

**TOPIC 5: PROPRIETARY EQUITABLE REMEDIES**

<p><b>Selecting the Appropriate Proprietary Equitable Remedy</b></p>	<p>Proprietary remedies operate against identifiable property rather than merely against D personally.</p> <p>The critical inquiry is whether P can identify property, trace value into substitute property, and establish a proprietary interest in the asset itself.</p> <p>Main remedies:</p> <ul style="list-style-type: none"> <li>▪ value has moved from original property into substitute property → tracing;</li> <li>▪ trust money or property has been mixed with other funds → tracing through mixed funds;</li> <li>▪ substitute property has increased in value and P seeks beneficial ownership of the asset → constructive trust;</li> <li>▪ substitute property has decreased in value or P simply seeks security for repayment → equitable lien</li> <li>▪ property has passed through multiple transactions or accounts → tracing and following should be considered;</li> <li>▪ third parties have received traceable property → tracing may continue unless defeated by a defence such as BFPWN.</li> </ul> <p>Common elections:</p> <ul style="list-style-type: none"> <li>▪ constructive trust (ownership of asset and gain) OR equitable lien (security for amount contributed);</li> <li>▪ proportionate ownership of substitute property OR charge securing repayment.</li> </ul>	<p>Where did value go?</p> <p>Ownership or security?</p>
<p><b>Whether Property Can Be Traced</b></p>	<p><b>Issue</b></p> <p>Whether P can identify and follow property or value into substitute assets.</p> <p><b>Application</b></p> <p>Warning: Where some funds have been dissipated and other funds remain identifiable, elect the approach that preserves the greatest amount of traceable value. Do not voluntarily trace into property that has disappeared if an alternative election preserves recoverable assets.</p> <p>P must first establish a proprietary interest in [trust property/fiduciary property/misappropriated funds]. As <i>Foskett v McKeown</i> explains, tracing identifies where property or value has gone so that proprietary remedies may later be claimed.</p> <p><b>Where did the value go?</b></p> <p>P would argue that [original property/funds] can be followed into [account/asset/property] because the value continues to survive notwithstanding changes in form. <i>Victoria University of Technology v Wilson</i> demonstrates that identifiable value may support proprietary consequences.</p> <p><b>Mixed account?</b></p> <p>Where fiduciary funds were mixed with personal funds, P would rely upon <i>Re Hallett's Estate</i> and argue that the fiduciary is presumed to have spent their own money first. Accordingly, any remaining balance is treated as containing trust money.</p>	<p>Where did value go?</p> <p>Still identifiable?</p>

Lowest Intermediate Balance Rule: Trust money cannot be replenished by later deposits of the wrongdoer's own money. The maximum amount recoverable from a mixed account is the lowest balance the account reached before later deposits were made.

#### Profitable investment?

Where mixed funds were partly dissipated and partly invested profitably, P would rely upon *Re Oatway* and argue that the fiduciary should not benefit from wrongful mixing. P may therefore claim the profitable investment rather than the depleted balance.

Warning: Where tracing may continue into multiple surviving assets, identify each possible tracing destination and then **elect the asset that produces the greatest recovery for P**. Do not assume P must trace proportionately into every asset.

#### Multiple accounts or substitutions?

Where money has passed through multiple accounts, mixtures, or substitute assets, tracing may continue provided the relevant value remains identifiable. *Clayton's Case* adopted a first-in first-out approach, treating money deposited first as being withdrawn first. However, modern courts apply that rule cautiously. *Re French Caledonia* and *Caron v Jahani* demonstrate that tracing should not fail merely because the accounting has become complicated. Courts may adopt flexible approaches to identify P's share of mixed funds and continue tracing into substitute assets.

#### Did D add significant value?

If D contributed substantial labour, entrepreneurial skill, or personal capital to the substitute asset, D may argue for apportionment under *Warman International Ltd v Dwyer*.

