BOOK REVIEWS

Discretionary Remedialism Down Under

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THE REMEDIAL CONSTRUCTIVE TRUST

By David M Wright
(Butterworths 1998 pp 312 $95.00)

TRADITIONALLY constructive trusts only arise by operation of law on property held by a trustee or fiduciary in breach of a trust or fiduciary obligation, or in discrete situations such as undue influence or mutual wills. Such constructive trusts are known as 'institutional constructive trusts' and form an important part of equity's capacity to redress breaches of fiduciary obligations and other forms of unconscionable conduct.[1] However, developments over the last 40 years have challenged once cherished assumptions about the limited availability of the constructive trust. At the forefront of these challenges have been plaintiffs in marital and de facto relationships who have been justifiably discontented with the legal characterisation of their property interests. From the 1960s onwards, the courts in Commonwealth jurisdictions including Australia, Canada and New Zealand have had to respond to proprietary claims in a social and legal context where proprietary relief in the form of the constructive trust had not previously been awarded. However, such challenges have not been limited to domestic disputes. They have also arisen in commercial contexts, where the acceptable level of judicial discretion, the interests of third parties, priorities, and the

1. Such constructive trusts have been described as 'a substantive trust institution analogous to an express trust': M Cope *Constructive Trusts* (Sydney: Law Book Co, 1992) 12.

appropriate form of proprietary relief are all important considerations. The remedial constructive trust has been developed to redress various kinds of unjust enrichment and unconscionable conduct which have not attracted proprietary relief in the past.

The remedial constructive trust is a controversial phenomenon which is still evolving. Wright's work therefore provides a timely review of the development of this type of trust and its place in equity's jurisprudence.

Wright suggests that his book has two main aims: first, to examine the role of equitable proprietary relief, particulary the constructive trust, and secondly, to investigate the constructive trust when qualified by the adjective 'remedial'.[2] In order to pursue these aims, Wright analyses cases dealing with constructive trusts in Australia, Canada, England, New Zealand and (to a much lesser extent) the United States. He highlights both the similarities and differences in the approaches taken in these jurisdictions. He correctly argues that the various jurisdictions discussed have adopted 'a composite theory' of the constructive trust.[3] In practice, this has meant that the institutional constructive trust has been retained, but the remedial constructive trust has been adopted as well.[4]

Wright points out that the institutional constructive trust effectively takes two forms, a personal liability to account, such as the personal liability for knowing assistance in *Barnes v Addy*,[5] and the imposition of proprietary relief in the form of a constructive trust in favour of another.[6] The inherent flexibility of the remedial constructive trust means that, in some circumstances at least, proprietary relief may not be required to redress the retention of an improper gain.[7] The constructive trust, whether institutional or remedial, may therefore give rise to a personal remedy rather than a proprietary claim.

This leads to what can be characterised as the three central tenets in Wright's theory concerning the role of the remedial constructive trust in our legal system. First, he argues that the development of this kind of trust indicates that obligation and remedy are being separated and distinguished.[8] In light of this, he proposes that the best way to understand the significance of the remedial constructive trust as a flexible remedy is to construct an 'obligation continuum' and a 'remedy continuum'. The two continua are presented as follows.

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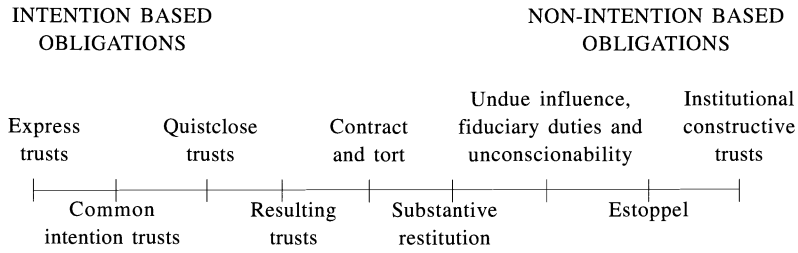
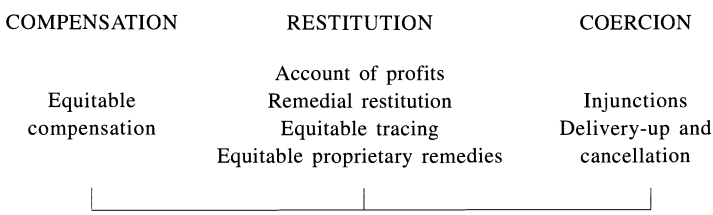
2. Wright, paras 1.1-1.2.
3. Ibid, paras 1.9-1.12 and 9.10.
4. See eg *Muschinski v Dodds* (1985) 160 CLR 583, Deane J 612-615; *Korkontzilas v Soulos* (1997) 146 DLR (4th) 214.
5. (1874) 9 Ch App 244.
6. Wright, para 3.1.
7. Ibid, para 3.3.
8. Ibid, ch 3.

