

TRUSTS ESSAY OUTLINES

Constructive trusts

1. What is a constructive trust

- a. A constructive trust arises by operation of law and not as a result of the intention of the parties
- b. They may be granted as a remedy
 - i. Equity will impose a constructive trust as a remedy to preclude the retention or assertion of beneficial ownership on the property to the extent that such retention or assertion would be contrary to equitable principle- *Carson v Wood*
- c. Situations a constructive trust may arise is

2. Does a constructive trust function as an institution or a remedy?

- a. CONTENTIOUS-It appears that the constructive trust is a concept flexible enough to function as an institution in some circumstances and as a remedy in others: *Muschinski v Dodds*

3. INSTITUTIONAL CONSTRUCTIVE TRUSTS -these arise from mutual wills, breach of fiduciary duty, and third trustees who receive trust property as a result of breach of trust or participation in the breach of trust

- a. Arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past: *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*
 - i. *Birmingham v Renfrew*-MUTUAL WILLS-mutual wills, the wife died husband got will changed it so all assets go to his fam. The wife's family sued...---the courts recognised an institutional constructive trust arising to give effect to an agreement between the parties for mutual wills
 - ii. IMPROPER GAINS BY TRUSTEE OR FIDUCIARY-A fiduciary who gains by reason of her / his position may be liable to account for that gain through the imposition of constructive trusteeship upon the fiduciary regarding the moneys or property the subject of the gain---*Keech v Stanford*- held lease on trust for a minor couldn't renew so he had the lease renewed for himself-HELD-that the lease should be held on trust for a minor and the trustee should account for profits made since the renewal
 - iii. TRUSTEES DE SON TORT- if one, not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee, he may thereby make himself what is called in law a trustee of his own wrong - ie a trustee de son tort." *Mara v Browne*---- The court must determine whether the stranger was so far in control of the trust property as to warrant imposing upon her or him the liabilities equivalent to those of express trustees-*Re Barney*---strangers are not to be made trustees merely because they act as agents unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest or fraudulent design on the part of the trustees-

- b. **MAIN CASE-***Barnes v Addy* (the doctrine has two limbs)
- Where a stranger to the trust become involved with the trust property or with a trustee committing a breach of trust, they may become liable in 2 main situations (the two limbs of *Barnes v Addy*)
 - 1) Knowing receipt-Where a person receives in her or his own capacity, not as agent for the trustee, property already subject to a trust with the requisite knowledge that it is trust property and that the transfer is in breach of fiduciary duty, he or she will be made a constructive trustee of that property for the benefit of the beneficiaries or principal---there are 5 different kinds of knowledge in knowing receipt cases...-----
 - a. a) actual knowledge- *United States Surgical Corporation v Hospital Products International Pty Ltd*,
 - b. b) willful blindness- *Consul Development Pty Ltd v DPC Estates Pty Ltd*,
 - c. c) wilfully and recklessly failing to make such enquiries as an honest and reasonable man would make- *Belmont Finance Corporation Ltd v Williams Furniture Ltd*
 - d. d) knowledge of circumstance a would indicate the fact to an honest and reasonable man- *Consul Development Pty Ltd v DPC Estates Pty Ltd*
 - e. e) knowledge that put a reasonable man on enquiry (traditional constructive notice)- *Baden Delvaux v Societe Generale*
 - 2) Knowing participation in a fraudulent design-ie what did the def know and what type of knowledge must be proven---liability for knowingly assisting a trustee or fiduciary to commit a breach of trust or fiduciary obligation and has three elements—
 - a. A dishonest breach of trust or other fiduciary duty
 - b. Assistance in the breach
 - c. Knowledge of the breach of fiduciary duty
- ii. **CASE-***Farah v Say Dee*
- A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation. It is not necessary that, in addition, the trustee or fiduciary was acting dishonestly, although this will usually be so where the third party who is assisting him is acting

dishonestly. 'Knowingly' is better avoided as a defining ingredient of the principle

4. Differences between remedial constructive trusts

- a. The common intention constructive trust is institutional, taking effect when the P acts to her detriment in reliance on the common intention or understanding-----this creates a real risk that the P's equitable interest will be subordinated to a mortgage created between the date of the P's contributions and date of judgement
- b. A constructive trust is able to be used as a remedy for equitable estoppel---ie *Giumelli v Giumelli*—son worked a heap of years on parents land and was promised a share of their law—denied a constructive trust because the parents had an interest in the land