#### Has the value disappeared completely?

Conversely, D may argue tracing fails because the value has been entirely dissipated, no substitute asset survives, the chain of substitutions has broken, or the money has been consumed through ordinary living expenses such as rent, food, holidays, or living costs.

Warning: Proprietary remedies require surviving property. If the asset has been destroyed, consumed, or otherwise disappeared, there is nothing left to attach a constructive trust or equitable lien to. Consider personal remedies instead, including an account of profits (where D obtained a gain, profit, opportunity, contract, client, or other benefit through the wrongdoing) and/or equitable compensation (where P suffered a loss flowing from the wrongdoing). Both may potentially arise from the same wrongdoing. However, if awarding both would compensate the same wrongdoing twice, P will ordinarily be required to elect the more valuable remedy.

The critical inquiry is simple: where did the value go, and is it still identifiable?

If tracing succeeds, the next inquiry becomes whether P should elect a constructive trust or an equitable lien.

	<p><b>Conclusion</b> Tracing will likely succeed where the original value can still be identified within an account, asset, investment, or substitute property.</p>	
<p><b>Whether P Should Elect a Constructive Trust or Equitable Lien</b></p>	<p><b>Issue</b> Whether P should obtain beneficial ownership through a constructive trust or a security interest through an equitable lien.</p> <p><b>Application</b> Where tracing succeeds, P may elect the proprietary remedy that most effectively protects the traceable value.</p> <p><b>Does P want ownership?</b> If the substitute asset increased in value, P will usually prefer a constructive trust because P captures the appreciation.</p> <p><b>Does P just want repayment?</b> If the substitute asset decreased in value, ownership would be impractical, or P primarily seeks repayment, P will usually prefer an equitable lien securing repayment of the amount contributed to the asset and traceable into it.</p> <p><b>Constructive trust</b> P would seek a constructive trust where ownership of the asset itself provides the greater advantage.</p> <p>P would argue that [property/profit/opportunity/substitute asset] was acquired through fiduciary wrongdoing and should therefore be treated as beneficially belonging to P rather than D.</p> <p>Where the facts involve:</p> <ul style="list-style-type: none"> <li>▪ a fiduciary opportunity → <a href="#">Chan v Zacharia</a>;</li> <li>▪ profits derived from knowledge, access, or opportunities obtained through the fiduciary position → <a href="#">Boardman v Phipps</a>;</li> <li>▪ a bribe or secret commission converted into property → <a href="#">Attorney-General for Hong Kong v Reid</a>;</li> <li>▪ a secret commission that beneficially belonged to the principal from the moment of receipt → <a href="#">FHR European Ventures v Cedar Capital</a>.</li> </ul> <p>Where the substitute asset substantially increased in value, P would rely upon <a href="#">Foskett v McKeown</a> and argue for a constructive trust so as to capture the appreciation.</p> <p><b>Insolvency concern?</b></p>	<p>Ownership or security?</p>