Obligation continuum



Remedy continuum



The obligation continuum sets out the grounds of liability. The remedy continuum emphasises the variety of remedies available. These two continua should not be regarded as permanent and immutable. Both continua will continue to develop as new equitable obligations emerge and greater attention is paid to the need for flexible remedies.

Secondly, Wright argues that, in the light of the remedial constructive trust, objections to proprietary relief in the absence of a surviving proprietary base are no longer tenable. The current law is that, before a party can claim proprietary relief in the form of a constructive trust, he or she must be able to identify the property and show that there is a nexus between the original proprietary interest and the proprietary interest claimed.[9] Professor Birks has succinctly described this requirement as the 'surviving proprietary base'.[10] Wright contends that property is a relationship between persons rather than an object.[11] A claim for an equitable proprietary interest must therefore be considered in the light of the obligations of

9. See generally *Re Hallett's Estate: Knatchbull v Hallett* (1880) 13 ChD 696; *Re Diplock* [1948] Ch 465; *Bishopsgate Investment Management Ltd (in liq) v Homan* [1995] Ch 211.
10. P Birks *An Introduction to the Law of Restitution* (Oxford: OUP, 1989) 378 et seq.
11. Wright, para 4.6.

the parties. Inevitably, judicial discretion will be involved in the creation of equitable proprietary interests, but such discretion must be used cautiously. Wright appears confident that this will be the case.[12]

Having separated obligation from remedy and equitable proprietary relief from the surviving proprietary base, Wright delineates a third major tenet of his theory. He argues that the existence of the remedial constructive trust highlights the wide variety of discretionary factors which impact on the choice of equitable remedy. These include any obligations existing between the parties, the conduct of the parties, the consequences of an award of proprietary relief, and administration of justice factors.[13]

Wright concludes that the remedial constructive trust 'is not some new concept'.[14] Rather, it is part of equity's traditional property-creating function and is 'a mandatory injunction, as it involves the compulsory doing of some act'.[15] The term 'remedial constructive trust' should be abandoned because it is vague. Instead, the courts should focus on a three-step process involving an investigation of the obligation continuum, the remedy continuum and, of course, an examination of the facts of the case.

The principal virtue of Wright's approach is that it identifies the phenomenon of the remedial constructive trust within the broader legal and historical context of equitable relief. What has been identified as the remedial constructive trust by judges and commentators alike loses its dubious and enigmatic qualities. Instead, for Wright, the remedial constructive trust highlights the ongoing evolution of new obligations and more flexible remedies demanded by modern societies and it demonstrates the importance of judicial discretion in our legal system.

Generally speaking, the book is well researched. However, on some occasions the presentation is marred by the unnecessary repetition of material such as Lord Browne-Wilkinson's statement on the remedial constructive trust in *Westdeutsche Landesbank Girozentrale v Islington LBC,*[16] which is quoted verbatim no less than three times.[17] Moreover, Wright's treatment of important doctrinal and policy issues is occasionally superficial. For example, he underplays judicial and academic concerns about the effect of a proprietary remedy on third parties in insolvency situations.[18] In my view, third party interests — even where insolvency issues are not at stake — continue to be a legitimate source of concern.[19]

12. Ibid, paras 4.10-4.19.
13. Ibid, ch 5.
14. Ibid, para 9.14.
15. Ibid.
16. [1996] 2 All ER 961.
17. Wright, paras 3.41, 4.8 and 6.29.
18. Ibid, para 4.25.
19. See eg the recent High Court decision in *Giumelli v Giumelli* (1999) 73 ALJR 547.

