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A) Resulting Trust

**Type 1: Automatic**

**General**
Imposed by operation of law to fill what would otherwise be a gap in beneficial ownership: *Vandervell*

**Situation 1: Failure of Express Trust**
When: Where express trust fails due to lack of certainty of subject matter or objects, money held on automatic resulting trust for settlor: *Vandervell*

**Situation 2: Basis of Charitable Trust Break down**
When: purpose of trust frustrated or already fulfilled with surplus remaining then in most cases the trust monies will be held on resulting trust for the donors *Re Abbots Settlement*

**Type 2: Presumed**

**General**
1. Rebut the presumption of resulting trust with evidence showing clear intention that X intended to vest beneficial interest in Y. Onus on X; OR
2. Employ presumption of advancement if Y+X relationship falls into certain categories. Onus to X to disprove.

**Step 1: Presumption: Purchase Money & Voluntary Transfer**

Principal: where X has purchased and transferred property to Y (for no consideration) or contributed to purchase of property with Y, equity will presume that Y holds the property on resulting trust for X *Vandervell*

Voluntary transfer: where X transfers property to Y for no consideration, presumed that X had no intention to vest beneficial interest in Y, such that X holds on RT for Y *Vandervell*

Purchase money: where X purchases property in the name of Y then equity presumes that Y holds the property on RT for X.

**Application:** both personal property and land in the following examples:

**Example 1:** X purchases fully but legal title in name of Y. Result: Y holds 100% of Pty on RT for X.

**Example 2:** X purchases fully but legal title in name of X and Y. Result: Y holds 100% of Pty on RT for X.

**Example 3:** Both X and Y pay, but X pays more and Y pays less but legal title in name of Y. Result: presume RT in favour of each in proportion to their contribution.

**Example 4:** Both X and Y pay evenly but legal title in name of Y. Result: presume RT in favour of both as joint tenants.

**Use of Mortgage:** irrespective of who pays off the loan, if both parties have joint liability of the loan, then such liability is considered a contribution to purchase price. So presumption of RT applies if one party shows they shared liability of a loan. As per *Calverley v Green*: court will calculate share by:

- Looking who purchased share of house via cash purchase
- Looking at if remaining share of house was equally shared by joint liability of loan.

Court will decide that:

- Each P's share will reflect their cash purchase + liability in loan.
- Any P who pays off loan above their 50% liability is entitled to a personal right in compensation but not propriety interest under RT.

**Example:** P1 pays 1/3 of home via cash; both P1 and P2 jointly enter into loan to pay remaining 2/3. P1 pays off all the loan.

Result:

- P2 contributed via joint liability of loan; thus RT applies and entitled to 50% of 2/3 interest in home = 1/3 interest in home.
- P1 entitled to 1/3 of home via cash purchase and 50% of 2/3 interest in home since jointly liable of loan = 2/3 of home.
- P1 entitled to compensation of his discharging of debt above his liable 50%.
- Can rebut RT presumption with evidence of (i) intention or (ii) presumption of advancement applies.

**Step 2: Rebutting Presumption of Resulting Trust**

**Test:** Onus on Y to rebut the presumption with evidence that, at the time of purchase or transfer, X intended (or joint intention if X+Y contributed equally) to provide Y with beneficial legal title *Calverley v Green*.

**Evidence:** which shows that the intention was that the beneficiary would be entitled to the use and enjoyment of their legal title for their own benefit *Anderson v Mcpherson*

**Property Type**

a) **Family Homes:** for purchases of family homes, the presumption of RT will be rebutted on the facts that: *TP of Cummings v Cummings*

(i) Two people are married
(ii) Property was family home
(iii) Property was NOT an investment property
(iv) Title was joint tenants and not tenants in common.

- RT rebutted given situation above so that each spouse holds equal share in house.
- If investment property equitable interest will reflect their contributions
- If tenants in common equitable interest will reflect their contributions

**Example:** W purchases 76% of property and H purchases 24%. W and H buy family home and register as joint tenants. The presumption that H held 26% interest on RT for W is rebutted. W and H both have equal interest and so W's entitlement is actually 50%.

**NB:** Above situation changes if husband purchases (i) majority stake of (ii) investment property where both RT and PoA will apply. See below at [*Family Homes in Step 3*]

b) **Investment Properties:** rebuttals for the fact of joint tenancy in family arrangements do NOT apply for investment properties. So if a party contributes purchase property, then RT will apply for share of purchase price whether or not under joint tenancy or if title is in another name.

