## 7

**CONSTRUCTIVE TRUSTS**

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### I GENERAL PRINCIPLES

A constructive trust arises by operation of law rather than by the intention of the parties and it can arise in a wide variety of circumstances. But there is little agreement amongst the judiciary or academic writers as to when a constructive trust will be recognised and why it should be recognised. To make this area of the law even more complicated, there is no consistent use of terminology. Indeed, the term ‘constructive trust’ has been used in at least four different ways.

*The institutional constructive trust.* According to this view of the constructive trust, it will only be recognised where the facts of the dispute fall within an existing category of cases where a constructive trust has previously been recognised.

*The remedial constructive trust.* According to this view, a constructive trust will be recognised through the exercise of judicial discretion. This notion of the constructive trust has been recognised in a number of Commonwealth countries, including Australia, Canada, and New Zealand, but it has generally not been recognised in England.

*The constructive trust as remedy.* Where a defendant has received property in which the claimant has an equitable proprietary right, it is possible for the court to vindicate

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2 *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399 at 1412, per Lord Millett [p. 205, above].
3 See p. 280, below. 4 See p. 315, below. 5 See p. 944, below.
that right by requiring the defendant to hold the property on constructive trust for the claimant.\(^6\) It is sometimes difficult to see the distinction between a constructive trust being imposed as a remedy and a duty to account. Where an agent has obtained illegal profits, should we say that he is a constructive trustee of those profits, or that he is simply under a duty to account to the claimant for their value? The former involves a proprietary claim by the claimant, the latter a personal claim. The difference may be considerable, but the terminology is indiscriminate.\(^7\) So long as the defendant can pay, it makes little difference whether the claim is proprietary or personal. But if the defendant is insolvent, and the claimant will only be satisfied by a claim in priority over the general creditors, the distinction is crucial. By making a proprietary claim, the claimant can take any property in which it can be shown that he has an equitable proprietary interest; and he can make a claim in priority over the general creditors upon a mixed fund of money or investments. Further, if the investments have appreciated, the claimant may wish to claim a share of the fund at this higher value. A claim involving only the defendant’s personal liability to account has nothing to do with a constructive trust. Where, however, the claimant brings a proprietary claim against a specific asset in the defendant’s hands, whether that is the same asset which was taken from the claimant, or a product of, or a substitute for that asset, the claimant will want the court to decide that the asset (or a share of it where the asset has become mixed with property belonging to somebody else) is held on a constructive trust for him.\(^8\)

**Liability as if a constructive trustee.**\(^9\) Sometimes the language of the constructive trust is used even though the defendant does not hold property on trust at all. Rather, the language of the constructive trust is used simply as a device to hold the defendant personally liable to the claimant. The language of the constructive trust in this context, although still used, is inappropriate.\(^10\) This area of the law is considered in Chapter 20 concerning personal liability arising from a breach of trust.

The constructive trust differs from the other types of trust which have been considered so far. Unlike the express trust, a constructive trust arises by operation of law and does not depend on the intention of the parties.\(^11\) The distinction between constructive and resulting trusts is less clear than it used to be. Traditionally, resulting trusts arise where there is a failure to dispose of the whole beneficial interest, while constructive trusts are imposed to prevent unconscionable conduct.\(^12\) Some of the

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\(^6\) See *Foskett v McKeown* [2001] 1 AC 102 [p. 915, below]. Cf Lord Millett in *Equity in Commercial Law* (eds. Degeling and Edelman) (2005), pp. 315–316 who says that the substitute property is held on the same trusts. So if the claimant was a beneficiary under an express trust, the substituted asset would be held on the same express trust.


\(^8\) An alternative proprietary remedy is a charge on the fund held by the defendant. Such a remedy gives the claimant priority over the defendant’s other creditors but does not involve a claim to any increase in the value of the asset. See p. 945, below.

\(^9\) See p. 969, below.

\(^10\) *Dubai Aluminium Co. Ltd. v Salaam* [2002] UKHL 48, [2003] 2 AC 366, 404. See also *Paragon Finance plc. v DB Thakerar and Co* [1999] 1 All ER 400, 408, per Millett LJ.

\(^11\) *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 705; (Lord Browne-Wilkinson); *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399 at 1412, per Lord Millett.

\(^12\) See (2006) 4 LS 475 (N. Hopkins).
more recent decisions have shown a tendency to merge the two concepts, as sometimes occurred in the context of family property disputes. But the House of Lords has now ruled that only the constructive trust is available in that context. This has little practical significance (for example, no formalities are required for the creation of either resulting or constructive trusts) but adds to the existing difficulties in attempting to define the constructive trust.

Finally, we need to consider whether a general principle can be found which will determine the circumstances in which a constructive trust will be recognised. This would be a great improvement over the present miscellany. Some find this in the principle of unjust enrichment, arguing that where the defendant is unjustly enriched at the expense of the claimant, he should disgorge this enrichment, and, since the defendant should never have had the property, his creditors should not be entitled to share it. Some decisions in the era of Lord Denning MR went further, treating a constructive trust as a doctrine which permits a desired result to be reached on a principle of justice and good conscience, regardless of the effect upon the rights of third parties of using a proprietary remedy to reach the solution. Lord Browne-Wilkinson has sought to explain the constructive trust by reference to the unconscionable conduct of the potential trustee. While this may explain some of the cases where a constructive trust has been recognised, it is a principle which is too uncertain to constitute a unifying theory of the constructive trust. Consequently, there appears to be no satisfactory general principle which explains when constructive trusts arise. Rather, we need to identify the particular categories where the constructive trust has previously been recognised.

II CATEGORIES OF CONSTRUCTIVE TRUST

A UNCONSCIONABLE CONDUCT

The court may conclude that the defendant holds property on constructive trust where he received it from the claimant in circumstances where the defendant can be characterised as acting unconscionably.

13 See Lord Denning MR in Hussey v Palmer [1972] 1 WLR 1286 at 1290. A resulting trust, however, creates a share proportionate to the contribution, which may not be the case with a constructive trust: p. 322, below.

14 Stack v Dowden [2007] UKHL 17, [2007] 2 AC 432 [p. 334, below].

15 See p. 112, above. See, however, Macmillan Inc v Bishopsgate Investment Trust plc (No 3) [1995] 1 WLR 978 (distinctions in the conflict of laws).


This was recognised in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 [p. 198, above]. In this case the plaintiff bank had paid money to the defendant local authority pursuant to an interest rate swap contract which was null and void. The bank sought restitution of the money. One question which was considered by LORD BROWNE-WILKINSON was whether the defendant held the money it had received on a constructive trust. His Lordship said at 705:

The relevant principles of trust law

(i) Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust).

(ii) Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, i.e. until he is aware... in the case of a constructive trust, of the factors which are alleged to affect his conscience.

(iii) In order to establish a trust there must be identifiable trust property. The only apparent exception to this rule is a constructive trust imposed on a person who dishonestly assists in a breach of trust who may come under fiduciary duties even if he does not receive identifiable trust property.

(iv) Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice....

This is not a case where the bank had any equitable interest which pre-dated receipt by the local authority of the upfront payment. Therefore, in order to show that the local authority became a trustee, the bank must demonstrate circumstances which raised a trust for the first time either at the date on which the local authority received the money or at the date on which payment into the mixed account was made. Counsel for the bank specifically disavowed any claim based on a constructive trust. This was plainly right because the local authority had no relevant knowledge sufficient to raise a constructive trust at any time before the moneys, upon the bank account going into overdraft, became untraceable. Once there ceased to be an identifiable trust fund, the local authority could not become a trustee: *Re Goldcorp Exchange Ltd* [1995] 1 AC 74.

His Lordship then considered whether the local authority held the money it received on a resulting trust for the bank: see p. 202, above. He considered various authorities including *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105:

In that case Chase Manhattan, a New York bank, had by mistake paid the same sum twice to the credit of the defendant, a London bank. Shortly thereafter, the defendant bank went into

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20 But the better view is that there is no constructive trust in such a situation, but only a personal liability to the claimant. See p. 969, below.
insolvent liquidation. The question was whether Chase Manhattan had a claim in rem against the assets of the defendant bank to recover the second payment.

Goulding J was asked to assume that the moneys paid under a mistake were capable of being traced in the assets of the recipient bank: he was only concerned with the question whether there was a proprietary base on which the tracing remedy could be founded: at 116. He held that, where money was paid under a mistake, the receipt of such money without more constituted the recipient a trustee: he said that the payer ‘retains an equitable property in it and the conscience of [the recipient] is subjected to a fiduciary duty to respect his proprietary right’ at 119.

It will be apparent from what I have already said that I cannot agree with this reasoning. First, it is based on a concept of retaining an equitable property in money where, prior to the payment to the recipient bank, there was no existing equitable interest. Further, I cannot understand how the recipient’s ‘conscience’ can be affected at a time when he is not aware of any mistake. Finally, the judge found that the law of England and that of New York were in substance the same. I find this a surprising conclusion since the New York law of constructive trusts has for a long time been influenced by the concept of a remedial constructive trust, whereas hitherto English law has for the most part only recognised an institutional constructive trust: see Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc [1990] 1 QB 391 at 478–480.

In the present context, that distinction is of fundamental importance. Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such trust having arisen (including the possibly unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion. A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court. Thus, for the law of New York to hold that there is a remedial constructive trust where a payment has been made under a void contract gives rise to different consequences from holding that an institutional constructive trust arises in English law.

However, although I do not accept the reasoning of Goulding J, Chase Manhattan may well have been rightly decided. The defendant bank knew of the mistake made by the paying bank within two days of the receipt of the moneys: see at 115. The judge treated this fact as irrelevant (at 114) but in my judgment it may well provide a proper foundation for the decision. Although the mere receipt of the moneys, in ignorance of the mistake, gives rise to no trust, the retention of the moneys after the recipient bank learned of the mistake may well have given rise to a constructive trust. . . . 21

The stolen bag of coins

The argument for a resulting trust was said to be supported by the case of a thief who steals a bag of coins. At law those coins remain traceable only so long as they are kept separate: as soon as they are mixed with other coins or paid into a mixed bank account they cease to be traceable at law.22 Can it really be the case, it is asked, that in such circumstances the thief cannot be required to disgorge the property which, in equity, represents the stolen coins? Moneys can

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22 See p. 898, below.
only be traced in equity if there has been at some stage a breach of fiduciary duty, i.e. if either before the theft there was an equitable proprietary interest (e.g. the coins were stolen trust moneys) or such interest arises under a resulting trust at the time of the theft or the mixing of the moneys. Therefore, it is said, a resulting trust must arise either at the time of the theft or when the moneys are subsequently mixed. Unless this is the law, there will be no right to recover the assets representing the stolen moneys once the moneys have become mixed.

I agree that the stolen moneys are traceable in equity. But the proprietary interest which equity is enforcing in such circumstances arises under a constructive, not a resulting, trust. Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity. Thus, an infant who has obtained property by fraud is bound in equity to restore it: Stocks v Wilson [1913] 2 KB 235 at 244; R Leslie Ltd v Shell [1914] 3 KB 607. Moneys stolen from a bank account can be traced in equity: Bankers Trust Co v Shapira [1980] 1 WLR 1274 at 1282: see also McCormick v Grogan (1869) LR 4 HL 82 at 97.23

The penultimate paragraph was considered by Rimer J in Shalson v Russo [2003] EWHC 1637 (Ch), [2005] Ch 281, at para. 110:

I do not find that an easy passage. As to the first paragraph, a thief ordinarily acquires no property in what he steals and cannot give a title to it even to a good faith purchaser: both the thief and the purchaser are vulnerable to claims by the true owner to recover his property. If the thief has no title in the property, I cannot see how he can become a trustee of it for the true owner: the owner retains the legal and beneficial title. If the thief mixes stolen money with other money in a bank account, the common law cannot trace into it. Equity has traditionally been regarded as similarly incompetent unless it could first identify a relevant fiduciary relationship, but in many cases of theft there will be none. The fact that, traditionally, equity can only trace into a mixed bank account if that precondition is first satisfied provides an unsatisfactory justification for any conclusion that the stolen money must necessarily be trust money so as to enable the precondition to be satisfied. It is either trust money or it is not. If it is not, it is not legitimate artificially to change its character so as to bring it within the supposed limits of equity’s powers to trace: the answer is to develop those powers so as to meet the special problems raised by stolen money.…

As to Lord Browne-Wilkinson’s more general proposition in the second paragraph that property obtained by fraud is automatically held by the recipient on a constructive trust for the person defrauded, I respectfully regard the authorities he cites as providing less than full support for it. At any rate, they do not in my view support the proposition that property transferred under a voidable contract induced by fraud will immediately (and prior to any rescission) be held on trust for the transferor.24

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23 Other cases where a constructive trust has been recognised where the defendant has obtained property by fraud, include: Halley v The Law Society [2003] EWCA Civ 97, para [48] Carnwath LJ; Papamichael v National Westminster Bank plc. [2003] 1 Lloyd’s Rep. 341, 374 (Judge Chambers QC); Commerzbank AG v IMB Morgan plc [2004] EWHC 2771 (Ch), [2004] All ER (D) 450 (Nov) at [36] (Lawrence Collins J); Sinclair Investment Holdings SA v Versailles Trade Finance Ltd [2005] EWCA Civ 722, [2006] 1 BCLC 60; Campden Hill Ltd. v Chakrani [2005] EWHC 911 (Ch.).

24 See further p. 284, below.
Chapter 7: Constructive Trusts

Questions


2. Will a defendant only be considered to have acted unconscionably where he knew of the relevant factors which affected his conscience, such as the claimant’s mistake in making a payment? What if the defendant should have known of the mistake but this did not cross his mind? See Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669 at 705; Papanicolaou v National Westminster Bank plc [2003] 1 Lloyd’s Rep 341, 373 (Judge Chambers QC) (actual knowledge required); Virgo, The Principles of the Law of Restitution, (2nd edn, 2006) p.611; [1996] 4 Restitution Law Review 21 (P. Birks).

