

CONSTRUCTIVE TRUSTS

Institutional v Remedial Trusts

Institutional CT

- **ARISING FROM CONTRIBUTIONS TO PROPERTY**
- Brought into being by specified events
- Exists from time of events giving rise to it
- Court merely recognised pre-existing proprietary right
- Court has no discretion
- CT gain priority over interest acquired by 3rd parties during period between creation and recognition by court

Remedial CT

- **BREACH OF FIDUCIARY DUTY AND PURSUANT TO ESTOPPEL**
- Brought into being by court order
- Arises at date of court order (although court has discretion as to date of operation)
- Court has discretion (whether to impose, date of operation, terms)
- CT does not gain automatic priority over 3rd party rights

Knowing Assistance and Knowing Receipt: The Rule in *Barnes v Addy*

Can be caught under either limb, or both limbs, for a constructive trust to be imposed

LIMB 1 – Knowing Receipt

*In recent times it has been assumed, but rarely if at all been decided, that the first limb applies not only to persons dealing with trustees, but also persons dealing with at least some other types of fiduciary' (*Farah Constructions* at [113])

*Note: when dealing with **Torrens system land**, if a 3rd party gets registered, cannot argue that the interest is held on constructive trust under the 1st limb of *Barnes v Addy* (*Farah* at [190-198])

- i) Disposal of **property** by a trustee in breach of trust (or by a fiduciary in breach of a fiduciary duty?)
 - 'property' includes real property, personal property, security interest, choses in action (i.e. contractual rights)
 - Can information be property?

Farah Constructions v Say-Dee Pty Ltd

Facts: Real estate venture between Farah and Say-Dee. Together purchased a block of units for redevelopment. Council declined permission as land too small but said it might approve if land was adjoined to neighbouring land. Mr Elias, owner of Farah, informed Say-Dee of opportunity but it declined. Mr Elias organised his wife and daughters to buy the adjoining land through their companies. Joint venture collapsed. Say-Dee tried to argue adjoining properties were held by Elias family on CT

Held: Although certain types of confidential information were property, this particular information was not confidential. Furthermore, even if it had been confidential, it was not

property as it was not of a kind that could give rise to property rights (e.g. trade secrets) [118]

- ii) **Beneficial receipt** by the third party of that trust property (or property subject to the fiduciary duty?)
 - 'beneficial receipt' – the third party must receive the property for its own benefit rather than simply as agent for someone else
- iii) Requisite degree of **knowledge** on the part of the third party
 - 'Knowledge' is satisfied by the *Baden* categories (see below) 1-4 but not 5.
 - Any suggestion of a restitutionary/strict liability approach is rejected in *Farah Constructions*

LIMB 2 – Knowing Assistance

- i) **Dishonest and fraudulent** breach of trust or fiduciary duty by the trustee or fiduciary
 - 'dishonest and fraudulent designs can include not only breaches of trust but also breaches of fiduciary duty; but any breach of trust or breach of fiduciary duty relied upon must be dishonest and fraudulent (*Consul Developments Pty Ltd v DPC Estates Pty Ltd* at [179])
- ii) The third party **assisted** in that breach of trust or fiduciary duty
 - 'Assistance' – from procuring the breach (persuading), to encouraging, to performing acts that enable the trustee/fiduciary to commit the breach
 - Includes causing and 'permitting' (*Royal Brunei Airlines*)

Royal Brunei Airlines Snd Bhd v Tan

Facts: In 1986, Royal Brunei Airlines (Royal Brunei) appointed Borneo Leisure Travel Sdn Bhd (Borneo) to be its agent for booking passenger flights and cargo transport around Sabah and Sarawak in Malaysia. Mr Tan was Borneo's managing director and main shareholder. Borneo was receiving money for Royal Brunei, which was agreed to be held on trust in a separate account until passed over. But Borneo, with Mr Tan's full knowledge and assistance, paid this trust money into its current account and used it for its own business. Borneo travel failed to pay on time, the contract was terminated, and Borneo went insolvent. Royal Brunei claimed the trust money back from Mr Tan.

