

CONSTRUCTIVE TRUSTS

Muschinski v Dodds (Deane): A constructive trust is fundamentally remedial, but it does have institutional features. Therefore it can be imposed as of the date of the wrongdoing (institutional), or at the date of judgment (remedial).

Intention is not a necessary element of the constructive trust (*Crafter v Crafter*); the courts impose it.

Muschinski v Dodds: the rationale for the CT is that it's unconscionable, or against equitable principles, for a person not to transfer property/be made liable. Courts will allow an innocent party to recover property by declaring a CT.

Two forms of constructive trusts (**Giumelli**):

1. **Proprietary:** court will treat one party as having a beneficial interest in property held by the other. E.g. Where X owns the property and the property is transferred to Y.
2. **Personal:** court will impose liability on one person in favor of the other. E.g. X is made liable to Y and must pay them \$1000

TWO STAGE PROCESS: (as adopted in **Giumelli and Van Dyke**)

1. Is the constructive trust available?
 - Four main ways (breach of fiduciary duty, third party liability, unconscionable retention of title and equitable fraud).
2. If yes, is it appropriate to order a constructive trust?

QUESTION ONE: IS THE CONSTRUCTIVE TRUST AVAILABLE?

- **FOUR MAIN WAYS IT MIGHT BE**

Breach of fiduciary duty (way of rendering a fiduciary accountable for a breach of fiduciary duty)

Constructive trusts can provide a remedy for breaches of fiduciary obligations (**Muschinski v Dodds**).

Was there a breach of fiduciary duty?

Yes, if either of the following rules were breached:

- Conflict rule: when there was a conflict of possible conflict between their fiduciary duty and personal interest.
- Profit rule: by reason of their fiduciary position, or by reason of taking advantage of opportunity or knowledge derived from their fiduciary position made a profit.

→ **Therefore the fiduciary is liable and a constructive trust may be awarded.**

1. **Is the constructive trust the only satisfactory means of ensuring the fiduciary accounts for the gain derived from their breach?**
 - Can you award something less than the constructive trust and achieve justice?
2. **Is there a sufficient connection between the breach that has occurred and the property that would be the subject of the constructive trust?**
 - E.g. breach of fiduciary duty regarding a business. Can't get a constructive trust over a water bottle the party owns (it is completely divorced from the breach).

→ **If yes to both of these questions, a constructive trust can be awarded.**

It is at the **courts discretion** what is held on constructive trust (**Hospital Products; Timber Engineering**).

- If the errant fiduciary can satisfy the court that a certain asset/s of the business has been contributed by the fiduciary (i.e. by way of their hard work, time, energy, skill or financial contribution that they have expended or made) the court may exclude that asset/s from the scope of the constructive trust (or impose a constructive trust over only a proportion of the property in question).

The right to constructive trust relief may be lost by reason of the operation of other equitable doctrines, such as laches and equitable estoppel.

Note: a constructive trust arising from breach of fiduciary duty is institutional in that it arises on occurrence

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Third Party Liability

You can make a third party liable (under the two limbs of *Barnes v Addy*) if they knowingly received property under a trust or if they assisted with a breach.

First Limb: KNOWING RECEIPT

- Persons who receive trust property become liable if it is established that they received it with notice of the trust ('recipient liability').

Second Limb: KNOWING ASSISTANCE

- Defendant/third party ('accessory') will be liable if they assist a trustee/fiduciary with knowledge of a dishonest and fraudulent design (accessorial liability).
- Applies to breach of trust and breach of fiduciary duty (*Farah Constructions*)

Three elements for the first limb that must be established (*The Bell Group v Westpac*):

- A breach of trust** (Noted in *Farah Constructions* that it has been assumed, but not decided, that the first limb could be applied to breach of fiduciary duty).
- Knowledge**
 - Property must have been transferred in breach of trust 'knowing' that the transfer of trust property was in breach of trust
 - According to *Consul Development* (and approved by obiter in *Farah*), the knowledge element will be satisfied if the recipient had:
 - Actual knowledge
 - Willful shutting of the eyes (Nelsonian knowledge)
 - Willfully and recklessly failing to make such enquiries as an honest and reasonable person would make
 - Knowledge of circumstances which would indicate the facts to an honest and reasonable person
- Receipt of trust property**
 - They received property from the breach. Requires person to have possession of the trust property for their own 'use and benefit' (*Stephens Travel Service v Qantas*)
 - Information is not property (*Farah Constructions*)