3. Should a defendant be considered to have acted unconscionably where she receives property innocently and only discovers subsequently that it was transferred, for example, by mistake? See Virgo, The Principles of the Law of Restitution, (2nd edn, 2006) pp. 611–612.


B Rescission

In Twinsectra Ltd v Yardley [1999] Lloyd’s Rep Bank 438 Potter LJ said at 461:

There is also authority to be found in El Ajou v Dollar Land Holdings plc [1993] 3 All ER 717 that monies of the plaintiffs paid away by the plaintiffs in reliance on a fraudulent share selling scheme gave rise to an ‘old fashioned institutional resulting trust’ (see at 734). In that case, as in his earlier decision in Lonrho plc v Fayed (No 2) [1992] 1 WLR 1, Millet J held that a victim of fraud is entitled to rescind the transaction, thereby revesting his equitable title ‘at least to the extent necessary to support an equitable tracing claim’, later acknowledging in Bristol and West Building Society v Mothew [1998] Ch 1 at 23 that, in doing so, he:

‘was concerned to circumvent the supposed rule that there must be a fiduciary relationship or retained beneficial interest before resort may be had to the equitable tracing remedy.’


26 (2000) 59 CLJ 444 (D. Fox). This point was not considered by the House of Lords.
In the *Lonhro* case, at 11–12, Millett J stated:

'A contract obtained by fraudulent misrepresentation is voidable, not void, even in equity. The representee may elect to avoid it, but until he does so, the representor is not a constructive trustee of the property transferred pursuant to the contract, and no fiduciary relationship exists between him and the representee, see *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 387–390 *per* Brennan J. It may well be that if the representee elects to avoid the contract and set aside a transfer of property made pursuant to it, the beneficial interest in the property will be treated as having remained vested in him throughout, at least to the extent necessary to support any tracing claim.'

In the course of his submissions Mr. Tager sought to build upon a short passage of Lord Browne-Wilkinson’s speech which I have quoted, an edifice which I do not think it was meant to support. He has argued (i) that the obtaining of monies by false pretences (at least in the circumstances of this case) should be regarded as ‘theft’; it having been long accepted, by whatever conceptual route, that theft, as such, immediately constitutes the thief a constructive trustee of the stolen money so that the victim may later trace in equity: see *Banque Belge pour L’Etranger v Hambrouck* [1921] 1 KB 321 *per* Bankes and Atkin LJJ, who held in the case of stolen cheques that the plaintiff bank could trace its money in law and equity, and *per* Scrutton LJ who considered that the bank could trace only in equity; (ii) that, even if that were not so, Lord Browne-Wilkinson’s observation should be read at face value as recognising that a constructive trust is imposed upon the recipient at the moment of receipt.

I do not accept either argument. It seems to me that, whatever the legal distinctions between ‘theft’ and ‘fraud’ in other areas of the law, the distinction of importance here is that between non-consensual transfers and transfers pursuant to contracts which are voidable for misrepresentation. In the latter case, the transferee may elect whether to avoid or affirm the transaction and, until he elects to avoid it, there is no constructive (resulting) trust; in the former case, the constructive trust arises upon the moment of transfer. The result, so far as third parties are concerned, is that, before rescission, the owner has no proprietary interest in the original property; all he has is the ‘mere equity’ of his right to set aside the voidable contract. That equity binds volunteers and those taking with notice of the equity, but not purchasers for value without notice; see generally Worthington: *Proprietary Interests in Commercial Transactions* (1996) Clarendon Press at pp. 163–165 and 167. Despite dicta of Lord Mustill in *Re Goldcorp*27 (a case in which the purchase monies sought to be traced were unidentifiable), which, if generally applied beyond the context of the facts in that case, would suggest that equitable title does not (or in appropriate circumstances may not) re vest on rescission, the general position seems to me that summarised in *Underhill and Hayton* (15th edn) at p. 372(f). It is there stated that equity imposes a constructive trust on property where a transferor’s legal and equitable title to his property has passed to the transferee according to basic principles of property law but in circumstances (e.g. involving fraud and misrepresentation) where the transferor has an equitable right (i.e. mere equity) to recover the property by having the transfer set aside, and the court declares that from the outset the transferee has held the property to transferor’s order, though nowadays it seems better to regard a restitutionary resulting trust as arising.28

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...I accepted the traditional view that rescission for fraud revested the legal title in the transferor: see *Car and Universe Finance Co Ltd v Caldwell* [1965] 1 QB 525. The proposition can be traced back to the judgment of Parke B in *Load v Green* (1846) 15 M and W 216... Since then, however, Mr. Swadling has convincingly demonstrated that Parke B invented the rule, which is difficult to justify in principle and is based on previous authority which does not support it:... (2005) 121 LQR 122. The better view, which he espouses and which is supported by authority before and since, is that a defrauded vendor should be able to rescind his contract of sale but this should not carry with it any revesting of title, at least in the case where title passed by delivery pursuant to the rescinded contract and not by the contract itself: see *Singh v Ali* [1960] 1 AC 167. If this is right, then equity must follow the law by denying any revesting of title merely because the underlying transaction is set aside. 29

C UNAUTHORISED PROFIT BY A FIDUCIARY

A person in a fiduciary position may not make use of this position to gain a benefit for himself. Any profit which a fiduciary obtains in breach of this duty 30 can be claimed to be held on constructive trust for the principal to whom the duty is owed. 31 A fiduciary includes an express trustee and also, for example, personal representatives, company directors, partners, solicitors, and agents. The category of fiduciaries is not closed. 32

D FIDUCIARIES DE SON TORT 33

Where a person who has not been properly appointed either as a trustee 34 or an executor, 35 or any other type of fiduciary, such as an agent, 36 intermeddles with trust or estate matters, or does acts which are characteristic of the fiduciary office, such a


30 See Chapter 16.


34 *Blyth v Flaggate* [1891] 1 Ch 337; *Mara v Browne* [1896] 1 Ch 199; *Taylor v Davies* [1920] AC 636, 651 (Viscount Cave); *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366, see p. 639, below.


36 *Lyell v Kennedy* (1889) 14 App. Cas. 437.
person can be considered to be a constructive trustee. Such fiduciaries *de son tort* will be treated by operation of equity as though they had been properly appointed to the respective office and so will be subject to fiduciary duties in the ordinary way and will hold property on constructive trust.\(^{38}\)

**James v Williams**  
[2000] Ch 1 (CA, Sir Stephen Brown P, Swinton Thomas and Aldous LJ)\(^{39}\)

The plaintiff’s mother (‘the grandmother’) died intestate. The family home was to be held on statutory trusts for the plaintiff and her brother (William Junior) and sister (Thirza), but the brother, although he knew that he was not solely entitled to it, did not take out letters of administration and took possession of the property as his own. The brother died. He left the property to Thirza. On her death the property was left to the defendant. The plaintiff claimed her one-third interest in the property. The defendant argued that the plaintiff’s claim was time-barred under the Limitation Act 1980.\(^{40}\)

**Held.** The brother was an executor *de son tort* since he knew that he was not solely entitled to the house and he held the property on constructive trust. Consequently, the plaintiff’s claim was not time-barred.\(^{41}\)

Aldous LJ: As a general rule a constructive trust attaches by law to property which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property. Is this such a case? . . .

In my view the circumstances of this case are such that the constructive trust arose in about 1972 on the death of the grandmother. William Junior knew that he was not solely entitled to the property. He took it upon himself to take possession of the property as if he owned it and assumed responsibility for its upkeep. In my view he was under an equitable duty to hold the property for himself and his sisters. Looking at the state of affairs as at the grandmother’s death, the law envisaged that the property would be held upon a statutory trust for the children. It would be inequitable to allow William Junior and, through him the defendant, to take advantage of his decision not to take out letters of administration and to act as if he was the owner with the full knowledge that he was not. This is an unusual case and, as was made clear by Mr. Hinks in his article,\(^{42}\) there are many cases where executors *de son tort* could not be constructive trustees. Each case will depend upon its own facts. But, in my view, this is a case where there was a constructive trust. It follows that the defendant’s title is that of constructive trustee with the result that the plaintiff’s case is not statute-barred.

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\(^{37}\) Perhaps better described simply as de facto trustees or executors. See *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366, 403 (Lord Millett), p. 639, below.

\(^{38}\) *Re Barney* [1892] 2 Ch 265, 273 (Kekewich J).

\(^{39}\) [1999] All ER Rev 232 (P. Clarke).

\(^{40}\) Section 15(1) (12-year limitation period).

\(^{41}\) For discussion of limitation periods, see p. 876, below.

Chapter 7: Constructive Trusts

E MUTUAL WILLS

Where two persons by agreement make wills which give the property of the first to die to the survivor, and after the survivor’s death to agreed legatees, they are said to make mutual wills. The parties are commonly husband and wife, but not necessarily so. The survivor may be given a life interest with remainders over to the agreed legatees; or perhaps an absolute interest with a substitutionary gift to the agreed legatees. It is now established that the doctrine of mutual wills applies even where no property is left to the survivor.

Assume that the husband is the first to die and he dies with a will which takes effect in the agreed form. The widow then remarries and decides to leave all her estate to her new husband. This would be a breach of the agreement. But, at least until recently, the agreed legatees cannot sue (even if they knew about the agreement) because they were not parties to the agreement. Nor can the widow be prevented from making a new will, for an existing will is always revocable. It is not right that the widow should be able to ignore the obligations of the contract, even if she has taken no benefit. Consequently, it has long been accepted that a trust is imposed in favour of the agreed legatees. But that simple solution leaves a number of questions unanswered.

1. Is this an express trust or a constructive trust? If an express trust, who declared it, and when, and in respect of which identifiable property? If a constructive trust, upon what ground? The failure to carry out the contract is not a sufficient justification. The receipt of benefits under the first will would be sufficient justification; but it has been held that such receipt is not necessary. Is fraud the basis?

2. To what property does the trust attach? To that (if any) received by the survivor from the first to die? To that owned by the survivor at the date of the first death? To all property owned by the survivor at the date of the survivor’s death?


44 Re Green [1951] Ch 148.

45 This may well be different following the enactment of the Contracts (Rights of Third Parties) Act 1999. See p. 169, above. By virtue of s. 1 of this Act a person who is not party to a contract is able to enforce terms of that contract in his own right either if it expressly provides that that party can enforce the contract or if the contract confers a benefit on him, save, in the latter case, where the parties did not intend the party to be able to enforce the terms of the contract.

46 Re Hey’s Estate [1914] P 192.

47 In Re Hobley (1997) The Times, 16 June the trust was characterised as constructive. Similarly in Healey v Brown [2002] WTLR 849 [p. 301, below], where the trust was characterised as a common intention constructive trust. In Thomas and Agnes Carvel Foundation v Carvel [2007] EWHC 1314 (Ch), [2007] 4 All ER 81, the survivor was described simply as a trustee.


49 (1951) 14 MLR 136 at 139, 140 (J.D.B. Mitchell) [p. 289, below].
3. When does that trust come into effect? It is clear that the trust does not come into existence before the death of either testator. So does it occur on the first death (which would prevent a lapse of the interest of one of the agreed beneficiaries)? Or on the second death, at which time the property which is the subject of the trust would be identifiable?


**Scope of the Trust**

The date of creation has important consequences on the scope of the trust. It is obvious that where the first testator’s will only gives a life interest to the survivor, no question arises in relation to that estate. It must be held upon trust to give effect to the whole will including the ultimate dispositions. Similarly even if it apparently gives an absolute interest, yet the survivor holds all that he receives thereunder on trust for himself for life and then for the ultimate beneficiaries. The trust, however, where the doctrine applies, affects not only the estate of the first testator but also that of the survivor. The question is as to the extent to which it does so. Is the entirety comprised in it and if so is it the entirety as at the first death or does the trust also comprise after-acquired property?

The short answer would simply be that the extent of the trust is defined by the agreement. Thus in Re Green the trust was to operate on property received from the other party and on property which was derived from another trust. The definition might be express, as in that case, or implied, by reason, for example, of the fact that the ultimate gifts are set out in specific sums and not as residuary dispositions. This short answer is not, judging from the few reported cases, satisfactory since the agreement is often silent or ambiguous on the point. In one case the trust apparently only affected property held by the survivor at the first death. That restriction was perhaps dictated by the fact that the mutual wills were only intended to deal with the assets of the two testators which resulted from a business they had carried on together. It was therefore reasonable to allow the survivor a free hand with the fruits of his unaided labour. In Re Oldham Astbury J seemed disposed to hold that the trust only binds the property held by the survivor at the time of his death, thus leaving unimpaired the power of disposition inter vivos. This seems to conflict with the decision as to lapse in Re Hagger, which implies that the interest of the beneficiaries is vested during the lifetime of the survivor. Moreover a devise to A with a direction to settle ‘so much as he shall die seised of’ has, by reason of uncertainty, been held...

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50 Re Hobley (1997), The Times, 16 June (the doctrine of mutual wills held not to apply once the first testator to die had altered his will in a way which was minor but not insignificant).

51 Re Green [1951] Ch 148.

52 In this respect Re Green does nothing more than make clear the effect of the agreement, which was implicit in earlier decisions, such as Re Hagger [1930] 2 Ch 190 at 195, or Re Oldham [1925] Ch 75, where, had the trust been regarded as effective, there would nevertheless have been some free property. The arrangement in Dufour v Pereira (1769) 1 Dick 419 seems only to have covered residue. See 2 Hargr Jurid Arg, p. 305.

