

Tracing and the ultimate choice of – *proprietary* – remedy:

There has been a profitable investment; the principal is able to claim a proprietary remedy - they elect their choice of remedy

- CT or EL

Yet, cannot proceed super safely with tracing and electing a remedy as there hasn't been a decision in a while; the courts could make a different decision to the case law we have which is older

SO: the choice for which remedy applies depends on the type of property we have traced to:

- If the principal can trace into property comprising a mixture of the principal *and* errant fiduciary's property, the available proprietary remedy will depend on whether the property is either:
 - 'Specifically severable' property: *Brady v Stapleton* (1952) 88 CLR 322.
 - Property that can be split; e.g. shares, cash (indistinguishable mass - every share and every dollar note are all equal, they all equal the same thing)
 - Can be broken down into individual parts
 - 'Specifically unseverable' property: *Scott v Scott* (1962) 109 CLR 649.
 - Property that *cannot* be split; e.g. house, boat (it is not indistinguishable mass - cannot break down a house into individual parts which are all equal)

a) If the mixed property is 'specifically severable', the principal may choose:

- A constructive trust over a proportionate part of the severable property: *Brady*.
 - E.g. constructive trust over 500 of 1000 shares (where \$500 of principal's and \$500 of fiduciary's money was used to purchase 1000 \$1 shares); *or*

- Proprietary interest - you know own part of the mass (e.g shares)
- An equitable lien securing the payment of the principal's money (\$500) used to purchase the severable property (shares): *Brady*.
 - Here, the shares would be sold and the money given to the principal
 - The property is not taken from the mass and given to principal, but secured and sold to give money to the principal

b) If the mixed property is 'specifically unseverable', the principal may choose:

- A constructive trust over a proportionate part of the unseverable property: *Scott; Foskett* Lord Millett at [93].
 - E.g. constructive trust over a one-half ownership of a house (where \$500,000 of principal's and \$500,000 of fiduciary's money was used to purchase a \$1,000,000 house); *or*
 - You can become a partial owner of the unseverable property
- An equitable lien securing the repayment of the principal's money (\$500,000) used to purchase the unseverable property (house): *Brady*;
 - The house is secured as payment for the principal
 - *Plus* – the repayment of profit in the form of any increase in value of the property in the meanwhile: *Scott*.
 - Eg. house (worth \$1,000,000, \$500,000 of principal's money used. When case goes to trial, if the house is \$1,500,000, the EL would not just secure \$500,000, but \$750,000 - it has immediately increased in value) AFTER the day of judgement, this profit is not available anymore

CT = enjoy future increase. EL = get a fixed amount of money back

(a) 2. Mixture: Innocent Principals: Where multiple innocent principals' moneys are 'mixed'

Consider the following scenario:

- Solicitor holds a trust fund account.
- On 1 Jan, solicitor deposits \$10,000 of A's money.
- On 2 Jan, solicitor deposits \$10,000 of B's money.
- On 3 Jan, solicitor misappropriates \$15,000, leaving \$5000.
- On Jan 4, solicitor is declared bankrupt.

Question: How is the \$5000 to be split between A and B?

Applying the rule in *Clayton's case*:

If the rule in *Clayton's case* applies, the result is as follows:

- All of A's money is regarded as spent.
- Half of B's money is regarded as spent.
- The \$5000 remaining in the account is treated as B's.
- A gets nothing.
- Courts have, therefore, developed a more equitable method of assessing entitlements.

Two – more equitable – methods of assessment:

1. The simple 'pari passu' approach: *Re French Caledonia Travel Service Pty Ltd in liq* (2003) 59 NSWLR 361, Campbell J at [193].
 - The innocent parties share what is left 'pari passu' - that is, 'in proportion to' their contributions to mixed fund.
 - If the 'pari passu' approach applied to the preceding scenario, both A and B would each get \$2500 of the remaining of \$5000.

In *French*, an airline had mixed multiple principal's money in an account before they went solvent; how would the money left be distributed? The court applied a 'pari passu' - determined proportionally by their original contributions to the fund

If A gave 40 and B gave 60, then A gets 40% of the money and B gets 60%

Proportional to the original amount put in

2. Lowest intermediate balance rule: *Caron v Jahani (No 2)* [2020] NSWCA 117.

Recently, the NSWCA held that the ‘pari passu’ rule was applied incorrectly in this case; they upheld the intermediate balance rule

Bell P at [14] (with whom Bathurst CJ and Macfarlan JA agreed):

‘The second approach does not ignore the withdrawal of amounts from the fund over time, but treats any given depositor’s share as rateably reduced whenever there is any withdrawal from the fund. It is in that sense a variation of the pari passu approach, but will yield a different outcome depending on the time that individual deposits were made and any subsequent movements in the account. This is called the “lowest intermediate balance”’.

Movements of the bank and money

Differs - it proportionally reduces each share whenever money is withdrawn from an account

th

Consider the following scenario:

- On 1 January, a solicitor deposits \$10,000 of A’s money into their account.
- Later that day, the solicitor withdraws \$5000.
- This leaves \$5000 in total.
- A has a claim to the full \$5,000.
- On 2 January, the solicitor deposits \$10,000 of B’s money.
- Now there’s \$15,000 in total.

Pari Passu:

- A originally gave \$10,000, B originally gave \$10,000. Of the remaining \$15,000, they both get half
- B would have lost \$2,5000, argue that A should bear the burden of loss alone, as only their money had incurred the loss

Intermediate balance rule:

- \$5000 of A's was taken out; \$10,000 of B's put in. of the remaining \$15,000, A get's \$5,000 and B gets \$10,000

Question: What of the \$15,000 are A and B entitled to as at January 2?

Under 'pari passu': A and B would each get half of \$15,000 (\$7500 each).

Under 'lowest intermediate balance': However, sensitivity to the solicitor's *first* \$5000 withdrawal, means that A is entitled to \$5000; and B to \$10,000.

Pari Passu vs Intermediate Balance Rule:

- Depends on the facts when each rule should be applied
- Consider: if money was put in from someone months ago, then someone else, the person from months ago should reasonably incur more loss
- Consider: if there is a lot of money in the account and a lot of movement, seems less likely the intermediate balance rule is appropriate

(b) Tracing into the hands of third parties

Bona fide third party - cannot take property from them

Remember = the children in the life insurance case were volunteers; they received a gift; they got the money for free

Basic third party principles:

- If property is still 'identifiable', a principal can vindicate an equitable interest in the property that has been successfully traced into, whether in the hands of a fiduciary *or* third party.