

CONSTRUCTIVE TRUSTS -
DIVIDED BY A COMMON LANGUAGE?

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This paper addresses a number of fundamental questions concerning the law of constructive trusts in the US and the English law countries of the British Commonwealth. My purpose is to explore whether the law in the US and in English law countries diverges as much as is commonly supposed.¹ My questions are:

- Is there really a difference between the constructive trust regarded as a remedy for restitution of property and as a matter of substantive legal right?
- How did the apparent divergence between the US and England establish itself?
- How far can Commonwealth judges go in imposing a restitutionary constructive trust?
- In claims to establish constructive trusts in US and English law jurisdictions, do outcomes really differ?

In the US “the basic objective of a constructive trust is the recognition and protection of property rights that have arisen in an innocent party and the vital tenet is one of equity”.² It is commonplace to refer to the dictum of Justice Cardozo (then at the outset of his judicial career, merely an associate justice of the NY Court of Appeals): “When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.”³ The *Restatement* (1937)⁴ treats the constructive trust as a remedy which follows from the proof of circumstances entitling a party to restitution of property,

¹ For example, *Paragon Finance v DB Thakerar & Co* [1999] 1 AER 400 at 414 (Millett LJ)

² *Corpus Juris Secundum*, Trusts § 174

³ *Beattie v Guggenheim Exploration Co* (1919) 225 NY 380 (Cardozo J) cited in England in Snell, *Equity* ed 30 p 227

⁴ Lord Wright MR, reviewing this work (51 Harv LR 369), deplored the absence of an English work on restitution and noted that the American principles stated appear to be consistent with the large and unanalysed mass of English cases.

and the whole treatment of the constructive trust is confined by the American Law Institute to the section of their work on restitution. The *Restatement's* exposition of the basic rule relating to the constructive trust reads:

§160 Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises.

On examining the instances given by the *Restatement*, by authors and in the cases, however, it can be seen that the basic difference is one of analysis. On the one hand, if the English judges had characterised the equitable jurisdiction of the Chancery courts as a restitutionary one, corresponding to the quasi-contractual remedies given by the common law courts, as did the *Restatement*, it would have been apparent that the law in both countries shared not only their origins but also their practical application. On the other hand, Cardozo's dictum seems to have been understood in England as a universal statement of the US law, regardless of the context in which it was uttered.

Some illustrations may make this clear. The leading case of constructive trust to which reference is constantly made in England is *Barnes v Addy*⁵ in which Lord Selborne LC gave a description of the manner in which a defendant would become liable in equity for participation in a breach of trust by another. In that case, the defendant was the solicitor of a trustee who had been held liable for breach of trust in leaving the husband of one of the beneficiaries as sole trustee, thereby enabling him to divert the whole fund to his own purposes. The issue was whether the solicitor, as agent of the trustee, was secondarily liable and ought to be declared a constructive trustee, liable to compensate the beneficiaries. The judges of the Court of Appeal all agreed that the solicitor could not be held liable unless it was proved that he had acted dishonestly, and with knowledge of the relevant breach of trust.

Lord Selborne says that the responsibility of a trustee “may no doubt be extended in equity to others who are not properly trustees, if they are found ... actually participating in any fraudulent conduct of the trustee to the injury of the cestui que

⁵ (1874) LR 9 Ch App 244

trust. But ... strangers are not to be made constructive trustees merely because they become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.”

The utility of this statement as to liability as a constructive trustee is strictly limited: in the first place, the Court was concerned with the imposition of accessory liability on a stranger to the trust (and not any of the many other bases of liability); and in the second, the Court was formulating a rule in the context of a case in which all the judges agreed that there was no evidence of any knowledge of either a breach of trust or a fraudulent breach of trust on the part of the defendant.

The other limitation in the statement lies in the phrase “dishonest and fraudulent” as applied to the trustees’ acts. Does this mean that accessory liability as a constructive trustee *could only* arise on proof of dishonesty or fraud on the part of the actual trustee?

