

THE REMEDIAL CONSTRUCTIVE TRUST - FACT OR FICTION

BANKING SERVICES AND FINANCE LAW ASSOCIATION CONFERENCE

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1. The trouble for a judge who wants to give an interesting or challenging lecture on a controversial point of law is that he may be disqualifying himself from subsequently determining the issue on the ground that he is *parti pris*. I have always wondered whether that was really a justified concern. The reasons for my scepticism are essentially twofold. In the first place, we all know that judges are human – well, most of us are – and so everyone will appreciate that a judge will often have a preliminary, even a strong preliminary, opinion on an issue that he is trying. It could be said to be positively more consistent with open justice that such an opinion is known in advance rather than locked away in his brain. In the good, or as others may see it the bad, old days when we were Law Lords, Lord Hoffmann and Lord Scott were unable to sit on the two appeals challenging the validity of the Hunting Act because they had both expressed views on the topic in the chamber of the House of Lords and voted on the Bill. Yet it is highly questionable whether the fact that they had, as it were, “come out” made them any less suitable to sit on the two cases than if they had quietly kept their strong views to themselves.
2. Secondly, any judge worth her salt should be prepared to change her mind on an issue on which she has expressed a view. The whole point of a hearing is for a

judge to decide the issues at stake by reference to the arguments as advanced and tested in writing in court and when discussing and deliberating after the hearing. Judges who have decided points one way often have to reconsider the point, sometimes in a higher court, and not infrequently change their minds – as Baron Bramwell said about a point of law in 1872 “[t]he matter does not appear to me now as it appears to have appeared to me then. Indeed, it may be thought that I had just such a damascene conversion very recently in the case of *FHR European Ventures LLP v Cedar Capital Partners LLC*¹.

3. But I do not go so far as to suggest that we should allow judges to sit on appeal from themselves. That would be thought to be quite unacceptable, but it is an indication of how things can change. Such a course was quite acceptable in 19th century England. Indeed, it is responsible for one of my favourite little vignettes of judicial independence. In the 1846 case of *Martindale v Falkner*², the Exchequer Court heard an appeal from a decision of Maule J sitting in the Exchequer Chamber. The appellate Court consisted of the Chief Justice and four other judges, one of whom was Maule J. Five judgments were given. The Chief Justice and three of the four judges explained that Maule J’s decision was entirely right. Maule J dissented and said that he had been quite wrong. That can be said to be as good an example as any of why one should in the end trust the judges.

¹ [2014] UKSC 45

² (1846) 2 CB 706

4. The *Martindale* case is in fact best known for Maule J's statement "[t]here is no presumption ... that every person knows the law: it would be contrary to common sense and reason if it were so". That seems entirely appropriate: on any view of that case Maule J cannot have known the law, because he must have been wrong either at first instance or on appeal. And, if a judge does not always know the law, how can we expect anyone to do so?

5. Reverting to my present theme, I do accept that Judges speaking on controversial legal topics have to be very circumspect. I therefore should make it clear that in talking about remedial constructive trusts today, I am intentionally shooting a line, going back to my days as an advocate. Obviously, I do not consider that the line I am about to shoot or the points which I am about to make are hopeless, any more than I ran hopeless arguments as a barrister – unless they were the only points I had. And I remain ready willing and able to consider with a genuine open mind the question whether we should adopt the remedial constructive trust in English law if and when the point arises in the UK Supreme Court. Having made that disclaimer,.....

6. There is much to be said for the notion of a remedial constructive trust displays equity at its flexible flabby worst. I will seek to show, at least arguably, that it is unprincipled, incoherent and impractical, that it renders the law unpredictable, that it is an affront to the common law view of property rights and interests, that it involves the court usurping the role of the legislature, and, as if that were not

enough, that the development of the remedial constructive trust is largely unnecessary. Apart from that, it's a pretty good concept.

7. What is a remedial constructive trust? Well as I understand the expression, it is best contrasted with an institutional constructive trust. An institutional constructive trust arises automatically as a matter of law when a benefit, whether it is property some other asset or simply money, is acquired in certain defined circumstances (and it sometimes can arise after when all those circumstances are satisfied). An obvious example is where a person in a fiduciary position, such as an agent, a director, or a trustee, acquires purportedly for himself a benefit which he should have acquired for his principal, company or trust. In such a case, equity imposes a constructive trust, so that the recipient of the benefit (assume an agent) holds it on trust for his principal.

8. As that great English equity judge and lawyer, Peter Millett, has expressed it extra-judicially, an institutional constructive trust “arises whenever the circumstances are such that it would be unconscionable for the owner of the legal title to assert his own beneficial interest and deny the beneficial interest of another³”. (Accordingly, a constructive trust may arise after acquisition if and when the requisite circumstances arise after the acquisition – eg if knowledge is required, it may be that the acquirer gets the knowledge sometime after acquisition). A recent example of an institutional constructive trust was

³ (1998) 114 LQR 399, 400

identified in the United Kingdom Supreme Court decision of *FHR European*⁴, where we held that a bribe or secret commission received by an agent was held on constructive trust for his principal. Accordingly, the benefit acquired by the agent is beneficially the property of the principal from the moment that the agent acquires it.

