Limitation Periods and the Constructive Trust

Scott Aspinall
Barrister
Ground Floor Wentworth Chambers, Sydney

Limitation Periods and the Constructive Trust

What is a "constructive" trust?

The constructive trust has been referred to as one of the most difficult of all the equitable doctrines to understand, and consistent with this it is difficult to produce an all-embracing definition of what a constructive trust is. In *Muschinski v Dodds* Deane J, said:

> "viewed in its modern context, the constructive trust can properly be described as a remedial institution which equity imposes regardless of actual or presumed agreement or intention (and subsequently protects) to preclude the retention or assertion of beneficial ownership of property to the extent that such retention would be contrary to equitable principle".[1]

His Honour's approach was subsequently affirmed by all members of the High Court in *Baumgartner v Baumgartner*.[2]

In a sense, the constructive trust is defined by its differences from the other types of trust. It is different from an express trust because it arises or is raised without reference to the intention of the parties and indeed is sometimes, contrary to the wishes of the constructive trustee. It does not need to comply with the statutory requirements of writing.

It is different from an implied or resulting trusts, because whereas in those cases the Court is looking for is the actual or presumed intentions of the parties, in the case of a constructive trust the inquiry goes further as to whether it would be a fraud or unconscientious for the constructive trustee to deny the trust.[3]

The traditional English view of a constructive trust was explained by F.W. Maitland in his *Lectures on Equity* in 1906, as operating wherever a person clothed with a fiduciary character, gained some personal advantage by availing themselves that situation and so they became they became the trustee of the advantage obtained. Maitland opined "if by reason of his position [a] trustee acquires an advantage of a valuable kind, he

[1] (1985) 160 CLR 583 at 614
[2] (1987) 164 CLR 137
[3] Heydon J, Leeming M, *Jacobs' Law of Trusts in Australia,* 8th ed, LexisNexis 2016 at [13-01]

must hold it upon trust, he is constructively a trustee of it." In a similar vein Cardozo CJ said:

> "When property has been acquired in such circumstances that the holder of the legal right may not in good conscience retain the beneficial interest equity converts him into a trustee"[4]

In 1920, Roscoe Pound, then Dean of Harvard Law School, wrote an article in the published in the Harvard Law Review which drew attention to the fact that, in some recent American cases judges had treated a constructive trust as though it was "something substantial", in other words, as though it were akin to an express trust which arose without the intervention of the Court, but that in other cases, the constructive trust was used by the Court as a "remedy" in the same way as, for example, an order for specific performance, or a declaration. Pound noted that distinction for the purpose of expressing his view that to regard the constructive trust as anything other than remedial was incorrect. Ironically, the distinction which Pound identified as incorrect, became at least in some countries, a routine way classify constructive trusts.

Attempts to structure to the field of constructive trusts, even if flawed, were ultimately welcomed by lawyers because the field is otherwise far from ordered. The constructive trust was colourfully described by Sykes as a "vague dust-heap for the reception of relationship which are difficult to classify or which are unwanted in other branches of the law".[5] In *Imobilari Pty Ltd v Opes Prime Stockbroking Ltd*,[6] Finkelstein J noted that Gibbs CJ in *Muschinski* had said the law of constructive trusts in Australia was "ill-defined", His Honour added "for my part, I would call it a mess".

What are the types of constructive trust?

Pound's observation that constructive trusts could be classified as either substantive or remedial took a long time to reach Australian law; and when it did it was not received with judicial warmth. Deane J in *Muschinski* described at as a "perceived dichotomy", although he noted that it had some "superficial plausibility", which, of course, consistent with Pound's own views. His Honour however, ultimately described the constructive trust as a "remedial institution" saying:

---

[4] *ibid* citing *Beatty v Guggenheim Exploration C* 122 NE 378 at 380 (1919)
[5] Sykes, E, "The Doctrine of Constructive Trusts" (1941) 15 ALJ 171 at 175
[6] [2008] FCA 1920; (2008) 252 ALR 41 at [18]

> "In a broad sense, the constructive trust is both an institution and a remedy of the law of equity. As a remedy, it can only properly be understood in the context of the history and the persisting distinctness of the principles of equity that enlighten and control the common law…
> The use or trust of equity, like equity itself, was essentially remedial in its origins … Like express and implied trusts, the constructive trust developed as a remedial relationship superimposed upon common law rights by order of the Chancery Court. It differs from those other forms of trust, however, in that it arises regardless of intention. For that reason, it was not as well suited to development as a conveyancing device or as an instrument of property law. Indeed, whereas the rationale of the institutions of express and implied trust is now usually identified by reference to intention, the rationale of the constructive trust must still be found essentially in its remedial function which it has predominantly retained."[7]

Ultimately, in *Bofinger v Kingways Group Limited,*[8] the members of the High Court cited with approval remarks of Crennan J in *Jones v Southall & Bourke Pty Ltd*,[9] where, after reviewing the authorities, her Honour said that they:

> "make plain [that] the term 'constructive trust' covers both trusts arising by operation of law and remedial trusts. Furthermore, a constructive trust may give rise to either an equitable proprietary remedy based on tracing or, whether based on or independently of tracing, an equitable personal remedy to redress unconscionable conduct. The equitable personal remedies include equitable lien or charge or a liability to account."