5. REMEDIAL CONSTRUCTIVE TRUSTS

a. GENERAL INFO ABOUT REMEDIAL CONSTRUCTIVE TRUSTS

- i. Does not exist until the court imposes it---a constructive trust that takes effect from the date of the court's judgement will be classified as remedial since most judicial remedies take effect from that date
 - ii. There must be an asset in the defendant's hands in respect of which the court considers it appropriate to impress a trust, and some principled basis for declaring that assets held by *Fortex Group Ltd (in receivership and liquidation) v MacIntosh*
 - iii. The court has a discretion as to whether or not to impose a constructive trust on the property in question, and will not do so if "there is an appropriate equitable remedy which falls short of the imposition of a trust.": *Giumelli v Giumelli*
 - iv. NOTE-similar to express and resulting trusts.. constructive trusts must exhibit both certainty of object and with some exceptions, certainty of subject matter
 - v. Theoretically, as the court "creates" the trust, the trust so created cannot be back-dated to a time before the court order which created it: *Fortex Group Ltd (in receivership and liquidation) v MacIntosh*
 - vi. But courts have exercised a discretion to back-date the proprietary impact of the order, taking into account any prejudice to 3rd parties: *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*
- b. What were remedial constructive trusts used for?
- i. Remedial constructive trusts have been used mainly in the context of allocating property interests on the breakdown of relationships between persons where the legal proprietary interests of the parties do not reflect that which equity considers consistent with equitable principle---
 - ii. NOTE-they are not based on a pre existing fiduciary or contractual duty owed by one party to another

- c. MAIN case- *Allen v Snyder*—illustration of a constructive trust upheld for common intention unlike institutional trusts
- i. *Allen v Snyder* --Mr Snyder and Ms Allen cohabited 1966-1974. When they separated, he was the sole legal owner. He sued to evict her. She countered that she was entitled to a beneficial interest in the house—concerns COMMON INTENTION CONSTRUCTIVE TRUSTS
 - There was authority that a party who expends effort or money on the property of another will acquire a beneficial interest, so long as there has been an agreement or common intention that the contribution would entitle them to an interest and that contribution having been made, it would be fraud to deny such an interest. *Gissing v Gissing*
 - This trust is about preventing fraud – but it is the fraud of going back on what was intended – not of accepting contributions---- Here Ms Allen could prove a common intention about what was to happen upon marriage/death, but not separation. So the argument for trust failed
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 - ii. The court would uphold a trust arising from an agreement or common intention as to the distribution of the beneficial interest in property, so long as the claimant could prove:
 - A common intention (actual ie expressed/inferable from the facts *not imputed*) that the parties were to have a particular share;
 - Proof that the claimant has acted to her detriment in reliance upon that common intention – by making contributions (need not be direct contributions to the purchase price)

d. MAIN CASE- *Muschinski v Dodds*

- i. *Muschinski v Dodds* where a husband contributed very little to improvement of a property that they agreed to spend way more ie 9% instead of 40% towards improvements
- ii. -establishes that remedial; constructive trusts arise, only when according to established equitable principles they are warranted—Deane J did recognise that the prevention of unconscionability was an established equitable principle and that notion of fairness are relevant to this
- iii. Held-So in this case, they each held their shares on *constructive trust* – term = to repay the other their contribution (ie her pay \$10 000 – him pay \$90 000) with the

capital appreciation to be split equally ie the same result as if he had lent him the \$ to make an equal contribution--- it would have been unconscionable for him to retain full beneficial interest in one half of the property

- e. **MAIN CASE- *Baumgartner v Baumgartner***---remedial constructive trusts differ as this trust was given as a matter of judicial discretion
- i. **FACTS=** de-facto couple moved onto land bought by the man in his own name. The woman provided the man her pay packet, which the man pooled and used for household expenses including mortgage repayments. The man contributed \$51,000; the woman \$38,000; for a total of \$89,000. Upon the breakdown of their relationship, the woman sought a declaration that that she had an equitable interest in the house
 - ii. *Muschinski v Dodds* was applied in *Baumgartner v Baumgartner* (1987) 164 CLR 137, where the High Court held a constructive trust may be imposed where, upon the breakdown of the relationship, it would be *unconscionable* for one party to assert her or his entire legal interest---a remedial constructive trust was imposed here in order to prevent unconscionable conduct---and could not be argued to be an institutional constructive trust as the case was not based on who contributed what but was about how much each person contributed
 - NOTE-the holistic examination of the relationship between the parties can be criticised on the ground that it involves a potentially limitless inquiry into everything the parties said and did
 - iii. ----- In this situation, the appellant's assertion,... that the ... property ... is his sole property, ...amounts to unconscionable conduct which attracts the intervention of equity and the imposition of a constructive trust---Equity favours equality and in circumstances where the parties have lived together for years and have pooled their resources and efforts to create a joint home, there is much to be said for the view that they should share the beneficial ownership equally as tenants in common
 - iv. In this case, there was NO BASIS FOR A COMMON INTENTION CONSTRUCTIVE TRUST