9. The fact that a principal can invoke a constructive trust in respect of a benefit obtained by his agent in breach of fiduciary duty, means that the principal has a proprietary interest in that benefit, as an alternative remedy to equitable compensation. Having a proprietary interest has three beneficial consequences for the principal. First, he can simply enforce his proprietary right against the benefit in order to recover what he is owed, rather than seeking to recover the cash equivalent from the agent. Like a mortgagee who can realise his security rather than simply pursuing his debt, a principal can obtain the benefit or convert it into money rather than chasing the agent for compensation. Secondly, in the event of the agent's insolvency, the principal is effectively a secured creditor in respect of the property. He does not have to prove for equitable compensation, on a *pari passu* basis, like any ordinary unsecured creditor. In other words, he is much more likely (indeed very likely) to recover in full rather than being reduced to receiving a dividend. Thirdly, the principal can trace the benefit into another asset acquired by the agent, and/or follow the benefit into the hands of third

⁴ [2014] UKSC 45

parties (unless they are bona fide purchasers for value without notice of the principal's claim).

10. A remedial constructive trust, by contrast, does not arise automatically when certain requirements are satisfied. If such a trust exists, it only comes into existence once a court is satisfied that (i) a plaintiff has a claim for equitable compensation (or even possibly common law damages) from a defendant, which does not give rise to an institutional constructive trust or other proprietary interest, and (ii) the court in its discretion, having considered all the circumstances, considers that justice would be done by imposing a trust in favour of the plaintiff. Once such a trust is imposed by the court, it would seem to have all the three beneficial characteristics of an institutional constructive trust which I have just described, and there is a question over whether it cannot be, must be, or may be, retrospective in its effect.

11. Lord Browne-Wilkinson said in *Westdeutsche Landesbank* case⁵ that “the New York law of constructive trusts has for a long time been influenced by the concept of a *remedial* constructive trust, whereas hitherto English law has for the most part only recognised an institutional constructive trust”. Although he recognised that the remedial constructive trust “may provide a more satisfactory road forward”, he said that the decision whether to adopt the remedial constructive trust would “have to be decided in some future case when the point

⁵ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 714

is directly in issue”⁶. In other words, the remedial constructive trust did not exist in English law. This was entirely consistent with the approach which had already been taken by the same judge when he was at first instance⁷, and by the Court of Appeal six years earlier in the *Metall Und Rohstoff* case⁸. More recently, it has been held in 1998 by the Court of Appeal⁹ that, as Lewison J put it in 2005, “[i]n some jurisdictions, the court will impose a constructive trust by way of remedy, but a so-called ‘remedial constructive trust’ is not known in English law”¹⁰. This is a view supported by Etherton LJ at least judicially; as recently as 2011 in *Crossco No 4 Unlimited v Jolan Ltd*¹¹, he said that “the current general view is that English law does not at present recognise a remedial constructive trust of the kind described by Lord Browne-Wilkinson with its critical features of judicial discretion and retrospectivity”.

12. However, there are some instances where judges appear to have thought that the remedial constructive trust existed. Although it may be said that they were unaware that that was the effect of their observations, unawareness of the fact that they were suggesting that English law recognised the remedial constructive trust does not alter the fact that that was indeed the effect of what they were saying. Until he started his education late in life after making his fortune,

⁶ *Ibid* 716

⁷ *In re Sharpe (A Bankrupt); ex p Trustee of the Bankrupt's Property v The Bankrupt* [1980] 1 WLR 219, 225

⁸ *Metall Und Rohstoff AG -v- Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 at 479

⁹ *re Polly Peck Ltd (No 2)* [1998] 3 All ER 812, [1998] EWCA Civ 789

¹⁰ *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1683(4) Ch, para 1515, a mega-judgment reported in three parts, no less, on bailii; and see per Patten J in *Turner v Jacob* [2006] EWHC 1317 (Ch), para 85

¹¹ [2011] EWCA Civ 1619, para 84, and see per Patten LJ in *de Bruyne v de Bruyne* [2010] 2 FCR 251, [2010] EWCA Civ 519, para 48

Monsieur Jourdain in Moliere's 17th century play *Le Bourgeois Gentilhomme*, had been unaware that he had been speaking prose all his life, but that didn't mean that he hadn't been speaking prose.