Her Honour had noted earlier in that judgment that the term "constructive trust" had been applied to include the enforcement of the obligation of a defaulting fiduciary to make restitution by a personal rather than a proprietary remedy.

Distilling those meanings and sub-meanings, Wight has suggested[10] that the terms constructive trusts should be thought of as an umbrella term consisting of:

1. a property-based institution, very similar to the express and resulting trusts including
    a. a proprietary based institution, and
    b. personal liability based institution; and

---

[7] *ibid* at 613
[8] [2009] HCA 44; 239 CLR 269 at [48]
[9] (2004) 3 ABC (NS) 1 at 17
[10] Wright, D "Third Parties and the Australian Remedial Constructive Trust", University of Western Australia Law Review, Vol. 37, No. 2, Mar 2014: 31-5

2. a remedy for the breach of certain legal primary rights:
    a. a personal remedy,
    b. a proprietary remedy.

The first category represents the substantive or institutional constructive trust. This was the type of trust which F.W. Maitland discussed in 1906. Ninety years later Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*,[11] describing an institution constructive trust said:

> "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 possible unfair consequence to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion."

Notwithstanding that intention is said not to be required it has been said that to create a constructive trust in the realm of the substantive constructive trust the issue of intention is clearly relevant at least to the extent there must be some act which either directly displays such an intention in the supposed trustee or some acts or circumstances from which it may be inferred that the supposed trustee had (or should have had) an intention to act as a trustee or fiduciary or in some other role which imported an obligation to hold property as if he were a trustee.[12]

It is repeatedly noted in the case law that the word "constructive" in this sense comes from the verb "construe" rather than "construct". The Court does not "construct" a trust. Instead the task which the Court undertakes it to construe or interprets the facts of the case as giving warranting that some consequences which would follow had there been an express trust created, should apply in the circumstances.[13]

A claim against the defendant might be proprietary or it may be personal. In most cases the plaintiff would be entitled to elect between the two, although in some cases

[11] [1996] AC 669 at 714 (with whom Lord Glynn at 713 and Lord Lloyd at 738
[12] *Nolan v Nolan & Ors* [2004] VSCA 109 at [80] per Ormiston JA, with whom Chernov and Eames JJA agreed.
[13] *Scott on Trusts* (4th ed, 1989) Vol 5 at [462.4]; *Giumelli v Giumelli* (1999) 196 CLR 101 at 111. In terms of a substantive constructive trust this is clearly so, although the proposition seems more troubled with respect to the remedial constructive trust.

there will be no option. If for example a fiduciary a misappropriated trust property but destroyed or consumed it, the remedy will need to be personal rather than proprietary.

Where available, the recognition of a proprietary interest in property can be of distinct advantage for a litigant. First, it gives the plaintiff a right to simply enforce the right against the property to recover what is due, rather than trying to extract a money sum from the defendant. This is particularly important if the defendant is insolvent since the property (in the usual course) will not form part of the assets of the bankrupt estate. Instead of having to prove in the bankruptcy or winding up for an equitable compensation claim, the plaintiff can simply have at the property held upon trust for it. Secondly, it avoids difficulty and expense of calculation of an account for profits or equitable compensation. Finally, it gives the plaintiff an ability to trace the property into the hands of others (subject to rights of the *bona fide* purchaser for value without notice). On the other hand, if the property in question has diminished in value and the defaulting fiduciary is solvent, then the personal liability to account in money for the value of the property misused may give a better outcome.

The second and more difficult category is the use of the constructive trust as a remedy. The circumstances in which this can be done are not closed but usually arise in circumstances where the plaintiff has a claim for equitable compensation (or perhaps even common law damages) which does not give rise to a substantive constructive trust or proprietary interest, but where the Court in all the circumstances considers that the minimum to do justice between the parties requires that the defendant be subject to the imposition of a constructive trust. Once that is done, the constructive trustee can be subjected to such of the obligations of a trustee as the Court thinks appropriate.

As with a substantive constructive trust, the liability might be proprietary or personal. In *Giumelli v Giumelli* the High Court said:

> "The term 'constructive trust' is used in various senses when identifying a remedy provided by a court of equity. The trust institution usually involves both the holding of property by the trustee and a personal liability to account in a suit for breach of trust for the discharge of the trustee's duties. However, some constructive trusts create or recognize no proprietary interest. Rather there is the imposition of a personal liability to account in the same manner as that of an express trustee. An example…is the imposition of personal liability upon one "who dishonestly procures or assist in a breach of trust or fiduciary obligation" by a trustee of other fiduciary."[14]

[14] *Giumelli v Giumelli* (1999) 196 CLR 101 at 112

The remedial constructive trust can thus be used to *in personam* duty to account or to pay equitable compensation as though the person was a trustee.