Three elements that must be established (*Young Investments Group v Mann*):

- The defendant must know that a dishonest and fraudulent design by a fiduciary is being implemented
- The defendant must know that their acts have the affect of assisting this design
- The levels of knowledge that make you liable (*Consul Developments*) are:
 - Actual knowledge
 - Willful shutting of the eyes (Nelsonian knowledge)
 - Willfully and recklessly failing to make such enquiries as an honest and reasonable person would make
 - Knowledge of circumstances which would indicate the facts to an honest and reasonable person
- The knowledge of the defendant must be of actual facts, not mere claims or allegations.

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Equitable Fraud Based Transactions

When there is an unconscionable transaction (specifically estoppel), Equity may declare a constructive trust for the innocent party to recover their property. However, the courts will not always award a constructive trust with estoppel – it is a last resort and your order it only if it is appropriate (*Giumelli; John Alexander's Clubs*).

Held by Deane in **Muschinski**, and adopted in **Baumgartner**, a constructive trust may be imposed upon a legal entitlement to property in order to prevent a person from asserting or exercising their legal right in respect of that property in circumstances where it would constitute unconscionable conduct. Whilst these are de facto cases, the principle applies more generally (**e.g. Carson v Wood**)

NOTE: upon the dissolution of marriage or a de facto relationship, the courts power to alter property interests is determined by the relevant legislation (The Family Law Act and De Facto Relationships Act), rather than the principles of constructive trusts.

Where only one party has contributed, but both names are on the title of the property
→ **Muschinski v Dodds**

M bought land and put D's name on the title on the basis he would renovate the cottage and erect a prefabricated house. D's funding fell through and he did not do what he had planned to do regarding improvements on the land. Mason and Deane held **there was a constructive trust because it was unconscionable after the failure of the joint venture between the parties for the man to assert his legal entitlement without recognising the woman's payment.**

Where only one party purchases the land/takes out the mortgage, but both make financial contributions

→ **Baumgartner v Baumgartner**

Man purchased a house and took out a mortgage, both solely in his name. However, the aggregate earnings of the parties were pooled (in proportions of approximately 55% and 45%) for living expenses, including paying off the mortgage. The man **held the house on constructive trust as where a joint endeavor is removed without attributable blame it would be unconscionable for one party to retain a benefit with respect to the relevant property not commensurate with their contribution.**

- **Baumgartner:** The relevant contributions that the court may take into account in determining the scope of the constructive trusteeship extend **beyond** financial contributions to the purchase price of the property. The courts have entitled persons to an interest in property as a result of:
 - The pooling of financial resources
 - The pooling of labour by or on behalf of both parties, even in the absence of the pooling of financial resources
 - Contributions to family welfare by way of domestic assistance (such as homemaking and parenting).
- CT may be imposed even if it is contrary to the express or implied intention of either or both of the parties.

QUESTION TWO: IF AVAILABLE, IS IT APPROPRIATE TO ORDER A CT?

PROMISE FULLFILMENT vs. Detriment Reversal

Verwayen: Mason held the purpose of estoppel was to rectify detrimental reliance, rather than promise fulfillment. This meant a constructive trust could not be awarded as it went beyond rectifying the detrimental reliance.

→ **Giumelli** held the prima facie remedy for estoppel is promise fulfillment. However this prima facie position can be altered. **Van Dyke** took this approach as well.

When will the position be altered?

A CT will not be imposed on the mere ground of unfairness – there must be unconscionable conduct (**Muschinski**). It is **not** unconscionable when:

- Where the parties have **made an agreement regarding their respective contributions**, in the absence of equitable grounds for avoiding that agreement (such as undue influence, mistake), it will generally not be unconscionable for a party to rely on the terms of the agreement, and the court will accordingly give effect to the agreement.
- Contributions were made with **knowledge that they would confer no proprietary entitlement**
- **Contributions are not intended to exist for the parties' common or joint benefit**, but rather for their own selfish (business reasons)

***** OR – it will be inappropriate if it is analogous with cases/situations on the following page *****