A QUESTION OF PLEADING CONSTRUCTIVE TRUST*

QBE Insurance v. *Sim Lim Finance*[1]

THE recent case of *QBE Insurance* v. *Sim Lim Finance* is rich picking for one interested in constructive trust and procedural law. Procedural law is of course nowadays a bad name and the days are long gone when lawyers spoke admiringly of the skills of such a pleader as Baron Parke. On the other hand, the modern tendency to ignore procedural law may well be a swing to the other extreme and ignorance of procedural law can so often pass as impatience with it.

In 1978, Sim Lim Finance entered into a hire-purchase agreement with Highlight Industry Pte Ltd, a company in the garment industry. Under that agreement, Highlight acquired on hire purchase 74 sets of industrial sewing machines and agreed to pay Sim Lim monthly instalments totalling $105,000. Highlight also entered into a contract with QBE Insurance, insuring its interest and property in "machinery and utensils" for $ 140,000 against loss or damage by fire.

Fire destroyed the insured machinery, and Sim Lim Finance promptly wrote to Highlight claiming an interest in them and requesting Highlight to instruct QBE Insurance to pay the insurance proceeds to them. A carbon copy was sent to QBE Insurance which in apparent disregard of it paid direct to Highlight. The present action was an application by QBE Insurance to dismiss the action brought in 1980 by Sim Lim Finance claiming against Highlight for conversion and conspiracy, K H Tan, a director of Highlight for conversion, breach of fiduciary duty and/or duty of care and QBE Insurance for negligence and conspiracy. Lai J. dismissed the application by QBE Insurance and the Court of Appeal affirmed the dismissal in an interesting judgment which is here discussed.

The Constructive Trust Point

The case deals principally with a point of constructive trust, Sim Lim Finance contending that QBE Insurance was liable as constructive trustee. The reason for this change of course was that Highlight had been wound up and presumably the insurance moneys had been dissipated or were no longer traceable. In reality then it was probably futile to proceed with the 1980 action unless QBE Insurance could be made liable as constructive trustee.

Treatment of the constructive trust point involves essentially bailment cases in which the bailee insures goods belonging to the bailor for their full value and in which it is held that the bailee holds the insurance proceeds less his expenses on constructive trust for the bailor. On this aspect of the problem the discussion of the Court of Appeal is very thorough.

* Thanks to Associate Professor (Mrs) Tan Sook Yee for invaluable comments.

[1] [1987] 2 M.L.J. 656.

The Court's conclusions were:-

(i) there is authority in *Maurice* v. *Goldsbrough Mart*[2] that a bailee is accountable in an action for money had and received to the owner for the balance of the insurance proceeds after deducting his own claims;

(ii) strong dicta suggest that a bailee is accountable as trustee to the owner for the balance of the insurance proceeds, whether or not the bailee expressly insured as trustee. The remarks of Upjohn L.J. in *Re King*[1] were cited with approval:-

> "Those cases establish that where a warehouseman (without the consent, or even knowledge, of the owners) insures the whole value of the goods in his warehouse, although his only interest in those goods is his lien for warehouse charges and so forth, the owners of the goods, which have been destroyed by some accidental fire, are entitled to claim against the insurers for the value of the goods. This is ancient mercantile law. The warehouseman is presumed to be insuring the respective interests of himself and the owners in the goods and each may claim according to his interest."

(iii) "It may be argued that if the insurance moneys belong, in equity, to the owner of the goods when in the hands of the insured bailee, there is no reason why, in principle, the same moneys should not belong to the owner when they become payable or have been appropriated against a fund from which such payment can be made, whilst in the hands of the insurers; …"[4]

(iv) "… if the owner is so entitled, it may be argued that the insurers should be liable as constructive trustees should they, after receiving notice of a conflicting claim by the owner, pay the moneys (and thereby assisting in their wrongful disposal) to the insured bailee."[5]

Of course, seeing that the present action was one for dismissal, the Court of Appeal did not have to require that the third and fourth conclusions be in fact sustainable in law. It was enough that they were plausible and merited full argument before the trial judge.