English law has not embraced the notion of the remedial constructive trust.[15] However, in *Nolan v Nolan,*[16] Ormiston JA noted that English law contained a similar distinction, his Honour drew on the remarks of Millet LJ in *Paragon Finance Plc v DB Thakerar & Co (a firm)* as explaining the difference between a substantive and remedial constructive trust, even though his Lordship did not use those labels:

> The first arise (at least in most cases) by reason of a lawful transaction which precedes any alleged breach, but the latter, if properly so described, come into existence only by reason of some act of fraud or other unlawful dealing. Although the first category are properly described as 'constructive trusts', the latter have been mis-described as such and, at the highest, those who have been subjected to remedial relief should be called 'constructive trustees' only for convenience' sake to identify the kind of equitable relief against them. As Millett LJ expressed it:
>
> > In such a case he is traditionally though I think unfortunately, described as a constructive trustee and said to be 'liable to account as constructive trustee'. Such a person is not in fact a trustee at all, even though he may be liable to account as if he were. He never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff. In such a case the expressions 'constructive trust' and 'constructive trustee' are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are 'nothing more than a formula for equitable relief': Selangor ... at 1582 ...

Notwithstanding its flexibility, the remedial constructive trust relief it not available on some free-wheeling basis or where its imposition is "fair". The imposition of a remedial constructive trust must be warranted by established equitable principles or by the legitimate processes or legal reasoning rather than some idiosyncratic notions of fairness or justice.[17] The headnote to *Muschinski* notes:

> "There is no place in Australian law for the notion of a constructive trust which is imposed by law whenever justice and good conscience require it. Proprietary rights all to be determined by principles of law and not by some mixture of judicial discretion,

[15] Although as Collins, suggests, the approaches may not be as different as first thought: Collins, B. *The remedial constructive trust 'between a trust and a catch-phrase',* Trusts & Trustees, Vol. 20, No. 10, December 2014, pp. 1055–1068.
[16] [2004] VSCA 109 at [61]
[17] *Muschinski at* 615-616

> subjective views about which party ought to win, or the formless void of individual moral opinion."[18]

Added to that is the proviso that the High Court has said that a constructive trust ought not be imposed "if there are other orders capable of doing full justice" "ordinarily relief by way of constructive trust is imposed only if some other remedy is not suitable".[19] It has been described as an "exceptional remedy", although it has been noted that the utility of such statements is problematic,[20] and experience shows that remedies that commence their lives as exceptional, have a tendency to become less exceptional as time passes.

In what circumstances do these type of constructive trusts arise?

As noted, circumstances in which a constructive trust arises or will be imposed are not closed. However, the substantive/remedial dichotomy, whilst imperfect, at least gives framework in which to consider the usual circumstances.

As noted above, a substantive constructive trust can arise where a trustee or fiduciary applies property to their own advantage. This is so even where the fiduciary obligation does not involve dealing with property. They can arise under mutual wills agreements where one party agrees to hold property bequeathed to them by the other on the basis that their will then bequeath what remains of it to certain persons;[21] the entitlement under contract to an expectancy after the consideration for it is executed; under secret trusts; or where an otherwise express trust would fail, for example, for want of writing. As will be seen shortly they can arise in circumstances where there is a successful claim of proprietary estoppel is made out.

Stolen money is sometimes described as being held by the thief on constructive trust or by a third party who is not a bona fide purchaser for value of the money.[22] This is an interesting example for two reasons. Firstly, because unlike the usual substantive constructive trust, there does not need to be any prior fiduciary relationship between

---

[18] *ibid* at 584
[19] *Farah Constructions Pty Ltd v Say-Dee (*2007) 230 CLR 89 at 172.
[20] Lord Neuberger, *The Remedial Constructive Trust – Fact or Fiction,* Paper presented to the Banking Services and Finance Law Association Conference, Queenstown, August 2014 at [31]
[21] Birmingham v Renfrew (1937) 57 CLR 666
[22] *Black v Freedman* (1910) 12 CLR 105 at 110, cf *Robb Evans of Robb Evans & Associates v European Bank Ltd* (2004) 61 NSWLR 75 at 101 (CA)

the victim of the theft and the thief (although of course there might be). Secondly, in terms of the timing of the existence of the constructive trust.

In *Black v Freedman* the High Court that money in the hand of a thief is "trust money", and subsequent cases have inferred that this was a reference was to a constructive trust arrangement. If that is correct, then from the time of the theft the property stolen is impressed with a constructive trust which arises automatically. If the thief then makes a gift of the stolen property to a third party without consideration the recipient will also be liable as a constructive trustee. On the other hand, if the third party provides consideration the constructive trust will only arise once the third party becomes aware of the theft. However, this analysis is not without uncontroversial. In *Evans v European Bank Ltd*,[23] Spielman CJ thought that such a trust was better described as resulting trust because of its automatic nature and institutional characteristics. They also arise where a purchase of Torrens land under a "common intention" which fails,[24] which was the case in *Muschinski* itself although some commentator might regard this as a hybrid constructive trust.

The most common circumstance in which remedial constructive trustee will be against third parties under the limbs of *Barnes v Addy*, where a person which is not a trustee or fiduciary, received property as a result of a transaction or has knowingly assisted in a fraudulent scheme by the trustee or fiduciary; another is where a person holds property as the result of a transaction (including a gift[25]) which is voidable by reason of undue influence, unconscionability or other equitable fraud,[26] or where an equitable estoppel operates.

Timing

A critical difference between the two types of constructive trust is that time at when they arise or are imposed. Since a substantive constructive trust arises on the circumstances and it will arise at the time when the events in question occur and the timing is not discretionary, although the circumstances which give rise to the trust can make the determination of the date unclear.