53 Re Hagger [1930] 2 Ch 190.

54 [1925] Ch 75 at 88.
incapable of creating a trust.55 Yet, in effect, that is what the view of Astbury J amounts to. The significance of this question lies of course in the powers of the survivor over his own property during his life. It would seem absurd if the court is prepared to prevent his breaking faith with the first testator only to the extent of preventing inconsistent testamentary dispositions thus allowing him to make the arrangement nugatory by dispositions inter vivos. It seems, therefore, that the two arguments of certainty and good faith lead to the conclusions that, in the absence of any definition, the trust of the survivor’s property must be treated as embracing that which he holds at the death of the first testator together with subsequently acquired property; though clearly he will be entitled to deal freely with the income of the fund and accumulations of the income. Such indeed seems to be the implication to be drawn from Lord Camden’s direction for accounts to be taken in Dufour v Pereira, and to have been the opinion of Lord Loughborough. It was one of his objections to finding an agreement in Lord Walpole v Lord Orford56 that it would have resulted in an inability of the survivor to raise portions for his daughters by mortgage. This breadth of the scope of the trust, or at least the possibility of it, affords another reason for delimiting it in the agreement.

In Re Hagger [1930] 2 Ch 190, a husband and wife made a joint will (to which the same principles apply) by which, inter alia, the survivor was given a life interest in the whole of their estate, and after the survivor’s death, their property at Wandsworth was to be held on trust for sale, with Eleanor Palmer as one of nine beneficiaries. The wife died in 1904, Eleanor Palmer in 1923, and the husband in 1928. By his will the husband left all his property on different trusts. The questions were whether the beneficiaries under the joint will could take on the husband’s death; and, if so, whether Eleanor Palmer’s interest lapsed by reason of her death before the husband. Clauson J held that all the beneficiaries, including Eleanor, could claim. He said at 195:

To my mind Dufour v Pereira (1769) 1 Dick 419 decides that where there is a joint will such as this, on the death of the first testator the position as regards that part of the property which belongs to the survivor is that the survivor will be treated in this Court as holding the property on trust to apply it so as to carry out the effect of the joint will. As I read Lord Camden’s judgment in Dufour v Pereira that would be so, even though the survivor did not signify his election to give effect to the will by taking benefits under it. But in any case it is clear that Lord Camden has decided that if the survivor takes a benefit conferred on him by the joint will he will be treated as a trustee in this Court, and he will not be allowed to do anything inconsistent with the provisions of the joint will. It is not necessary for me to consider the reasons on which Lord Camden based his judgment. The case must be accepted in this Court as binding. Therefore I am bound to hold that from the death of the wife the husband held the property, according to the tenor of the will, subject to the trusts thereby imposed upon it, at all events if he took advantage of those provisions.

The effect of the will was that the husband and wife agreed that the property should on the death of the first of them to die pass to trustees to hold on trusts inconsistent with the right of survivorship, and therefore the will effected a severance of the joint interest of the husband and wife. By the will they made a provision which was inconsistent with the survivor taking by

55 *Bland v Bland* (1745) 2 Cox Eq Cas 349. See also *Re Jones* [1898] 1 Ch 438.
56 (1797) 3 Ves 402 at 417. For the opposed view see, however, Dixon J in *Birmingham v Renfrew* (1937) 57 CLR 666 at 689. See also *Re Cleaver* [1981] 1 WLR 939 [p. 292, below].
survivorship. Therefore the property at the moment when, on the wife’s death, it came within the ambit of the will ceased to be held by the two jointly, and the husband had no title to the wife’s interest on her dying in his lifetime, save in so far as he took a life interest under the joint will. From the moment of the wife’s death the Wandsworth property was held on trust for the husband for life with a vested interest in remainder as to one-sixth in E. Palmer. So far as the husband’s interest in the property is concerned the will operated as a trust from the date of the wife’s death. There is, accordingly, no lapse by reason of Eleanor Palmer’s death in the husband’s lifetime, but after the wife’s death.

Similar questions arise, where, as in Ottaway v Norman [1972] Ch 698, property is left to a legatee upon a secret trust to leave it by will to another. Brightman J, as has been seen, upheld the trust.

(1973) 36 MLR 210, 212–214 (S.M. Bandali)

On the evidence [in Ottaway v Norman] Brightman J found that the residue was not intended to be subject to trust. However, he went on to state a new principle, while making clear that this was obiter. 'I am content to assume for present purposes but without so deciding that if property is given to the primary donee on the understanding that the primary donee will dispose by will of such assets, if any, as he may have at his command at his death in favour of the secondary donee, a valid trust is created in favour of the secondary donee which is in suspense during the lifetime of the primary donee, but attached to the estate of the primary donee at the moment of the latter’s death.' In the present case on the evidence there had been no such ‘far-reaching undertaking’ and, therefore, no trust arose as regards Eva’s [the house-keeper’s] residuary estate. Moreover, no obligation had been undertaken by Eva as regards the money she had received under H’s will. Such an obligation could be binding provided the donor and donee had discussed and intended that the donee should keep the money distinct from her own money, but there was no such evidence here. However, the above doctrine of a ‘trust in suspense’ calls for analysis, for apart from being a salutary, if bad, attempt at indicating the potential dynamism of equitable principles, the opinion ignores some difficulties.

There is no clear English authority on this concept. The court referred to Birmingham v Renfrew, an Australian decision, as giving some support to the proposition. This was a case of mutual wills where the survivor-husband revoked his will in breach of the undertaking he had given to his wife, and the High Court held that the agreement between them had created a constructive trust not of any specific property but of any residue of property, of whatever character, at the time of the survivor’s death. The obligation was a ‘floating obligation, suspended, so to speak, during the lifetime of the survivor [and] can descend upon the assets at his death and crystallise into a trust.’ Let us consider theoretical difficulties.

First, there is the problem of determining the ownership of property in the interval. Is the property (i.e. which ‘he may have at his command at his death’) during the intervening period vested in the primary donee or the secondary donee? If the former, then the legal owner should

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57 See p. 132, above.  
58 Ottaway v Norman [1972] Ch 698 at 713.  
59 The absence of this intention to keep the money distinct was, according to Brightman J, the distinguishing factor from Re Gardner [1920] 2 Ch 523, where the half-secret trust clearly showed that the donee only had a life interest in the personal estate of the donor.  
60 (1937) 57 CLR 666.  
61 (1937) 57 CLR 666 at 689 per Dixon J.
logically be able to dispose of it subject to any possible remedy for a breach of contract which, again, would be subject to the rules of privity and consideration. If the ownership is vested in the secondary donee, then there is an immediate trust. But, according to Brightman J, the trust ‘attaches . . . at the moment of the [primary donee’s] death’. It is submitted that the difficulty cannot be avoided by holding that, in such circumstances, the primary donee has a life interest in such assets, for the fact is that the donor has been given a promise that property would be given ‘if any’ is left at the donee’s death; this suggests that the donee is free to do what he likes with the property. Moreover, if the trust attaches when the primary donee dies, what property could be subject to a life interest before that event?

Secondly, such an undertaking would in all probability fail to satisfy the requirement of certainty of the subject matter of a trust. This requirement has to be satisfied at the time the trust comes into operation. Brightman J’s words that the trust is, during the intervening period, in suspense suggests that the trust has its existence at the time the donor dies, though it does not ‘bite’ until the primary donee dies. If so, such a trust would fail to meet the test of certainty. The primary donee should then take the property absolutely. Moreover, the trust is open to the charge of inconsistency of directions if the primary donee is entitled to do what he likes with the property during his lifetime (an absolute ownership) but is bound by a promise to leave any residue of that property in a particular way at his death. It is therefore submitted that the trust concept cannot legitimately be extended to deal with the situation envisaged by Brightman J. It would be theoretically better if the situation is left to be dealt with by the law of contract, i.e. the estate of the promisor should be subject to contractual obligation undertaken by the promisor.

In Re Cleaver [1981] 1 WLR 939, an elderly couple married in 1967 and made wills in each other’s favour, with a substitutionary gift to the husband’s three children. After the husband’s death, the wife made a new will, leaving the property to one child only. Nourse J held that, on the balance of probabilities, there had been an agreement to make mutual wills, and therefore a constructive trust had arisen. Following Birmingham v Renfrew (1937) 57 CLR 666, it was held that the trust attached to the survivor’s assets, allowing her to enjoy the property subject to a fiduciary duty which crystallised on her death and disabled her only from voluntary dispositions inter vivos calculated to defeat the agreement. There would be no objection to ordinary gifts of small value.

Nourse J, having referred to Dufour v Pereira (1769) 1 Dick 419 and Re Oldham [1925] Ch 75, said at 945:

I do not find it necessary to refer to any other English case, but I have derived great assistance from the decision of the High Court of Australia in Birmingham v Renfrew (1937) 57 CLR 666. That was a case where the available extrinsic evidence was held to be sufficient to establish the necessary agreement between two spouses. It is chiefly of interest because both Sir John Latham CJ and more especially Dixon J examined with some care the whole nature of the legal theory on which these and other similar cases proceed. I would like to read three passages from the judgment of Dixon J which state, with all the clarity and learning for which the judgments of

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62 Presumably, if the trust arises at the death of the donee, and if the ultimate beneficiary predeceases the donee then, unlike in Re Gardner [1923] 2 Ch 230, the trust fails. Who would then be entitled to the property?

that most eminent judge are renowned, what I believe to be a correct analysis of the principles on which a case of enforçable mutual wills depends. The first passage reads, at 682–683:

‘I think the legal result was a contract between husband and wife. The contract bound him, I think, during her lifetime not to revoke his will without notice to her. If she died without altering her will then he was bound after her death not to revoke his will at all. She on her part afforded the consideration for his promise by making her will. His obligation not to revoke his will during her life without notice to her is to be implied. For I think the express promise should be understood as meaning that if she died leaving her will unrevoked then he would not revoke his. But the agreement really assumes that neither party will alter his or her will without the knowledge of the other. It has long been established that a contract between persons to make corresponding wills gives rise to equitable obligations when one acts on the faith of such an agreement and dies leaving his will unrevoked so that the other takes property under its dispositions. It operates to impose upon the survivor an obligation regarded as specifically enforceable. It is true that he cannot be compelled to make and leave unrevoked a testamentary document and if he dies leaving a last will containing provisions inconsistent with his agreement it is nevertheless valid as a testamentary act. But the doctrines of equity attach the obligation to the property. The effect is, I think, that the survivor becomes a constructive trustee and the terms of the trust are those of the will which he undertook would be his last will.’

Next, at 689:

‘There is a third element which appears to me to be inherent in the nature of such a contract or agreement, although I do not think it has been expressly considered. The purpose of an agreement for corresponding wills must often be, as in this case, to enable the survivor during his life to deal as absolute owner with the property passing under the will of the party first dying. That is to say, the object of the transaction is to put the survivor in a position to enjoy for his own benefit the full ownership so that, for instance, he may convert it and expend the proceeds if he choose. But when he dies he is to bequeath what is left in the manner agreed upon. It is only by the special doctrines of equity that such a floating obligation, suspended, so to speak, during the lifetime of the survivor can descend upon the assets at his death and crystallise into a trust. No doubt gifts and settlements, inter vivos, if calculated to defeat the intention of the compact, could not be made by the survivor and his right of disposition, inter vivos, is, therefore, not unqualified. But, substantially, the purpose of the arrangement will often be to allow full enjoyment for the survivor’s own benefit and advantage upon condition that at his death the residue shall pass as arranged.’

Finally, at 690:

‘In Re Oldham [1925] Ch 75 Astbury J pointed out, in dealing with the question whether an agreement should be inferred, that in Dufour v Pereira (1769) 1 Dick 419 the compact was that the survivor should take a life estate only in the combined property. It was therefore, easy to fix the corpus with a trust as from the death of the survivor. But I do not see any difficulty in modern equity in attaching to the assets a constructive trust which allowed the survivor to enjoy the property subject to a fiduciary duty which, so to speak, crystallised on his death and disabled him from voluntary dispositions inter vivos.’

I interject to say that Dixon J was there clearly referring only to voluntary dispositions inter vivos which are calculated to defeat the intention of the compact. No objection could normally be taken to ordinary gifts of small value. He went on:

‘On the contrary, as I have said, it seems rather to provide a reason for the intervention of equity. The objection that the intended beneficiaries could not enforce a contract is met by the fact that
a constructive trust arises from the contract and the fact that testamentary dispositions made upon the faith of it have taken effect. It is the constructive trust and not the contract that they are entitled to enforce.’

It is also clear from Birmingham v Renfrew that these cases of mutual wills are only one example of a wider category of cases, for example secret trusts, in which a court of equity will intervene to impose a constructive trust. A helpful and interesting summary of that wider category of cases will be found in the argument of Mr. Nugee in Ottaway v Norman [1972] Ch 698 at 701–702. The principle of all these cases is that a court of equity will not permit a person to whom property is transferred by way of gift, but on the faith of an agreement or clear understanding that it is to be dealt with in a particular way for the benefit of a third person, to deal with the property inconsistently with that agreement or understanding. If he attempts to do so after having received the benefit of the gift, equity will intervene by imposing a constructive trust on the property which is the subject matter of the agreement or understanding. I take that statement of principle, and much else which is of assistance in this case, from the judgment of Slade J in Re Pearson Fund Trusts (21 October, 1977 unreported). The statement of principle is at p. 52 of the official transcript. The judgment of Brightman J in Ottaway v Norman is to much the same effect.

I would emphasise that the agreement or understanding must be such as to impose on the donee a legally binding obligation to deal with the property in the particular way and that the other two certainties, namely, those as to the subject matter of the trust and the persons intended to benefit under it, are as essential to this species of trust as they are to any other. In spite of an argument by Mr. Keenan, who appears for Mr. and Mrs. Noble, to the contrary, I find it hard to see how there could be any difficulty about the second or third certainties in a case of mutual wills unless it was in the terms of the wills themselves. There, as in this case, the principal difficulty is always whether there was a legally binding obligation or merely what Lord Loughborough LC in Lord Walpole v Lord Orford (1797) 3 Ves 402 at 419, described as an honourable engagement.