Nevertheless, a number of comments may even now be made.

(i) To succeed, Sim Lim must show that although the principle in conclusion (ii) applies to bailment situations, it applies equally to an hirer who has possession of the goods under a hire-purchase agreement. There should be little difficulty in showing this, if the reasoning of Lord Pearce in *Hepburn* v. *A. Tomlinson (Hauliers) Ltd.*[6] is adopted. According to Lord Pearce, the position of a bailee who is taking up a policy may be likened to that of a bailee suing for conversion. What gives the bailee the right to sue for conversion is his right to possession; but he must

2 [1939] A.C. 452.
3 [1963]Ch. 459, 491.
4 At p. 661.
5 At p. 661.
6 [1966] A.C. 451.

hold in trust for the owner such damages as represent the owner's interest. Similarly, what gives the bailee an insurable interest to insure is his right to possession; so he must hold in trust for the bailor so much of the moneys recovered as is attributable to his interest. Possession then is the key element and there should be no obstacle if the hirer has a right to possession.

If, however, the basis for recovery by the owner of the goods is restitution (as is suggested by the *Goldsbrough* case) it may not be unfair as between the hirer and the financier that the hirer should keep the insurance proceeds since it is contemplated in every hire-purchase agreement that the hirer should ultimately own the hire-purchase goods (provided of course the hirer makes allowance for the payments yet unsatisfied).[7]

(ii) Assuming that the right to possession is the key to the problem, a difficulty then arises because it cannot sustain the third conclusion of the Court of Appeal. Looking at the bailment aspect, it is well settled that if the bailee has sued for damages for conversion, a subsequent action for conversion by the bailor against the converter is barred. The trouble is that the hirer has exclusive possession and until the hire contract is determined the owner (financier) cannot sue.[8] In the present case, one could regard the contract of hire as frustrated by the destruction of the goods. If it were possible to say that upon frustration the relationship between the financier and the hirer became one of simple bailment, then there should on these facts be no difficulty in applying the *Hepburn* line of cases. But if there arose upon frustration, a simple bailment, where were the goods bailed? It follows that even if the financier has made a demand upon the defendant after his conversion of the property, the defendant need not comply with the demand and must pay damages to the hirer alone. On this analysis, it is hard to see how Sim Lim could have any proprietary interest in the moneys payable in the hands of QBE Insurance.

(iii) Moreover, supposing that the difficulty pertaining to exclusive possession can be overcome, it is still hard to see how the insurance proceeds could belong to the owner when they become payable. When they become payable, a chose in action arises. The holder of that chose in action is Highlight and Highlight holds the benefit of it on constructive trust for Sim Lim. There would appear to be no fund in the hands of QBE Insurance which could form the subject-matter of a constructive trust. And besides, how may a debtor be a trustee of a debt which he himself owes? For even if tragically a debtor may be such a trustee there would still need to be a direction by creditor to debtor and assented to by the debtor.[9] Suppose a fund has been earmarked for payment, as being the insurance moneys. Yet where there is no direction by Highlight to QBE Insurance, why should QBE Insurance be said to be a trustee of that sum of money for the benefit of Sim Lim?

7 See analogous case of *Karflex* v. *Poole* [1933] 2 K.B. 251.
8 See *Gordon* v. *Harper* (1796) 7 T.R. 9.
9 *Cf. Paterson* v. *Murphy* (1835) 11 Hare 88; *McFadden* v. *Jenkyns* (1842) 1 Phil. 153.

(iv) As to the effect of the notice of a conflicting claim, this might be regarded as the direction to QBE Insurance to pay Sim Lim. But QBE Insurance is not bound to assent to the direction. QBE Insurance has its liabilities to Highlight to think about and unless Highlight itself has directed payment to Sim Lim releasing QBE Insurance from all claims, why should QBE Insurance assent?