In *Selangor United Rubber Estates v Cradock* (No 3)⁶ Unged Thomas J said “It seems to me imperative to grasp and keep constantly in mind that the second category of constructive trusteeship (which is the only category with which we are concerned) is nothing more than a formula for equitable relief. The court of equity says that the defendant shall be liable in equity, as though he were a trustee. He is made liable in equity as trustee by the imposition or construction of the court of equity. This is done because in accordance with equitable principles applied by the court of equity it is equitable that he should be held liable as though he were a trustee. Trusteeship and constructive trusteeship are equitable conceptions.”⁷

This view was roundly rejected by the Court of Appeal in *Belmont Finance Corp v Williams Furniture Ltd*⁸: if dishonesty in the trustee were not the criterion, what was to be the test? The “strait-jacket” into which this branch of constructive trust liability had been forced by *Barnes v Addy* was released by the decision of the Privy Council

⁶ [1968] 1 WLR 1555 at 1582

⁷ Compare the *Restatement* in its commentary on §160: “An express trust and a constructive trust are not divisions of the same fundamental concept. They are not species of the same genus. They are distinct concepts. A constructive trust does not, like an express trust, arise because of a manifestation of an intention to create it, but it is imposed as a remedy to prevent unjust enrichment.”

⁸ [1979] Ch 250

in *Royal Brunei Airlines v Tan*⁹. The defendant against whom accessory liability is alleged must be proved to have acted dishonestly, by objective standards of honesty. The fiduciary whose breach of duty the accessory has assisted need not have acted dishonestly.

This point clearly illustrates how the common terminology of “constructive trustee” on either side of the Atlantic obscures the different senses in which the term is used in our respective jurisdictions. The *Barnes v Addy* formulation includes in the concept of the constructive trust the imposition of personal liability “as if a trustee” on a third party accessory to a breach of an express trust. This liability, being a purely personal liability, does not give rise to a proprietary lien or interest in any asset held by the defendant. So far as I can tell, neither American authorities nor text books use the term in this context.

Let me return to the dictum of Justice Cardozo and the facts of *Beattie v Guggenheim Exploration Co.* Beattie was engaged by Guggenheim to evaluate oil properties in the Yukon over which Guggenheim had options. On arrival, Beattie discovered that there were other concession lands which were adjacent to the option lands, and necessary to their exploitation. Beattie arranged with another agent of Guggenheim to fund the acquisition of these adjacent lands from his own money, and to have an option to treat the funding as a loan or as the acquisition price of the lands. He then returned to New York, and, according to his case, disclosed these arrangements to the Guggenheim management, who orally agreed to them. Guggenheim then repented, and when Beattie sued to enforce his claim to the adjacent properties, the defence was that (a) Beattie was a constructive trustee for Guggenheim of the benefits which he claimed; (b) the oral assent of the Guggenheim board was ineffective because Beattie’s contract for services contained a clause prohibiting parol variation of it. The trial court found that there had been an agreement by Guggenheim to allow Beattie the benefit of his contracts, but held that it did not bind Guggenheim because it was a parol agreement.

⁹ [1995] 2 AC 378 – the epithet is Lord Nicholls’s (p 385)

Justice Cardozo gave the judgment of the majority of the Court of Appeals of New York, which decided that the parol agreement bound Guggenheim despite the terms of Beattie's contract for services. His famous dictum, which I have already quoted¹⁰, was a sentence which confirmed that Beattie would not have been entitled to retain the benefits for which he had stipulated in the absence of Guggenheim's informed agreement. Importantly, he stressed that Beattie, as an agent for Guggenheim, would not necessarily be a trustee in relation to its affairs, and he cited the English cases of *Dean v McDowell*¹¹, *Trimble v Goldberg*¹² and *Aas v Benham*¹³. The first of these cases concerned the renewal of a partnership lease in favour of a single partner in the firm. It was held that there was no irrebuttable principle that that partner would be constituted a constructive trustee of the new lease on trust for his partners; he would be entitled to retain it if he showed that he had acted bona fide and had not taken undue advantage of other parties interested. In *Aas v Benham* a partner was held entitled to retain profits generated by business opportunities based on information received by him as a partner, so long as the business in question was outside the scope of the partnership business. (This decision was subsequently approved in *Boardman v Phipps*¹⁴, the leading English case on the liability of an agent of a trust as a constructive trustee for profits generated by the use of information obtained by him in that capacity.) Justice Cardozo was speaking, therefore, of a principle which is well-recognised in English jurisprudence: the accountability of a fiduciary for profits made personally in consequence of the fiduciary relationship.