Issue: Could Royal Brunei claim the trust money back from Mr Tan, due to his knowing assistance of a breach of trustee duties and the knowing receipt of trust property?

Held:

1. The Privy Council held that it was the dishonest assistant's state of mind which matters.
 2. Knowledge depends on a "gradually darkening spectrum".
 3. The test for being liable in assisting breach of trust must depend on dishonesty, which is objective.
 4. It is irrelevant what the primary trustee's state of mind is, if the assistant is himself dishonest.
- iii) With the requisite degree of **knowledge** of the breach of trust or fiduciary duty
- Original list from *Baden* restated in *Consul Developments* and affirmed in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* at [177]
 1. Actual knowledge
 2. Wilfully shutting one's eyes to the obvious
 3. Wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make
 4. Knowledge of circumstances which would indicate the facts to an honest and reasonable man
 - Defendant has actual knowledge of facts which to a reasonable person would suggest a dishonest and fraudulent design
 5. Defendant knows facts that would have been investigated by a reasonable person acting diligently, thereby discovering the truth, where the defendant has innocently but carelessly failed to make the appropriate investigation. (*NCR Australia v Credit Connection* [2004] NSWSC 1 per Austin J at [168]-[169])
- iv) And **knowing that his/her acts assisted** the trustee's/fiduciary's breach

Resulting Trusts Arising from Contributions to Property

***Muschinski v Dodds* (1985) 160 CLR 583**

Facts: M (woman) and D (male) entered an agreement to buy a property as tenants in common for \$20,000. The relationship broke down and M sought a declaration that the respondent's "joint interest" was held in trust for her. When the joint project was abandoned, the parties were left as equal legal owners of the project property towards the overall costs of which Mrs M had contributed approximately ten-elevenths (\$25,259.45) while Mr. Dodds had contributed but the remaining one-eleventh (\$2,549.77). There was no express or implied agreement, arrangement or understanding between the parties that they should hold their legal interests upon trust for themselves in shares corresponding to their respective contributions. To the contrary, the evidence leads inexorably to the conclusion - expressed in concurrent findings of fact in the courts below - that it was their shared intention that, from the time of purchase, each should have a full one-half beneficial, as well as legal, interest in the property

The presumption of resulting trust had risen in Mrs Muschinski's favour. This was not rebutted by the presumption of advancement but was rebutted by evidence of actual intention → warranted constructive trust analysis

'As the learned trial judge found, it was not the intention of either of them that Mr Dodds' equal beneficial interest should be acquired by stages as he contributed towards the planned joint endeavour. Their planned future association and joint activity provided the occasion for, and the explanation of, the arrangement between them. That interest in the property should be immediate and unconditional. It was not qualified to provide for the un contemplated double contingency that their personal relationship would fail and that the proposed venture involving the development and joint use of the land would crumble under the yoke of inauspicious stars' per Deane J [611-12]

	M	D
Purchase price	\$20,000	-
Legal title	½	½
Resulting trust	Whole	-
Rebuttal of presumption	½	½

Elements:

1. Contribution to a
2. Joint venture
3. Which has prematurely failed
4. Without attributable blame (cannot go to equity with unclean hands)

Baumgartner v Baumgartner (1987) 164 CLR 137

Facts: De facto relationship (not married despite name). Property purchased in Mr Baumgartner's sole name (point of differentiation from *Muschinski*). Mr B was also the sole mortgager under the mortgage securing the bank loan over the property. Mortgage repayments were made for a joint bank account (pooled resources of both parties).

'Their contributions, financial and otherwise, to the acquisition of the land, the building of the house, the purchase of the furniture and the making of their home, were on the basis of, and for the purposes of, that joint relationship. In this situation the appellant's assertion, after the relationship had failed, that the Leumeah property, which was financed in part through the pooled funds, is his sole property, is his property beneficially to the exclusion of any interest at all on the part of the respondent, amounts to unconscionable conduct which attracts the intervention of equity'

Elements:

1. A mutual arrangement between the parties under which the parties each spend money for the purpose of their joint relationship with the object that some or all of that money was to finance the purchase of the home, notwithstanding the absence of physical pooling of resources

2. The pooling of labour by or on behalf of both parties
3. Contributions to family welfare by way of domestic assistance such as homemaking and parenting