13. In a judgment in 1806 in *Hovenden v Lord Annesley*¹², a case which had been argued round his sick-bed (from which he fully recovered), Lord Redesdale, the Irish Lord Chancellor, had to consider whether a person who had fraudulently received trust property, what we would today call a knowing recipient, had the status of a trustee. The main point in the case concerned limitation, ie time bars, and his reasoning was recently approved and followed by the United Kingdom Supreme Court¹³. Lord Redesdale held that a person such as a knowing recipient was “not, in the ordinary sense of the word, a trustee a trustee” because “his possession [of the trust property] is adverse to the title of the person who impeaches the transaction on the ground of fraud”. Consequently, a knowing recipient could plead limitation against a claim for the return of the trust property, whereas a trustee properly so called could not. However, crucially for present purposes, although the Irish Lord Chancellor considered that a knowing recipient was not a trustee, he stated that a knowing recipient could be someone who was “to be constituted a trustee by a decree of a court of equity, founded on the fraud”. That seems to be a pretty good description of a remedial constructive trustee.

¹² (1806) 2 Sch & Lef 607

¹³ *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] 2 WLR 355

14. Three-quarters of a century later, in *Metropolitan Bank v Heiron*¹⁴, a case which received rather less respect recently from the United Kingdom Supreme Court in the *FHR* decision¹⁵ earlier this year, Brett LJ referred to the judgment of Lord Redesdale. He then said that in a case where an a director of a company accepted a bribe, the effect of what Lord Redesdale had decided in *Hovenden v Annesley* was that the money was not held on trust for the company, as “the money is to be considered as held adversely to the ... company”. However, again crucially for present purposes, Brett LJ said that the effect of Lord Redesdale’s judgment was that this state of affairs applied only “until the decree; and where the suit is founded upon fraud so that there is no trust until the decree”. Again, this seems to amount to a pretty unambiguous suggestion that a remedial constructive trust exists.

15. However, both these observations were *obiter* and, in truth, they were little more than throw away lines. Furthermore, the way in which the observations were expressed may well suggest that, once the court decides that the defendant is a dishonest recipient, a trust arises automatically. That is not, as I understand it, consistent with the modern notion of a remedial constructive trust, whose imposition is a matter of judicial discretion. If the existence of a constructive trust is automatic, as Lord Redesdale and Brett LJ appear to have thought, then it seems rather quaint that it can only arise once the court has found the relevant facts rather than arising as soon as the relevant facts occur. It is also unclear to

¹⁴ (1880) 5 Ex 319, 324

¹⁵ *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45

me whether or not the imposition of such a trust would be retrospective in its effect: either possibility would seem to raise difficulties. If it is retrospective, why should it not be imposed at once as an institutional trust (as should have been the case in *Metropolitan v Heiron* in the light of our recent decision in *FHR*); if it is not retrospective, its consequences could be avoided by the defendant before it is imposed

16. Sir Terence Etherton, now the Chancellor of the English High Court, writing extrajudicially, has suggested that what he called the “seminal” decision of the House of Lords, *Stack v Dowden*¹⁶ involved the imposition of a remedial constructive trust. In that case, an unmarried couple had contributed unequally to the acquisition of a house which they purchased in joint names. The House of Lords by a majority of 4 to 1 held that, *prima facie* they held the beneficial interest in the house equally (as equity followed the law), but that the course of dealing between them could justify a departure from this conclusion. I am probably not the best person to discuss this case, as I was the minority of one, who thought the analysis and views of the majority somewhat heretical and impractical, and involved an unjustified wrecking of the well-established resulting trust principle, and the replacement of a relatively certain outcome by an uncertain outcome. So I suppose that, at least to that extent, it was consistent with some of the undesirable aspects of a remedial constructive trust.

¹⁶ [2007] UKHL 17, [2007] 2 AC 432.

17. In *Stack*, the majority speech of Lady Hale¹⁷ suggested that the court could impute an intention to parties when deciding how a property was to be held. I strongly disagreed with that view¹⁸, on the basis that it was perfectly valid to imply or infer an intention, but quite wrong in principle to impute an intention in such circumstances. I think that my disagreement is supported to a significant extent by the opinions in a subsequent Supreme Court decision concerned with a similar problem, *Jones v Kernott*¹⁹, to which two of the majority in *Stack* were parties but I was not. That decision has effectively confirmed the decision in *Stack*, so, whatever I may have thought, it now plainly represents the law. However, for present purposes, I would suggest that the important point is that *Jones* largely puts to sleep the ambitious notion that in *Stack*, the majority of the House of Lords were adding insult to injury by sleepwalking their way into importing the remedial constructive trust into English law. The notion of imputation was rejected²⁰. As Lord Walker and Lady Hale explained in *Jones*²¹, the majority in *Stack* held that the presumption of equality can be displaced by the common intention of the parties gathered from words and actions both before and after the property is acquired: it has nothing to say about remedial constructive trusts, a point supported by Lord Collins in his summary of the law in *Jones*²². It appears likely that Sir Terence recognises this, in the light of what he said judicially in *Crossco*²³ three years after his article appeared.