6. Differences between constructive trusts and express trusts

- a. The essential difference between an express trust and a constructive trust is that an express trust is created by the act of a settlor, who manifests an intention to create a trust, whereas a constructive trust is imposed by operation of law. Intention is not

irrelevant to the imposition of a constructive trust (indeed one type of constructive trust is termed a common intention constructive trust but the source of the obligations imposed on the trustee is the court order, not the intention or expectations of a settlor.

7. Difference between constructive trusts and resulting trusts

- a. A resulting trust arises when a provider of property does not intend the recipient to obtain beneficial title to the property; the trust arises upon proof of the provider's absence of intention to benefit the recipient⁶ But the intention of a provider of property does not, without more, establish the existence of a constructive trust. The trust arises because it would be unconscionable for the legal owner of the property to assert full beneficial title. Intentions may be relevant to determining whether the recipient acted unconscionably, but inquiry will be directed to the conscience of the recipient in determining the imposition of constructive trusteeship

Resulting trusts (implied trusts)

1. When do resulting trusts arise
 - a. There are two situations
 - i. **Presumed** resulting trusts arise where a purchaser of property directs that it be conveyed into the name of a 3rd person, but there is no evidence that that person was to take beneficially. If there is no express intention for that person to take beneficially, there is a presumed intention that the property should revert to the settlor
 - ii. **Automatic** resulting trusts arise where a settlor transfers property to trustees without wholly disposing of the beneficial interest in the property: what is undisposed of 'results back' to the settlor, though in one sense it never left the settlor (automatic).---See the judgment of Megarry J in [Re Vandervell's Trusts \(No 2\)](#)
 - b. arise when one person confers title to property to another person, but equity considers that they retain some or all of the beneficial interest in it themselves
 - c. the beneficial interests 'results' back to the first person

- d. are based on the presumed intention of the parties-
Westdeutsche Landesbank Girozentrale v Islington London Borough Council

2. Presumption of advancement

- In some relationships - where the transferor is under a “natural obligation to provide” for the transferee, the law *presumes* that the transferor intends to make a gift. This presumption is called the “presumption of advancement
 - The presumption of a resulting trust may be displaced where a presumption of advancement applies. *Calverley v Green*
 - in obiter *Carverly v Green* suggested that the presumption of advancement should apply to transfers made by a partner in a de facto relationship where the relationship is permanent and partners hold themselves to be married
- b. where does this presumption operate
- i. Transfer from Husband to Wife: is presumed to be made by way of advancement: *Russell v Scott*
 - ii. A transfer after separation will not attract the presumption: *Cossey v Bach* [1992] 3 NZLR 612 at 630; *Wilson v Wilson*
 - iii. Transfer by a man to his fiancée will attract the presumption: *Wirth v Wirth* (1956) 98 CLR 228 (at 237-238), but if the marriage does not take place a resulting trust arises [*Davies v Messner*]
 - EXCEPTIONS-(where no presumption of advancement arises)—de facto spouses-*Calverly v Green*
- c. REBUTTALS TO THE PRESUMPTION
- i. Presumption of advancement may be rebutted either partially or completely, by evidence that at the time of the transfer no gift was intended. *Shepherd v Cartwright*
 - ii. Can look to acts and declarations before or at time of purchase or so immediately after as to form part of the transaction
 - iii. Burden of rebutting the presumption of advancement lies upon the person asserting the existence of a trust: *Martin v Martin*
 - iv. Evidence that the transfer was motivated for reasons inconsistent with an intention to confer beneficial ownership will displace the presumption. (eg illegal purpose cases) *Nelson v Nelson*

3. *Calverley v Green*

a. FACTS

- i. the leading authority on the application of resulting trust principles to the family home is the High Court decision of *Calverley v Green*, si A de facto couple purchased a house in their joint names. The purchase

price was \$27000, of which the defendant paid \$9000 as a deposit, with the balance raised by a mortgage. The defendant told the plaintiff that the finance company required the mortgage to be in their joint names, and at his suggestion they became jointly and severally liable under the loan agreement to make the repayments. The defendant in fact made all the mortgage repayments. The couple split up after living together for ten years, and the plaintiff claimed a share in the home. The High Court held that the application of resulting trust principles entitled the plaintiff to a one-third share in the home. In reaching this conclusion the Court ruled that: