

CONSTRUCTIVE TRUSTS: TOO MUCH DISCRETION OR NOT ENOUGH?

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I. INTRODUCTION

The diverse intricate concepts of a trust have long proven difficult to define within one consolidated umbrella definition. Acknowledged as one of the most complete classifications and one approved of in Snell's *Equity*¹ is that suggested by Keeton and Sheridan:

A trust is the relationship which arises wherever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit accrues, not to the trustee, but to the beneficiaries or other objects of the trust.²

The principles underlying constructive trusts are a minefield of theory and counter-theory. Described by one text as “empty and amorphous,”³ this particular trust as yet has no one consolidated definition, which explains to a large extent why developments within the common law world surrounding this controversial issue have been diverse. The principle difficulty over the cataloguing of constructive trusts is that two distinct views have developed.

This essay will attempt to provide a framework in which these views are compared and contrasted in an effort to explain why some jurisdictions regard certain elements of this trust as “palm tree” justice and “...too liberal an application...,”⁴ while other jurisdictions remain satisfied with its present form.

¹ McGhee (Ed.), *Snell's Equity* (London, 30th Ed., 2000) at p. 110.

² Keeton & Sheridan, *The Law of Trusts* (London, 12th Ed., 1993) at p. 3.

³ Pearce and Stevens, *The Law of Trusts and Equitable Obligations* (London, 1995) at p. 3.

⁴ *Hussey v. Palmer* [1972] 1 W.L.R. 1286 at 1290.

Whether too much discretion or, in fact, not enough prudence is afforded when granting such trusts depends largely on which judicial system you explore.

While the British judiciary have remained sceptical of the principles established in many of the Commonwealth nations, Ireland has taken a much more liberal approach and has tended to show much more acceptance of this additional discretion. However, not unlike Canada, judges and commentators have stated that some modifications would need to be made in granting trusts of this nature.

As such, this essay will endeavour to conclude whether the more liberal approach, which undoubtedly affords much more discretion, or the more stringent approach adopted by the British courts is at present the most apt structure to embrace as regards constructive trusts.

Described by Hilary Delany as an equitable remedy which the law creates to satisfy the demands of “justice and good conscience,”⁵ in general, a constructive trust is “one which arises by operation of law and which comes into being as a result of conduct and irrespective of the intention of the parties.”⁶ Where the courts have found such a person or a party to have derived profit or unjust enrichment in a fraudulent manner, a trust of this nature will be induced. They will arise where no trust has directly or indirectly been declared but where, according to the principles of equity, it would be fraud for the person on whom the court imposes a trust to assert a beneficial ownership.

Delany also opines that to isolate or insulate this particular trust within its own context or circumstances would be unorthodox; the temperament of this trust demands that it be deliberated in concurrence with either the proprietary remedy of tracing trust

⁵ *Ibid.*

⁶ Delany, *Equity and the Law of Trusts in Ireland* (Dublin, 1992) at p. 196.

property, as evidenced in the *Baden* case,⁷ or the personal remedy against a trustee for a breach of trust, which surfaces in the case of *Gabbet v. Lawder*.⁸ As such, it must legitimately emanate where “fairness” demands it. However, it has been specified that equity’s intervention to prescribe such trusts “must be based on principle; there must be some relationship between the relief granted and the circumstances which give rise to it.”⁹

The difficulty engulfing the law regarding constructive trusts is the inability of the various judiciaries to assemble a single set of principles from which to work with, resulting in the variation of discretion afforded in each jurisdiction. It has often been described as a “grey” area of law with nothing as yet set in stone with which to refer to. The courts in England (*Grant v. Edwards*¹⁰) have customarily branded the constructive trust as a “substantive institution,” confining this instrument to express circumscribed situations. One prime example is where there has been a breach of fiduciary duty or the wrongful assumption of trust duties by a stranger to the trust.