(v) It would seem that the most that can be put (apart from conspiracy) is that QBE Insurance knowingly assisted in a fraudulent design by Highlight who were constructive trustees of the insurance moneys for the benefit of Sim Lim Finance. Whether the notice was sufficient to fix QBE Insurance with the requisite knowledge would then have to be considered with *Carl Zeiss-Stiftung* v. *Herbert-Smith* [No. 2][10] in mind. But if so, this would be a case of constructive trusteeship, not constructive trust.[11]

The Limitation Period Point

The Court of Appeal's consideration of the English limitation period point is affirmation that cases on s. 8 of the Limitation Act 1888 continue to be relevant after passage of the Limitation Act 1939.

Bowen L.J.'s judgment in *Soar* v. *Ashwell*[12] was adopted for the general proposition that certain types of constructive trust are not subject to the Limitation Act (or analogous rules in equity). In particular, the Court of Appeal named four instances of such constructive trust; namely:-

(i) the trustee de son tort;

(ii) the stranger participating in trustee's fraud;

(iii) the person dealing inconsistently with trust property which he has received; and

(iv) cases such as *Bridman* v. *Gill*[13] and *Wilson* v. *Moore*[14].

Unfortunately, *Soar* v. *Ashwell* is in a real sense superseded by the English Limitation Act 1939, which is in *pari materia* with the Limitation Act, Cap. 163. It no longer matters whether the claim arises out of an express trust or constructive trust. This is because the definition section refers the meaning of trust to the Trustees Act, Cap. 337 which makes plain that trust extends to implied and constructive trust. The limitation period of 6 years will therefore now apply to all actions based on breach of trust save actions:—

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

(ii) 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.

[10] [1969] 2 All E.R. 367.
[11] See D.J. Hayton, "Personal Accountability of Strangers as Constructive Trustee", (1985) 27 Mal. L.R. 313.
[12] [1893] 2 Q.B. 390.
[13] 24 Beav. 302.
[14] 1 M. & K. 337.

One is left wondering why the Court felt it necessary to rely on *Soar* v. *Ashwell* and whether the categories (i) and (ii) above are to be treated as synonymous with the categories listed in *Soar* v. *Ashwell* or whether they are broader and capable of reaching other kinds of constructive trustee.

The Pleading Points

There is no doubt that Sim Lim pleaded that Highlight effected the insurance policy as its agent or trustee. From the report, it may be inferred that the condition in the fire policy which was as follows was pleaded:-

> "The above are the property of the Insured or held by them in trust or on commission for which they are responsible, whilst contained in the building built of and roofed with concrete throughout, occupied as GARMENT FACTORY, SITUATE NO. 315, ALEXANDRA ROAD, 2ND FLOOR, SINGAPORE PAPER PRODUCT LIMITED BUILDING, SINGAPORE 3."

The material facts of the alleged conspiracy were pleaded as follows: that Highlight and Tan Kah Hwee and QBE Insurance conspired dishonestly to and for gain to deprive Sim Lim Finance of its claim to the policy money by ignoring its interest and by QBE Insurance releasing the money to Highlight.

However, an entirely different cause of action from conspiracy was argued. Before Lai J., Sim Lim Finance took up the constructive trust point discussed earlier, although not having prayed for relief by way of constructive trust. And both Lai J. and the Court of Appeal thought that since a claim based on constructive trust could be made out on the pleadings, the absence of a prayer for specific relief by way of constructive trust was not fatal.

The reason for requiring every statement of claim to state specifically the relief which the plaintiff claims is clear. The defendant must have every opportunity to know the case against him and he would be taken by surprise if the plaintiff could ignore the claim made and take another judgment. On the other hand the plaintiff, at least as against the defendant who appears, is not confined to the relief demanded. The court may grant such general relief as the material facts will sustain and consistent with that specifically claimed.[15] But, the court will not allow specific relief of another description under the rubric of general relief.

In Sim Lim Finance's pleadings there was no prayer for general relief; but that does not preclude the court in fact granting such relief as is consistent with the material facts, and the specific relief prayed for. So one question is — is there an inconsistency between the specific prayer based on conversion and the relief by way of constructive trust even though there may not be any between the prayer based on breach of fiduciary duty and constructive trust? And the superficial answer is yes for a very simple reason. The cause of action in conversion implies a legal right of possession, at least, to the policy monies. But if in fact

[15] See *Cargill* v. *Bower* 10 Ch.D. at 508.

Highlight was a trustee of the policy monies, whether under a constructive trust or an express trust, how could Highlight have converted any property belonging to Sim Lim? And therefore, if it would be inconsistent with the relief based on conversion to assert a claim in equity in the insurance monies, it would be equally inconsistent to assert a claim against QBE Insurance as constructive trustee. The real question however is whether there is inconsistency between the specific prayer against QBE Insurance based on conspiracy and relief by way of constructive trust. And it may be that the answer is still yes. Certainly if the old law-equity distinction was maintained, the answer would be clearly that where the cause of action is at law, it would be improper for the court, without amendment of the pleadings, to entertain an action in equity sustainable on the facts alleged. The old law-equity distinction could arguably be maintained because section 3 of the Civil Law Act, Cap. 30 which provides for administration of law and equity in the same court does not touch on pleadings. But we do better perhaps to regard the old law-equity distinction as gone and not tie the plaintiff "to a theory of pleadings which he cannot abandon without beginning a new action.".[16] To this extent, the Court's preparedness to entertain relief by way of constructive trust is a significant advance towards achieving uniform procedure.

Where there is serious difficulty is in seeing how the pleadings could have sustained a claim based on constructive trust. The difficulty may perhaps best be discussed in connection with the possible argument based on trust of the promise; that is to say, that Highlight effected the fire policy as trustee for the benefit of Sim Lim Finance. The Court of Appeal was prepared to countenance such an argument. Chan Sek Keong J.C. said:[17]

> "The respondents (Sim Lim) have another string to their bow. They have pleaded that the 1st defendants had insured the sewing machines as their trustees, which was permitted by the condition of the policy. This is an issue of fact which has to be decided on the evidence. The form of the policy does not preclude this factual situation. *If the 1st defendants did insure the sewing machines as trustees for the respondents, there might be an argument that the respondents adopted or ratified such insurance by claiming against the appellants directly."*

In the words italicised above, we have latent problems. If Highlight did insure the machines as trustees for Sim Lim, Sim Lim should bring an action in the name of Highlight. If, however, Highlight had refused to sue, then Sim Lim might sue in its own name joining Highlight as defendant.[18]

Such action by Sim Lim would not require ratification or adoption at all. If, however, Highlight had merely contracted the policy as agents for an undisclosed principal — *(i.e.* Sim Lim Finance), then even if Highlight had taken out the policy without authority of

16 See R.E. Kharas, 1 Syracuse L. Rev. 186.
17 At p. 662.
18 See *Harmer* v. *Armstrong* [1934] Ch. 65, 82-83, *Vandepitte* v. *Preferred Accident Insurance Corp. ofNew York* [1933] A.C. 70.

Sim Lim, ratification may arguably be made by Sim Lim after loss.[19] Moreover, ratification may be inferred from commencement of the action by Sim Lim directly against QBE Insurance.[20]

So the difficulty is this — in so far as the claim based on trust of the promise is concerned, the material fact that Highlight had refused to sue cannot be supplied by the fact of ratification by commencement of action, because ratification is irrelevant to such claim. Would the pleading be deficient in this respect?

At issue here is the degree of specificity with which facts must be pleaded. Beyond the very general statement that pleadings must give adequate notice of the claim or defence, no satisfactory test has been formulated. So far as concerns the point at issue, it is quite clear that a statement of claim must show (1) that a defendant is in some way liable to the plaintiff's demand; otherwise it will be struck out as disclosing no cause of action,[21] and (2) that there is such privity between the defendant and the plaintiff as gives the plaintiff the right to sue the defendant.[22]