[23] [2004] NSWCA 82
[24] Young, Croft, Smith *On Equity,* Lawbook Co, 2009 at [6.700] – [6.710]
[25] *Louth v Diprose* (1992) 175 CLR 621 at [15]
[26] *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143 at 153

With remedial constructive trusts the situation is more complex because it is flexible. a starting point it might be thought that it is imposed at the time of judgment, however it has been noted that these types of cases have been rare. Professor Bryan, has noted:[27]

> "The 'date of judgment' constructive trust imposed in *Muschinski*…has since played only a minor role in constructive trust adjudication. The jurisdiction to make such an order undoubtedly exists. But very few Australian decisions since *Muschinski..*have imposed a 'date of judgment' constructive trust, and some of those decisions have later been disapproved. Moreover, some judgments confuse the imposition of a 'date of judgment' constructive trust with postponing enforcement of the equitable interest under the trust to a later-created interest."

As was noted in *Muschinski*:

> "…where competing common law or equitable claims are or may be involved a declaration of constructive trust by way of remedy can properly be so framed that the consequences of its imposition are operative only from the date of judgment or formal court order or from some other specified date."

This recognizes the capacity for the recognition of a remedial constructive trust with proprietary interests can give rise to great injustice to third parties whose property right can be made worthless by the declaration of a constructive trust at a time with pre-dates the interests for the third parties.

However, the authorities indicate that if Court decides to impose a remedial constructive trust retrospectively, equity regards as done what ought to have been done and the trust is considered to have existed as an institution from that time onwards, rather than from the time of the order. Of course, the consequences of that imposition can be modified if necessary.

This lack of clarity as to when a remedial constructive trust arises has been the source of comment by Lord Neuberger writing extra judicially from an English perspective. His Lordship said [citations omitted]:

> "The lack of clarity is illustrated by another problem…. namely as to when the remedial constructive trust actually arises – when the court decides it exists, when the facts which gave rise to it occurred, or on a date selected by the court? The uncertainties

[27] Bryan, M, "What exactly is a remedial constructive trust?", July 2013 https://law.uq.edu.au/files/23479/CLI-25July2013-Bryan-Remedial-Constructive-Trust.pdf

> become painfully clear if one reads the judgment of the full Federal Court of Australia in *Parsons v McBain*, where they said that the cases displayed "a divergence of views as to when a [remedial] constructive trust … arises", and then examined the cases. In an interesting analysis in a 2009 case, Ward J in the New South Wales Supreme Court rightly said, "As a general statement of principle, a constructive trust will be treated as coming into existence at the time of the conduct which gives rise to the trust" and the uncertainties and problems which arise if one departs from that elementary and clear principle are apparent when one reads the ensuing twenty paragraphs, and the analysis of statements from a number of cases, many of them in the High Court and already referred to. If it takes effect retrospectively, it is getting close to being an institutional constructive trust; if it takes effect on the date of the court order, that would be arbitrary in theory and often avoidable in practice. If it takes effect when the court decides, then some might say that the judges may all just as well close our courtrooms and head for the palm trees."

Having said that I now turn to the issues of limitation of constructive trust claims, where, as will be seen, both the nature of a constructive trust and the time when it arises are important issues.

Williams v Central Bank of Nigeria[28]

Williams is a 2014 decision of the UK Supreme Court. The plaintiff, Dr Williams, alleged that in 1986 he was induced into acting as a guarantor of what turned out to be a fraudulent transaction to import food into Nigeria. He paid over $6 million to an English solicitor to be held on trust, pending the release of funds in Nigeria. He alleged that the solicitor, in fraudulent breach of trust paid those funds to the defendant, a bank in Nigeria. He alleged that the bank was a knowing recipient of that funds; that knowingly assisted in the solicitor's fraudulent scheme; or both. In other words, Dr Williams alleged that the bank was liable under both limbs of *Barnes v Addy.* Given the claim was commenced over 25 years later the transactions the Bank sought to strike out the claim as time barred.

Section 21 of the *Limitation Act 1980* (UK) provided:

(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action —

  (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

[28] [2014] UKSC 10

(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.

However, as Lord Sumption noted:

> "The combined effect of the definition sections of the *Limitation Act 1980* and the*Trustee Act 1925* is that in section 21 of the *Limitation Act* a trustee includes a "constructive trustee". Unfortunately, this is not as informative as it might be, for there are few areas in which the law has been so completely obscured by confused categorisation and terminology as the law relating to constructive trustees…"

Dr Williams claimed that the money which he paid to his solicitor was held upon trust, and that, in knowingly assisting in the solicitor's breach of trust or in knowingly receiving that trust property, the Bank had made itself a constructive trustee, thus it was argued, the action for the recovery for trust property from a constructive trustee. Alternatively, Dr Williams argued that it was it was an action "in respect of" a fraudulent breach of trust by his solicitor.