The remedial constructive trust is regarded simply as a potential remedy (one amongst others) available to a plaintiff to secure compensation in an action for unjust enrichment. A trust might be imposed by the court on the defendant’s property when a proprietary remedy is more suitable than, for example, an award of damages. The plaintiff’s interest under the trust does not necessarily pre-date the order of the court.

II. THE DEVELOPMENT OF THE NEW MODEL CONSTRUCTIVE TRUST

Pioneered by Lord Denning in the English Court of Appeal in the latter part of the 1960’s and early 1970’s, Denning MR followed suit by adopting this “new model”

⁷ *Baden v. Societe Generale pour Favoriser le Developpement du Commerce et de l’Industrie en France SA* [1993] 1 W.L.R. 509.

⁸ [1883] 11 L.R. Ir. 295.

⁹ *Lonrho plc v. Fayed (No. 2)* [1992] 1 W.L.R. 1 at 9.

¹⁰ *Grant v. Edwards* [1986] 2 All E.R. 426 at 432.

and stated in *Hussey v. Palmer*¹¹ that the application of a constructive trust “whenever justice and good conscience require it” would now be considered. Although met with rigorous academic criticism because of its flexible discretionary procedure regarding contractual licenses (*Binions v. Evans*)¹² and family property (*CB v. SB*),¹³ the liberal remedial constructive trust has since taken root in nations such as Canada and the United States, with the latter more accommodating of this new brand of constructive trust because the American judiciary are much more ready to interfere with existing third party rights.

However, it must be noted that, in both jurisdictions, the model first put forward by Lord Denning has been tailored to a more acceptable form. In Canada, this modification surrounded the issue of unjust enrichment and the specific circumstances in which a constructive trust would be enforced to resolve this. A recent summary of the position in Canada was put forward by McLachlin J. in her judgement in *Soulos v. Korkontzilas*.¹⁴ There, she stated that the “Canadian courts have never abandoned the principles of constructive trust developed in England. They have however, modified them.”

As Dickson J. explained in the leading case of *Petkus v. Becker*,¹⁵ three elements are required to establish an unjust enrichment: “an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment.” Furthermore, it is necessary to demonstrate a “casual connection” between the contributions and the disputed assets. If all these requirements are satisfied, a constructive trust will be imposed.

¹¹ [1972] 1 W.L.R. 1286 at 1290.

¹² [1972] Ch. 359.

¹³ *CB v. SB*, High Court, Unreported, Baron J., 17 May 1983.

¹⁴ 146 D.L.R. (4th) 214 at 222 (1997).

¹⁵ *Petkus v. Becker* [1980] 2 S.C.R. 834.

III. DIVERGENCE IN ACCEPTING THE NEW MODEL TRUST

Although Court of Appeal decisions (*Heseltine v. Heseltine*¹⁶) immediately before and after 1970 suggested there was a readiness to embrace and perceive this trust as remedial, the well-established guidelines encompassed within the traditional institutional trust meant that this newer breed of trust is still being integrated with caution. This reluctance stems from two main sources. In the first instance, Millet J. made clear in *Lonrho plc v. Fayed (No.2)*¹⁷ that, while the flexibility of equity is essential, the intention of such intervention must encompass principle. As mentioned previously, there is the growing concern that the advancement of this new doctrine may lead to complacency in the model of “palm tree justice.”

The second and perhaps more important rationale for such unwillingness relates to the context of insolvency and the basic distinction between the effect of personal and proprietary rights. Once again, Sir Peter Millet has quite astutely observed that the “potential effect of a proprietary claim on creditors makes it unacceptable that rights of property should depend on vague and ill defined notions of fairness.”¹⁸ The proprietary nature of such liabilities affects the existing property rights both of the constructive trustee, and, in the event of his bankruptcy, of his general creditors. Under the present thought of the judiciary in England, such alterations of existing property rights should not be able to ensue, as a matter of principle, merely from the desire of a court to do justice. Too much discretion, in their view, is afforded with this form of constructive trust. The House of Lords has repeatedly stated (*Pettit v. Pettit*¹⁹) that the rights of property are not to be determined according to what is reasonable and fair or just in all circumstances. They have

¹⁶ *Heseltine v. Heseltine* [1971] 1 All E.R. 952.

