of fact was impressed with a trust so that the payer could take precedence over the scramble of unsecured creditors).

Legislation

Mr Justice Pincus has spoken on the Proceeds of Crime Act and the Customs Act and other legislation which allows for the recoupment of ill-gotten gains, and he has rightly warned of some dangers for banks.

I make two brief comments on that aspect of the paper.

The first is that bankers may now be their brother's keeper, and if your customer is clearly living off the proceeds of crime then it is no longer safe to assume that his assets, whether mortgaged to you or not, are available to meet his liabilities.

The second point I make concerns the onus of proof and the confusing words used to describe a well known concept. The tests adopted by the legislation for innocent third parties equates somewhat with the longstanding equitable notion of bona fide purchaser for value without notice, although there is the reversal of the onus of proof as well as the incidental difficulties to which Mr Justice Pincus has referred. I make the observation that embodying in legislation longstanding equitable notions which everybody understands and which have stood the test of time well (and produced equitable results) rather than producing new definitions would appear to be more efficient.