The UK Supreme Court rejected both arguments. Lord Sumption (with whom Lord Neuberger and Lord Hughes agreed), said that even if Dr Williams could make out the facts claimed that at best the bank was a wrongdoer who had not assumed the obligations of trustee. His Lordship, in discussing *Barnes v Addy* said:[29]

> "It is clear that Lord Selborne regarded as a constructive trustee any person who was not an express trustee but might be made liable in equity to account for the trust assets as if he was. The problem is that in this all embracing sense the phrase 'constructive trust' refers to two different things to which very different legal considerations apply. The first comprises persons who have lawfully assumed fiduciary obligations in relation to trust property, but without a formal appointment. ... In its second meaning, the phrase 'constructive trustee' refers to something else. It comprises persons who never assumed and never intended to assume the status of a trustee, whether formally or informally, but have exposed themselves to equitable remedies by virtue of their participation in the unlawful misapplication of trust assets. Either they have dishonestly assisted in a misapplication of the funds by the trustee, or they have received trust assets knowing that the transfer to them was a breach of trust. In either case, they may be required by equity to account as if they were trustees or fiduciaries, although they are not."

[29] *ibid* at [8]

His Lordship said that the law did not regard the Bank as a "true" trustee, and that it was such "true" trustees to which the section was referring notwithstanding that a trust as defined included a “constructive trust”. Accordingly, section 21(1)(b) did not apply.

In respect of the argument that section 21(1)(a) could assist, the Supreme Court held that that section applied only to claims against the trustee, not a third party who assists in or receives the trust properly.

In other words, the Supreme Court seems to interpret the term “constructive trust” as referring only a substantive constructive trust rather than the remedial form – because the remedial constructive trust whilst made to behave as though he or she were a trustee is actually not a trustee.

That proposition was considered again by the Victorian Court of Appeal in a decision handed done late last year

McNab v Graham[30]

In *McNab,* a testator (Mr Turner) who owned land, made a promise to a couple (the Grahams) that he would leave his land to them absolutely in his will if the cared for him.

The Grahams duly did so over many years, but the will Mr Turner left at his death did not give the Grahams an absolute right the land, instead granting only a right to occupy for life.

The Grahams discovered the terms of the will on the day of Mr Turner’s funeral in 1997. They told the solicitors who had prepared and were the executors of it, that Mr Turner had promised to leave the property to them if they looked after him and Mrs Turner. The evidence was to the effect the couple told the solicitors that they wished to challenge the will, but were told by the solicitor (whom they regarded as competent) they had “no hope of success and that if they made such a claim it would be defended”.

Accordingly, the Grahams took no step to challenge the will or seek other relief at that time. They relied upon the solicitor’s assessment of the prospects and did not seek independent legal advice. They remained in residence at the property and paid all outgoings associated with it. Eventually, the Grahams became infirm, and Mr Graham

[30] [2017] VSCA 352

began to worry what would happen to Mrs Graham if he died and whether she would be able to continue living in the property, a no-win no fee solicitors was consulted to see if anything could be done. Eventually, in 2015 (that is, 17 years after the death of Mr Turner) an application was made seeking a declaration that the executor held the property on trust for the couple or for damages.

The trial judge was satisfied Mr Turner had done gave rise to a proprietary estoppel. That is, that as the owner of land he had induced the Grahams to believe that they would have an interest in his land if they cared for him, that they had relied upon that representation to their detriment, and that that reliance was reasonable.

The trial judge that said that he was satisfied that Mr Turner held the property on a constructive trust for the carers and that upon his death his executors held the property on a constructive trust for the carers. This was an interesting observation because it is essentially a finding that the trust arose prior to death, and it implied also that the breach of the trust had occurred at the time of death or shortly after when the executor denied there was any duty to transfer the land to the carers. It was at that point that the question of limitation periods arose.

The *Limitation of Actions Act* (Vic) was very similar to the UK Limitation Act which had been considered in the *Williams* case. It relevantly provided:

> **Limitation of actions in respect of trust property**
>
> (b) *No period of limitation* prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—
>
> (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> [Emphasis added]

Section 22 provides:

> **Actions claiming personal estate of a deceased person**
>
> Subject to the provisions of subsection (1**)** of the last preceding section no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of fifteen years from the date when the right to receive the share or interest accrued.

As in the UK, the definition of “trust” and “trustee” within the *Limitation of Actions Act*, incorporates a definition in in *Trustee Act 1958* (Vic) which states that the expressions trust and trustee extended to constructive trusts and to cases where the trustee has a “beneficial interest in the trust property “.

Given the time which had passed since the death of Mr Turner, in order for the claim to be viable it needed to fall within section 21(1)(b) of the Act, namely be an action to recover trust property from a trustee.

The trial judge concluded that it was and so no limitation period applied. His Honour considered that the authorities distinguished between an institutional and a remedial constructive trust. His Honour also accepted that the evidence showed that it could be inferred that the testator either intended to hold the property on behalf of the carers, or else *should* have had that intention and emphatically rejected the view that this was merely a remedial constructive trust, and made a declaration that the executors held the property on constructive trust for the carers and ordered the executors to convey the land to the carers. The executors appealed.

The key issue in the appeal was whether a constructive trust created by a proprietary estoppel fell within the scope of section 21(1)(b). The executors argued based upon the decision in *Williams* that any trust which arose only by order of the Court – that it was remedial in nature and that accordingly it did not fall within the scope of a “constructive trust” within the meaning of the subsection.