Before turning in detail to the evidence which relates to the question whether there was a legally binding obligation on the testatrix in the present case or not I must return once more to Birmingham v Renfrew. It is clear from that case, if from nowhere else, that an enforceable agreement to dispose of property in pursuance of mutual wills can be established only by clear and satisfactory evidence. That seems to me to be no more than a particular application of the general rule that all claims to the property of deceased persons must be scrutinised with very great care. However, that does not mean that there has to be a departure from the ordinary standard of proof required in civil proceedings. I have to be satisfied on the balance of probabilities that the alleged agreement was made, but before I can be satisfied of that I must find clear and satisfactory evidence to that effect.

Re Dale

[1994] Ch 31 (Ch D, Morritt J)

A husband and wife agreed that each would leave his or her estate to their son and daughter equally. The husband died first, leaving his estate of £18,500 accordingly. The

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wife made a new will leaving £300 to her daughter and the rest of her estate of £19,000 to her son.

Held. The son, as executor, held the estate on trust for himself and the daughter equally. Benefit by the survivor was not necessary to the doctrine of mutual wills.

Morritt J: There is no doubt that for the doctrine to apply there must be a contract at law. It is apparent from all the cases to which I shall refer later, but in particular from Gray v Perpetual Trustee Co Ltd [1928] AC 391, that it is necessary to establish an agreement to make and not revoke mutual wills, some understanding or arrangement being insufficient—‘without such a definite agreement there can no more be a trust in equity than a right to damages at law’: see per Viscount Haldane, at 400. Thus, as the defendant submitted, it is necessary to find consideration sufficient to support a contract at law. The defendant accepted that such consideration may be executory if the promise when performed would confer a benefit on the promisee or constitute a detriment to the promisor. But, it was submitted, the promise to make and not revoke a mutual will could not constitute a detriment to the first testator because he would be leaving his property in the way that he wished and because he would be able, on giving notice to the second testator, to revoke his will and make another if he changed his mind. Accordingly, it was argued, consideration for the contract had to take the form of a benefit to the second testator.

I do not accept this submission. It is to be assumed that the first testator and the second testator had agreed to make and not to revoke the mutual wills in question. The performance of that promise by the execution of the will by the first testator is in my judgment sufficient consideration by itself. But, in addition, to determine whether a promise can constitute consideration it is necessary to consider whether its performance would have been so regarded: cf. Chitty on Contracts, (26th edn, 1989), vol. 1, p. 160, para. 161. Thus it is to be assumed that the first testator did not revoke the mutual will notwithstanding his legal right to do so. In my judgment, this too is sufficient detriment to the first testator to constitute consideration. Thus mutual benefit is not necessary for the purpose of the requisite contract. What is necessary to obtain a decree of specific performance of a contract in favour of a third party is not, in my judgment, a relevant question when considering the doctrine of mutual wills. A will is by its very nature revocable: cf. Re Heys’ Estate [1914] P 192. It seems to me to be inconceivable that the court would order the second testator to execute a will in accordance with the agreement at the suit of the personal representatives of the first testator or to grant an injunction restraining the second testator from revoking it. The principles on which the court acts in imposing the trust to give effect to the agreement to make and not revoke mutual wills must be found in the cases dealing with that topic, not with those dealing with the availability of the remedy of specific performance.

The origin of the doctrine of mutual wills is the decision of Lord Camden LC in Dufour v Pereira (1769) 1 Dick 419.... The case concerned a joint will made pursuant to an agreement between husband and wife whereby the residuary estate of each of them was to constitute a common fund to be held for the survivor for his or her life with remainders over. On the death of the husband the wife, who was one of his executors, proved the will. Thereafter she took possession of her husband's property and enjoyed the benefit of his residuary estate together with her separate property for many years, but on the death of the wife it was found that her last will disregarded the provisions of the joint will and left her estate to her daughter, the defendant, Mrs. Pereira. The plaintiffs were the beneficiaries under the joint will and claimed that the wife's personal estate was held in trust for them.

[His Lordship referred to the judgment of Lord Camden LC reported in Dickson’s Reports and continued:] But in Hargrave, Juridical Arguments and Collections, vol. 2.... Mr. Hargrave
Chapter 7: Constructive Trusts

quotes extensively from a manuscript copied from Lord Camden LC’s own handwriting which he describes, at p. 306, as ‘entered’, seemingly in the decree. This source was described as authoritative by Viscount Haldane in Gray v Perpetual Trustee Co Ltd [1928] AC 391 at 399 and is, in my judgment, to be preferred because it is much fuller. In Hargrave, at pp. 304–306, the facts are set out. At p. 306, Lord Camden LC recorded that mutual wills were unknown in England but that the case must be decided in accordance with English law. He stated, at p. 307:

‘And I trust, that the everlasting maxims of equity and conscience, upon which the jurisdiction of this court is built, are capacious enough, not only to comprehend this, but every other case that may happen; and that the justice of this court is co-extensive with every possible variety of human transactions. Consider it in two views. First, how far the mutual will shall operate as a binding engagement, independent of any confirmation by accepting the legacy under it. Secondly, whether the survivor can depart from this engagement, after she has accepted a benefit under it.’

Lord Camden LC’s decision on the first point should be read in full. He said, at pp. 307–311:

‘It was said upon the first point, and Mr. Skynner cited an authority to prove it, that where two had made a mutual will either of them might cheat his partner, foeda machinatione, by a secret will to disappoint the joint disposition, because they are two distinct instruments. Hall and Bickerstaff to the same purpose.

The law of these countries then must be very defective, and totally destitute of the principles of equity and good conscience: for nothing can be more barbarous, than a law, which does permit in the very text of it one man to defraud another. The equity of this court abhors the principle. A mutual will is a mutual agreement. A mutual will is a revocable act. It may be revoked by joint consent clearly. By one only, if he give notice, I can admit. But to affirm, that the survivor (who has deluded his partner into this will upon the faith and persuasion that he would perform his part) may legally recall his contract, either secretly during the joint lives, or after at his pleasure; I cannot allow. The mutual will is in the whole and every part mutually upon condition, that the whole shall be the will. There is a reciprocity, that runs through the instrument. The property of both is put into a common fund and every devise is the joint devise of both. This is a contract. If not revoked during the joint lives by any open act, he that dies first dies with the promise of the survivor, that the joint will shall stand. It is too late afterwards for the survivor to change his mind: because the first to die’s will is then irrevocable, which would otherwise have been differently framed, if that testator had been appraised of this dissent. Thus is the first testator drawn in and seduced by the fraud of the other, to make a disposition in his favour, which but for such a false promise he would never have consented to.

It was argued however, that the parties knowing that all testaments were in their nature revocable, were aware of this consequence, and must therefore be presumed to contract upon this hazard. There cannot be a more absurd presumption than to suppose two persons, while they are contracting, to give each a licence to impose upon the other. Though a will is always revocable, and the last must always be the testator’s will; yet a man may so bind his assets by agreement, that his will shall be a trustee for performance of his agreement. A covenant to leave so much to his wife or daughter, etc. Or suppose he makes his will, and covenants not to revoke it. These cases are common; and there is no difference between promising to make a will in such a form and making his will with a promise not to revoke it. This court does not set aside the will but makes the devisee heir or executor trustee to perform the contract. Suppose the husband had so devised after the wife’s promise, that he would devise in like manner. A man intends to devise for the benefit of A

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and B promises that if he will appoint him his executor, A shall have his legacy. *Thynn v Thynn* (1684) 1 Vern 296; *Devenish v Baines* (1689) Prec Ch 3, testator, persuaded by his wife to give his copyhold, which he intended to devise to his godson. *Chamberlaine’s case* cited [(1678) 2 Eq Cas Abr 43]. A man persuaded his father not to make a will, promising his brother and sisters should have the provision intended. This court bound the will with the promise, and raised a trust in the devisee. The act done by one is a good consideration for the performance of the other.

This case stands upon the very same principle. The parties by the mutual will do each of them devise, upon the engagement of the other, that he will likewise devise in manner therein mentioned. The instrument itself is the evidence of the agreement; and he, that dies first, does by his death carry the agreement on his part into execution. If the other then refuses, he is guilty of a fraud, can never unbind himself, and becomes a trustee of course. For no man shall deceive another to his prejudice. By engaging to do something that is in his power, he is made a trustee for the performance, and transmits that trust to those that claim under him. The court is never deceived by the form of instruments. The actions of men here are stripped of their legal clothing, and appear in their first naked simplicity. Good faith and conscience are the rules, by which every transaction is judged in this court; and there is not an instance to be found since the jurisdiction was established, where one man has ever been released from his engagement, after the other has performed his part."

Only in the sentence at p. 308 is there any reference to the first testator conferring a benefit on the second testator. The rest of the judgment on the first point emphasises more than once that there is a contract between the testators which, on the death of the first testator, is carried into effect by him, that the first testator dies with the promise of the second testator that the agreement will stand, and that it would be a fraud on the first testator to allow the second testator to disregard the contract which became irrevocable on the death of the first testator. In my judgment the essence of the decision is contained in the passage at p. 310:

‘he, that dies first, does by his death carry the agreement on his part into execution. If the other then refuses, he is guilty of a fraud, can never unbind himself, and becomes a trustee of course. For no man shall deceive another to his prejudice.’

In my judgment, it is no part of the principle there expressed that the first testator must have conferred a benefit on the second testator by his will. If he has, the principle will apply a fortiori, but it may apply even if he has not.

Lord Camden LC’s judgment on the second question appears at p. 311, in the following terms:

‘I have perhaps given myself more trouble than was necessary upon this point; because, if it could be doubtful, whether after the husband’s death his wife could be at liberty to revoke her part of the mutual will, it is most clear, that she has estopped herself to this defence by an actual confirmation of the mutual will, not only by proving it, but by accepting and enjoying an interest under it. She receives this benefit, takes possession of all her husband’s estates, submits to the mutual will as long as she lives, and then breaks the agreement after her death. In this view the case falls within the rule of *Noys v Mordaunt* (1706) 2 Vern 581. She takes under the joint will and can take no otherwise.’

In my view the emphasis in this passage on proving the joint will and accepting and enjoying an interest under it underlines the fact that Lord Camden did not regard those matters as relevant to the application of the principle enunciated on the first question.

My conclusion on the defendant’s submission based on this authority is that it does not establish that the doctrine of mutual wills can only apply if the testators confer mutual benefits on
each other. In my judgment it establishes, subject to later authorities, that such mutual benefit is a sufficient but not a necessary condition.

His Lordship referred to *Lord Walpole v Lord Orford* (1797) 3 Ves 402; *Re Wilford’s Estate* (1879) 11 Ch D 267; *Stone v Hoskins* [1905] P 194; *Re Heys’ Estate* [1914] P 192; *Re Oldham* [1925] Ch 75; *Gray v Perpetual Trustee Co Ltd* [1928] AC 391; *Re Hagger* [1930] 2 Ch 190 [p. 290, above]; *Birmingham v Renfrew* (1937) 57 CLR 666; *Re Cleaver* [1981] 1 WLR 939 [p. 292, above]; *Re Basham* [1986] 1 WLR 1498, and continued:

Having concluded the survey of the authorities to which I was so helpfully referred by counsel, I should now express my conclusion and my reasons for it. My conclusion is that I should answer the preliminary issue in the negative. It is clear from the decision of Lord Camden on the first question in *Dufour v Pereira* that there must be a legally binding contract to make and not to revoke mutual wills and that the first testator has died having performed his part of the agreement. The basis of the doctrine, at p. 310 in Hargrave, *Juridical Arguments and Collections*, vol. 2, is:

‘If the other then refuses, he is guilty of a fraud, can never unbind himself, and becomes a trustee of course. For no man shall deceive another to his prejudice. By engaging to do something that is in his power, he is made a trustee for the performance, and transmits that trust to those that claim under him.’

As all the cases show, the doctrine applies when the second testator benefits under the will of the first testator. But I am unable to see why it should be any the less a fraud on the first testator if the agreement was that each testator should leave his or her property to particular beneficiaries, for example their children, rather than to each other. It should be assumed that they had good reason for doing so and in any event that is what the parties bargained for. In each case there is the binding contract. In each case it has been performed by the first testator on the faith of the promise of the second testator and in each case the second testator would have deceived the first testator to the detriment of the first testator if he, the second testator, were permitted to go back on his agreement. I see no reason why the doctrine should be confined to cases where the second testator benefits when the aim of the principle is to prevent the first testator from being defrauded. A fraud on the first testator will include cases where the second testator benefits, but I see no reason why the principle should be confined to such cases. In my judgment so to hold is consistent with all the authorities, supported by some of them, and is in furtherance of equity’s original jurisdiction to intervene in cases of fraud.

In *Re Goodchild* [1997] 1 WLR 1216, a husband, Dennis, and wife, Joan, made wills at the same time in favour of the survivor of them and then in favour of their son, Gary. The wife died leaving her entire estate to her husband. He remarried and left his entire estate to his second wife, the defendant. On the husband’s death Gary sought a declaration that the defendant held the husband’s estate on trust for him.

It was held that the doctrine of mutual wills did not apply because there was no express agreement not to revoke the wills,66 but the husband was under a moral obligation to provide for the plaintiff which meant that an order could be made under section 2 of the Inheritance (Provision for Family and Dependants) Act 1975.

66 See also *Gillett v Holt* [2001] Ch 210; *Birch v Curtis* [2002] EWHC 1158 (Ch).
Leggatt LJ said at 1224:

‘[T]he reason why, if mutual wills are to take effect, an agreement is necessary, is that without it the property of the second testator is not bound, whereas a secret trust concerns only the property of a person in the position of the first testator. . . . I am satisfied that for the doctrine to apply there must be a contract at law (see Re Dale [1994] Ch 31 at 38, per Morritt J).

Two wills may be in the same form as each other. Each testator may leave his or her estate to the other with a view to the survivor leaving both estates to their heir. But there is no presumption that a present plan will be immutable in future. A key feature of the concept of mutual wills is the irrevocability of the mutual intentions. Not only must they be binding when made, but the testators must have undertaken, and so must be bound, not to change their intentions after the death of the first testator. The test must always be, ‘suppose that during the lifetime of the surviving testator the intended beneficiary did something which the survivor regarded as unpardonable, would he or she be free not to leave the combined estate to him?’ The answer must be that the survivor is so entitled unless the testators agreed otherwise when they executed their wills. Hence the need for a clear agreement.