**Example 1:** P1 pays 70% of Investment Property and P2 pays 30% Both P1 and P2 are joint tenants (legally P1 holds 50% and P2 holds 50%); however equity will presume that P2 holds 20% on RT for P1 to reflect proportional contributions.

**Example 2:** P1 pays 70% of Investment Property and P2 pays 30% However, P1 registers property under P2’s name (legally P2 holds 100%); however equity will presume that P2 holds 70% on RT for P1 to reflect his contribution.

**YES:** Presumption Rebutted

**NO:** Transfer was a resulting trust UNLESS presumption of advancement. See Step 3 below.
B) Constructive Trusts

Which Trust?
Resulting trust – only concerned with the purchase price
Constructive trust – the overall contributions of the parties

CIT/BT vs RT: always choose CIT/ BT over RT if there has been no financial contribution to the purchase price and P wants to claim ownership because of (1) detrimental reliance; or (2) financial contributions after purchase; or (3) non-financial contributions to house.

CIT vs BT: CIT is better sometimes because the constructive trust takes effect at date when P acts to her detriment in reliance on the common intention; compare this if BT which takes affect at date of judgement. So, when mortgage is involved over the house, if she reliance on a BT, then creates risk that P’s equitable interest will be subordinated to a mortgage created between date of P’s contributions and date of judgement.

Type 1: Common Intention Constructive Trust

Test: D will hold on constructive trust equitable interest for P where there is a common intention or understanding that P will acquire an interest in the property; and in reliance on that intention or understand acted to P’s detriment. Allen v Snyder

Applicability:

Step 1: Common Intention?

Is there a common intention or understanding that P will acquire an interest in the property?

Common Intention: per Allen v Snyder intention might be express or inferred from conduct of the parties.
- Intention can be inferred if P has contributed to purchase price (although entitled under RT if a woman) OR has paid for significant improvements to house after purchase
- So common intention can arise after property been acquired
  Rasmussen v Rasmussen
- If no financial contribution has been made, intention can still be inferred from conduct/context and also express statements e.g “this is your house, I bought it for you” Green v Green

Step 2: Acted to Detriment

Has P acted to her detriment in reliance on that intention or understanding?

Detriment: significant changes in P’s life induced by D’s promise
- Green v Green
  - E.g. above case: leaving Thailand, family, had two children

Step 3: Result

Upon reliance, a constructive trust will be created and NOT at date of judgement as per Parsons v McBain
- Compare with Baumgartner Trust = date of judgement
- Therefore, CIT can give P better priority over interest of creditors

Type 2: Unconscionable Conduct

Type 1: Baumgartner Constructive Trust

Test: D will hold on constructive trust equitable interest for P when there has been a failure of a joint venture/endavour between P & D on no fault to the P; and P had contributed money or other property which would not otherwise been enjoyed by D Muschinski v Dodds, Baumgartner

NB: Differences to CIT:
- no detrimental reliance is required.
- The parties intentions, while important, the overall conduct and the relationship will also be relevant when considering whether the claimant has an equitable interest.

Step 1: Joint endeavour between parties?

As per LKC v Kia Silverbrook, proof of joint venture requires proof of actual intention to pool resources and efforts. This is then a ‘common intention to enter into a joint endeavour’.

Examples:
- Muschinski [couple bought property in joint names to use as home and small business; woman paid full purchase price; man was to contribute to running costs with his divorce settlement from previous marriage; no RT as intention was for joint ownership]
- Baumgartner [husband bought house in his name and made only direct acquisition to purchase price, using money from prior house = from mortgage in his name; however, husband and wife pooled all monies; mortgage repayments made out of the joint fund]

Step 2: Joint endeavour ended without attributable blame

Blame is part of the inquiry into unconscionability, and is applied when some party is seriously at fault Krezis v Krezis

Step 3: Contribution to Joint Endeavour?

Is it unconscionable for the benefit of contributions of one party (whether financial or other, e.g., homemaking, renovations) to be retained by other?
- NB: Unlike RT, take into account all circs incl. those post-transaction.

