

The Constructive Trust in English Law

Hon Mr Justice David Hayton, Caribbean Court of Justice

Distinguish property held on constructive trust and persons treated as constructive trustees so that they can be made liable to pay compensation

Two situations must be clearly distinguished. First, there is the *proprietary* liability that automatically arises when the court declares that on the happening of certain past events specific property owned by a defendant immediately became held by him on constructive trust for other persons or for himself and another. This specific property or its traceable equivalent is held on trust for the beneficiaries and is not part of the defendant's estate to pass on insolvency or death to creditors or heirs.

Second, there is the *personal* liability to pay compensation of a defendant who was not a trustee or a fiduciary subject to trustee-like duties but who became involved in a breach of trust or fiduciary duty and whose unconscionable or dishonest behaviour justifies the courts in treating him constructively as if he had been a trustee from the date of such behaviour so that he can be made personally liable. There are two classic instances.

First, a defendant's dishonest assistance of a trustee's or fiduciary's breach of duty makes him personally liable to the same extent as the trustee or fiduciary.

Second, where a defendant actually received trust property in breach of trust, other than as a bona fide purchaser without notice of the trust, he holds it on a proprietary constructive trust to give effect to the express trusts by returning it to augment the trust fund. Any personal liability, however, only arises when he becomes aware of the express trust yet dishonestly does not return the trust property to augment the trust fund.

The imposition of personal liability by treating a defendant as a constructive trustee is a remedy

It is clear that when no remedy is available at common law because a defendant's wrongful interference has been with a proprietary relationship recognised only in equity, the constructive treatment of the defendant as if he had been a trustee, liable on the same principles as trustees, is in order to provide a remedy.

The automatic recognition of certain types of events as always giving rise forthwith to a constructive trust in respect of particular *property* is not a remedy but an acceptance of a position established under the law of property

In some jurisdictions e.g. Canada, Australia and New Zealand, constructive trusts automatically arise in a limited number of traditional instances like secret trusts. There are, however, increasing circumstances where the courts first establish whether or not there was a breach of some duty and, if there was, the courts in their creative discretion then consider the most appropriate remedy to award, whether a personal liability to pay compensation or disgorge profits or the imposition of a proprietary constructive trust in the claimant's favour over particular property of the defendant to take effect prospectively or retrospectively from a specific time.

In English law it is well-established at the Court of Appeal level (as accepted in *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd* [2005] EWCA Civ 722 at [42]) that the courts have no discretion to impose a remedial proprietary constructive trust in circumstances where they consider it just: their judgments are confirmatory not creative. Property rights established before a person's insolvency cannot be adjusted in contravention of the statutory rules applicable to insolvencies, while, in any event, variation of property rights requires to be permitted by legislation like the Variation of Trusts Act 1958 or the Matrimonial Causes Act 1973: see *Re Polly Peck International Ltd (No 2)* [1998] 3 All ER 812 at 827 & 831 per Mummery & Nourse LJ.

Lord Browne-Wilkinson, however, in *Westdeutsche Landesbank v Islington BC* [1996] AC 696 at 716 has adverted to the possibility of English law developing a remedial proprietary constructive trust, though subsequently in *Foskett v McKeown* [2001] 1 AC 102 at 109 he stated. "It is a fundamental error to think that because certain rights are equitable, rather than legal, such rights are in some way discretionary. This case does not depend upon whether it is fair, just and reasonable to give the purchasers an interest as a result of which the court in its discretion provides a remedy." Nevertheless, Sir Terence Etherton, the current Chancellor of the Chancery Division, has suggested developing equitable proprietary estoppel principles to provide a discretionary remedial constructive trust by way of a 'mere equity' arising upon the occurrence of particular events *before* a claimant brings his case. Such 'mere equity' if satisfied by a proprietary award is a right binding all persons subsequently becoming interested in the relevant property unless bona fide purchasers of a legal or equitable interest without notice of the mere equity: *London Allied Holdings Ltd v Lee* [2007] EWHC 2061 (Ch) at [274].

As Lord Walker made clear in *Stack v Dowden* [2007] UKHL 17 at [37] "Proprietary estoppel typically consists of asserting an equitable claim against the conscience of the 'true owner'. The claim is a mere equity. It is to be satisfied by the 'minimum award necessary to do justice', which may sometimes lead to no more than a monetary award. A 'common intention' constructive trust, by contrast, is identifying the true beneficial owner or owners, and the size of their beneficial interests."

Thorner v Major [2009] UKHL 18 shows that for a successful proprietary estoppel claim a claimant needs to prove

- (1) that assurances or conduct of the defendant in relation to identified property were sufficiently clear and unambiguous in all the circumstances so as
- (2) to lead the claimant reasonably to rely on those assurances or conduct
- (3) so as significantly to act to his or her detriment.

Once there is this detrimental reliance, the claimant acquires a mere equity because it has become unconscionable for the defendant to get away with denying the claimant any remedy. The claim is then satisfied by the minimum award necessary to do justice ranging from a sum of money (perhaps secured on the relevant property), a contractual licence, the grant of an easement or tenancy or life interest or fee simple. In *Thorner* Lord Scott in obiter dicta at [20] in the context of promises as to a promisor's property on death, said that he would "prefer to confine proprietary estoppel to cases where the representation, express or implied, is unconditional and to address the cases where the representations are of future benefits and subject to qualification on account of unforeseen future events, via the principles of remedial constructive trusts." No other Law Lord agreed while these dicta have been criticised by Lord Neuberger in (2009) 68 Camb LJ 537 at 549 and Lloyd LJ in *Cook v Thomas* [2010] EWCA Civ 227 at [105].

English examples of automatic or institutional constructive trusts of property

Secret trusts – intention, communication, acceptance but lack of formalities.

Mutual wills- contractual intention specifically enforceable so survivor cannot break contract as to particular inherited property being held for others.

Common intention constructive trusts of family homes – express or inferred actual common intention to have some specific share or to have unequal shares left at large; in the latter eventuality the court will impute to the parties the share the court considers fair having regard to whole course of dealing between the parties .

A party pursuant to an arrangement with another acquires property for himself in circumstances inconsistent with the arrangement on which the non-acquiring party has acted (e.g. refrained from bidding at auction: *Pallant v Morgan* [1953] Ch 43).

Contracts for sale of unique assets specifically enforceable to give effect to common intention to transfer title in return for agreed consideration.

Paid-up contracts for purchase of future assets where, the price having been paid, the common intention is that the relevant materialised assets will belong to the payer.

Unauthorised fiduciary gains where common intention that (1) property derived from fiduciary property will also be fiduciary property and (2) money or other property obtained by the fiduciary in breach of the 'no profit, no conflict' rules is forthwith to be held on trust for the beneficiaries (the fiduciary being incapable of beneficially owning such property). In (2) however, there is another view that the wrongdoing of the fiduciary merely makes him personally liable for the amount of a bribe or secret commission unless he took advantage of an opportunity or right which was properly that of his principal or beneficiary. See *FHR European Ventures LLP v Mankarious* [2013] EWCA Civ 17 dealing with *Sinclair Investments v Versailles Trade Finance* [2011] EWCA Civ 347 that had refused to follow the Privy Council in *Att-Gen for Hong Kong v Reid* [1994] 1 AC 324. The Supreme Court needs to resolve the position.

Incomplete gifts treated as complete via the donor holding on trust for the donee until completion.

Fraudsters who attempt to obtain property fraudulently by relying upon non-compliance with statutory formalities intended to prevent fraud will hold the property as if there had been compliance with the relevant formalities: *Bannister v Bannister* [1948] 2 All ER 133, CA.

Killers who obtain property by their killings hold inherited property on constructive trust for those who would have inherited if the killer had predeceased the victim (subject to relief under Forfeiture Act 1982). If a joint tenant kills the other joint tenant he holds on constructive trust for himself and the victim in equal shares. If a remainderman kills the life tenant he should for the notional life-span of the victim hold the income on constructive for the victim's estate.