Swettenham v Wild [2005] QCA 264

Facts: Ms Wild to take legal right to property but he was to reside in the granny flat of the property and receive support of living in family environment (this was the nature of the joint endeavour between them). Joint endeavour failed through no attributable fault of either party. Mr Swettenham contributed a large portion of the purchase price and so in these circumstances it would be unconscionable for Ms Wild to retain beneficial interest in the whole of the property

Ratio: Mr Swettenham entitled to proportionate share of the property relative to his capital contribution to the property (prima facie)

Buffrey v Buffrey

Facts: Parties had legal title in an investment property as joint tenants. Husband provided most of the purchase money for the property, with the balance being made up by mortgage for which he & his wife were jointly liable.

Held: the presumption of advancement had been rebutted because the purchase was made mainly for the benefit of the husband. Therefore, there is the presumption that the wife holds her share on a resulting trust for the husband, because it was an investment property, the parties arranged their financial affairs separately, and because the wife's presence as a joint tenant was due to the bank's insistence on the mortgage.

'If the presumption of resulting trust arises where the joint tenants have made unequal contributions to the acquisition cost: the presumption may be rebutted by evidence showing that the common intention of the parties at the time of acquisition was for equality of interests despite inequality of contributions' per Palmer J

When Will a Constructive Trust be the Appropriate remedy?

1. Other remedies to be considered first
2. Consider third party rights

Giumelli v Giumelli (1999) 196 CLR 101

(estoppel)

'Before making an order designed to bring about a conveyance of the promised lot to the respondent, the Full Court was obliged to consider all the circumstances of the case. These circumstances included the still pending partnership action, the improvements to the promised lot by family members other than

Robert, both before and after his residency there, the breakdown in family relationships and the continued residence on the promised lot of Steven and his family' plurality at [49]

'...qualification was necessary both to avoid injustice to others, particularly Steven and his family, and to avoid relief which went beyond what was required for conscientious conduct by Mr and Mrs Giumelli. The result points inexorably to relief expressed not in terms of acquisition of title to land but in a money sum' per Gleeson CJ, McHugh, Gummow and Callinan JJ at [49]-[50]

Milling v Hardie [2014] NSWCA 163

(estoppel)

Facts: Mr Milling is a farmer who lives in one of several rural properties he owns in central west NSW. In 1992, Mr Milling invited his daughter Mrs Hardie and her husband to move into a homestead on one of the nearby properties. Over the following years, the Hardies carried out various improvements to the homestead and its grounds. They undertook these improvements with the consent of Mr Milling but at their own expense. They paid no rent and Mr Milling paid all the rates and taxes. Mr Milling consistently refused Mr Hardie's request to conduct farming activities on the property.

After 18 years, a dispute arose between the parties. Mr and Mrs Hardie commenced legal proceedings, claiming an entitlement to the property on the basis that Mr Milling had made promises or representations to them that he intended to transfer the property to them during his lifetime or leave it to them in his will. They claimed it was on the basis of these promises or representations that they made the improvements to the property.

On appeal: Conduct did not justify the expectation of Mr and Mrs Hardie that they would inherit or gain ownership of any part of the farm. But his conduct in inviting them to live at the homestead and consenting to the improvements they made could justify the expectation in them that they could occupy the homestead and the surrounding area for a considerable period so they could gain the benefit of the improvements they had undertaken.

Bathurst City Council v PWC Properties Pty Ltd (1998) 195 CLR 566

(breach of fiduciary duty)

Facts: The case involved Council-owned land that was being used as a public car park. The respondent (PWC Properties Pty Ltd) sought to change the local planning controls governing the car park, to prohibit the Council from further altering the use of the land to be anything but a public car park. The respondent argued that because the car park was freely available for use by members of the general public, the land was subject to a constructive trust, for charitable purposes. The Court ruled in favour of the appellant (the Council) citing *Commissioners for Special Purposes of Income Tax v Pemsel* to support its judgment that the imposition of a constructive trust over the land would not create a trust for charitable purposes and that in this circumstances there would be other and more immediate equitable remedies available to the respondent.