Two further criticisms of the book need to be made. First, whilst Wright realises that aspects of his model will not be accepted by other commentators including Professor Birks,[20] he does not set up a comprehensive defence of the model. Perhaps this could have been undertaken in the conclusion. Indeed, such a defence would have been particularly helpful in the light of Birks's contrasting views on proprietary claims.[21] Although Birks's approach to such claims is constantly evolving, it can safely be said that he favours predictability and certainty (supported by a surviving proprietary base, strict liability and a clear taxonomy) over judicial discretion.[22] For Birks, legal certainty is at the heart of the relationship between law and society. On the other hand, Wright's model incorporates a number of factors which would necessarily reduce certainty — in particular the separation of obligation and remedy, the rejection of a surviving proprietary base, and reliance on judicial discretion. The courts will need to find an appropriate balance between the contrasting approaches of Birks and Wright.

Secondly, Wright suggests that the High Court decision in *Maguire v Makaronis*[23] represents a silencing of earlier references to 'unconscionability' which may signal a new approach to equitable remedies.[24] In this case, a firm of solicitors lent money to its clients for the purchase of a block of land. The clients had been led to believe that the fund had been provided by a financial institution. The solicitors had not disclosed to the clients that the firm had a direct interest in the transaction and had not advised them to take independent legal advice. The High Court held that the failure to make such disclosure constituted a breach of a fiduciary obligation. Wright points out that the members of the High Court did not expressly refer to 'unconscionability' in their judgments.[25] However, it is certainly arguable that the High Court did not need to use the word 'unconscionability': it was nonetheless redressing unconscionable conduct, namely the breach of a fiduciary obligation which constituted an abuse of a relationship of trust and confidence. In his discussion of *Maguire*, Wright underrates the continued importance of unconscionability. Subsequent cases have indicated that unconscionability, and variants such as 'unconscionable conduct', remain important words in the lexicon of the High Court.[26] It is submitted that unconscionability remains at the heart of equity's jurisprudence in Australia.

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20. See eg Wright's discussion of Birks' approach at paras 4.2-4.5, 4.10 and 4.15.
21. See eg P Birks 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 UWAL Rev 1; P Birks 'Property and Unjust Enrichment: Categorical Truths' (1997) NZ L Rev 623; P Birks 'Equity, Conscience and Unjust Enrichment' (1999) 23 MULR 1.
22. Birks 'Equity in the Modern Law' ibid, 22-25.
23. (1997) 188 CLR 449.
24. Wright, paras 1.31 and 3.79.
25. Ibid.
26. *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395; *Bridgewater v Leahy* (1998) 194 CLR 457.

Notwithstanding these criticisms, Wright's bold and exploratory work is well worth reading. It will be a helpful reference on equity and the remedial constructive trust in the years ahead.

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Pioneering but Imperfect

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PROPRIETARY CLAIMS AND INSOLVENCY

By Gerard McCormack
(Sweet & Maxwell 1997 pp 253 £70.00)

PROBLEMS in insolvency administration can lead to lengthy and acrimonious disputes. One major problem facing the insolvency practitioner is to define what assets comprise the property available for distribution amongst the insolvent's creditors. In order to resolve this fundamental issue, it is often necessary to consider the principles which govern proprietary claims in equity, as well as the legislative regime set up to deal with insolvency. In modern times, proprietary claims have become increasingly complex and difficult to resolve.

McCormack's book is a helpful introduction to the growing complexity of proprietary claims and their impact on insolvency administration. The author suggests that the work is pioneering:

> The book stands very much at the intersection between three branches of law that are traditionally thought of as discrete: Trusts, Restitution and Insolvency. There is no other text directly in point (p v).

McCormack begins by stating that the book's focus 'is on the treatment of trust assets in insolvency' (p 1). In the first chapter, he describes the trust and sets the stage by reviewing insolvency procedures, administration orders, receiverships and the floating charge. In succeeding chapters, he considers such diverse topics