CONSTRUCTIVE TRUSTS

QUESTIONS AND ANSWERS

Comment - Gregory Burton (Barrister-at-Law, Sydney):

Very quickly, picking up on what Francis Neate and John Lehane have said, given that we have a circus going on in Sydney called **Spedley** where constructive trusts is very important too - in some of the cases it seems to me that you will always have to advise your client on the worst basis or the most extensive basis of notice because it is very difficult to determine when, particularly a bank with an overdraft which is partly paid off, whether above or below a limit has received a benefit - so you have to assume the worst case and the most extensive case of notice. The questions that then importantly arise, which the cases do not seem to deal with and Francis just touched on at the end, are twofold. Who bears the onus of proof? And if you had asked, who do you ask, and what you would have found out? Because if you ask and you would not have been told anything, and what you have asked was reasonable, then you cannot be said to have had notice one would have thought, although maybe creative judicial livering will get around that problem as well in the interests of someone - I do not know who.

Response - Francis Neate (Commentator)

I do not think I can say anything to that - I agree.

Response - John Lehane (Commentator)

I think I agree also. I think it does provide the occasion to say two things very briefly. The first is that my disagreement with Francis is not so complete as he appears to propose. I am not suggesting one grills one's own client too vigorously, but I was making a suggestion as to the way, unfortunately in the current state of the law, one has in certain circumstances, and I would hope not too extensive circumstances, to advise one's own client to grill one's client's customer. I think that is very important. The second problem with it all I suppose is that we have a general principle that does not justify the bankers or lawyers, but applies very generally to anybody dealing with trustees or fiduciaries. And if you have a general principle of that sort the only way you can deal with it by way of restriction adequately in the case of particular sorts of people or particular sorts of transactions is in areas such as what does amount to the necessary degree of notice? What do the commercial realities, if you like, of particular sorts of transactions demand when you are deciding whether somebody is put on enquiry? I find that I get into real difficulty when I start thinking about "bottom of the harbour" exercises.

Response - Francis Neate (Commentator)

Can I just add something. John and I, I do not think, are disagreeing. The only point I am making about your client is that where you advise your client to cross-examine his client, he faces with his client exactly the same problem as you would face if you were required to cross-examine your client. [Unfortunately, yes.]

Comment - Martin Kriewaldt (Feez Ruthning, Brisbane):

One of the difficulties I have with the current direction of the Australian and it seems the New Zealand law on the area of constructive trusts is that it seems to totally disregard the principle that you are entitled to deal with people on the basis that they are honest. Francis Neate touched on that and I echo his words. For those of you who would like a breath of fresh air in this area, can I commend to you the judgment in the **Theodore Goddard** case which came out a month or two ago about a chap who was thoroughly duped by a dishonest solicitor. Fortunately in that case he ran up against a judge who actually took some notice of those words. The duped director was able to get away simply because the judge was able to understand that you do not always assume the worst of somebody who appears to be honest and appears to be doing the right thing.

The biggest problem that I have, if you take his Honour's example, and make it even more simple. Assume you have a company and assume you have a director and they each bank with your banker and they each happen to deal with a particular stock broker. When the company draws a cheque payable to the stock broker, on his Honour's thesis, and I think in a way endorsed by John, the bank must make an inquiry of the customer or perhaps even the stockbroker, as to whether the cheque is being drawn for the purposes of paying the director's own personal dealings, and even then perhaps go back to the company and check whether perhaps the company is not discharging a debt which the company owes to the director for wages, or commission, or bonuses, or anything like that. The problem is that it is just impossible to impose upon bankers the obligation to second-guess their clients and to look over their shoulder and to do it in an incredibly short space of time required by the banking system. And I think the sooner that our courts recognise that they are raising the standard too high and making life just ridiculously impossible; unless we achieve that somehow or another, we are going to see either commercial business just stop or people just start to ignore the courts because the law that they wish to impose is not terribly useful in real life.

Response - The Hon Mr Justice Edmund Thomas (Speaker):

I would not disagree in any way what the Mr Kriewaldt has just said or even with what the previous speaker has just said. But it is very simple, I think, to say these things and Francis Neate has said them excellently, in a way which expresses the populous viewpoint. Francis Neate I am pleased has read my paper twice - I wish he had read it three times! The paper does stress the need for judges to be commercially realistic, and certainly in my 32 years of practice I found that it was essential to understand the commercial practicalities before one could properly advise on the likely outcome of a case. What I did think prevailed, and I am sure that most counsel agree with me, that the way of being able to tell what the outcome of a case is lies in assessing the merits of the case. The worst mistake to make is to think that you have some authority which is binding and that it is in your favour. So, I would not like it to be thought that I have approached this paper from the point of view of one who is commercially innocent. My 32 years of background in commercial litigation would, I hope, deny that. For one horrifying moment I thought that Francis Neate was accusing me not of innocence but of insouciance! That troubles me because last night I spent a most restless night trying to

work out what the meaning of that word was! You would think that a hotel of this size and complexity would provide a dictionary - no, a bible - yes, a dictionary - no! And it is not every New Zealand judge's idea of a restful night to be wandering round the corridors of a hotel somewhere in Queensland, Australia, looking for a dictionary! However, I can tell you, that insouciance is not a word that Jesus used!

Question - Peter Fox (Mallesons Stephen Jaques, Melbourne):

The point has been touched on, and I think it is really just to reinforce it, a lot of the law in this area is going very definitely against the modern systems by which payments are made and settlements are finalised. The idea of individual intervention that lawyers and bankers might have in an electronic based banking system is sheer nonsense. It is often a reconstruction of the facts at the end. I think it is troubling that the class of case that we are talking about the application of these principles to is becoming very much smaller. The types of reconstructions we are doing at the end of some of these insolvencies are fairly horrifying and it is true, money just passes through bankers' hands and there may or may not have been an advantage obtained in the wrong place. The point is, how at the point that the payment is made can the legal system, through bankers and lawyers, intervene to ensure a just result? I do not know the answer to that - I simply observe the trend is most troubling.

Response - The Hon Mr Justice Edmund Thomas (Speaker):

Could I suggest again that it can only be that the legal representatives and counsel for the banks convey to the court the commercial reality of the situation. The difficulty that exists at the time that the bank is required to make a decision. And it is for that reason that I have not in my paper, notwithstanding the impression that might have been gained later, suggested that there is any duty of care on the bank at all. There is not. The bank does not owe a duty of care to the beneficiary. Its obligation is certainly not to act in an unconscionable way. And that is not a severe standard. At the point that it makes the inquiry therefore, the bank has got to do something remiss before, to my mind, a court is justified in saying that you have behaved in an unconscionable manner and must now take the consequences as if you were a trustee. It is a matter of conveying, I think, the facts to the court.

Comment - Peter Short (Chairman):

It remains for me to thank the speakers on your behalf. The outrageous success, I think, of this Banking Law Association is due in no small part to the fact that we carefully pick the topics and then carefully select the speakers. We have been fortunate today to have three absolutely outstanding speakers: the judge you can see quite well deserves his reputation in New Zealand, and with the other two speakers, John Lehane and Francis Neate, we just simply got the best from Australia and England, and on your behalf, could I thank them for their time and their contribution today.