¹⁷ *Lonrho Plc v. Fayed (No. 2)* [1992] 1 W.L.R. 1 at 9.

¹⁸ Millet, “Restitution and Constructive Trusts” [1998] 114 *Law Quarterly Review* 399.

¹⁹ *Pettit v. Pettit* [1970] A.C. 777.

stressed that (*Gissing v. Gissing*²⁰) the imposition of a remedial constructive trust in order to bring a dispute to a conclusion which appears to be just and equitable is inevitably contrary to such a principle.

A J Oakley²¹ is not persuaded that the remedial constructive trust in its unvarnished form is suitable for England and has said that to grant discretion of this capacity to the courts simply cannot be afforded. His argument is largely based around potential injustices to possible third parties. He points out that the beneficiary under a constructive trust has an equitable proprietary interest in the property in question, which entitles him to priority over the general creditors of the trustee in the event of the latter's bankruptcy.²² Yet, in contrast to this stance, Lord Browne-Wilkinson said that the remedial constructive trust, although much more discretionary in its nature, could provide a more satisfactory way forward in that it could, with a little ingenuity, be tailored to the circumstances of the particular case, where third parties would not necessarily be victims of this more flexible discretion. He has pointed out that although the "institutional" constructive trust aspired to deliver a fair result, it has nevertheless over the years taken on a rigid character; the restraints and inflexibility in certain circumstances meant that discretion often fell short upon deserving applicants. Perhaps penal in character, this was aptly demonstrated in *Boardman v. Phipps*,²³ where a constructive trust was imposed on a fiduciary who utilised an opportunity for profit for his own benefit. In this case, however, it would seem to be stretching the boundaries of discretion to allow such an act to pass without some form of remedy.

²⁰ *Gissing v. Gissing* [1971] A.C. 886.

²¹ Oakley, *Constructive Trusts* (London, 2nd Ed., 1987).

²² Oakley, "Has the Constructive Trust Become a General Equitable Remedy?" (1973) *Current Legal Problems* 17 at 39.

²³ [1967] 2 A.C. 46.

The new formulae created by Lord Denning for the constructive trust have also been embraced with little enthusiasm in this jurisdiction, though occasionally this new model has been given authority (*Murray v. Murray*).²⁴ The courts have stated, however, that, if a more exact or more acutely classified doctrine was to emerge, acceptance would be more forthcoming. Indeed, these words were echoed in statements from Canadian Chief Justice McEachern in *Clarkson v. McCrossen Estate*²⁵ where he posited that, “The few cases that have been decided cannot be taken as the final word on any of these matters. They point the direction the law is taking, but not the many contours that must be traversed along the way.”²⁶

Many judiciaries in recent times have dismissed any notions of using the concept of “justice” as grounding for which to grant constructive trusts, often commenting that to do so would create a vacuum in which proprietary rights would inevitably operate in a wider context than initially desired, i.e., that too much discretion would in time be granted, essentially creating a domino effect in which logical barriers of the law would fall in order to grant “justice” (*BL v. ML*).²⁷

Lord Denning’s version of the constructive trust also received an inhospitable reception in Australia and New Zealand. In the latter jurisdiction, they argued that to apply or enforce this “supposed” principle, which was engulfed in total uncertainty, was to go against any valid principle of jurisprudence. In the Australian case of *Allen v. Snyder*,²⁸ it was described as “a mutant from which further breeding should be discouraged.”²⁹ This was further emphasised when the Australian Chief Justice,

²⁴ High Court, Unreported, Baron, J., 15 December 1995.

²⁵ [1995] 13 R.F.L. (4th) 237 (BCCA).

²⁶ *Ibid.* at par. 98.

²⁷ *BL v. ML*. [1992] 2 I.R. 77.

²⁸ [1977] 2 NSWLR 685.

²⁹ *Ibid.* at 700.