This principle of accountability is, of course, also embedded in the laws of the US (as *Beattie's* case itself demonstrates). The application of the principle co-exists with the English assertion that the English law constructive trust is a substantive rule, and not a restitutionary remedy. This well illustrates that some English lawyers are, to use a fashionable phrase, in denial about the restitutionary use of the constructive trust. Even in the middle of the 20th century, some English judges¹⁵ were decidedly

¹⁰ See p 1
¹¹ (1878) 8 Ch D 345
¹² [1906] AC 494
¹³ [1891] 2 Ch 244
¹⁴ [1967] 2 AC 46
¹⁵ Not Lord Wright MR (see p 2)

reluctant to accept that restitution as a concept ought to be imported into English law (possibly because Scots law had a well-developed jurisprudence on the subject). Take first *Reading v Attorney General*¹⁶. Reading was a sergeant in the British Army. He was found in possession of a large quantity of money, which the authorities confiscated. He sued for its return. Reading admitted that he had received the money from drug smugglers as payment for riding in uniform on lorries carrying illicit spirits to secure their passage through customs, and he spent two years in the glasshouse for this offence. This, of course, is one of those cases with absolutely no merit in which a principled decision may be hard to discern (counsel for Reading submitted that the Crown's case was a distortion of the law). Denning J at first instance took the opportunity to assert that the Crown had a restitutionary claim. For Reading, it was argued that restitution of unjust enrichment formed no part of the law of England. The House of Lords accepted this, but nevertheless held that money received by a servant in consequence of his position is payable to his master, and that if the defendant is also subject to a fiduciary duty and is in breach of it, that forms an alternative equitable ground for relief – alternative, that is, to the common law claim for money had and received.

The next step was taken in *Attorney General of Hong Kong v Reid*¹⁷. Reid was a government lawyer in Hong Kong who took bribes for impeding the trials of certain criminals. The proceeds of the bribes were invested in three properties in New Zealand, two of which were vested in the names of Reid and Reid's wife, one of which was vested in a solicitor acting for Reid. Judgment had been given for the Attorney against Reid for several million Hong Kong dollars. The question on appeal was whether the properties, which were assumed to be held in trust for Reid, should be transferred to the Crown. The New Zealand Court of Appeal held that they should not, because two decisions in the 19th century¹⁸ had decided that the taker of a bribe owed merely a debt to his employer in the amount of the bribe.

¹⁶ [1951] AC 507

¹⁷ [1994] 1 AC 324

¹⁸ *Metropolitan Bank v Heiron* (1880) 5 Ex D 319; *Lister & Co v Stubbs* (1890) 45 Ch D 1

On appeal, the Privy Council decided that these cases were inconsistent with the underlying principle that a fiduciary is accountable for profits derived from his office and from the use of property over which he is a fiduciary. This is a principle which is applied with great strictness in English law. The leading case is *Keech v Sandford*¹⁹ concerning the renewal of a lease which was trust property by a trustee who held it for an infant beneficiary. The landlord refused to renew the lease for the benefit of the infant, the infant could not have compelled the renewal, and the trustee was held to have acted in good faith. The Lord Chancellor said “the trustee is the only person of all mankind who might not have the lease”. Later examples of the principle are very numerous. When a trustee accepted £75 for his agreement to resign from his trust and appoint the payer of the money in his place, he was held liable to pay the money into the trust.²⁰ When a company director received a present of shares in a company from the vendor of property to the company, he was obliged to return the shares to the company or its liquidator.²¹ When the vendor made a present of cash to a director, to enable him to purchase shares in the company, the cash was treated as the property of the company, so that the director’s shares were not paid up.²²