The executor submitted that firstly:

a. if a constructive trust was to be imposed by the Court there was no legitimate reason to ‘backdate’ its inception to a point in time anterior to the commencement of proceedings, indeed, there were good reasons why a Court should not do so; and
b. even if a constructive trust were to be imposed by the Court from a time prior to the making of the order imposing the trust, it did not overcome the problem that *at the time the proceedings were commenced* that the property was not “trust property” within the meaning of *the Limitation of Liability Act*.

The executors argued that Mr Turner was not a trustee during his life and that he never assumed the responsibility of a trustee either expressly or in a *de facto way*. They submitted that the representation that Mr Turner made was the property would belong to the Grahams after this death, and until then the legal and beneficial ownership

remained with him. They submitted that this was not a case where the testator had assumed the status of a trustee but was at best a case where the testator had exposed the estate to an equitable remedy by participation in the unlawful misapplication of trust assets.

On that argument, neither the testator nor the executor was a trustee at any time prior to the making of the orders. Since section 21(b), on the authority of *Williams* the references to “trusts” and “trustees” did not apply to remedial constructive trustees, the claim was brought out of time.

The Court of Appeal unanimously rejected that proposition. The Court held that by making a representation that the Grahams would own the land upon which they relied, he had given them a proprietary interest in the land. The testator either intended or should have intended that the land was held on trust for the Grahams to take ownership upon Mr Turner’s death. That meant that the trust was substantive or institutional and that is arose without the making of any order.

The Court of Appeal held that notwithstanding that the UK Supreme Court had found that a constructive trustee who is a wrongdoer in the sense of a *Barnes v Addy* accessory would not fall within the limits of the term “trustee” within the section, those circumstances were very different from this case. In the case of a *Barnes v Addy* defendant, they are a wrongdoer who is never a “true” trustee in the relevant sense. The situation here was different because by his actions Mr Turner did or should have intended to hold the property on trust for the Grahams. For the purposes of that section a substantive constructive trustee can be regarded to use Lord Sumption’s words as a “true trustee” whereas a remedial constructive trustee cannot.

As to the executor’s point that the backdating of the date of the constructive trust to around the date of Mr Turner’s death, the Court of Appeal held that the declaration of the existence of the constructive trust was not a matter of “backdating” the trust arbitrarily or to defeat a limitation period. It was a matter of the Court declaring the appropriate date on which that which ought to have been done is regarded as having been done. Once so declared, the effect of the maxim that equity “regards as done that which ought to have been done” has the effect that so far as the Court was concerned, it *was* done at that time.

For completeness it should be noted that in an earlier case the Victorian Court of Appeal had (in obiter) indicated considerable skepticism that the term “constructive trust” within section 21 of the Limitation of Actions Act would include a remedial

constructive trustee.[31] However, in neither case was the constructive trust being considered was substantive. Given the High Court's endorsement of the proposition in *Bofinger* of the proposition that a constructive trust includes both remedial and constructive trust, it may be that the question of whether a provision such as section 21(1)(b) can apply to a remedial constructive trustee is not completely closed in Australia.

Finally, in decision handed down last month, in *Burnden Holdings (UK) Ltd v Fielding & Anor*[32] and Another recent UK Supreme Court determined where, by an unlawful, but non-fraudulent transaction, a director of a company Defendants converts the company property to his or own our or procures of participates in the unlawful distribution of it to a third party, then the action to recover that property by the company or, in this case, its liquidator fell within section 21(1)(b) and so was not subject to any time bar.

The Supreme Court held that whilst section 21 is primarily aimed at express trustees it was applicable to company directors by analogy, and that under the typical constitution of an English company the directors are regarded as being in possession of trust property (being company property) from the outset. Thus, where a director's misappropriation of the company's property amounts to a conversion of it to their own use (whether directly or through a corporate entity), then an action will lie for the recovery of trust property within the meaning of section 21(1)(b) and, in England, and presumably Victoria, not time barred. Whilst the Court referred to the application as being by "analogy" to an express trust, another way of viewing the facts is that by misappropriating the company's property to their own use, the directors became constructive trustees in the substantive sense.

What might the outcomes have been in NSW?

An interesting question arises as to what the outcomes in *Williams* and *McNab* would have been in NSW. In my view both claims would likely have failed.

The *Limitation Act* in NSW bears some similarities to the UK and Victorian Act but there are also important differences.

[31] *Nolan v Nolan & Ors* [2004] VSCA 109 at [61] – [67].
[32] [2018] UKSC 14

Section 47 of the *Limitation Act 1969* (NSW)(*the NSW Act*) provides:

(1) An action on a cause of action:

….

(c) to recover trust property, or property into which trust property can be traced, against a trustee or against any other person…

is not maintainable by a trustee of the trust or by a beneficiary under the trust or by a person claiming through a beneficiary under the trust if brought after the expiration of the only or later to expire of such of the following limitation periods as are applicable:

(e) a limitation period of twelve years running from the date on which the plaintiff or a person through whom the plaintiff claims first discovers or may with reasonable diligence discover the facts giving rise to the cause of action and that the cause of action has accrued…

Meanwhile section 11 defines "trust" as including:

express implied and constructive trusts, whether or not the trustee has a beneficial interest in the trust property, and whether or not the trust arises only by reason of the transaction impeached…

[Emphasis added]

"Trustee" is defined as having the corresponding meaning as trust.