Mason, commented that Lord Denning's "new model" may only have been intended to be a "blueprint" and possible amendments could offer a more acceptable standard.

Australian decisions seem to signify that the growing need to remedy unconscionable conduct has over-ridden the need to lower the bench-mark of discretion (*Baumgartner v. Baumgartner*).³⁰ The Chief Justice of Australia has signified that a remedial constructive trust is a viable option, as long as the power of discretion granted to the courts is not abused, and that, as a powerful tool, a constructive trust of this nature should only be warranted where the plaintiff has a "higher claim in equity to property in question than the general creditors."³¹ He went on to stress that consideration must be afforded to the position of third parties, in particular to unsecured creditors.

The standardisation of discretion when dealing with constructive trusts is evidently gauged by the pre-determination of each judiciary as to what exactly constitutes grounds for granting these trusts. English authorities, as already mentioned, have vigilantly begun by classifying "unjust enrichment" as the keystone to which this remedy will be granted (*Lipkin Gorman v. Karpanale Ltd*).³²

Goff J., in *Amalgamated Investment & Property Co Ltd v. Texas Commerce International Bank Ltd*,³³ emphasised the flexible nature of the "new model" and rejected rigid over-categorisation which inevitably placed greater strain on the discretion of the courts. He argued that such a doctrine would give rise to more sophisticated assessment of all the circumstances in a given case. He further emphasised that uncertainty on the matter was not a "get out of jail free" passport for other such judiciaries to simply reject other ideals on the matter. Plaintiffs should not

³⁰ *Baumgartner v. Baumgartner* [1987] 164 C.L.R. 137.

³¹ Delany, *Equity and the Law of Trusts in Ireland* (Dublin, 1992) at p. 265.

³² *Lipkin Gorman v. Karpanale Ltd* [1991] 2 A.C. 548.

³³ [1982] Q.B. 84.

suffer simply because of the inability of the courts to deal adequately with the subject matter.

Considerable controversy still surrounds the degree of knowledge required in cases of knowing receipt and, for this very reason, it has been difficult to establish concrete principles. The debate over this issue has been rife in recent years, yet subsequent decisions have failed to satisfactorily resolve this question. The judiciary in England have thus preferred to maintain a strict test (*Eagle Trust plc v. SBC Securities Ltd*)³⁴ and, as such, has been regarded as imposing too high a burden of proof. Thus, the discretion of the courts has been restrained in this jurisdiction. More often than not, the plaintiff is left with little satisfaction – where uncertainty is present, the courts are reluctant to grant the remedy, preferring to ignore justice and good conscience in favour of principle and authority. Albert Keating has commented that “the attitude of the English courts in recent years appears to have become less responsive towards extending the boundaries of the doctrine, and somewhat more strict in adherence to the present criteria.”³⁵

Other judiciaries of the common law world have instead chosen to adopt the principles of unjust enrichment and unconscionable conduct to varying extents, while still maintaining, in some scope, the status quo of the traditionally recognised doctrine which may afford a trust of this nature. Subsequently, discretion is much less constrained within these jurisdictions. Therefore, the emphasis on burden of proof is not as prohibitive regarding the plaintiff’s application. Canada and the United States have in reality taken the most noticeable steps in adopting these ideals, securely establishing unjust enrichment, in particular, as a source of liability and their judiciaries seem much more open to the notions discussed by Lord Denning.

³⁴ *Eagle Trust Plc v. SBC Securities Ltd* [1993] 1 W.L.R. 484 at 495.

³⁵ Keating, “A Proprietary Estoppel or in the Alternative a ‘New Model’ Constructive Trust” (2003) 8 *Conveyancing and Property Law Journal* 9 at 17.