The essential characteristic of the constructive trust claims in these English cases is that the remedy fastens on the property in the hands of the errant fiduciary. By the same reasoning, Justice Cardozo would have held that Beattie was a constructive trustee of the benefits of his contracts, had he not disclosed them to his employer and obtained oral ratification.

If we seek for recent analysis of the jurisprudential basis of constructive trust claims in the US, we find ourselves in a somewhat strange legal context. Section 502(a)(3) of the Employee Retirement Income Security Act 1974²³ provides that a civil action may be brought in the federal courts “to enjoin any act” which violates an employee welfare benefit plan which is subject to the Act (known as “ERISA”) or to obtain “other appropriate equitable relief” against violation of the plan. In *Great-West Life*

¹⁹ (1726) Sel Cas Ch 61

²⁰ *Sugden v Crosland* (1856) 3 Sm & G 192

²¹ *Re Morvah Consols Tin Mining Co (McKay’s case)* (1875) 2 Ch D 1; *Re Caerphilly Colliery Co* (1877) 5 Ch D 336

²² *Re Canadian Oil Works Corp* (1875) LR 10 Ch App 593

²³ 29USCS 1132(a)(3)

*& Annuity Insurance Co v Knudson*²⁴ the defendants incurred substantial medical expenses as a result of a motor accident, which they claimed from their ERISA-regulated benefit plan. The plaintiff insurance companies indemnified the benefit plan under a stop-loss agreement. The defendants went on to recover the expenses in a suit against the motorist who had caused their injuries. The insurance companies then brought a suit in the District Court to recover the expenses against the defendants as assignee of the benefit plan's right of reimbursement against them. Held, by a majority of the Supreme Court²⁵ that the claim was neither "equitable relief" nor the proper subject of a claim for an injunction and the action was not maintainable in the federal court. The Supreme Court had held in *Mertens v Hewitt Associates*²⁶ that equitable relief must mean something less than all the relief, legal and equitable, which a Court could grant in any given state of facts. Accordingly, it was necessary to determine what the character of the relief claimed actually was. The majority (*per* Scalia, J) said this:

"Second [after their injunction claim], petitioners argue that their suit is authorized by [ERISA] because they seek restitution, which they characterize as a form of equitable relief. However, not all relief falling under the rubric of restitution is available in equity. In the days of the divided bench²⁷, restitution was available in certain cases at law, and in certain others in equity.... Thus, 'restitution is a legal remedy when ordered in a case at law and an equitable remedy ... when ordered in an equity case,' and whether it is legal or equitable depends on 'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought – *Reich v Continental Casualty Co*²⁸, Posner, J.

"In cases in which the plaintiff 'could not assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him' the plaintiff had a right to restitution at law through an

²⁴ 534 US 204 (2002)

²⁵ Rehnquist CJ, Scalia, O'Connor, Kennedy and Thomas JJ

²⁶ 508 US 248 (1993)

²⁷ *Ie* in English law terms, before the fusion of law and equity and the creation of the united High Court.

²⁸ 33 F 3d 754 (CA7 1994)

action derived from the common law writ of assumpsit²⁹.... In such cases, the plaintiff's claim was considered legal because he sought 'to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money.'³⁰ Such claims were viewed essentially as actions at law for breach of contract (whether the contract was actual or implied).

"In contrast, a plaintiff could seek restitution in equity, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner. But where 'the property sought to be recovered or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor,' and the plaintiff 'cannot enforce a constructive trust of or an equitable lien upon other property of the [defendant].'³¹ Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession."³²

The learned Justice then points out in a footnote that an account of profits forms a limited exception to this classification: it is not necessary to identify a *res* in which profits made with an asset subject to a constructive trust are contained or invested in order to recover those profits from the defendant.

The majority judgment recognises that this distinction is not one which has been expressly drawn in earlier cases before the Supreme Court. This analysis does, however, involve exactly the distinction between a purely discretionary remedy imposed whenever the justice of the case requires, and a substantive or institutional rule of law. Criticising the opinions of the dissenting minority (given by Stevens, J

²⁹ 1 Dobbs *Law of Remedies* §4.2(1), 571
³⁰ *Restatement of Restitution*, §160, pp 641-2 (1936)
³¹ *Restatement of Restitution*, §215 at p 867
³² 534 US at p 212-214

and by Ginsburg, J), Scalia, J says that their approach, looking only to the nature of the relief, and not to the conditions imposed by equity on its grant, leads to an untenable conclusion, that the express mention and authorization of an injunction permits something, which equity would not permit, namely, the grant of an equitable injunction requiring the payment of a debt.

Naturally, the minority³³ reasoning is somewhat scornful of the idea that the Congress has introduced nice distinctions between equity and law in a statute concerning the limits of the federal jurisdiction to adjudicate on matters affecting retirement benefit plans. Ginsburg, J considers it most implausible that Congress intended “to make controlling the doctrine which [the majority’s] chosen texts describe”. She invokes the Court of Appeal in England and the Supreme Court of Canada for authority that the rules of equity were intended to supplement and provide flexibility to the rules of the common law.³⁴ Ginsburg, J’s preferred construction of ERISA is that it permits the federal court to grant relief which equity “typically” granted, including those remedies which in fact confer restitution, even if the same remedy is available at common law.

The admixture of the issue of construction of the statute does not obscure, I suggest, the very clear view, even of the minority, that the equitable relief which the Court grants in the US is not a purely discretionary remedy, but is subject to the substantive limitations to be found in the decided cases both in England and in the US.

The minority of the Supreme Court (and the plaintiffs) might have been assisted if they had had cited to them *Lord Napier & Ettrick v Hunter*³⁵, in which it was held that stop-loss insurers were entitled to an equitable proprietary right (a lien) over moneys representing recoveries by their assureds (who were Lloyds names) and were entitled to injunctions restraining brokers from paying out funds to the assured in respect of recoveries from third parties. The basis of this decision (which runs counter to authoritative statements in England that subrogation is a common law claim for restitution, equity being involved only to compel the assured to lend his name to the

³³ Ginsburg, Stevens, Souter and Breyer, JJ

³⁴ *Medforth v Blake* [1999] 3 AER 97 (CA); *Boulting v Assn of Cinematograph etc Technicians* [1963] 2 QB 606 (CA); *Pettus v Becker* [1980] SCR 834

³⁵ [1993] AC 713

insurer's claim) lay in cases from the 18th century that a shipowner who had recovered losses caused by Spanish capture, once from an insurer and again from reprisals by the Crown of England, held the prize money paid or to be paid by the Crown on trust for the insurer.³⁶ The House of Lords held that these and later cases demonstrated that (a) the insurer was not limited to a common law claim for money had and received; (b) the remedy in equity was not (as the Courts below thought) the imposition of a full-blown trust of the entire fund, with accompanying obligations of investment, etc, but the imposition of an equitable lien, with an accompanying right to an injunction to preserve the lien. Importantly, Lord Goff of Chieveley, dealing with the theory of implied contract for which the assureds argued, said "No doubt our task nowadays is to see the two strands of authority, at law and in equity, moulded into a coherent whole; but for my part, I cannot see why this amalgamation should lead to the rejection of the equitable proprietary right recognised in the line of cases to which I have referred." The same judge also indicated that it was possible that the claim of the assured against the third party would also constitute property subject to the equitable lien of the stop-loss insurer.

Thus far I have concentrated on England and the US. What about the Commonwealth? There are instances of Commonwealth judges acting more boldly than their English counterparts. For example, a Singapore judge had rejected the rule that a bribe was recoverable by an employer from an agent only as a debt³⁷ some time before the Privy Council did so in *AG of Hong Kong v Reid*.

Commonwealth judges have approached closer to the fundamental analysis of the constructive trust which the *Restatement* offers than their English counterparts. I take some cases in Canada for the purposes of illustration. The starting point in Canada is that the Supreme Court of Canada decided to adopt a principle of restitution and unjust enrichment in 1954³⁸, only 3 years after the House of Lords were denying that any such principle had any place in English law. The law was developed in a series of cases concerning matrimonial (or quasi-matrimonial) property, but even then, the

³⁶ *Randal v Cockran* (1748) 1 Ves Sen 98; *Blaauwpot v Da Costa* (1758) 1 Ed 130

³⁷ *Sumitomo Bank v Kartika Ratna Thahir* [1993] 1 SLR 735 (Lai Kew Chai J)

³⁸ *Degelman v Guaranty Trust Co* [1954] SCR 725

Court determined the cases on the basis of the common law approach, by ascertaining the intention of the parties in relation to beneficial ownership of their shared property. References to the imposition of a constructive trust as a remedy merely confirmed the successful party's entitlement.³⁹ In *LAC Minerals Ltd v International Corona Resources*⁴⁰, however, there was a clear cut commercial dispute requiring due analysis of the remedial theory. In this case, Corona had identified the Williams land as a potential goldmine. Their geologist shared certain information about it with LAC's geologist in the course of negotiations towards a joint venture. Ultimately, LAC purchased land adjacent to the Williams land and then the Williams land itself, and developed a mine. The Courts below had held that LAC was under a fiduciary duty to Corona by reason of its possession of confidential information, that it had breached the duty by exploiting the information, and that it held the Williams mine on constructive trust for Corona, subject to a lien for the cost of developing the land and the mine.

La Forest J, speaking for the majority said:

“Having established that Lac breached a duty of confidence owed to Corona, the existence of a fiduciary relationship is only relevant if the remedies for a breach of a fiduciary obligation differ from those available for a breach of confidence. In my view, the remedies available to one head of claim are available to the other, so that provided a constructive trust is an appropriate remedy for the breach of confidence in this case, finding a fiduciary duty is not strictly necessary. In my view, regardless of the basis of liability, a constructive trust is the only just remedy in this case.”

It can be seen that this case, too, involves a recognised ground for equitable intervention: the reposing of a confidence in another party and breach of that confidence.

In *Korkontzilas v Soulos*⁴¹ K was a real estate broker and S was his client. K made an offer for a bank building on behalf of S, which was rejected by the vendor. He then

³⁹ *Murdoch v Murdoch* [1975] 1 SCR 423; *Rathwell v Rathwell* [1978] 2 SCR 436

⁴⁰ [1989] 2 SCR 574

⁴¹ [1997] 2 SCR 217

ascertained the price which the vendor would accept, and purchased the property in the name of his wife. S claimed that K held the property on a constructive trust for him. The property had declined in value by the time of the trial, so that K had made no profit. S gave evidence that he was a customer of the bank tenant, and that in his community, to be one's banker's landlord was a matter of important social status. The trial judge refused S relief, on the basis of absence of unjust enrichment. The Court of Appeal reversed his decision, and the Supreme Court dismissed K's appeal.

McLachlin, J, giving the reasons of the majority, pointed out that the trial judge had fallen into the error of believing that under the modern Canadian law, unjust enrichment was the only ground for imposition of a constructive trust. She adopts, in her reasoning, the conclusions of a number of writers who identify the purpose of a constructive trust as two-fold: as a remedy for unjust enrichment and as a principle to obviate the risk of disloyalty by a fiduciary. An English court, and a US court would almost certainly have reached the same conclusion as the Canadian Supreme Court on these facts. In England, reference would be made to the strict doctrine that a fiduciary may not allow his duty and his interest to conflict. An agent such as a real estate broker is clearly a fiduciary for this purpose. K would be declared a constructive trustee of the property, regardless of the monetary value of it to him or to his client. The relief would be subject to reimbursement by S of the purchase price. K's conduct also falls quite clearly within the doctrine of the *Restatement*.