The decision in *Williams* was based upon Lord Sumption's view that the Bank was not a constructive trustee because it was not a "true" trustee". However, the NSW Act, extends the reach of the section beyond constructive trustees to "any other person" so long as the *subject matter* is the recovery of trust property or the traceable proceeds thereof. It removes the requirement need for there to be a proprietary interest in the property claimed, seemingly opening it to a claim against a knowing assistant to a breach of trust such as the Bank was alleged to have been.[33]

If that is correct then Dr Williams' claim would have been caught by the section and unless he could show he had not been aware of the facts for less than 12 years, his claim would be have been out of time.

[33] In *Morlea Professional Services Pty Ltd v Richard Walter Pty Ltd (In Liq)* [1999] FCA 1820 at [36] a Full Court of the Federal Court was prepared to "assume" the section 47 applied to a *Barnes v Addy* claim, however the point was not considered beyond that assumption.

Likewise, it seems unlikely the Grahams could have succeeded in NSW. Their claim of proprietary estoppel founding a substantive constructive trust, was a claim to recover trust property but they had been aware that the will did not leave them the property for over for more than 12 years. Although it might have been arguable that the advice of the solicitor that they had "no hope" of overturning the will, might have been argued as a basis to say that they were not aware of the true "facts", that argument would need to overcome the argument that the solicitor's view was an opinion rather than a fact. Although section 55 of the NSW Act preserves the defence of fraudulent concealment, on the facts there appears to be no basis for that to apply.

The scope of the claims to which section 47 extends is therefore significant, although it remains subject to differing judicial views. In *Cassegrain v Cassegrain*[34] a director of a company in breach of his fiduciary duties, credited his loan account with the company with the sum of $4.25 million, and then drew on that account for to pay the costs of acquiring land, which he then transferred to his wife. The funds had been used to purchase the land 11 years and 3 months before the commencement of the proceedings.

The trial judge held that because the claim was for equitable compensation and that provisions of the NSW Act did not apply other than by analogy as required by section 23. His Honour held that the appropriate analogous period was the six year period provided by section 14, which limits causes of action founded in tort. The trial judge rejected the contention that section 47 applied on basis that whilst the company director may have owed fiduciary duties to the company that a fiduciary in that position was not a "trustee" for the purposes of the section.

Basten JA (with whom McFarlan JA agreed on this issue) overturned conclusions. His Honour relevantly said at [193]:

> "While the relief claimed against [the director] was not recovery of trust property (which he no longer held), but equitable compensation*, s 47 is not limited to claims to recover trust property***.** The findings accepted above involve Claude Cassegrain, as director of the company, acting to obtain the property of the company in breach of his general law fiduciary duties and his duties under the *Corporations Act*. Whilst the property was in his hands, it was held by him as a constructive trustee for the company: *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* [1958] HCA 33; 100 CLR 342 at 350; *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; 156 CLR 41 at 107-110 (Mason J). The fact that the trust arose by reason of the transaction impeached

[34] [2013] NSWCA 454.

> did not take it outside the terms of s 47, as explained in the definition of "trust" set out above. The beneficiary of the trust is the company. As s 47 applies not merely to an action to recover trust property but also one for a remedy of the conversion of the property and to recover money on account of a wrongful distribution of trust property, it has application in the present case against [the director] as a constructive trustee of the property upon transfer. The appellant did not explain why this line of reasoning was erroneous: in the absence of such a submission, the limitation period of 12 years applied, running from the date (on or about 30 June 1997) when the discontented shareholders discovered the facts from which the misappropriation could be discovered. The proceedings were commenced in time."
>
> [Emphasis added]

His Honour concluded that, if for any reason, that analysis was flawed, then it remained the closest statutory provision to the circumstances of the case and should apply by analogy.

In dissent, Beazley P held that a company director, albeit owing fiduciary obligation to the company, did not by that circumstance alone, become a trustee.[35] Her Honour referred with approval to the remarks of the learned authors of *Ford's Principles of Corporations Law,*[36] referring to directors and trustees as follows:

> "While both [directors and trustees] are fiduciaries, it is a characteristic of the trustee's office that property is vested in him or her for the benefit of the *cestui qui trust*. Normally no property of the company is vested in a director although the directors as a board will have control over the company's property. If property of the company were to be vested in a director, the director would very probably be a trustee of it."

Her Honour held that the money credited to the loan account by the director created a debtor and creditor relationship between the director and the company, which was different from the property of the company becoming vested in the director, nor did the wrongful creditor of monies in the loan account make him a trustee of the company.

The outcome is that the payment by a director of corporate funds to themselves in breach of a fiduciary duty to the Company will give rise to a constructive trust relationship (of a substantive nature) which is caught by section 47, which remains even if those funds are dissipated and the claim is for equitable compensation.[37]

---

[35] *Cassegrain* at [133]
[36] R P Austin and I M Ramsey, *Ford's Principles of Corporations Law*, 13th ed, (2007) at [8.050]
[37] ibid at [135] to [137]

Can section 47 be circumvented?