Just for contrast, suppose that QBE Insurance had not yet paid Highlight and Sim Lim wished to claim directly from QBE Insurance. The lack of allegation that Sim Lim Finance had requested Highlight but Highlight had refused to bring an action in Highlight's name would seem to be fatal unless the inference could be drawn from other parts of the Statement of Claim that that had indeed occurred. In particular, could the inference be drawn from the fact that Highlight was named as defendant? The answer appears to be no, on the persuasive authority of *Bostock* v. *Edgar*.[23]

Suppose now, as in fact happened, that QBE Insurance has paid Highlight. In a suit against QBE Insurance based on constructive trust, the lack of allegation that Sim Lim Finance had requested Highlight to sue would be irrelevant. But it must be alleged that QBE Insurance has paid Highlight, in breach of trust, moneys belonging in equity to Sim Lim. That is to say there must be material allegations that when notice of Sim Lim's conflicting claim was received by QBE Insurance, a fund had already been appropriated for payment of the insurance moneys, that QBE Insurance assented to holding on trust for Sim Lim, that subsequently QBE Insurance disposed of the fund inconsistently with the trust. Can these material allegations which are missing be supplied by inference from the nature of the claim based on conspiracy? Can these material allegations be inferred from the nature of the claim based on conspiracy? On a strict view, no. Suppose a case of breach of a contract to pay money and the plaintiff claims as follows:-

1. The Firstnamed Defendant became indebted to the Plaintiff in the sum of $X pursuant to an agreement... etc.
2. By a guarantee in writing the Second etc. Defendants jointly and severally guaranteed to the Plaintiff... the observance and performance by the Firstnamed Defendant...

[19] See *Water* v. *Monarch Fire and Life Assurance* (1856) 5 El & Bl 870, 881.
[20] See *Re Portuguese Consolidated Copper Mines Ltd.* ex p. Badman; ex p. Bosanqust (1890) 45 Ch.D. 16, 31 & 34.
[21] See *Crosseing* v. *Honor,* 1 Vern. 180.
[22] See *A-G* v. *E. Chesterfield* 18 Beav. 596.
[23] (1899)24 V.L.R. 677.

AND THE PLAINTIFF CLAIMS FROM THE DEFENDANTS AND EACH OF THEM.

a. The Sum of $X.

The above pleadings do not allege any present indebtedness of the firstnamed defendant, nor any specific breach of the firstnamed defendant's obligations under the contract, nor any breach of guarantee by the other defendants nor that any demand was made upon the guarantors. Nevertheless, inference can supply what is expressly missing. The only way in which the claim to payment of the whole sum of $X can have any relevance to the stated obligation to pay the sum $X would be that the obligation had not been met at all. And because of this necessary implication, the pleadings would give sufficient notice to the defendants.[24]

Contrast now the case *of Shell Co. of Australia* v. *Esso Australia*.[25] The plaintiffs and defendants constructed a pipeline to carry crude oil to their respective refineries. Subsequently, the plaintiffs contended that by a metering defect they had paid the supplier for vast amounts of oil which they thought they had received but which in fact had been received by the defendants. The Statement of Claim alleged, *inter alia,* that:- (a) it was an implied term of their agreement that the plaintiffs and defendants would together pay to the supplier but as between themselves the plaintiffs would be responsible for paying for the oil delivered to their refinery and likewise the defendants; (b) that by a common mistake the plaintiffs paid for oil which had not been delivered to their but to the defendants' refinery, by reason whereof the defendants were indebted to the plaintiffs for the price of the oil as for money paid; and (c) that the defendants had been unjustly enriched and benefited at the expense of the plaintiffs and the defendants were obliged to restore the said benefit to the plaintiffs. Brooking and Nathan JJ. (Murphy J. dissenting) held that the claim for money paid and the claim based upon unjust enrichment should be struck out as disclosing no reasonable cause of action. It is sufficient to quote Nathan J.:[26]

> "In so far as Shell contended that the reference to unjust enrichment should be read as a reference to money paid for and on behalf of the defendants that contention must fail. The basic requirements of a money paid count are all absent, no request either expressed or implied for the payment is referred to, nor is there any reference to any compulsion activating Shell to pay money on behalf of the defendants; that may have been the fact but it is not stated."