Dennis and Joan executed wills in the same terms save that each left his or her estate to the other. Thus the survivor was to have both estates. They wanted Gary to inherit the combined estates. But there was no express agreement not to revoke the wills. Nor could any such agreement be implied from the fact that the survivor was in a position to leave both estates to Gary. The fact that each expected that the other would leave them to him is not sufficient to impress the arrangement with a floating trust, binding in equity.67 A mutual desire that Gary should inherit could not of itself prevent the survivor from resiling from the arrangement. What is required is a mutual intention that both wills should remain unaltered and that the survivor should be bound to leave the combined estates to the son. That is what is missing here. The judge found that Joan regarded the arrangement as irrevocable, but that Dennis did not. No mutual intention was proven that the survivor should be bound to leave the joint estate to Gary. That is what they meant to achieve. It could not happen unless they first left their respective estates to the survivor of them. But the fact that each was able to leave the combined estate to Gary does not without more mean that both were bound to do so.

The judge declined to infer any agreement between Dennis and Joan that would prevent the survivor of them from interfering with the succession. That was a conclusion to which he was entitled to come on the evidence. Mr. Gordon has helpfully marshalled the judge’s references to what had to be shown to establish binding mutual wills. Though Joan believed that they mutually intended to leave their estates to Gary, Dennis was not shown to have shared it. So the intention was not in fact mutual. Hence the result that Dennis had no more than a moral obligation to give effect to Joan’s belief at least in so far as it affected what had been her estate.

His Lordship then considered whether the court was able to make financial provision for Gary under section 2 of the Inheritance (Provision for Family and Dependants) Act 1975, and concluded:

When the court finds that the testator has been guilty in all the circumstances of a breach of moral obligation owed by a father towards his child, leaving the child in straitened financial circumstances, the court must ensure that adequate provision is made for the child out of the

estate, having regard to his need for maintenance and support (see Bosch v Perpetual Trustee Co Ltd [1938] AC 463). There was here the plainest possible basis for concluding that, whereas Dennis and Joan had not made a clear agreement for mutual wills, nonetheless Joan’s understanding of the effect of the will she had made was such as to impose upon Dennis, free though he was of any legal obligation, a moral obligation, once Gary’s need for reasonable financial provision was established, to devote to his son so much of his mother’s estate as would have come to him if there had been mutual wills.

Morritt LJ said at 1229:

As Leggatt LJ has pointed out, a consistent line of authority requires that for the doctrine of mutual wills to apply there must be a contract between the two testators. In delivering the advice of the Privy Council in Gray v Perpetual Trustee Co Ltd [1928] AC 391 at 400 such requirement was made abundantly clear by Viscount Haldane. Counsel for Gary suggests that this test is too high. He does so by reference to the requirements for a secret trust or the imposition of a constructive trust. I do not accept that there is any justification to be found in those areas of equity such as would justify departing from the clear statement of Viscount Haldane.

The principles applicable to cases of a fully secret trust do, in substance, require the proof of a contract. Thus in Ottaway v Norman [1972] Ch 698 at 711, Brightman J recorded:

‘The essential elements which must be proved to exist are: (i) the intention of the testator to subject the primary donee to an obligation in favour of the secondary donee; (ii) communication of that intention to the primary donee; and (iii) the acceptance of that obligation by the primary donee either expressly or by acquiescence.’

But if those principles do not require exactly the same degree of agreement as does a contract at law there is no reason to import that lesser requirement into the doctrine of mutual wills. Secret trusts affect the property of the donor not that of the primary donee. Where there are mutual wills the doctrine affects the property of both testators, in particular that of the second to die. If he is to be subjected to an obligation with regard to property of his own not derived from the other then an agreement should be required.

In the case of the imposition of a constructive trust in cases like Lloyds Bank plc v Rosset [1991] 1 AC 107, on which counsel for Gary relied the court is considering the equitable interests in property acquired for joint use.

[His Lordship quoted from the judgment of Lord Bridge of Harwich at 132 [see p. 325, below], and continued:] In my view this principle has no operation in the case of mutual wills in regard to property already owned both legally and beneficially by the second testator to die. Even assuming that in the absence of an agreement a constructive trust may be imposed in relation to the property acquired by the second testator from the first there is no basis, in the absence of an agreement relating to the property of the second testator, to impose a constructive trust in relation to that property too.

The doctrine of mutual wills is anomalous. The bequest of his entire estate by a husband to his wife absolutely and beneficially with a gift over of whatever was left at her death could not take effect in accordance with its terms. Either the interest taken by the wife would be limited or the gift over would be void as repugnant to the absolute and beneficial nature of the gift.

68 This is a particular form of the constructive trust known as the ‘common-intention constructive trust’, see p. 322, below.
Similarly the bare promise of the wife to leave her property by will in a particular manner would be unenforceable for any will she then made would be revocable under the Wills Act 1837. In my judgment if these principles are to be excluded in the case of mutual wills it is essential that there should be a contract to that effect. In my view that is what both principle and the authorities require.

In Healey v Brown [2002] WTLR 84969 it was held that, where mutual wills related to land, section 2 of the Law Reform (Miscellaneous Provisions) Act 1989 required there to be a single document signed by both parties. It followed that the binding contract between the parties could not trigger the doctrine of mutual wills. However, the separate doctrine of common-intention constructive trust would apply,70 by virtue of which it would be inequitable for the surviving testator to transfer the property during his lifetime otherwise than as they had agreed. However, this constructive trust could not be imposed upon the surviving testator’s share of the property.

QUESTIONS

1. If the doctrine of mutual wills depends on a binding contract, should the trust be characterised as express or constructive? Does it matter?

2. You are a solicitor and are approached by a husband and wife who wish to make mutual wills. What advice should you give to them?

F SECRET TRUSTS

It is unsettled whether secret trusts should be regarded as express or constructive trusts. The practical significance of the classification is that constructive trusts of land are exempted from the requirement of written evidence by section 53(2) of the Law of Property Act 1925.72 If a secret trust is to be analysed as a declaration operating outside the will, then it looks like an express trust, particularly if it is a half-secret trust, where the intention to create a trust is expressed in the will. Fully secret trusts may be easier to classify as constructive, as they are enforceable on the ground of fraud (McCormick v Grogan (1869) LR 4 HL 82) which cannot be perpetrated by a half-secret trustee.73 There is little authority on the point. In Ottaway v Norman [1972] Ch 698 [p. 132, above], an oral fully secret trust of land was upheld without discussing this
matter, whereas in *Re Baillie* (1886) 2 TLR 660 a half-secret trust of land was held to require written evidence. But if a fully secret trust of land were to fail for lack of writing on the ground that it was express, the secret trustee, having accepted the trust, would not hold for his own benefit, but for the residuary legatee or next-of-kin. Any other result would amount to using the statute as an instrument of fraud.

G ACQUISITION OF PROPERTY BY A CRIMINAL

It is a basic principle of public policy that no criminal should profit from his crime. This was recognised by Fry LJ in *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147 at 156:

The principle of public policy invoked is in my opinion rightly asserted. It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanor.... This principle of public policy, like all such principles, must be applied to all cases to which it can be applied without reference to the particular character of the right asserted or the form of its assertion.

One consequence of this principle is that where a killer obtains rights to property as a result of an unlawful killing, those rights are forfeited. This is called the Forfeiture Rule.

In *Dunbar v Plant* [1998] Ch 412, Mummery LJ recognised, at 422, that:

...this is a statement of a principle of public policy, the application of which may produce unfair consequences in some cases: it is not a statement of a principle of justice designed to produce a fair result in all cases: see the observations of Lord Goff of Chieveley on the principle of *in pari delicto* in *Tinsley v Milligan* [1994] 1 AC 340 at 355. (This principle of public policy is different from, for example, the equitable maxim that 'he who comes to equity must come with clean hands', which is a principle of justice designed to prevent those guilty of serious misconduct from securing a discretionary remedy, such as an injunction.)...

[His Lordship then referred to the Forfeiture Act 1982 which recognises the forfeiture rule [see p. 305, below] and continued:] The following propositions relating to the scope of the principle enunciated by Fry LJ in *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147 and recognised by section 1 of the Act of 1982 may be stated.

(1) The rule applies to a case where the benefit results from the commission of murder by the intended beneficiary. Dr. H.H. Crippen notoriously survived his wife. Between the date of his conviction for her murder and the carrying out of the death sentence passed on him,

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74 Although Brightman J did incorporate the plaintiff’s pleadings into his judgment and these did base the claim upon a constructive trust.

Dr. Crippen made a will naming Ethel Le Neve as the sole executrix and universal beneficiary. Not surprisingly Ethel Le Neve was passed over on a motion for the grant of an administration to Mrs. Crippen’s intestate estate. In holding that there were special circumstances justifying this course Sir Samuel Evans P said:

‘It is clear that the law is, that no person can obtain, or enforce, any rights resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights.’ (See Re Crippen [1911] P 108 at 112.)

(2) The principle is not confined to murder cases, as was made clear by the Court of Appeal in Re Hall [1914] P 1. The court unanimously rejected the contention that a distinction should be drawn between cases of murder and manslaughter. Sir Herbert Cozens-Hardy MR. said, at 6, that he entirely failed to appreciate the supposed distinction: ‘It was a case of felony and I see no reason to draw a distinction between murder and manslaughter in a case like this.’ Hamilton LJ said, at 7–8, that the principle could only be expressed in a wide form:

‘It is that a man shall not slay his benefactor and thereby take his bounty; and I cannot understand why a distinction should be drawn between the rule of public policy where the criminality consists in murder and the rule where the criminality consists in manslaughter. . . . The distinction seems to me either to rely unduly upon legal classification, or else to encourage what, I am sure, would be very noxious—a sentimental speculation as to the motives and degree of moral guilt of a person who has been justly convicted and sent to prison.’

His Lordship then considered whether the forfeiture rule only applied where the killing involved deliberate, intentional and unlawful violence and threats of violence, as had been suggested by the Court of Appeal in Gray v Barr [1971] 2 QB 554, and concluded:

In my judgment, however, the presence of acts or threats of violence is not necessary for the application of the forfeiture rule. It is sufficient that a serious crime has been committed deliberately and intentionally. The references to acts or threats of violence in the cases are explicable by the facts of those cases. But in none of those cases were the courts legislating a principle couched in specific statutory language. The essence of the principle of public policy is that (a) no person shall take a benefit resulting from a crime committed by him or her resulting in the death of the victim and (b) the nature of the crime determines the application of the principle. On that view the important point is that the crime that had fatal consequences was committed with a guilty mind (deliberately and intentionally). The particular means used to commit the crime (whether violent or non-violent) are not a necessary ingredient of the rule. There may be cases in which violence has been used deliberately without an intention to bring about the unlawful fatal consequences. Those cases will attract the application of the forfeiture rule. It does not follow, however, that when death has been brought about by a deliberate and intentional, but non-violent, act (e.g. poison or gas) the rule is inapplicable.

His Lordship held, on the facts of the case, that the forfeiture rule applied where the defendant was guilty of aiding and abetting suicide.

Where a killer has obtained property as a result of an unlawful killing this may be held on constructive trust since the killer is not entitled to benefit from the property. This is rare, because the usual effect of the forfeiture rule is to prevent the killer from obtaining the property in the first place. However, there is scope for greater use being made of the constructive trust in this context.
A consequence of the principle that no criminal should profit from his or her crime is that title to the property which would otherwise accrue to the criminal, or to those claiming through him or her, cannot pass to the criminal. But this response is not free from difficulty. This is because in many cases, whether by virtue of statute or the common law, legal title should indeed pass to the criminal, and there is no provision in the statute or common law to the effect that an exception should be made where the passing of property is triggered by the criminal’s own act. For the forfeiture rule to work it must be assumed that, for reasons of public policy, every legal rule contains an implied term to the effect that no criminal who, by the commission of the crime, has triggered the passing of property should be allowed to benefit from the crime. It would be a much more honest response to apply the relevant statutory and judicial laws literally, without artificial interpretation. This would mean that title to property would pass to the criminal. But, because of the principle that no criminal should profit from his or her crime, equity should ensure that because of the killer’s unconscionable conduct an equitable interest in the property is created in favour of the victim, with the result that the criminal should hold the property on a constructive trust for the victim’s estate. This would be consistent with Lord Browne-Wilkinson’s interpretation of the constructive trust in Westdeutsche Landesbank Girozentrale v Islington London Borough Council. Such an approach would have a number of advantages.

(i) The operation of the forfeiture rule would not conflict with the clear words of statute and judicial precedent but would continue to fulfil the policy that no criminal should profit from his or her crime.

(ii) If it is accepted that legal title to the victim’s estate should pass to the killer, then a constructive trust will be imposed in favour of the people whom equity regards as entitled to the estate. Usually it will be clear who such people are, because the normal rules of succession will be applied, with the obvious qualification that the killer and those claiming through the killer will not have a beneficial interest. But in certain circumstances the flexibility of equity will enable the beneficial interest to be created in favour of another party. The most obvious example of this will be where there is clear evidence that the victim had intended to change his or her will, or to make a will, so as to leave the estate to a particular person, but was killed before he or she was able to do so.

(iii) If the property which had been acquired by or through the criminal had been received by a third party, then the victim of the crime, or the beneficiaries of the victim, would be able to recover the property. But this is subject to an important qualification, namely that the property could not be recovered from a third party who was a bona fide purchaser for value without notice.

This constructive trust analysis was not adopted, however, by the Court of Appeal in Re DWS [2001] Ch 568 where a son had murdered his parents who died intestate. The deceased’s grandchild claimed that he was entitled to the estate, since his father could not have profited from the crime. The Court of Appeal held that the constructive trust analysis was not applicable in this case because the property was not acquired by or through the criminal. See also (1890) Harvard Law Review 394 (J.B. Ames); (2001) 117 LQR 371 (R. Kerridge).