The embrace of the new doctrine in this jurisdiction, together with a cautious regard to the maintenance of property law and conveyancing practice, would seem to signify the most balanced approach. They have granted considerably more discretion, yet remain adamant that this will in no way intervene with legal practice. Eoin O’Dell has quite acutely recognised that “though many of the earlier cases in these jurisdictions reflect Lord Denning’s influence, the more recent cases and academic treatments reflect a much more sophisticated dexterity with the issues of policy, priority, timing and doctrine.”³⁶

IV. THE NEW MODEL TRUST IN IRELAND

Although the Irish judiciary have tended to follow suit with the English authorities regarding such controversial areas of law, they have as yet not chosen any real substantial concrete principles and have instead shown both inconsistency and hesitation in relation to this trust. With similar attitudes to the Australian judiciary, they have not totally dismissed Lord Denning’s proposals, but have stated that a more definite array of principles would be much more preferable. Barron J., in the case of *N.A.D v. T.D.*,³⁷ posited that the conditions for the imposition of this trust would largely if wholly depend on the “conduct of the person upon whom it is imposed which would make it inequitable for him to assert his legal rights.”³⁸

More recently, Costello J. readily accepted the notion of “good conscience” and stated in *H.K.N. Investment Oy v. Incotrade Pvt Ltd*³⁹ that “where a person...holds property in circumstances which in equity and good conscience should be held or enjoyed by another he will be compelled to hold the property in trust for

³⁶ O’Dell, “Unjust Enrichment and the Remedial Constructive Trust” (2001) 23 *Dublin University Law Journal* 71 at 77.

³⁷ [1985] I.L.R.M. 153 at 160.

³⁸ *Ibid.*

³⁹ [1993] 3 I.R. 152.

another.”⁴⁰ This was further echoed in *Murray v. Murray*,⁴¹ where Barron J. stated that “it is I think quite clear that the law will impose a constructive trust in all circumstances where it would be unjust and unconscionable not to do so.”⁴²

However, Ireland, as previously mentioned, has produced a number of contradictory decisions in this area of law. It would seem that cautiousness manifests itself in the judiciary’s failure to adopt any solid principles to any two cases. In the case of *Murray v. Murray*,⁴³ Barron J. held in favour of the plaintiff, citing *Hussey v. Palmer*.⁴⁴ However, convincing evidence, albeit indirect, that Lord Denning’s doctrine was not to be accepted into Irish law emerged in *BL v. ML*⁴⁵ and *EN v. RN*.⁴⁶

Budd J. has perhaps best captured the mindset of the Irish judiciary in ascribing the lack of consistency to the ambiguity inherent in the “nebulous touchstone”⁴⁷ of justice and good conscience. Consequently, Ireland, like England, has been left with a scenario of too much discretion in one particular instance, and not enough in another. Finding the balance has proven a most difficult task.

Irish academic commentary on this issue is as varied and contentious as the trust itself. John Mee argues that the courts would be well advised to meticulously inspect the development of the remedial constructive trust in Canada and the principle of unconscionability in Australia. He notes that “a simple appeal to abstract notions of equity and fairness will not suffice.”⁴⁸ He also warns that “dangerous precedents”⁴⁹ must not be allowed to lead the judiciary astray into a void where

⁴⁰ *Ibid.*

⁴¹ High Court, unreported, Barron J., 15 December 1995.

⁴² *Ibid.*

⁴³ High Court, unreported, Barron, J., 15 December 1995

⁴⁴ *Hussey v. Palmer* [1972] 1 W.L.R. 1286 at 1290.

⁴⁵ *BL v. ML* [1992] 2 I.R. 77.

⁴⁶ *EN v. RN* [1992] 2 I.R. 116.

⁴⁷ Delany, *Equity and the Law of Trusts in Ireland* (Dublin, 1992) at p. 260.

⁴⁸ Mee, “Palm Trees in the Rain – New Model Constructive Trusts in Ireland (1996) 1 *Conveyancing and Property Law Journal* 9.

⁴⁹ *Ibid.*

vagaries supersede the doctrines of equity. The judiciary must either reassess the doctrine and adopt a more rigorous approach or allow the demise of a trust riddled with disarray, perplexity and conflation.