¹⁷ *Stack*, para 61

¹⁸ *Ibid*, paras 125-126

¹⁹ [2011] UKSC 53, [2012] 1 AC 776

²⁰ Para 64 (Lord Collins), para 73 (Lord Kerr) and para 88 (Lord Wilson)

²¹ at para 51

²² at para 60

²³ See footnote 7

18. I must confess there is a small chink of darkness (if you can have a chink of darkness) in the *Jones* decision. That is because there does seem to be room for the court to apportion on the basis of what it thinks is fair and reasonable, at least according to four of the five members of the court, in a case where it is clear that the parties intended to share, but it is completely unclear in what proportions²⁴. However, I question that view: surely it is precisely in those sorts of circumstance where presumptions, whether resulting trust or equality, come into their own. I mention this aspect of *Stack* and *Jones* because it seems to me that allocating beneficial interests by reference to what the court thinks is fair and reasonable has features of similarity with an institutional constructive trust, in that it involves the parties' rights being determined not by what they did, said or understood at the relevant time, but by what a court subsequently thinks it right to decide or to attribute to them.

19. However, for present purposes, the essential point is that, even in this connection, fairness and reasonableness only come into it once the court concludes that there is an institutional trust: it merely fills the gap, where there is one, as to how the beneficial interest under that institutional trust are to be assigned. Incidentally, I note that the four Justices who took this view were generally of the opinion that such considerations of fairness would rarely arise²⁵ – perhaps something of a giveaway that they were somewhat uncomfortable about it. Further, it only arises

²⁴ See *Jones* paras 31-2 and 51(4) (Lord Walker and Lady Hale), para 64 (Lord Collins), and para 75 (Lord Kerr)

²⁵ See *Jones* para 34 (Lord Walker and Lady Hale), para 65 (Lord Collins)

in the domestic context, where some (not me) may think certainty is less important. Accordingly, the fact that imputation was rejected by the Supreme Court in *Jones*, even though they left the door faintly ajar to fairness, represents, I would suggest, another slight nail in what should be a firmly closed coffin for the corpse of the remedial constructive trust.

20. For completeness I should mention another House of Lords case in which I was involved (a unanimous decision, I might add), *Thorner v Major*²⁶. In that case, Lord Scott suggested that he based his decision on a remedial constructive trust. However, when one examines his reasoning in the subsequent and substantive part of his judgment, it appears to me that he was not relying on that at all²⁷. In my view, he was either relying on an estoppel or on a classic institutional constructive trust, and that becomes particularly clear once one examines the cases he cited in support of his conclusion. In any event, the other four Law Lords in *Thorner* clearly and explicitly based their decision on proprietary estoppel, and nothing they said could be cited in support of a remedial constructive trust.

21. The position in other common law jurisdictions is less satisfactory – at least if the sceptical view I am proffering is correct. In Canada, the remedial constructive trust has been adopted, as decisions such as the *LAC Minerals case*²⁸ and

²⁶[2009] UKHL 18, [2009] 1 WLR 776, para 14

²⁷*Ibid*, para 20

²⁸ *LAC Minerals Ltd -v- International Corona Resources Ltd* [1989] 61 DLR 14, 51

*Korkontzilas -v- Soulos*²⁹ establish, although the adoption has its problems as I shall seek to show.

22. In Australia, the notion of a remedial constructive trust seems to have proved to be, at least arguably, acceptable, although there appears to be a degree of inconsistency, which is one of the undesirable consequences of the introduction of this, as I argue, heretical concept. Judgments in High Court cases such *Muschinski v Dodds*³⁰ *Giumelli*³¹ and *Agnew*³², as well as the more recent *Farah Constructions*³³ and *Bathurst City Council*³⁴, appear to involve the conclusion that the remedial constructive trust exists in Australian law. However, I am not entirely sure whether they are strictly all remedial rather than institutional constructive trusts.

23. In New Zealand, Tipping J in the Supreme Court has applied a remedial constructive trust remedy in the *Regal Castings* case in 2008³⁵, and Blanchard and Wilson JJ appear to have agreed³⁶. However, although Tipping J briefly explained³⁷ the nature of a remedial constructive trust and relied on *Westdeutsche* and Sir Terence's article as well as an earlier decision of the New Zealand Court of Appeal³⁸, the *Fortex Group* case, there was no express discussion of the

²⁹ [1997] 146 DLR 217, 227

³⁰ [1985] HCA 78; (1985) 160 CLR 583

³¹ *Giumelli v Giumelli* [1999] HCA 10; (1999) 196 CLR 101

³² *Secretary, Department of Social Security v Agnew* [2000] FCA 59; (2000) 96 FCR 357

³³ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 230 CLR 89

³⁴ *Bathurst City Council v PWC Properties Pty Ltd* [1998] HCA 59; 195 CLR 566, paras 38-42

³⁵ *Regal Castings Limited v Lightbody* [2008] NZSC 87; [2009] 2 NZLR 433, para 162

³⁶ *Ibid*, para 78

³⁷ *Ibid*, footnote 194

³⁸ *Fortex Group Ltd (in receivership and liquidation) v MacIntosh* [1998] 3 NZLR 171

implications. Furthermore, as Tipping J himself said in his judgment in the *Fortex Group* case, that case did not require the court to decide “whether the so-called remedial constructive trust should be confirmed as part of New Zealand law”.

24. Whatever may have been happening in other common law jurisdictions, the only real authorities in England and Wales which can be said to support the idea that English law has embraced the remedial constructive trust is something of a throw-away *obiter* line in Lord Redesdale’s judgment in *Hovenden v Annesley*, picked up in something of a throw-away *obiter* line from one of three members of the Court of Appeal in *Metropolitan v Heiron*. It is fair to say that Lord Redesdale’s judgment has the accolade not only of being cited with approval and followed by the UK Supreme Court this year, but of having been described as a “classic” by Lord Justice Millett in his very impressive judgment in the *Paragon Finance case*³⁹.

25. However, ironically, Peter Millett is one of the strongest critics of the remedial constructive trust, as his impressive article in the 1998 Law Quarterly Review demonstrates⁴⁰. Judicially, as Lord Millett, he has emphasised the importance of distinguishing between “vindicating rights of property” and “reversing unjust enrichment”⁴¹, in a case, *Foskett v McKeon*, where Lord Browne-Wilkinson referred to the fact that the plaintiffs were “claiming a proprietary interest in the

³⁹ *Paragon Finance v DB Thackerar & Co* [1999] 1 All ER 400, 408h

⁴⁰ See footnote 3

⁴¹ *Foskett v McKeown* [2001] 1 AC 102 2

policy monies and that such proprietary interest is not dependent on any discretion vested in the court”⁴².

26. As I put it in 2011 in a case in the Court of Appeal⁴³, which it is fair to say was the case which, together with six colleagues, I subsequently overruled in the Supreme Court *FHR* case⁴⁴ (albeit in relation to another issue): “Whether a proprietary interest exists or not is a matter of property law, and is not a matter of discretion: see *Foskett v McKeown* ... per Lord Browne-Wilkinson, It follows that the courts of England and Wales do not recognise a remedial constructive trust as opposed to an institutional constructive trust”. In other words, the doctrine of the discretionary remedial constructive trust offends against the fundamental principle that property rights are a matter of strict law not discretion. In the 1998 case of *re Polly Peck Ltd (No 2)*⁴⁵, Nourse LJ said, with real justification it may be thought, that “we must recognise that the remedial constructive trust gives the court a discretion to vary proprietary rights. You cannot grant a proprietary right to A, who has not had one beforehand, without taking some proprietary right away from B. No English court has ever had the power to do that, except with the authority of Parliament”.

27. There is an important point there. There must at least be a serious argument that judges should not go around altering property rights and property ownership, in

⁴² Ibid 108

⁴³ *Sinclair Investments (UK) Ltd v Versailles Group plc* [2012] Ch 453, [2011] EWCA Civ 347, para 37

⁴⁴ *FHR* referred to in footnote 2

⁴⁵ [1998] 3 All ER 812, [1998] EWCA Civ 789

a way and in circumstances which are not sanctioned by statute, and which do not accord with well-established principles laid down by the judges over the years. One can properly question whether it is appropriate as a matter of principle for judges to decide today that, in a certain state of affairs, property can in practice change hands, whereas it would not have done so in the past. The question is all the more pertinent given that the new rule depends on judicial discretion, and given that we are now in a world heavily regulated by statute. Should not the creation of new property rights be left to Parliament? If social, commercial or technological changes have given rise to new circumstances which appear to justify the ability to create or transfer new property rights, I wonder whether even that would be enough – and anyway it does not apply here. In these days of human rights, especially the right to enjoyment of property under article 1 of the first protocol to the European Convention and its analogues in other conventions, charters and constitutions, I wonder whether it can be proper for the courts to change the law by creating or importing a remedial constructive trust. The Law Lords have held in more than one case in the past ten years that, for reasons which are not dissimilar, the courts should not invoke the common law to create new crimes⁴⁶.

28. There is also a powerful case for saying that a remedial constructive trust offends against another fundamental principle, namely that the law should be as a clear and certain as possible. Particularly, in these days of expensive litigation and

⁴⁶ See eg *Norris v United States of America* [2008] UKSC 16, [2008] 1 AC 920, at paras 52-56 and the cases there cited

complex and cross-border commercial transactions, it is more necessary than it ever was for the law to be predictable. I accept that the common law has achieved its world-wide success partly because of its flexibility and practicality, its pragmatism. But that does not mean that judges have a free hand to change the law as they think fit. On the contrary. The common law has also achieved its success because of the importance it attaches to precedent, which means predictability. If judges go around inventing unpredictable unprincipled forms of relief, we risk undermining the international allure of the common law. And if we look for judicial guidance as to when the courts would impose a remedial constructive trust, we get little help. Hand-waving suggestions such as “when it is just”, or, as it has been put in a Canadian case, when it is not “unjust in all the circumstances”⁴⁷ is all we get. Even though that formulation comes from McLaghlin J, no less, we are in Lord Chancellor’s foot territory.

29. The lack of clarity is illustrated by another problem to which I have also briefly referred, namely as to when the remedial constructive trust actually arises – when the court decides it exists, when the facts which gave rise to it occurred, or on a date selected by the court? The uncertainties become painfully clear if one reads the judgment of the full Federal Court of Australia in *Parsons v McBain*⁴⁸, where they said that the cases displayed “a divergence of views as to when a [remedial] constructive trust ... arises”, and then examined the cases. In an interesting

⁴⁷*Korkontzilas -v- Soulos* [1997] 146 DLR 217, 227

⁴⁸ [2001] FCA 376

analysis in a 2009 case⁴⁹, Ward J in the New South Wales Supreme Court rightly said, “As a general statement of principle, a constructive trust will be treated as coming into existence at the time of the conduct which gives rise to the trust”⁵⁰, and the uncertainties and problems which arise if one departs from that elementary and clear principle are apparent when one reads the ensuing twenty paragraphs, and the analysis of statements from a number of cases, many of them in the High Court and already referred to. If it takes effect retrospectively, it is getting close to being an institutional constructive trust; if it takes effect on the date of the court order, that would be arbitrary in theory and often avoidable in practice. If it takes effect when the court decides, then some might say that the judges may all just as well close our courtrooms and head for the palm trees.

30. Another arguably connected concern about the remedial constructive trust is that, even in Canada where it seems to have taken root, it is seen as a remedy which should rarely be available. In his judgment in the *LAC Minerals case*⁵¹, La Forest J said that:

“The issue of the appropriate remedy only arises once a valid restitutionary claim has been made out. The constructive trust awards a right in property, but that right can only arise once a right to relief has been established. In the vast majority of cases a constructive trust will not be the appropriate remedy”.

⁴⁹ *Australian Building & Technical Solutions Pty Limited v Boumelhem* [2009] NSWSC 460, paras 143-165

⁵⁰ *Ibid*, para 144

⁵¹ *LAC Minerals Ltd -v- International Corona Resources Ltd* [1989] 61 DLR 14, 51

One finds the same caution in Australia, where the High Court has said that “Ordinarily relief by way of constructive trust is imposed only if some other remedy is not suitable”⁵².

31. When a judge refers to a new right or remedy being rarely appropriate or a last resort, a warning light should start to flicker in the reader’s brain. First, the fact that a judge describes a remedy as being granted rarely or exceptional is a sign that the judge may be (and I emphasise the “may be”) about to cheat. Secondly, as the UK Supreme Court has pointed out, to describe a remedy or right as being available only in exceptional circumstances is of little assistance to practitioners and litigants. It gives no principled or practical guide as to how the court will approach the issue, as exceptionality is an outcome not a guide⁵³. Thirdly, in these days of expensive litigation and complex and cross-border commercial transactions, Judges should not be introducing new, unpredictable and controversial remedies particularly if they are only likely to be considered in a small number of cases. The game is not worth the candle. Fourthly, and conversely, how often have judges introduced a new concept with the promise or prediction that it will only be invoked in exceptional circumstances, only for the remedy to become standard fare?

⁵² *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 230 CLR 89, at para 200

⁵³ *Pinnock v Manchester City Council* [2010] UKSC 45, [2011] 2 AC 104, para 51

32. My next concern is based on the horns of a dilemma which the proponents of a remedial constructive trust must face. Either the imposition of such a trust wrongly prejudices unsecured creditors of an insolvent defendant (and may even be precluded by statute), or one of its main *raison d'être* is blown out of the water. If a plaintiff has a non-proprietary claim against a defendant, there is, at least normally, little point in giving the plaintiff a remedial proprietary interest unless (i) the defendant is or may become insolvent or (ii) the plaintiff would benefit by the right to trace or follow. So far as the defendant's insolvency is concerned, it seems to me highly questionable whether it could be appropriate for a court to exercise a discretionary power to give an unsecured creditor security against an insolvent defendant: it would involve the court being close to granting a fraudulent preference. This doubt was effectively recognised in Canada, a jurisdiction which, as I have mentioned, enthusiastically recognises remedial constructive trusts. In the 1997 case of *Korkontzilas*⁵⁴, the future Chief Justice of Canada, McLachlin J said that “[t]here must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; eg the interest of intervening creditors must be protected.” In England, Mummery LJ in *Polly Peck case* in the Court of Appeal went further and has recognised that “the effect of the statutory scheme applicable on an insolvency is to shut out a remedy which would, if available, have the effect of conferring a priority not accorded by the provisions of the statutory insolvency scheme”⁵⁵.