Footnotes:
77 See e.g. Re Royse [1985] Ch 22, [1984] 3 All ER 339, where it was assumed that the application of the Inheritance (Provision for Family and Dependants) Act 1975 was subject to the forfeiture rule, even though the Act makes no provision for this rule. Similarly in Re Sigsworth [1935] Ch 89 the Administration of Estates Act 1925 was interpreted as though its provisions relating to intestacy were subject to the forfeiture rule.
78 (1973) 89 LQR 235, 253 (T.G. Youdan).
not benefit by virtue of the forfeiture rule. However, the Court held that, by virtue of the Administration of Estates Act 1925, the grandson was not entitled to the estate since the Act specifically prevented him from succeeding to the estate if his parent was living. Instead, the Court held by a majority\textsuperscript{81} that collateral relations were entitled to the estate. A preferable solution would have been to conclude that the forfeiture rule did not prevent the father from succeeding to the estate. Instead, it prevented him from taking the estate beneficially. So he should have held the estate on constructive trust for his son.

An alternative solution is that recommended by the Law Commission,\textsuperscript{82} namely that the Administration of Estates Act 1925 and Wills Act 1837 should be amended so that a murderer who, for example, has killed a parent should be deemed to have died immediately before the death of the parent. It would follow that the parent’s estate in a case such as \textit{Re DWS} would pass to the person next entitled, namely the murderer’s own child.

The Forfeiture Act 1982\textsuperscript{83} gives the court power to grant total or partial relief from forfeiture of inheritance and related rights to persons guilty of unlawful killing other than murder, where the court is satisfied that the justice of the case requires it.

**FORFEITURE ACT 1982**

1. \textit{The ‘forfeiture rule’}

   (1) In this Act, the ‘forfeiture rule’ means the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing.

   (2) References in this Act to a person who has unlawfully killed another include a reference to a person who has unlawfully aided, abetted, counselled or procured the death of that other and references in this Act to unlawful killing shall be interpreted accordingly.

2. \textit{Power to modify the rule}

   (1) Where a court determines that the forfeiture rule has precluded a person (in this section referred to as ‘the offender’) who has unlawfully killed another from acquiring any interest in property mentioned in subsection (4) below, the court may make an order under this section modifying the effect of that rule.

   (2) The court shall not make an order under this section modifying the effect of the forfeiture rule in any case unless it is satisfied that, having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be so modified in that case.\textsuperscript{84}

\textsuperscript{81} Sedley LJ held that the estate should pass to the Crown as \textit{bona vacantia} in the hope that the Crown would transfer all or some of it to the grandson.

\textsuperscript{82} \textit{The Forfeiture Rule and the Law of Succession} (Law Com No. 295, 2005).

\textsuperscript{83} (1983) 46 MLR 66 (P.H. Kenny).

\textsuperscript{84} See \textit{Re K [1986]} Ch 180; \textit{Re H [1990]} 1 FLR 441 (degree of moral blame significant); \textit{Dunbar v Plant [1998]} Ch 412 [p. 307, below]; \textit{Dalton v Latham [2003]} EWHC 796, [2003] WTLR 687 (refusal to grant relief from the forfeiture rule where the defendant had taken advantage of the victim’s vulnerability).
(3) In any case where a person stands convicted of an offence of which unlawful killing is an element, the court shall not make an order under this section modifying the effect of the forfeiture rule in that case unless proceedings for the purpose are brought before the expiry of the period of three months beginning with his conviction.\footnote{The doctrine does not require a criminal conviction: \textit{Gray v Barr} [1971] 2 QB 554 (acquittal but lower standard of proof in civil action).}

(4) The interests in property referred to in subsection (1) above are—

(a) any beneficial interest in property which (apart from the forfeiture rule) the offender would have acquired—

(i) under the deceased’s will . . . or the law relating to intestacy . . . ;

(ii) on the nomination of the deceased in accordance with the provisions of any enactment;

(iii) as a \textit{donatio mortis causa} made by the deceased; . . .

(b) any beneficial interest in property which (apart from the forfeiture rule) the offender would have acquired in consequence of the death of the deceased, being property which, before the death, was held on trust for any person.

(5) An order under this section may modify the effect of the forfeiture rule in respect of any interest in property to which the determination referred to in subsection (1) above relates and may do so in either or both of the following ways, that is—

(a) where there is more than one such interest, by excluding the application of the rule in respect of any (but not all) of those interests; and

(b) in the case of any such interest in property, by excluding the application of the rule in respect of part of the property.

(6) On the making of an order under this section, the forfeiture rule shall have effect for all purposes (including purposes relating to anything done before the order is made) subject to the modifications made by the order.

(7) The court shall not make an order under this section modifying the effect of the forfeiture rule in respect of any interest in property which, in consequence of the rule, has been acquired before the coming into force of this section by a person other than the offender or a person claiming through him.\footnote{Re K, note 84 above (property not ‘acquired’ if held by personal representatives who have not completed administration). Note also \textit{Jones v Midland Bank Trust Co Ltd} [1998] 1 FLR 246 (the Forfeiture Act 1982 could not be used to rewrite the victim’s will, so the property of the victim devolved on an intestacy).}

(8) In this section—

‘property’ includes any chose in action or incorporeal moveable property; and

‘will’ includes codicil.

5. Exclusion of murderers

Nothing in this Act or in any order made under section 2 or referred to in section 3(1) of this Act [or in any decision made under section 4(1A) of this Act] shall affect the
application of the forfeiture rule in the case of a person who stands convicted of murder.

In Dunbar v Plant [1998] Ch 412, Plant and her fiancé, Dunbar, entered into a suicide pact. Dunbar killed himself but Plant survived. Dunbar’s father, who was the administrator of his estate, sought a declaration as to the ownership, amongst other things, of a house jointly owned by his son and Plant, and the proceeds of an insurance policy on Dunbar’s life for the benefit of Plant. The trial judge held that, since Plant had committed the crime of aiding and abetting a suicide, the forfeiture rule applied. The question for the Court of Appeal was whether the forfeiture rule could be modified in this case.

In holding that the forfeiture rule applied but could be modified on the facts, so that the defendant could take her fiancé’s share of the house but she could not receive the proceeds of the insurance policy on his life, Mummery LJ said at 427:

... the relevant question for the court is: does ‘the justice of the case require’ that the effect of the forfeiture rule be modified? In my view, the judge erroneously regarded himself as under a duty to try and do ‘justice between the parties’. That is not the approach required by section 2(2). The provision requires that the judge should look at the case in the round, pay regard to all the material circumstances, including the conduct of the offender and the deceased, and then ask whether ‘the justice of the case requires’ a modification of the effect of the forfeiture rule. Having taken the wrong approach, the judge failed, in my view, to give consideration in his reasons to all the factors material to the exercise of his discretion. In those circumstances it is open to this court to exercise the discretion afresh on the basis of the relevant material. On doing that, I have in fact reached the same conclusion as the judge on the limited scope of the modification order. It is difficult to draw the line with confidence. The point at which the judge drew it is not obviously wrong. The court is entitled to take into account a whole range of circumstances relevant to the discretion, quite apart from the conduct of the offender and the deceased: the relationship between them; the degree of moral culpability for what has happened; the nature and gravity of the offence; the intentions of the deceased; the size of the estate and the value of the property in dispute; the financial position of the offender; and the moral claims and wishes of those who would be entitled to take the property on the application of the forfeiture rule.

H THE VENDOR UNDER A CONTRACT FOR THE SALE OF LAND

In Rayner v Preston [1881] 18 Ch D 1, Preston agreed in 1878 to sell to Rayner for £3,100 a house which had been insured by Preston against fire. The contract did not


88 Lake v Bayliss [1974] 1 WLR 1073; (1974) 38 Conv (NS) 357 (E.R. Crane); Freevale Ltd v Metrostore (Holdings) Ltd [1984] Ch 199; Englewood Properties Ltd v Patel [2005] EWHC 188 (Ch), [2005] 3 All ER 307;
refer to the insurance. After the date of the contract but before the time fixed for completion, the house was damaged by fire to the amount of £330, and this sum was paid by the insurers to Preston. Rayner brought an action to establish his right to the sum, or to have it applied in repairing the house. The Court of Appeal held that Rayner was not entitled to the benefit of the insurance as against Preston.

The law on this point was changed by the Law of Property Act 1925, section 47, under which, a purchaser may recover from the vendor any money due under an insurance policy ‘in respect of any damage or destruction of property included in the contract’.

COTTON LJ\(^{89}\) said at 6:

It was said that the vendor is, between the time of the contract being made and being completed by conveyance, a trustee of the property for the purchaser, and that as, but for the fact of the legal ownership of the building insured being vested in him, he could not have recovered on the policy, he must be considered a trustee of the money recovered. In my opinion, this cannot be maintained. An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a Court of Equity will give effect to by transferring the property sold to the purchaser, and so far as he is a trustee he is so only in respect of the property contracted to be sold. Of this the policy is not a part. A vendor is in no way a trustee for the purchaser of rents accruing before the time fixed for completion, and here the fire occurred and the right to recover the money accrued before the day fixed for completion. The argument that the money is received in respect of property which is trust property is, in my opinion, fallacious. The money is received by virtue or in respect of the contract of insurance, and though the fact that the insured had parted with all interest in the property insured would be an answer to the claim, on the principle that the contract is one of indemnity only, this is very different from the proposition that the money is received by reason of his legal interest in the property.

In Shaw v Foster (1872) LR 5 HL 321, LORD CAIRNS said at 338:

The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a Court of Equity of the property subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation, therefore, of trustee and cestui que trust subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property.\(^{90}\)

\(^{89}\) Brett LJ and James LJ (who dissented) expressed different views.

\(^{90}\) See also Lysaght v Edwards (1876) 2 Ch D 499 at 506, per Jessel MR. (‘the position of the vendor is something between what is called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz., possession of the estate and a charge upon the estate for his purchase-money.’); Royal Bristol Permanent Building Society v Bomash (1887) 35 Ch D 390 at 397, per Kekewich J (‘of course we all know that he is only a trustee in a modified sense’); Cumberland Consolidated Holdings Ltd v Ireland [1946] KB 264 at 269, per Lord Greene MR (‘his position is that of a
In Lloyds Bank plc v Carrick [1996] 4 All ER 630, the defendant, Mr. Carrick, had suggested to his sister-in-law, Mrs. Carrick, that she should sell her home, pay the proceeds to him and move into a property of which he was a lessee. She did this. He said that he would transfer the lease to her but did not do so. The title to the property was unregistered. The defendant charged the property to the plaintiff bank without informing it that his sister-in-law occupied the property. The bank brought proceedings for possession of the property. One of the issues for the court was whether the defendant was a bare trustee of the property. If he was, then the sister-in-law had an interest which did not need to be registered.

Held. As the sister-in-law had paid the purchase price the defendant was a bare trustee, but the existence of this bare trust prevented the court from concluding that there was a common intention constructive trust.

Morritt LJ said at 637:

... it is accepted by Mrs. Carrick that if her only interest in the maisonette was derived from the contract which she accepts is void as against the bank as an unregistered estate contract then the appeal succeeds. Second, Mrs. Carrick accepts that the original contract between her and Mr. Carrick, as found by the recorder, was a valid open contract for the purchase of the maisonette; that it became enforceable by her when she partly performed it by entering into possession and paying the whole of the purchase price but that it remained executory, that is to say uncompleted, at the time of the legal charge to the bank granted in November 1986. Third, the bank accepts that if Mrs. Carrick had an interest in the maisonette not arising from but separate and distinct from the unregistered contract, it was and is binding on the bank for, as found by the recorder, the bank had notice of it.

Thus the issue argued on this appeal was whether Mrs. Carrick had an interest in the maisonette separate and distinct from that which arose under the unregistered estate contract which was capable of binding the bank as successor in title to Mr. Carrick. For Mrs. Carrick it was submitted that she did. It was contended that she was entitled to such an interest under a bare trust, a constructive trust and by virtue of a proprietary estoppel.

I shall consider each of these points in due course. But before doing so it is necessary to consider the position of Mr. Carrick and Mrs. Carrick before the charge to the bank was executed. At the time it was made the contract was valid but, as provided by section 40 of the Law of Property Act 1925, unenforceable for want of a memorandum in writing or part-performance. It became enforceable when in or about November 1982 Mrs. Carrick paid the purchase price to Mr. Carrick and went into possession. One consequence of the contract becoming enforceable was that it was specifically enforceable at the suit of Mrs. Carrick. Accordingly Mr. Carrick became a trustee of the maisonette for Mrs. Carrick. Normally such trusteeship is of a peculiar kind because the vendor himself has a beneficial interest in the property as explained in Megarry and Wade on The Law of Real Property (5th edn, 1984), p 602. But in this case as Mrs. Carrick had paid the whole of the purchase price at the time the contract became

quasi-trustee for the purchaser'). The vendor owes no fiduciary duty to a sub-purchaser: Berkley v Poulett (1976) 242 Estates Gazette 39.

enforceable, Mr. Carrick as the vendor had no beneficial interest. Thus he may properly be described as a bare trustee (cf. Bridges v Mees [1957] Ch 475 at 485). It follows that at all times after November 1982, Mrs. Carrick was the absolute beneficial owner of the maisonette and Mr. Carrick was a trustee of it without any beneficial interest in it.

His Lordship then concluded that, since this interest arose from the contract, it needed to be registered and was void for non-registration.92

**QUESTION**

Is it correct to say that a vendor of land who has entered into a contract of sale holds the land on a constructive trust? See H&M, pp. 332–333.

I **UNDERTAKINGS BY A PURCHASER**93

In certain exceptional circumstances where a purchaser has bought land and made an undertaking that he would respect the rights of a third party, the third party’s rights are protected by means of a constructive trust.94 This has proved to be important in respect of licences. In the context of contractual licences, the question whether a third party acquiring the land from the licensor holds on constructive trust for the licensee has been clarified by the Court of Appeal in *Ashburn Anstalt v Arnold* [1989] Ch 1 [below].