	<p>Where D faces actual or potential insolvency, P may additionally prefer a constructive trust because beneficial ownership may place the asset outside the pool available to unsecured creditors. Under <a href="#">ss 82, 116 and 153 of the Bankruptcy Act 1966 (Cth)</a>, property subject to equitable proprietary claims may fall outside D's divisible estate.</p> <p><b>Equitable lien</b> Conversely, P may prefer an equitable lien where ownership would be excessive, impractical, or economically disadvantageous. P would prefer an equitable lien securing repayment of the [<a href="#">\$...</a>] traceable contribution rather than ownership of the depreciated asset itself.</p> <p>P would argue that [<a href="#">property</a>] was acquired, improved, or preserved using value traceable to P and that conscience requires secured recovery even if full ownership is inappropriate.</p> <p><a href="#">Scott v Scott</a> demonstrates that an equitable lien may be preferable where co-ownership or division of the asset would be impractical.</p> <p><b>Did D add substantial value?</b> Where the asset decreased in value, or where D substantially contributed independent labour, skill, or capital, P may prefer an equitable lien securing repayment rather than ownership of the asset itself.</p> <p>Conversely, D may argue that tracing failed, an equitable lien sufficiently protects P, proprietary relief would unfairly prejudice creditors or third parties, or D substantially contributed labour, skill, expertise, or capital.</p> <p><a href="#">John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd</a> confirms that Australian courts exercise caution before imposing constructive trusts where lesser remedies sufficiently achieve justice. <a href="#">Boardman v Phipps</a>, <a href="#">Victoria University of Technology v Wilson</a>, and <a href="#">Warman International Ltd v Dwyer</a> demonstrate that substantial independent contributions may justify a lesser proprietary response. The critical inquiry is simple: does P want ownership of the asset, or security for the value contributed to it?</p> <p><b>Conclusion</b> P will likely elect the remedy that best protects the traceable value. Constructive trusts are generally preferred where ownership and appreciation are advantageous, whereas equitable liens are often preferred where secured repayment is sufficient.</p>	
<p><b>Whether Tracing May Continue Into Third Parties</b></p>	<p><b>Issue</b> Whether P may continue tracing into property transferred to a third party.</p> <p><b>Application</b></p>	<p>Volunteer or purchaser?</p>

**Has the property reached a third party?**

P would argue that tracing should continue because identifiable value remains preserved in [account/property/shares/substitute asset].

Tracing may continue into third-party hands unless the property reaches a bona fide purchaser for value without notice.

**Volunteer or purchaser?**

Accordingly, P may ordinarily trace into volunteers, innocent recipients, and substitute assets held by third parties.

A volunteer is a person who provides no consideration, such as a gift recipient. P may rely upon *Re Diplock* and argue that tracing may continue against volunteers because they have given no value for the property received.

**Has value been preserved?**

Where fiduciary funds were used to discharge secured debt or improve a third party's position, P may rely upon *Heperu v Belle* and argue that identifiable value remains preserved through the reduction of liabilities.

P would therefore argue that the recipient provided no value, possessed notice, or that identifiable substitute property continues to preserve the traceable value.

**Why might tracing fail?**

Conversely, D or the third party may argue that valuable consideration was provided, no notice existed, the property was dissipated, or no identifiable substitute asset survives.

Where innocent third parties mixed funds rather than fiduciaries, courts may provide more limited proprietary relief because conscience is less strongly affected.

The critical inquiry is whether the third party gave value and whether the traceable value can still be identified in some form.

**Protected purchaser?**

If tracing survives, the next inquiry becomes whether the recipient is protected as a bona fide purchaser for value without notice.

**Conclusion**

Tracing will likely continue into third-party hands where identifiable value remains preserved, and the recipient is not protected as a bona fide purchaser for value without notice.

<p><b>Whether BFPWN Defeats Proprietary Recovery</b></p>	<p><b>Value given?</b>  → YES = Possible BFPWN  <b>Value not given?</b>  → Volunteer → Stop. → Do NOT analyse BFPWN. → Move to Tracing / Proprietary Remedies / Knowing Receipt.</p> <p><b>Issue</b>  Whether the third party acquired the property free from P's equitable interest as a bona fide purchaser for value without notice.</p> <p><b>Application</b>  Under <i>Pilcher v Rawlins</i>, equity will not disturb legal title acquired by a bona fide purchaser for value without notice.</p> <p>The third party must establish that they acquired legal title, provided valuable consideration, and had no actual, constructive, or imputed notice of P's equitable interest at the time of acquisition.</p> <p>P would argue the defence fails because the third party had notice, suspicious circumstances required further inquiry, or knowledge was acquired through an agent.</p> <p>If BFPWN is established, tracing against that property ends and proprietary recovery against that property fails. However, P may still pursue personal claims against D, equitable compensation, an account of profits, or tracing into other identifiable substitute proceeds.</p> <p><b>Conclusion</b>  BFPWN will defeat proprietary recovery where the third party acquired legal title for value without notice of P's equitable interest.</p>	<p>Equity's darling?</p>
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