Assessing contributions: As per Baumgartner, Ct will adopt a Holistic analysis of conduct of parties contributions to the acquisition and maintenance of property/endavour which can be financial, non-financial or both and even homemaker contributions Nichols
- Relevant Factors for homemaker; longevity of relationship; extent of share responsibility of children; extent partners earning capacity was enhanced by homemaker contributions
  Pari v Pari; Nichols

If parties’ contributions unequal then CT in proportion to contributions: Baumgartner

Step 4: Any Equitable Adjustments

Adjustments made for costs incurred in paying off other party’s debts/or loss of right to occupy house in form of equitable. Compensation while doesn’t vary property interest, can be secured with an equitable lien over the property

Type 2: Mistaken Payments

- Mistaken payee obviously under in personam obligation to return regardless of knowledge and spending;
- Big issue is whether in rem right exists, protecting mistaken payments from other creditors and allowing tracing etc.

Test: If (1) mistaken payee aware (at least level four on the Baden Scale – aware of circumstances indicating facts to honest/reasonable person) that payments were mistaken and (2) still holds the funds, then a CT arises: Wambo Coal

Wambo Coal: [P repaid debt to D, but then accidentally made two more payments; D then went insolvent; P unable to recover 1st payment as D not aware; able to recover 2nd payment as D aware and held on CT, it then being transferred to D’s liquidators who were also aware and thus not BPPFVWNs].

Type 3: Stolen Property by 3rd P

Thief has possessory legal title to stolen property; beneficial possessor title therefore held on CT for the victim; victim able to
**Limitations:**

- Clause 2 will be fairly construed but not broadly – Wight v Olsawang
- Cannot exclude duty to act in good faith and in an honest manner – Amitytage v Nurse

**Step 6: Defences to Breach?**

**Defence 1: Exemption Clause**

- Clause will be fairly construed but not broadly – *Wight v Olsawang*
- Cannot exclude duty to act in good faith and in an honest manner – *Amitytage v Nurse*

**Interpretation of ECs**

- For exclusion clauses that only limit liability except dishonesty, objective test of ‘dishonesty’ should be applied – *Walker v Stones*

**Objective Test:** dishonest for trustee to deliberately commit a breach of trust which no reasonable trustee could have thought to be in the best interests of the beneficiaries *Walker v Stones*

**NB:** Even though ECs limit liability, the act itself is still a breach but with liability curtailed. So a trustee might not be liable but any 3rd P with knowledge who received/assisted in breach will be still liable. See 3rd P liability at Step 8.

**Defence 2: Statutory Exculpation**

- **Wilful default:** not liable for an agent’s, including co-trustee, default only liable for own wilful default s59(2) TA

**NB:** The trustee will not be protected if the co-trustee’s breach is causally linked to the trustee’s own breach OR the trustee was negligent in allowing the co-trustee breach it e.g. allow co-trustee to solely control trust *Dalrymple v Melville*.

**Relieve Liability:** statutory power to relieve trustees from liability (whole or part) where the trustee has been honest, reasonable and ought fairly be excused the breach of trust s85 TA

**NB:** In interpreting s85 TA, must be honest AND reasonable. Trustee’s breach might be honest but not reasonable:

- Negligent = NOT reasonable – *Noten v Collee*.
- Breach of profit/ conflict = NOT honest – *Reader v Fried*.
- Not automatic: if it would be unfair to blameless Bs

**Defence 3: Informed Consent**

B has validly consented if T has made full disclosure of circumstances and legal consequences.

**Defence 4: Acquiesced & Release?**

- **Acquiesce:** B had full knowledge and by actions or words accepted breach *Re Kerr*
- B’s have notice of breach and did not protest for 5 years = acquiesced

**Release:** Following a breach of trust if B deliberately with full knowledge of circes freely and without pressure released T from breach *Farrant v Blanchford*

**Step 7: Can Property Be Traced?**

**General**

**Applicability:** B identifying what has happened to trust monies so to claim a propriety in rem claim in any traceable assets or its proceeds.

**Sequence for Claiming for Breaches:**

1. Claim in personam for breach of trust/ FD against trustee/fiduciary who misapplied funds; then
2. Claim in personam against third party who received the trust funds/assisted in breach *Barnes v Addey*; then
3. Trace property and claim in rem (either demand conveyance or assert equitable lien to secure in personam liability).