In England, by contrast with Canada, there have been only tentative hints at a future which will include the remedial constructive trust. In one case, however, the Court of Appeal has decided firmly that in no circumstances would a constructive trust be imposed in competition with the general body of creditors in an insolvency: *re Polly Peck International plc (No 2)*⁴². In this case, landowners in Cyprus asserted that their property had been expropriated by the Turkish Republic of Northern Cyprus, and then illegally occupied by Polly Peck group companies. When those companies went into administration⁴³, the administrators sold the assets to companies in Northern Cyprus

⁴² [1998] 3 AER 812 (CA)

⁴³ An interim insolvency process similar to Chapter 11, US Bankruptcy Code, but in which the debtor is not left in possession

under the control of the former principal shareholder and director of Polly Peck, Mr Nadir. The assets sold included shares in subsidiaries which occupied the expropriated land. The landowners made explicit claims for the imposition of a constructive trust on the proceeds of sale of the shares in the subsidiaries, for their benefit. The Court of Appeal considered the Canadian cases, and pointed out that the remedial constructive trust could only be imposed in that jurisdiction if it was appropriate in all the circumstances, and subject to the limitations on claims for restitution generally. Accordingly, a claim made after the commencement of an insolvency regime would not justify the removal of the relevant assets from the administration in insolvency.

The future for the constructive trust in England is not particularly clear. The one recent case of importance is bedevilled by the limitation of the arguments presented. Local borough councils entered into swap transactions in order to hedge their liabilities on bonds issued by the councils. This was found to be *ultra vires* and the transactions were void. The plaintiff bank had paid the defendant council £2.5 million under the swap, and sued for the recovery of the balance of that sum after deducting money paid back by the council under the swap contract. The bank obtained a judgment for the balance and compound interest on it.⁴⁴

It was agreed between the parties that compound interest was only recoverable if the council was a trustee for the bank of the balance due. The bank argued for a resulting trust – and not for a constructive trust, or a personal liability in equity analogous to the claim against an executor by a disappointed beneficiary for overpayment to another beneficiary. The minority of the House of Lords thought that the bank should succeed on the basis that the equitable jurisdiction to award interest was not confined to claims to recover property subject to a trust. In other words, the instances of awards of compound interest against fiduciaries were not exclusive examples of the equitable jurisdiction.

⁴⁴ *Westdeutsche Landesbank v Islington London Borough Council* [1996] AC 669 – the council refused to continue with the appeal when further argument was invited by the Bench, because they did not want to spend further money on the case.

The majority decided that where property was transferred outright (as the payment by the bank had been), in a commercial transaction, the property remained with the transferee even if the transaction was *ultra vires*, and there could be no resulting trust. They also held that the equitable grant of compound interest did not cover any case where a personal claim for restitution at common law lay, and that the court could not act ‘in aid of the common law’ because Parliament had enacted in 1934 and 1981 that only simple interest was recoverable on common law claims.

Lord Browne-Wilkinson said that although the resulting trust was an unsuitable basis for developing a proprietary restitutionary remedy, the remedial constructive trust might be a more satisfactory way forward. The interests of innocent third parties could be considered, and restitutionary defences, such as change of position, could be recognised. This was not, however, the case in which to consider such a development of the law.

The future may well hold a recognition by all courts in the common law world that the concept of inequitable conduct is the unifying feature of constructive trusts, proprietary estoppel and restitution; that defences of change of position are the correlative of the detriment to the plaintiff which gives rise to a proprietary estoppel; and that the governing rules are those which concern tracing into property. No one could seriously support a system conferring a pure discretion to take away the possession of or title to property on the basis of bad behaviour.