

Trusts arising by operation of law – constructive, resulting

Typology of trusts

- An express trust is created when a settlor *exercises* her powers of ownership to create it.
- Resulting trusts are based on *presumptions* about the settlor's intention to create a trust. (but trust failed).
- In contrast, the law itself *imposes* constructive trusts in circumstances where it would be unconscionable for the owner of property not recognise someone else's rights to the property. (even if the person did not intend to be bound by a trust)

Resulting trusts

- What is a resulting trust?
- "A transfers property to B, and B ends up holding that property on trust for A"
- 'Resulting' means "jumps back"; although it seemed like A lost their beneficial interest, it went back (or never left them)
- *Westdeutsche Bank v Islington* p. 708
- Resulting trust arises:
 - Voluntary payment from A to B or A pays the purchase price for property vested in the name of B, B becomes the legal owner but presumption property or money held on trust for A.
 - If A has only put in some of the money where property purchased, a proportionate share of property vested in B held on trust for A
 - If A transfers property to B on express trust but trust declared does not exhaust the whole beneficial interest i.e. some property not distributed.
 - Lack of certainty of object, which means there was no trust.

'Automatic' (Failure to dispose) Resulting Trusts

- These should be familiar... *McPhail v Doulton*, *Morice v Bishop of Durham*, *Choithram*
- Failure of express trusts – eg uncertainty of objects, non-charitable purposes
- *Re Vandervell (No 2)*: "The resulting trust here does not depend on any intentions or presumptions, but is the automatic consequence of A's failure to dispose of what is vested in him. ... the resulting trust does not establish the trust but merely carries back to A the beneficial interest that has not been disposed of"
- Where there is a failure to establish an express trust, the trust property automatically returns to where it came from – not necessarily a presumption

Presumed Resulting Trusts

- Presumption of resulting trust: if no other evidence,
- (i) gratuitous transfer of property or (ii) payment of purchase price of property is seen to be owned beneficially by the person providing the property or value
- Presumption can be rebutted by evidence of nature of transaction, eg gift or loan
- Counter-presumption of advancement where A is in relation of parent-child or husband
- *Crampton-Smith v Crampton-Smith*
- But Property (Relationships) Act 1976, s 4
- Registered legal titleholder of the land not the real owner – real beneficial owner is the beneficiary who has paid the purchase price or who previously held the land before gratuitously gave it to someone else for no consideration.
- Resist presumption by bringing evidence of actual intentions of transaction eg. gift, loan or transfer without trust relationship

Crampton Smith
<p>Facts:</p> <ul style="list-style-type: none"> • Brother paid purchase price and argued property was held on trust for him by his sister despite the absence of formalities i.e. written trust deed. • Intention irrelevant as brother showed that he had paid the purchase price, therefore presumption of resulting trust arises. • Sister was registered title holder. She subdivided and built over land which brother had paid the purchase price of \$100,000 for. She subsequently sold sections for \$511,000. • Seems unjust for brother to say sister held property on resulting trust for him. • HC: brother's evidence was not credible – thought it was a loan.
<p>Result:</p> <ul style="list-style-type: none"> • CA: overturned HC because of resulting trust presumption • Sister provided no evidence to rebut the presumption • Presumption arises where the brother paid the purchase price but the land was registered in his sister's name. • Remedies took into account extra value put in by sister as inequitable for brother to take the benefit of the subdivision. However, the sister had to pay the total value for which the sections ultimately sold for i.e. the entire value of the property held on trust.

Constructive trusts

“A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property ... to assert his own beneficial interest in the property and deny the beneficial interest of another. ... the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control [or other circumstances] make it unconscionable for him thereafter to assert a beneficial interest [or full beneficial interest] in the property.”