Mixing money in a bank account has special rules in different circumstances

**Step 1: Identify Which Circumstances**

**Circumstance 1: Mixes then Spends**

- **Mixes Money, Spends Some**

  If trustee mixes trust money in his own bank account and spends some of the money:

  1. Trustee is assumed to spend his money first as per *Re Halletts*
  2. B then entitled to equitable lien over the unspent moneys in bank account to asset in personam claim against Trustee *Brady v Stapleton*

- **Mixes, Buys Pty, Exhausts Remaining**

  If trustee mixes trust money, buys property with some of the money before exhausting the money remaining in the account:

  1. Rule of *Re Hallett* will NOT strictly apply which assumes Trustee spends his money first. Instead as per *Re Oatway*, assumes Trustee spent B’s money.
  2. B then able to trace into purchased product and can:

(i) if depreciating asset, B entitled to equitable lien to secure in personam claim against trustee;
quit his job and commenced study, it would be inequitable given the dramatic change in his circumstances.

**Step 8: Any 3rd P Liability?**

**General**

Consider application in conjunction with tracing rules if the 3rd P still has the property. If 3rd P still has the property, the onus is on him to prove he was a good faith purchaser with notice.

If property is no longer with the 3rd P, the onus is on the claimant to establish the 3rd P as a constructive trustee.

One limb of the overall test is ‘knowing assistance’ to the breach, so the 3rd P might not even have possession of the property anyway, but by establishing they have duties such as restoring the property received in breach, and compensating the trust for loss caused by the breach. This can be achieved with equitable compensation with in personam claims.

**Overall Principle:** Strangers can be made constructive trustees if they (a) receive some part of the trust property with knowledge that it was in breach of a duty, or (b) assist with knowledge in a dishonest and fraudulent design on the part of the trustees *Barnes v Addy*.

**Type 1: Knowing Recipient**

**Principle:** A recipient of property transferred in breach of fiduciary obligation, or of the proceeds (substitute) of such property, is liable to account as constructive trustee to the beneficiary if they had knowledge that the Fiduciary/Trustee was in breach by transferring.

**Step 1: Any Breach by Trustee?**

A breach of trust by a trustee or a breach of a fiduciary duty by a fiduciary (e.g. misappropriation of company property) is required and the breach need NOT be dishonest.

**Step 2: Was it Beneficial Receipt?**

(i) A 3rd P that either directly or indirectly receives the property or traceable proceeds of that property is said to be in recipient.

(ii) The 3rd P then must have beneficially received that property as the principal rather than as an agent for someone else as per *Stephens Travel Service v Qantas*.

**Type 2: Knowing Assistance**

**Principle:** A 3rd P who knowingly assist in the commission of a dishonest and fraudulent breach of trust will be liable to compensate for the loss caused by the breach *Farah Construction*.

**Step 1: Dishonest + Fraudulent Breach of Trust**

The breach by Trustee/Fiducary must be objectively dishonest and fraudulent as per *Farah Constructions*.

- Breaches vary widely in their seriousness, so breach cannot be merely negligent but serious that it transgressions ordinary standards of behaviour *Hasler v Singtel*.

**NB:** this requirement is different to ‘knowing recipient’ where dishonest is not a requirement.

**Step 2: Assistance in Breach?**

The 3rd P must have assisted in a way that it “forwarded or advanced the primary breach or misconduct in some way” - *Mere passive acquiescence in breach is not sufficient* *Re: Engine v Ferguson*.

**Step 3: Knowledge of Breach at the Time**

**Knowledge:** The 3rd P will have knowledge if he has knowledge between 1-4 on the below Baden Scale: *Farah Constructions v Say-Dee*

- This can determined by looking at the context to which the property was received and the actual knowledge possessed by the 3rd P at the time or after.

**Baden Scale of Knowledge**

1) Actual Knowledge
2) Willful blindness
3) Willfully and recklessly failing to inquire
4) Knowledge of circumstances that would indicate facts to honest and reasonable person
5) Knowledge of circumstances to H&R person upon inquiry

Knowledge of What:

3rd P will NOT be liable if he was aware that he had received the property from a fiduciary but was unaware of the breach: *Spangaro v GIAFM*

When:

Liability is imposed from the time he becomes aware of the breach. A 3rd P who receives money from a fiduciary and then spends some of it prior to becoming aware of the fiduciary’s breach will not be accountable for the amount spent: *Re Blundell*.

**Step 4: What Remedies Available?**

- If 3rd P still has property then a constructive trust over the property.
- If 3rd P does not have the property still, then personal remedy such as equitable compensation is available
  - See Remedies [Step 9].

**NB:** beneficiaries must proceed against executors first, before going after 3rd P.

**See Remedies [Step 10].**

**Type 3: De Facto Trustees**

de facto trustees, where 3rd party intermeddles in affairs of trust: see e.g., *Baughman v Phipps* [Baughman solicitor intermeddled, hence treated as trustee and therefore liable as a fiduciary that breached the no profit rule].
E) Fiduciary Obligations

The essence of a fiduciary relationship is that the fiduciary must act exclusively in the interests of the beneficiary in matters coming within the scope of that relationship.

NB: T breach of trust and FD are separate – e.g., trust terms prohibit purchase of stocks; if trustee buys stocks then breach of trust but no breach of FD; if trustee buys stock of company his wife is director of, then breach of FD (no conflict/profit). However, once established someone is a trustee; consider breach of FDs, as well as breach of trustees’ duties.

Overall Steps:

1) Is there a fid relationship?
2) What is the scope of that relationship?
3) Was there a breach within that scope?
4) Is the breach excluded by contract or by informed consent/refatification by B?
5) What is the property? Has it been assigned validly? Can it be traced?
6) Are there any bars? (hardship, unclean hands, laches, third party rights)

Step 1: Is it Fiduciary Relationship?

General

Type 1: Presumed Fiduciary Relationships

As per Mason J in Hospital Products v USSC:

a) Trustee/beneficiary: e.g., Boardman v Phipps [solicitor for trustees, Mr Boardman, de facto trustee as he ‘intermeddled’ in affairs of trust; hence owed FDs to trust beneficiaries].
   - Incl resulting/constructive trustees once aware of trust such that their conscience is affected by it.

b) Partner/partner (reciprocal): Chan v Zacharia [Drs in medical practice partnership owed FDs; relationship broke down; Chan renewed lease for himself, profiting from relationship; lease held on constructive trust in equal shares for both].
   - Incl prior to execution of final JV Agt: United Dominions Corp v Brian [UDC owed Brian FDs prior to closing final Agt; cutting him out of deal was breach].

c) Solicitor/client: Nocton v Lord Ashburton Once retainers has ended, no subsisting FD (just duty of confidence) per Bolkiah v KPMG

Type 2: Novel Relationships

Factors considered: vulnerability, representation, one P has greater access to skill/resources, power of one of the parties Hospital Products

Examples:
- Two commercial parties: if Ps are in commercial, arm’s length relationship then no FDs imposed as both have competing interests. Distinguish to partnership where mutual interests.
- Hospital Products [manufacture relied on exclusive distributor in Aus who stole IP, arms-length rel = no FDs].

Investment advisor-client: yes if Y is in reliance of the expert skill of X Daly v Sydney stock exchange

Bank-Client: if bank makes undertaking to act exclusively in interests of Y then yes. Cth Bank v Smith.

Type 3: Horizontal Relationships

Test: whether Ps have placed a high degree of mutual trust and confidence in each other in the pursuit of their common goal UDC v Brian

- All partners act in the interests of the partnership—all horizontal relationships that mimic a partnership can be treated as fiduciary in nature.
- Resources, skill and info is shared for common goal

Examples: JVs, partnerships, co-operation arrangements.

Step 2: Scope of Fiduciary Relationship

Test: examination into factual matrix and nature relationship; F not conflicted action related to matters outside scope.

Example: Lawyer owes FD to client, scope of FR is providing legal advice. So if lawyer advises client to bet on horse that lawyer has stake in, then no breach of FR as outside scope.

Contract Limiting Scope: contracts can limit scope of FD, however, when examining the factual matrix, court will look beyond written record and look to parties conduct Birtchnell

Cases: Mousat [no breach of FD even though solicitors did not advise her properly of the financial situation of her son because the scope of their duty was limited to legal advice not financial].

Farah v Say Dee [UV partners owed FDs for land they planned to develop together; NOT owe FDs for other plots of land].

Breen v Williams [in certain circumstances FD owed, scope patient needs a particular treatment or test [if they had a stake in the path lab, potential breach].

Step 3: Duties of Fiduciary Relationship

General

FDs are strict duties: irrelevant whether F acted honestly: Boardman v Phipps [did not matter that fiduciary acted with good intentions/in fact benefited the beneficiaries; he was still in breach]; Keach v Sandford [did not matter that fiduciary tried his best to renew lease for beneficiary and only took it for himself upon failure]).

Duty 1: No-conflict

Test: would a reasonable person looking at the relevant facts would think there was a real, sensible possibility of conflict, be it duty-duty or duty-interest? Boardman v Phipps

Example: law firm can’t act for two concurrent parties with competing interests unless Chinese wall in place Bolkiah v KPMG