⁵⁴ [1997] 146 DLR 217, 227

⁵⁵ Per Mummery LJ in *re Polly Peck Ltd (No 2)* [1998] EWCA Civ 789, [1998] 3 All ER 812

33. The suggestion that it is inappropriate to interfere with insolvency priorities has a real resonance for me in the light of the Supreme Court's decision last year in *In re the Nortel and Lehman companies*⁵⁶. The issue before the court was how a potential liability under a complex statutory system of a company in insolvent administration to contribute towards group pension liabilities was to be ranked. Having decided that the liability was to be treated as an ordinary unsecured debt as a matter of principle, we had to deal with an argument that the court had a residual discretion to direct a liquidator or administrator to accord a debt a higher (or, presumably, a lower) ranking than it was accorded under the statutory insolvency scheme. We rejected that argument on the ground that it "would involve a judge effectively overruling the lawful provisions of a statute or statutory instrument" and because it "would also be highly problematic in practice because it would throw many liquidations and administrations into confusion: the law would be uncertain"⁵⁷. That logic may be said with force to justify challenging the notion that, if it thought it appropriate to do so, the court could create a resulting trust in favour of one creditor in respect of part of a debtor's property and thereby remove it from the debtor's estate.

34. So one of the three benefits of a proprietary interest, namely added protection in the event of the debtor's insolvency, seems to be, at any rate largely, gone up in flames. What about another one, namely the ability to follow or trace? As Lord

⁵⁶ [2013] UKSC 52, [2014] AC 209

⁵⁷ *Ibid* para 116.

Millettt explained in *Foskett v McKeown*⁵⁸, tracing means pursuing the benefit acquired into other assets acquire by the defendant in place of or with the benefit, and if those other assets have increased in value the plaintiff can get that increase. On the other hand, as Lord Millettt said, following means pursuing the benefit (or its proceeds) into the hands of third parties, provided that they are not bona fide purchasers for value without notice. In Lord Millettt's opinion in that case there is a hint that, in his view a plaintiff need not have a proprietary interest in order to follow or trace.

35. Writing extra-judicially⁵⁹, Lord Millettt has expressed that view more unequivocally, but without citing any authority in support. I wonder about that: unless there is property in which the plaintiff has an interest, what is there to follow or trace? However, if Lord Millettt is right (and he normally is) then that is the end of the second alleged benefit of the remedial constructive trust. But, even if Lord Millettt is wrong, I suspect that, at least so far as tracing is concerned, the benefit of the remedial constructive trust will often be academic.

36. In an impressive judgment of the English Court of Appeal in the recent case of *Novoship (UK) Ltd v Nikitin*⁶⁰, Longmore, Moore-Bick and Lewison LJJ, held that even where a plaintiff only had a non-proprietary claim for equitable compensation, he could, as a matter of the court's discretion, be required to account for any profit which he had made, if, although not himself a fiduciary,

⁵⁸ [2001] 1 AC 102, 127

⁵⁹ See footnote 3

⁶⁰ [2014] EWCA Civ 908

he became mixed up in breach by another of a fiduciary duty (ie as a dishonest assister or a knowing recipient). As the Court of Appeal said

“There is now a body of modern case-law at first instance which recognises that the court has the power to order an account of profits against a dishonest assistant, even where no corresponding loss has been suffered by the beneficiary”⁶¹.

While the court’s power to order an account of profit is circumscribed and discretionary, as the facts of that case show, I wonder how many cases there could be where, unless a remedial constructive trust could be granted, the court would not have power to award an account of profits without such a trust. Further, as the actual result in that case indicated, the right to an account of profits is discretionary and it was not accorded to the claimant in that case. (In the light of my earlier comments, and because the decision may be appealed, I express no view as to whether *Novoship* is right or wrong. The fact that I think it an impressive judgment does not mean that I think it is right – or wrong).

37. So far as following is concerned, I doubt that it is of much value where the defendant is solvent, and, when he is not, legislation should have appropriately muscular provisions to enable a liquidator or trustee in bankruptcy recover transfers by the insolvent at an undervalue. I readily acknowledge that many people may think that the United Kingdom statutory provision which seeks to achieve this aim, section 423 of the Insolvency Act 1986, is rather weaker than contemporary standards might think appropriate. However, as I have already

⁶¹ Ibid para 71

indicated, it is highly questionable whether the courts should be constitutionally entitled to invent a new proprietary discretionary remedy because it considers that the legislature has provided insufficient protection. The point, in other words, is for the legislature not for the courts. Indeed, the fact that the legislature has dealt with the point, albeit that some may think inadequately, is a strong indicator that the courts should not intrude with new and additional remedies.

38. As I have mentioned, there must also be a question as to whether there is any point in the remedial constructive trust, especially if it cannot be invoked to steal a march on unsecured creditors. In *Polly Peck*, Nourse LJ pointed out that the Canadian cases which had been purportedly decided on the basis of a remedial constructive trust would have been decided the same way by an English court without the need to invoke this heretical construct, often through the medium of proprietary estoppel – the basis of the decision of the Supreme Court in *Thorner* to which I have referred. Furthermore, once a plaintiff has a money judgment, he can of course enforce it by obtaining a charging order over specified property of the defendant. A charging order substantially gives security, and therefore legislation and well established common law principle has prescribed the extent to which a plaintiff with a non-proprietary claim can be awarded security by the court, and it is at the enforcement stage. The charging order remedy also calls into question the one alleged benefit of the remedial constructive trust which I have not so far dealt with, the ability to enforce a debt established in court against the defendant's assets.

39. The argument as to whether or not we should recognise the remedial constructive trust is but one battle in a never-ending war. That war is between those who advocate the notion that equity should have rules which are clear and principled, so that outcomes can be predicted with confidence, and those who support the view that equity is concerned to be flexible and fair, so that outcomes in individual cases can be seen to be just. In the today's increasingly litigious and fast moving world, with expensive and time consuming litigation, and international contracts, there is a great deal to be said for the latter approach. A judge should not be too easily swayed by his or her perceptions of the moral merits of a particular case. First, the view is subjective, and may be highly influenced by the personality of the witnesses and may depend on the identity of the judge. Secondly, to cheat on the law may actually harm the successful party, who may lose on appeal and find himself paying two sets of costs. Thirdly, and most relevantly and most importantly, even if an unorthodox judgment may appear to achieve a fair result in the case before the Judge, it may not produce a just result, and it risks introducing considerable uncertainty of outcome, in a large number of cases which are unknown and unknowable to the Judge. Parties engaged in litigation are entitled to justice, of course, but justice is in accordance with the law, and the law is for everyone, not just for the parties.

40. I am very far from suggesting that fashioning new rights or new remedies can be ruled out. Equity it has famously been said is not beyond child-bearing⁶². Nor should it be. Judges have a duty to develop the common law and equity, particularly in the present fast changing world. And we are not afraid to do so. Thus, in the 1970s, the English courts famously developed the Mareva injunction⁶³ and the Anton Pillar order⁶⁴, giving judges new powers to pre-empt the frustration of judgments and the right to disclosure. But, as any student of earlier editions of Meagher, Gummow and Lehane's treatise on Equity⁶⁵, or any follower of US Supreme Court judgments will know, those developments, while enthusiastically invented and applied in the English and Welsh courts, have their strong critics.

41. So too in the *Cambridge Gas* case in the Privy Council, with his characteristic bravura, Lord Hoffmann has invented and developed the "principle of universality" in the field of cross-border insolvency⁶⁶. However, it is fair to say that that principle has to some extent been called into question by Lord Collins in the Supreme Court in the subsequent *Rubin* decision⁶⁷, and the Privy Council is shortly to give a judgment which considers the principle in more detail, but unfortunately I cannot say more about that today.

⁶² Per Lord Denning MR in *Eves v Eves* [1975] 1 WLR 1338, but he did not originate this statement

⁶³ As discussed in *AJ Bekhor & Company Ltd. v Bilton* [1981] QB 923

⁶⁴ *Piller KG v. Manufacturing Processes* [1976] 1 Ch 55 at 61

⁶⁵ Meagher, Gummow and Lehane, *Equity: Doctrine and Remedies* eg the fourth edition

⁶⁶ *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors* [2006] UKPC 26, [2007] 1 AC 508

⁶⁷ *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] AC 236 and see also *McGrath v Riddle* [2008] UKHL 21, [2008] 1 WLR 852,

42. What this all shows is that judges should undoubtedly be prepared to innovate, but that we should also be very careful before we do so. Even if I have exaggerated the case against the remedial constructive trust, as many may well think I have, it may be said with force that the onus is very much on those who speak in favour of the remedial constructive trust. If it is not necessary to adopt a novel form of judicial discretionary power which interferes with well-established property rights, then, many may think, it is necessary not to adopt that power. So, my argument concludes with the suggestion that the remedial constructive trust represents an unnecessary weapon in the judiciary's armoury, a book too many in equity's library, and a discretion too many in a Chancery judge's locker.

David Neuberger

Queenstown

New Zealand

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