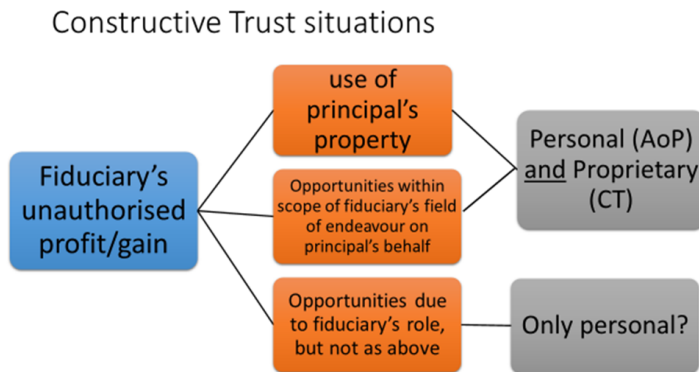
- *Paragon Finance v Thakerar* [1998] EWCA Civ 1249
- Constructive trust arises when unconscionable for constructive trustee not to recognise they were bound to holding property on trust for another person.
- Unlike express trust as not the trustee's intention that they were bound by the trust.

Kinds of Constructive Trust

- *Re Rose, Choithram*: transfers not valid at law, but given effect to in equity eg. settlor has done everything necessary to effect the transfer of property
- *Walsh v Lonsdale* from LAWS 301 – contracts for the sale of land (and for other property interests in land) once it is enforceable
- Defendant unconscientiously asserts legal ownership of property to which another has contributed: *Lankow v Rose; Murrell; Vervoort*
- Fiduciary improperly profits from his or her fiduciary position: *Keech v Sanford, Regal v Gulliver, Boardman v Phipps, Chirnside*
- Important proprietary consequences if there is a constructive trust – especially in insolvency where there is a property right to the trust property

Q: How does Equity respond to breaches of fiduciary duties?

Breach of fiduciary duty

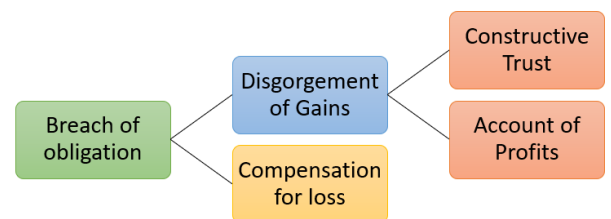


Constructive Trust situations

- Where breach of FD involves actually using trust property to make unauthorised gains
- Where breach of FD involves using opportunities arising out of fiduciary position: *Keech v Sanford*, *Regal v Gulliver*, *Boardman v Phipps*
- Third category is unclear: where breach of FD does not involve using trust property or opportunities that should have been exploited for principal; eg fraud, bribery, other kinds of secret profits
- A number of English cases hold that there is only a personal liability to account
- Chirside, Keech, fiduciary has to disgorge the gains and provide an account of profits
- Or can say generally there is a constructive trust to receive a property right
- Or if property gains in value, assert a constructive trust so receive get all the gains
- In some cases eg. Boardman it is unclear if discussing constructive trust or an account of profits
- Unclear over the proper position whether CT is available when a fiduciary breaches their FD and makes a gain or if a special category where CT did not apply eg. in bribery or secret profits made by fiduciary in the course of acting on beneficiary's behalf

Attorney-General for Hong Kong v Reid

- Reid as DPP of HK takes bribes in exchange for not pursuing prosecutions. Invests in houses in Tauranga, which increase in value. AG HK lodges caveats in NZ against houses
- HC and CA in NZ find no proprietary rights; Reid only has personal duty to account
- What is the basis for saying that the claim in *Attorney-General for HK v Reid* is proprietary?
- *Lister v Stubbs* – can it really be that bribes paid to a fiduciary are the **property** of the principal? If the fiduciary makes a profit outside the scope of their fiduciary duties eg. bribe, then it was never meant to be taken for the principal. There is only personal liability and no CT – exception to fiduciaries making a profit which is held on CT



AG for HK

Facts:

- AG for HK: constructive trust over bribes held for principal as want to apply proprietary interest through tracing as bribes turned into land. Proprietary claim worth more as bribes now more valuable as a housing asset.
- Otherwise claiming Reid owes the value of the bribe and an account of profits, which is a personal obligation.
- Issue: whether certain breaches of fiduciary obligations where gains will not be considered to be have been held on trust following Lister as bribes are not held on CT. There is only a personal requirement to account for the gain.
- Consequence is if the fiduciary went insolvent – the principal can claim that its their property if there is a CT. Principal can also claim any consequential gains from value of property.

Result:

- Lord Templeman: bribes can be held on CT as it is the same as a fiduciary making a profit in the context of a fiduciary relationship. No reason to retain an exception to the rule
- Bribes offered belong to the recipient as they have title over the bribe but equity will require them to hold it on trust for the principal
- Equity considers as done what ought to have been done – here the bribe ought to have been handed to the principal as soon as it was taken.
- Contrary to longstanding English authority
- Aligns remedies for all kinds of gains fiduciaries may make and dispenses with separate categories on the different means by which fiduciary has made the gains.

Sinclair v Versailles [2011] EWCA 347 [link](#)

- Ponzi scheme makes business seem more valuable and shares are sold for huge profit
- Principal claims proprietary rights in proceeds of share sale, as profits were gained in breach of FD
- EWCA reviews authority and principle, concluding [88]-[89] that there is no proprietary right to assets obtained in breach of FD unless
 - (1) obtained through **funds previously owned** by principal or
 - (2) **derived from opportunities** that should have been taken up for the principal

Sinclair

Facts:

- Ponzi scheme where fictitious profits paid to investors when money used for fraudster's own purposes
- Fraudster purchased shares which sold for a profit in breach of FD
- Investors: profits held in CT.

Results:

- Wrong to follow PC in Reid where bribes and secret commissions give rise a constructive trust.
- Bribes and secret commissions are different from other kinds of gains made in breach of FD
- Retained distinction in Lister v Stubbs. CT only arises if gains were actually made using fiduciary funds or using an opportunity which should only be taken by the principal

- Bribe came into fiduciary's hands not derived from principal's property or an opportunity the fiduciary should have received from the principal. Not connected to the principal.
- Investors only entitled to an account of profits – a personal remedy. Captures further gains made so fiduciary does not benefit, not limited to the bribe itself and do not need to impose a CT.

[88] “a beneficiary of a fiduciary's duties cannot claim a proprietary interest, but is entitled to an equitable account, in respect of any money or asset acquired by a fiduciary in breach of his duties to the beneficiary, unless the asset or money is or has been beneficially the property of the beneficiary or the trustee acquired the asset or money by taking advantage of an opportunity or right which was properly that of the beneficiary.”

FHR v Cedar Capital

- Agent for purchaser takes secret/undisclosed commission from vendor
- Possible rules – see arguments in [10]-[11] and [30]-[31]; authorities divided [13]-[28]; big academic debate [29]
- Is the distinction going to be about whether property should have been obtained for the principal by the agent/fiduciary? [34], [10]
- Key reasons
 - While legal authority (precedent) divided, argument against proprietary remedy not well founded eg [47]- [50]
 - No right answer “as a matter of pure legal authority” [32]
 - Strict conflict of interest principle applies to such cases [33], [37], [40]
 - **The CT rule is good as a matter of principle** – bribery is bad [42]; principal may have been disadvantaged [37], [43]; allows tracing [44]; fiduciary must disgorge the ‘whole benefit’ [41]
 - Simplicity vs uncertainty [35]; Harmonising common law in different jurisdictions [45]

Result:

- Followed Reid not merely because of a desire for a coherent common law but also for policy reasons
- Overturned Sinclair.
- “it is not possible to identify any plainly right or plainly wrong answer to the issue of the extent of the Rule, as a matter of pure legal authority.”
- Legal principles do not tell us if bribes and secret commissions should be held on CT
- Rejected the need to draw a distinction between different kinds of profits
- Followed simple rule: every time there is a breach of fiduciary duty and a gain is made then the principal can claim that there was a CT. Principal can trace bribes and secret commissions
- Secret commissions can be made to the detriment of the principal.
- Eg. Buyer may have been able to pay 10 million euros less for the hotel if there was no secret commission paid to the fiduciary and a gain was made which was not authorised.
- Bribery is bad from a policy perspective
- Strange that a gain made from a bribe leaves the fiduciary better off and the principal with a less secure remedy than if the fiduciary had breached their duty in more innocent circumstances.
- Insolvency point not determinative.

- If recognise a CT where a fiduciary is insolvent, the principal receives the benefit of their proprietary right but other creditors lose out.

- Generally for breach of trust similar to common law remedy in terms of losses, restore them to the position they would have been in had breach of fiduciary duty not occurred. If could show they would have sold at a higher price, that would be the remedy