A licence to occupy land is traditionally regarded as creating a personal right only.95 This is clearly so in the case of a gratuitous licence (unless the circumstances give rise to an estoppel, which is capable of binding third parties). Where the licence is contractual, the proper remedy is upon the contract. This may work hardship in cases where the land is sold to a third party, and the courts have sought to avoid the result that the purchaser, not being bound by the contract, can evict the licensee, by imposing a constructive trust on him.

In *Ashburn Anstalt v Arnold* [1989] Ch 1,96 the question was whether the plaintiff purchaser took the land subject to the interest of the defendant. The Court of Appeal

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94 Alternatively the third party may have a cause of action against the purchaser by virtue of the Contracts (Rights of Third Parties) Act 1999. See p. 169, above.
95 *King v David Allen & Sons Billposting Ltd* [1916] 2 AC 54; *Clare v Theatrical Properties Ltd* [1936] 3 All ER 483. On licences generally, see Cheshire and Burn, *Modern Law of Real Property* (17th edn), chap. 23; H&M, chap. 27.
held that the defendant had a lease which was binding on the plaintiff under the normal rules of property law. The court, however, considered what the position would have been if the defendant had been only a contractual licensee. After concluding that such a licence could not bind a purchaser in the absence of a constructive trust, Fox LJ at 23 examined the circumstances in which a constructive trust could be imposed for the protection of the licensee:

We come then to four cases in which the application of the principle to particular facts has been considered.

In *Binions v Evans* [1972] Ch 359 the defendant’s husband was employed by an estate and lived rent free in a cottage owned by the estate. The husband died when the defendant was 73. The trustees of the estate then entered into an agreement with the defendant that she could continue to live in the cottage during her lifetime as tenant at will rent free; she undertook to keep the cottage in good condition and repair. Subsequently the estate sold the cottage to the plaintiffs. The contract provided that the property was sold subject to the tenancy. In consequence of that provision the plaintiffs paid a reduced price for the cottage. The plaintiffs sought to eject the defendant, claiming that she was tenant at will. That claim failed. In the Court of Appeal Megaw and Stephenson LJJ decided the case on the ground that the defendant was a tenant for life under the Settled Land Act 1925. Lord Denning MR. did not agree with that. He held that the plaintiffs took the property subject to a constructive trust for the defendant’s benefit. In our view that is a legitimate application of the doctrine of constructive trusts. The estate would certainly have allowed the defendant to live in the house during her life in accordance with their agreement with her. They provided the plaintiffs with a copy of the agreement they made. The agreement for sale was subject to the agreement, and they accepted a lower purchase price in consequence. In the circumstances it was a proper inference that on the sale to the plaintiffs, the intention of the estate and the plaintiffs was that the plaintiffs should give effect to the tenancy agreement. If they had failed to do so, the estate would have been liable in damages to the defendant.

In *DHN Food Distributors Ltd v Tower Hamlets Borough Council* [1976] 1 WLR 852 premises were owned by Bronze Investments Ltd. but occupied by an associated company (DHN) under an informal agreement between them—they were part of a group. The premises were subsequently purchased by the council and the issue was compensation for disturbance. It was said that Bronze was not disturbed and that DHN had no interest in the property. The Court of Appeal held that DHN had an irrevocable licence to occupy the land. Lord Denning MR. said, at 859:

‘It was equivalent to a contract between the two companies whereby Bronze granted an irrevocable licence to DHN to carry on their business on the premises. In this situation Mr. Dobry cited to us Binions v Evans to which I would add Bannister v Bannister [1948] 2 All ER 133 and Siew Soon Wah v Young Tong Hong [1973] AC 836. Those cases show that a contractual licence (under which a person has a right to occupy premises indefinitely) gives rise to a constructive trust, under which the legal owner is not allowed to turn out the licensee. So, here. This irrevocable licence gave to DHN a sufficient interest in the land to qualify them for compensation for disturbance.’

Goff LJ made this a ground for his decision also.

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97 Overruled on this point in *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386.
On that authority, Browne-Wilkinson J in Re Sharpe [1980] 1 WLR 219 felt bound to con-
clude that, without more, an irrevocable licence to occupy gave rise to a property interest. He
evidently did so with hesitation. For the reasons which we have already indicated, we prefer
the line of authorities which determine that a contractual licence does not create a property
interest. We do not think that the argument is assisted by the bare assertion that the interest
arises under a constructive trust.

In Lyus v Prowsa Developments Ltd [1982] 1 WLR 1044 [p. 313, below], the plaintiffs
contracted to buy a plot of registered land which was part of an estate being developed by the
vendor company. A house was to be built which would then be occupied by the plaintiffs. The
plaintiffs paid a deposit to the company, which afterwards became insolvent before the house
was built. The company’s bank held a legal charge, granted before the plaintiffs’ contract,
over the whole estate. The bank was under no liability to complete the plaintiffs’ contract. The
bank, as mortgagee, sold the land to the first defendant. By the contract of sale it was provided
that the land was sold subject to and with the benefit of the plaintiffs’ contract. The
first defendant contracted to sell the plot to the second defendant. The contract provided
that the land was sold subject to the plaintiffs’ contract so far, if at all, as it might be enforce-
able against the first defendant. The contract was duly completed. In the action the plaintiffs
sought a declaration that their contract was binding on the defendants and an order for specific
performance. The action succeeded. This again seems to us to be a case where a constructive
trust could justifiably be imposed. The bank were selling as mortgagees under a charge prior in
date to the contract. They were therefore not bound by the contract and on any view could give
a title which was free from it. There was, therefore, no point in making the conveyance subject
to the contract unless the parties intended the purchaser to give effect to the contract. Further,
on the sale by the bank a letter had been written to the bank’s agents, Messrs. Strutt & Parker,
by the first defendant’s solicitors, giving an assurance that their client would take reasonable
steps to make sure the interests of contractual purchasers were dealt with quickly and to their
satisfaction. How far any constructive trust so arising was on the facts of that case enforceable
by the plaintiffs against owners for the time being of the land we do not need to consider.

Re Sharpe seems to us a much more difficult case in which to imply a constructive trust
against the trustee in bankruptcy and his successors, and we do not think it could be done.
Browne-Wilkinson J did not, in fact, do so. He felt (understandably, we think) bound by author-
ity to hold that an irrevocable licence to occupy was a property interest. In Re Sharpe although
the aunt provided money for the purchase of the house, she did not thereby acquire any property
interest in the ordinary sense, since the judge held that it was advanced by way of a loan, though,
no doubt, she may have had some rights of occupation as against the debtor. And when the
trustee in bankruptcy, before entering into the contract of sale, wrote to the aunt to find out
what rights, if any, she claimed in consequence of the provision of funds by her, she did not reply.
The trustee in bankruptcy then sold with vacant possession. These facts do not suggest a need
in equity to impose constructive trust obligations on the trustee or his successors.

We come to the present case. It is said that when a person sells land and stipulates that the
sale should be ‘subject to’ a contractual licence, the court will impose a constructive trust upon
the purchaser to give effect to the licence: see Bdings v Evans [1972] Ch 359 at 368, per Lord
Denning MR. We do not feel able to accept that as a general proposition. We agree with the
observations of Dillon J in Lyus v Prowsa Developments Ltd [1982] 1 WLR 1044 at 1051:

‘By contrast, there are many cases in which land is expressly conveyed subject to possible incum-
brances when there is no thought at all of conferring any fresh rights on third parties who may
be entitled to the benefit of the incumbrances. The land is expressed to be sold subject to incumbrances to satisfy the vendor’s duty to disclose all possible incumbrances known to him, and to protect the vendor against any possible claim by the purchaser. . . . So, for instance, land may be contracted to be sold and may be expressed to be conveyed subject to the restrictive covenants contained in a conveyance some 60 or 90 years old. No one would suggest that by accepting such a form of contract or conveyance a purchaser is assuming a new liability in favour of third parties to observe the covenants if there was for any reason before the contract or conveyance no one who could make out a title as against the purchaser to the benefit of the covenants.‘

The court will not impose a constructive trust unless it is satisfied that the conscience of the estate owner is affected. The mere fact that that land is expressed to be conveyed ‘subject to’ a contract does not necessarily imply that the grantee is to be under an obligation, not otherwise existing, to give effect to the provisions of the contract. The fact that the conveyance is expressed to be subject to the contract may often, for the reasons indicated by Dillon J, be at least as consistent with an intention merely to protect the grantor against claims by the grantee as an intention to impose an obligation on the grantee. The words ‘subject to’ will, of course, impose notice. But notice is not enough to impose on somebody an obligation to give effect to a contract into which he did not enter. Thus, mere notice of a restrictive covenant is not enough to impose upon the estate owner an obligation or equity to give effect to it: London County Council v Allen [1914] 3 KB 642.

The material facts in the present case are as follows. (i) There is no finding that the plaintiff paid a lower price in consequence of the provision that the sale was subject to the 1973 agreement. (ii) The 1973 agreement was not contractually enforceable against Legal & General, which was not, therefore, exposed to the risk of any contractual claim for damages if the agreement was not complied with. The 1973 agreement was enforceable against Cavendish and it seems that in 1973 Cavendish was owned by Legal & General. There is no finding as to the relationship between Cavendish and Legal & General in August 1985, when Legal & General sold to the plaintiff. And there is no evidence before the deputy judge as to the circumstances or the arrangements attending the transfer by Cavendish to Legal & General. (iii) Whilst the letter of 7 February, 1985 is not precisely worded, it seems that Legal & General was itself prepared to give effect to the 1973 agreement.

In matters relating to the title to land, certainty is of prime importance. We do not think it desirable that constructive trusts of land should be imposed in reliance on inferences from slender materials. In our opinion the available evidence in the present case is insufficient. The deputy judge, while he did not have to decide the matter, was not disposed to infer a constructive trust, and we agree with him.

An important principle which can justify the use of the constructive trust against purchasers who have entered into undertakings in respect of third-party rights, is that a statute must not be used as an instrument of fraud.98 So, for example, in Lyus v Prowsa Developments Ltd [1982] 1 WLR 104499 land was bought expressly subject to

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98 See Rochefoucauld v Boustead [1897] 1 Ch 196, where the trust that was recognised was an express trust. See W. Swadling, Restitution and Equity, Vol 1: Resulting Trusts and Equitable Compensation (ed. P. Birks and F. Rose), pp. 65–68.
the plaintiff’s contractual rights, but the defendants sought to defeat them by relying on the provisions of the Land Registration Act 1925. Dillon J, in imposing a constructive trust on the defendants on the ground that a statute is not to be used as an instrument of fraud, said at 1054:

It has been pointed out by Lord Wilberforce in Midland Bank Trust Co Ltd v Green [1981] AC 513 at 531, that it is not fraud to rely on legal rights conferred by Act of Parliament. Under section 20 [of the Land Registration Act 1925], the effect of the registration of the transferee of a freehold title is to confer an absolute title subject to entries on the register and overriding interests, but, ‘free from all other estates and interests whatsoever, including estates and interests of His Majesty …’

[His Lordship considered Miles v Bull (No 2) [1969] 3 All ER 1585, and continued:] It seems to me that the fraud on the part of the defendants in the present case lies not just in relying on the legal rights conferred by an Act of Parliament, but in the first defendant reneging on a positive stipulation in favour of the plaintiffs in the bargain under which the first defendant acquired the land. That makes, as it seems to me, all the difference. It has long since been held, for instance, in Rochefoucauld v Boustead [1897] 1 Ch 196, that the provisions of the Statute of Frauds 1677, now incorporated in certain sections of the Law of Property Act 1925, cannot be used as an instrument of fraud, and that it is fraud for a person to whom land is agreed to be conveyed as trustee for another to deny the trust and relying on the terms of the statute to claim the land for himself. Rochefoucauld v Boustead was one of the authorities on which the judgment in Bannister v Bannister [1948] 2 All ER 133 was founded.

It seems to me that the same considerations are applicable in relation to the Land Registration Act 1925. If, for instance, the agreement of 18 October, 1979, between the bank and the first defendant had expressly stated that the first defendant would hold Plot 29 upon trust to give effect for the benefit of the plaintiffs to the plaintiffs’ agreement with the vendor company, it would be difficult to say that that express trust was over-reached and rendered nugatory by the Land Registration Act 1925. The Land Registration Act 1925 does not, therefore, affect the conclusion which I would otherwise have reached in reliance on Bannister v Bannister and the judgment of Lord Denning MR. in Binions v Evans [1972] Ch 359 [p. 311, above], had Plot 29 been unregistered land.


But there is no rule that the sale of land ‘subject to’ a contractual licence automatically gives rise to a constructive trust, rather the reverse. To establish a constructive trust very special circumstances must be proved showing that the transferee of the property undertook a new liability to give effect to provisions for the benefit of third parties. It is the conscience of the transferee which has to be affected and it has to be affected in a way which gives rise to an obligation to meet the legitimate expectations of the third party.100 It has been suggested101 that if a ‘subject to’ clause does create a trust the true analysis is that it arises because that is what the parties intended. It is therefore not a constructive trust at all, but rather an express trust.

A matter of particular controversy concerns whether the constructive trust should only be treated as an institutional mechanism or whether it can also be treated as a remedial mechanism. The ‘institutional’ constructive trust will be recognised where the dispute falls within one of the existing categories of case where such trusts are recognised. Being operative before the date of the court order which confirms it, this trust can affect third parties. This is the way in which the English cases have traditionally regarded the constructive trust. The ‘remedial’ constructive trust is widely accepted in Australia, New Zealand, and Canada. Such a trust can be imposed de novo as the foundation for the grant of an equitable remedy, and does not involve the vindication of some pre-existing proprietary right of the claimant. It may operate only from the date of the court order, and thus need not affect third parties.