Eoin O'Dell does not disregard Lord Denning's doctrine outright. He writes that that, while Ireland have imposed this trust "whenever justice and good conscience require it,"⁵⁰ it should nevertheless be "deployed with caution, and sensitivity to issues of doctrine, policy, priorities and timing."⁵¹ His analysis is rational and seems the most befitting advance; he argues persuasively that the stream of authority and analysis within this jurisdiction is entirely separate from the principle against unjust enrichment, and that "the two ought not to be confused, conflated, equated or intertwined."⁵²

In the case of *Kelly v. Cahill*,⁵³ Barr J. adopted the remedial constructive trust, but held that its purpose is to prevent unjust enrichment. Eoin O'Dell maintains throughout his article that this judgement by Barr J. "represents an unwelcome and unfortunate elision of entirely separate and distinct concepts. If their separation cannot be maintained, it may be necessary to expunge the remedial constructive trust."⁵⁴

Perhaps O'Dell's most incisive observation is that the remedial constructive trust "may yet prove a powerful and important tool in the legal toolbox; but it will need to be handled with much greater care and sensitivity than that displayed by Barr J. in *Kelly v. Cahill*."⁵⁵

⁵⁰ O'Dell, "Unjust Enrichment and the Remedial Constructive Trust" (2001) 23 *Dublin University Law Journal* 71 at 96.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Kelly v. Cahill* [2001] 2 I.L.R.M. 205

⁵⁴ O'Dell, "Unjust Enrichment and the Remedial Constructive Trust" (2001) 23 *Dublin University Law Journal* 71 at 96.

⁵⁵ *Ibid.*

V. CONCLUSION

It would seem from an analysis of constructive trusts throughout the various judiciaries of the common law world that each jurisdiction has found it immensely difficult to sustain any one set of principles. As such, the discretion of the courts in granting this remedial trust wavers to both extremes; to define “discretion” as too much or too little largely depends upon the judicial system to choose to explore. England would seem to be the most reluctant to adopt any new principles and has frowned upon Lord Denning’s “new model.” It would be fair to say that such an attitude has bred complacency within the judiciary regarding this matter. Uncertainty has forced authorities to retreat to traditional principles. The unpredictability of the courts’ discretion has meant that reliance on precedent for some direction on the matter will often prove futile. As a result, the plaintiff has suffered in many instances.

The remainder of the common law world have mixed reactions to this new genre of constructive trusts. Canada has adopted the principles outlined by Lord Denning to some extent, but its judiciary has constructed more nuanced guidelines, derived from both the traditional and more liberal standpoints.

Ireland has yet to sway in any one direction. This hesitancy is born of uncertainty. Unsurprisingly then, the Irish precedent on the matter is riddled with inconsistencies and contradictions. The judiciary has yet to set the benchmark for discretion, yet it would seem that Irish judges have incorporated the “new model” to a larger degree than their neighbours. To state whether they have granted too much or too little discretion is, at this point, difficult to gauge.

Australia, on the other hand, has looked the most promising jurisdiction with regard to achieving the right balance of discretion. Its judges have adopted what they see as “feasible” principles, while successfully attempting to retain the status quo

where appropriate. To overstate their success in compromising on the matter, however, would be reckless.

In sum, none of the jurisdictions considered *supra* has yet achieved the right balance. It is simply unacceptable for the judiciaries to move at a snail's pace on this contentious issue, while the remainder of other legal issues are capable of being resolved and amended in order to accommodate societal changes. Uncertainty has led to complacency and, although the courts in some jurisdictions seem satisfied with their hesitancy on the matter, their efforts today remain insufficient. Discretion needs to be reviewed in order to accommodate all parties as best as possible. *Ad hoc* rulings, that, taken together, form an indiscriminate and incongruous mess, are no longer defensible. The meandering quest for equilibrium “between the extremes of inflexible rules and case-by-case ‘palm tree’ justice”⁵⁶ continues.

⁵⁶ *Peel v. Canada*, 98 D.L.R. (4th) 140 at 164 (1992).