A recent attempt to argue that a court of equity retained a discretion not to apply section 47 to a claim involving a constructive trust was recently considered by Ball J in *Malek Fahd Islamic School Limited v The Australian Federation of Islamic Councils Inc*.[38]

Relevantly, between 2000 and 2003, a director of a company had purchased and profited from the subsequent sale of land which it was said to have been acquired in breach of the director's fiduciary duties to the company. The argument relied upon the principles set out in *Hospital Products Ltd v United States Surgical Corp,*[39] that once it is established that a fiduciary is liable to account for a profit or benefit obtained in circumstances of a conflict or possible conflict of interest and duty, or by taking advance of opportunity or knowledge derived from the fiduciary occupation occupied, then there could be no objection to his being held to account as a constructive trustee for that profit or benefit.

Alternatively, it was argued that the director had held the property he profited from on a substantive constructive trust, because it had been purchased with the Company's money, relying on cases including *Cassegrain.*

Whilst the resale and hence any profit had been obtained in 2003, the claim was not brought until 2016, thus outside the twelve-year period set by section 47. The Company argued that in circumstances of a *purely equitable claim*, equity retained a discretion not to apply statutes of limitations.[40]

Justice Ball rejected this proposition. His Honour held that equity *did* retain a discretion not to apply a statute of limitation in respect of a claim at law that was analogous to an equitable claim, but that section 47 was a section that directly applied to a claim in respect of a trust. The claim which the plaintiff was making, whilst equitable was caught by the statute and there was no discretion of equity to simply ignore the statute because its basis was equitable.

[38] [2017] NSWSC 1712
[39] (1984) 156 CLR 41; [1984] HCA 64 at 107-8
[40] Relying upon an analysis of the authorities by White J in *Issa v Issa* [2015] NSWSC [2015] NSWSC 112 at [66].

Can laches defeat a constructive trust claim brought within the statutory limitation period?

A final issue of interest is whether in NSW, an exclusively equitable claim which is subject to a statutory limitation period nevertheless remains subject to a defence of laches (the equitable principle that bars claims brought where the delay is unreasonable and based on the maxim that "equity aids the vigilant and not those who slumber on their rights").

In *P & O Nedlloyd BV v Arab Metals Co & Ors (No 2)*[41] Moore-Bick LJ (with whom the other members of the Court of Appeal agreed) said:

> "I can see no reason in principle why, in a case where a limitation period does apply, unjustified delay coupled with an adverse effect of some kind on the defendant or a third party should not be capable of providing a defence in the form of laches even before the expiration of the limitation period."

142. Whilst in *Gerace v Auzhair Supplies Pty Ltd,* Meagher JA[42] considered, without deciding that that passage, "may not take sufficient account of the distinction between laches and acquiescence", subsequently *in Lallemand and Stevenson v Brown and Swan*,[43] Mossop M, noted that both the Limitation Act (ACT) contained the equivalent of section 9 of the NSW Act which says:

> "Nothing in this Act affects the rules of equity concerning the refusal of relief on the ground of laches acquiescence or otherwise."

Master Mossop considered that that provision preserved the defence of laches to a *Barnes v Addy* claim notwithstanding that the time limit is governed by statute.[44]

Conclusions

Although this section is headed "conclusions" is might better be titled "reflections" since in the realm of constructive trusts issues can never be regarded as completely resolved. Equity's relationship to statutory limitation periods, whether by statute or by

[41] [2006] EWCA Civ 1717; [2007] 1 WLR 2288 at [61]
[42] [2014] NSWCA 181; (2014) 310 ALR 85 at [27]- [29], with whom Beazley P and Emmett JA agreed)
[43] [2014] ACTSC 235
[44] *ibid* at [139] – [155]

analogy to statute, has never been simple or straightforward. In the realm of claim in constructive trust, this difficulty is compounded by the flexible and diverse nature of circumstances where constructive trusts can arise. Notwithstanding that the constructive trust has a long pedigree, questions of limitation of such claims continue to be a source of contemporary controversy.

Where they exist, the statutory provision relating to trusts are the starting point for consideration time limits for claims involving constructive trust, together with any definitions of trust and trustee which are imported into those sections (often by operation of different Acts). The next step is to consider whether the statute (such as in NSW) preserves or extinguishes any equitable principles which would otherwise operate.

In some jurisdictions, what constitutes a constructive trust for the purposes of a limitation statute is confined to substantive constructive trusts only. Even in NSW, where the statute seems to largely remove the importance of such distinctions, there remains a division of judicial opinion amongst very senior judicial officers as to the ambit of the reach of provisions which limit claims made based on a constructive trust, and indeed whether factual circumstances give rise to a constructive trust at all.

As has been seen, limitation period in constructive trust claims are often critical as constructive trusts are prone to arise in circumstances where long periods elapse before the claim is brought, such as the case in *McNab*. They often involve arrangements which to lay people might seem informal or unenforceable and there is a tendency for them to sit on rights or to not obtain the correct advice as to extent of those rights initially. In some jurisdictions this does not mean the claim is barred. In every case, a careful review of the relevant time is an essential step when considering or defending against any claim where a constructive trust claim or remedy is raised.

Disclaimer

The information and view expressed in this paper does not constitute legal advice and should not be relied upon. Readers should seek their own professional advice regarding any issues raised or discussed within this in this paper and I accept no responsibility to readers or users of this papers as to the respect to the accuracy of the information or views expressed.