The crucial distinction between an institutional and a remedial constructive trust was recognised by Lord Browne-Wilkinson in Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669 at 714:

Under an institutional constructive trust the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such trust having arisen (including the potentially unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion. A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court.

In England, the remedial constructive trust has never been formally recognised, although some judges have expressed a willingness to do so. In this case, Lord Browne-Wilkinson said at 716:

Although the resulting trust is an unsuitable basis for developing proprietary restitutionary remedies, the remedial constructive trust, if introduced into English law, may provide a more satisfactory road forward. The court by way of remedy might impose a constructive trust on a defendant who knowingly retains property of which the plaintiff has been unjustly deprived. Since the remedy can be tailored to the circumstances of the particular case, innocent third parties would not be prejudiced and restitutionary defences, such as change of position, are capable of being given effect. However, whether English law should follow the United States

105 Muschinski v Dodds, ibid.
and Canada by adopting the remedial constructive trust will have to be decided in some future case when the point is directly in issue.\textsuperscript{106}

More recently, however, the Court of Appeal specifically refused the opportunity to recognise the remedial constructive trust when it had the opportunity to do so.

In \textit{Re Polly Peck International (No 2)} [1998] 3 All ER 812,\textsuperscript{107} the issue for the Court of Appeal was whether the court had jurisdiction to hear a claim arising from the occupation of land in Cyprus by the subsidiaries of a company (PPI) which was insolvent and subject to an administration order. The plaintiffs sought restitution of a sum received by the administrators which the plaintiffs alleged represented the profits from the company’s wrongdoing. The plaintiffs claimed, \textit{inter alia}, that these profits were held on a remedial constructive trust.

Mummery LJ said at 826:

In my judgment, the intervening insolvency of PPI means that under English law there is no seriously arguable case for granting the applicants a remedial constructive trust on the basis of the allegations in the draft statement of claim. PPI is a massively insolvent company subject to an administration order. The administrators are bound to distribute the assets of PPI among the creditors on the basis of insolvency. Parliament has, in such an eventuality, sanctioned a scheme for \textit{pari passu} distribution of assets designed to achieve a fair distribution of the insolvent company’s property among the unsecured creditors. This scheme, now contained in the Insolvency Act of 1986, was described by Sir Donald Nicholls Vice-Chancellor in \textit{Re Paramount Airways Ltd} [1993] Ch 223 at 230 as ‘a coherent, modernised and expanded code’.

The provisions of that code apply both to the case of an insolvent company which has gone into formal liquidation and to one in respect of which an administration order has been made. The essential characteristic of the statutory scheme is that the liquidator or administrator is bound to deal with the assets of the company as directed by statute for the benefit of all creditors who come in to prove a valid claim. There is a statutory obligation on the administrators of PPI to treat the general creditors in a particular way. A question may arise as to whether a particular asset was or was not the beneficial property of the company at the date of the commencement of the winding up (or administration). If it is established in a dispute that it is not an asset of the company then it never becomes subject of the statutory insolvency scheme: see \textit{Chase Manhattan Bank NA v Israel-British Bank (London) Ltd} [1981] Ch 105. If, on the other hand, the asset is the absolute beneficial property of the company there is no general power in the liquidator, the administrators or the court to amend or modify the statutory scheme so as to transfer that asset or to declare it to be held for the benefit of another person. To do that would be to give a preference to another person who enjoys no preference under the statutory scheme.

In brief, the position is that there is no prospect of the court in this case granting a remedial constructive trust to the applicants in respect of the proceeds of sale of the shares held by PPI.

\textsuperscript{106} See also \textit{Metall und Rohstoff AG v Donaldson Luusk & Jenrette Inc} [1990] 1 QB 391 at 479; \textit{Re Goldcorp Exchange Ltd} [1995] 1 AC 74 at 104 (Lord Mustill); \textit{London Allied Holdings v Lee} [2007] EWHC 2061 (Ch).

in its subsidiaries, since the effect of the statutory scheme applicable on an insolvency is to shut out a remedy which would, if available, have the effect of conferring a priority not accorded by the provisions of the statutory insolvency scheme. In her eloquent address Miss Dohmann submitted that ‘the law moves’. That is true. But it cannot be legitimately moved by judicial decision down a road signed ‘No Entry’ by Parliament. The insolvency road is blocked off to remedial constructive trusts, at least when judge-driven in a vehicle of discretion.

For those reasons alone I would refuse leave to the applicants to commence these proceedings. To a trust lawyer and, even more so to an insolvency lawyer, the prospect of a court imposing such a trust is inconceivable and, in my judgment, even the most enthusiastic student of the law of restitution would be forced to recognise that the scheme imposed by statute for a fair distribution of the assets of an insolvent company precludes the application of the equitable principles manifested in the remedial constructive trust developed by such courts as the Supreme Court of Canada.108

Nourse LJ said at 830:

The formidable and continuing problems of terminology which afflict the consideration of many questions on constructive trusts make it desirable to start with definition. In referring to a remedial constructive trust, I mean an order of the court granting, by way of remedy, a proprietary right to someone who, beforehand, had no proprietary right.

The essential allegations the applicants seek leave to make were summarised by Mr. Justice Rattee towards the end of his judgment [1997] BCLC 648:

‘(a) that the applicants remained at all material times entitled to possession of the applicants’ properties, (b) that PPI knew that its subsidiaries were exploiting those properties, to which it knew the applicants claimed title and the right to possession, (c) that PPI actively encouraged such exploitation, (d) that it has benefited from that exploitation and should be bound to disgorge such profit, and (e) that the court should accordingly impose a remedial constructive trust on so much of the proceeds of the sale by PPI to Learned Ltd as represents such profit.’

Whatever other rights the applicants may have or may have had against the subsidiaries or PPI itself, it is plain that they have no proprietary right to any part of the proceeds of the sale of the shares in the subsidiaries. They could only get one by the imposition of a remedial constructive trust in their favour. So this case raises fairly and squarely the question whether the remedial constructive trust is part of English law.

Although...this court (Slade, Stocker and Bingham LJ) in Metall und Rohstoff AG v Donaldson, Lufkin & Jenrette Inc [1990] 1 QB 391, Lord Mustill in Re Goldcorp Exchange Ltd [1995] 1 AC 74 and Lord Browne-Wilkinson in Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669 have accepted the possibility that the remedial constructive trust may become part of English law, such observations, being both obiter and tentative, can only be of limited assistance when the question has to be decided, as it does here. There being no earlier decision, we must turn to principle. In doing so, we must recognise that the remedial constructive trust gives the court a discretion to vary proprietary rights. You cannot grant a proprietary right to A, who has not had one beforehand, without taking some proprietary right away from B. No English court has ever had the power to do that, except

with the authority of Parliament; cf. Chapman v Chapman [1954] AC 429. But it is said that, although that may be the law today, it may not be the law tomorrow. If the Supreme Court of Canada can develop the law so as to permit the court to vary proprietary rights without legislative authority, why cannot the House of Lords do likewise? At least, it is said, there must be a real prospect that they will, and so the applicants ought to be allowed to bring their action.

I agree with Mummery LJ that where, as here, there would be not simply a variation of proprietary rights but a variation of the manner in which the administrators are directed to deal with PPI’s assets by the Insolvency Act 1986 it is not seriously arguable, even at the highest level, that a remedial constructive trust would be imposed. For myself, I would go further and hold that it would not be seriously arguable even if PPI was solvent. It is not that you need an Act of Parliament to prohibit a variation of proprietary rights. You need one to permit it; see the Variation of Trusts Act 1958 and the Matrimonial Causes Act 1973.

Partly because we were only referred to three of the Canadian decisions and partly because it appears that in none of them has the Supreme Court had to grapple with the insolvency of the party on whose assets the remedial constructive trust is to be imposed, this is not an appropriate occasion for a comparative inquiry into the jurisprudence of our two countries. Three points ought nevertheless to be made.

First, in Canada the remedial constructive trust, whose origin was in the dissenting judgment of Laskin J (as he then was) in Murdoch v Murdoch (1973) 41 DLR (3d) 367 (see also Rathwell v Rathwell (1978) 83 DLR (3d) 289), was developed through Pettkus v Becker (1980) 117 DLR (3d) 257 and Sorochan v Sorochan (1986) 29 DLR (4th) 1 as a remedy in property disputes between married and unmarried couples. Both Murdoch v Murdoch and, as I understand it, Rathwell v Rathwell were actually decided on the principles of Gissing v Gissing [1971] AC 886 and, subject to a rather surprising difference of opinion in the Supreme Court as to the findings of the trial judge, Pettkus v Becker could have been so decided and was so decided by the minority. Sorochan v Sorochan, on the other hand, could not have been decided according to those principles. In that case the Supreme Court had to rely for its decision on the remedial constructive trust. Although there must have been later family property cases which could have been decided on Gissing v Gissing principles, I believe that the remedial constructive trust has now become the accepted and perhaps the exclusive remedy in such cases.

Secondly, in Canada the application of the remedial constructive trust has not only been extended beyond family property cases (we were referred to LAC Minerals Ltd v International Corona Resources Ltd (1989) 61 DLR (4th) 14 and Korkontzilas v Soulouss (1997) 146 DLR (4th) 214); in the other areas to which it has been extended there are also cases which could have been decided in exactly the same way according to principles well known to English law. For example, I would think that English notions of breach of confidential obligation and fiduciary duty were well up to leading to the same result as in LAC Minerals Ltd v International Corona Resources Ltd.

Thirdly, it is evident that some of the early Canadian decisions in family property cases were influenced by Lord Denning MR’s constructive trust of a new model; cf. Cooke v Head [1972] 1 WLR 518; Hussey v Palmer [1972] 1 WLR 1286; and Eves v Eves [1975] 1 WLR 1338. However, in the 1980s this court, in particular in Burns v Burns [1984] Ch 317 and Grant v Edwards [1986] Ch 638 held that Lord Denning’s approach was at variance with the principles stated in Gissing v Gissing. That is not to say that English law has remained static

109 See p. 324, below.
in this area. In *Grant v Edwards* the court was able to achieve the same beneficial result as in *Eves v Eves*, although by adopting the approach, not of Lord Denning, but of Brightman J and Browne LJ. Since then the possibility of further developments through applying the principles of proprietary estoppel has been signalled by the House of Lords in *Lloyds Bank plc v Rosset* [1991] 1 AC 107 [p. 325, below].

It is appropriate that we on this side of the Atlantic should remind ourselves of some observations of Lord Simonds LC in *Chapman v Chapman* which were well known at the time but may have been forgotten. In holding that the court had no inherent jurisdiction to vary the beneficial interests of infants and unborn persons in settled property, he said at [1954] AC 429 at 444:

'It may well be that the result is not logical, and it may be asked why, if the jurisdiction of the court extends to this thing, it did not extend to that also. But, my Lords, that question is as vain in the sphere of jurisdiction as it is in the sphere of substantive law. We are as little justified in saying that a court has a certain jurisdiction, merely because we think it ought to have it, as we should be in declaring that the substantive law is something different from what it has always been declared to be, merely because we think it ought to be so. It is even possible that we are not wiser than our ancestors. It is for the legislature, which does not rest under that disability, to determine whether there should be a change in the law and what that change should be.'

Despite this the potential relevance of the remedial constructive trust remains a live issue. In *London Allied Holdings v Lee* [2007] EWHC 2061 (Ch) Etherington J, said, at para. 274, having referred to Professor Birks’ criticism of this form of trust as ‘a nightmare trying to be a noble dream’ and ‘rightlessness implicit in discretionary remedialism’:

An equity lawyer might observe that such language is overly emphatic, having regard, for example, to the strong discretion in the Court to decide upon the appropriate form of relief for proprietary estoppel, including whether it should be personal or proprietary and whether it should be to protect the claimant’s expectations or compensate for reliance loss. Moreover, there is no English authority, including *Polly Peck International plc (No 2)* (in which Mummery LJ, with whom Potter LJ agreed, concentrated on the fact of insolvency), which is binding authority against the remedial constructive trust in principle. Nevertheless, it seems realistic to assume that an English Court will be very slow indeed to adopt the US and Canadian model. On the other hand, there still seems scope for real debate about a model more suited to English jurisprudence, borrowing from proprietary estoppel; namely a constructive trust by way of discretionary restitutionary relief, the right to which is a mere equity prior to judgment, but which will have priority over the intervening rights of third parties on established principles, such as those relating to notice, volunteers and the unconscionability on the facts of a claim by the third party to priority.

**QUESTIONS**

1. ‘*[Re Polly Peck International]* cannot be taken to have excluded altogether the remedial constructive trust from the judicial armoury in England.’ [1999] LMCLQ 111, 117 (C. Rickett and R. Grantham). Do you agree?

### III THE NATURE OF CONSTRUCTIVE TRUSTEESHIP

It is often assumed that a constructive trust, like any other trust, is a mechanism by virtue of which specific property is vested in a trustee on trust for ascertained beneficiaries. This is not always so; there are many differences between constructive trusts and other trusts. A constructive trustee may not know that he is a trustee. Where the trust arises because a fiduciary has received a benefit in breach of a fiduciary obligation, it may be difficult to say what the trust property is. In many cases, the duty of a constructive trustee is less onerous than that of an express trustee; he is under no obligation to invest nor to observe the usual duty of care. It would be unreasonable to impose such obligations in cases in which he did not know that he was a trustee.


There is an obligation on the [constructive] trustee: to convey the trust property to or to the order of the beneficiary. A breach of this obligation would create a personal liability. But the trustee cannot, without fiction, be said to have assumed obligations of the utmost selflessness. The only way to reach the contrary conclusion would be to say that this is the technique of equity: to subject trustees, even unwilling ones, to the fiduciary standard, so as to generate the corresponding liabilities. That, however, would be using the fiduciary relationship in a wholly instrumental way.

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111 Cp. Lord Browne-Wilkinson’s assertion in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 705 that it is a fundamental principle of the law of trusts that a trustee must know that he is a trustee.
112 Lonrho plc v Fayed (No 2) [1992] 1 WLR 1 at 12 (Millett J).