Unfortunately the stronger impression is that the present case more resembles the *Shell Co* case than the *Buttigieg* case.

Alternatively, it may be that QBE Insurance had knowingly assisted in Highlight's fraudulent design. Can the material allegation of fraud be inferred from the claim of conspiracy? In *Belmont Finance* v. *Williams Furniture* Buckley L.J. said:[27]

[24] See analogous case of *Buttigieg* v. *V.L. Finance* [1986] V.R. 392.
[25] [1987] V.R. 317.
[26] At p. 344-345.
[27] [1979] 1 Ch. 250. 269-270.

> "In the present case the absence of any claim in constructive trust, which was introduced, as I have said, at a late stage, has greatly added, it seems to me, to the likelihood of confusion about whether the statement of claim contains any sufficiently clear allegation of fraud and dishonesty; and indeed whether the plaintiff company was intending to rely on any allegations of fraud and dishonesty at all. Dishonesty was not a necessary ingredient of the claim of conspiracy; all that would be necessary to support that claim would be actual, or possibly imputed, knowledge of the facts which rendered the transaction an illegal one. "Crime" and "fraud" are not synonymous; a criminal act may well be committed without any fraud or dishonesty.
>
> In the present case, as it seems to me, there is no sufficiently clear allegation of dishonesty to be found in this statement of claim; and if it is to be raised it must be raised by amendment, and I understand that an application for amendment is to be made later."

But Sim Lim Finance in fact pleaded that the conspiracy was dishonest and for gain, and this would distinguish the present case from *Belmont Finance.* The pleadings then could have sustained a case of knowing assistance (i.e. constructive trusteeship) but not constructive trust.

The Dilatoriness in Prosecution Point

"In addition to the powers to dismiss an action under the Rules of the Supreme Court for want of prosecution, the court has an inherent jurisdiction to dismiss an action for want of prosecution where there has been prolonged or inordinate and inexcusable delay in the prosecution of the action causing or likely to cause serious prejudice to the defendant or giving rise to a substantial risk that a fair trial would not be possible".[28] The case of intentional and contumelious want of prosecution is *ex hypothesi.* Further, where an action has been so dismissed, the plaintiff may so long as the limitation period is not exceeded bring a fresh action, subject to the possibility that the second action may also be dismissed as an abuse of process.

The contribution of the Court of Appeal to this learning is not insubstantial. The question of the effect of the inability to begin a fresh action fell to be determined. Did it automatically follow that in such circumstances that the present action should be dismissed? The Court of Appeal held as follows:-

> "In *Birkett* v. *James* the House of Lords decided that a court should not normally dismiss an action for want of prosecution where a fresh action could immediately be filed, but not that it should as a matter of course dismiss such action where a fresh action could not be filed. In such a case, the question of serious prejudice to the defendant or the risk that he would not be able to get a fair trial must still be inquired into."

[28] See *Birkett* v. *James* [1978] A.C. 297 & 37 Halsbury para. 448.
[29] *Janov* v. *Morris* [1981] 1 W.L.R. 1389, *cf. Joyce* v. *Joyce* [1978] 1 W.L.R. 1170.

Consistent with this attitude, the Court also rejected the submission that where a claim is based on fraud, conspiracy or negligence, inordinate and inexcusable delay would, *ipso facto,* cause serious prejudice to the defendant. This must be right as "(e)ach case must depend on its own facts and the issues involved, including the nature of the defence."

In result, QBE Insurance failed in getting the action dismissed for 3 reasons. First, their defence could be made out largely by documentary evidence. Secondly, QBE Insurance's loss of right of contribution (if any) from Highlight on account of winding-up had no relation to the prosecution of the action because the winding up had occurred as long ago as 1981. Thirdly, the defence was substantially one of law: although if the present view is correct that the only possible action is knowing assistance in a fraudulent design, then questions of fact will assume paramount importance.

Two final points for completeness: First, the Court of Appeal declined to follow the arguably more liberal approach in Malaysia founded on Order 34, rule 8(2), saying:[30]

> "(t)herefore, unless compelled by a clear and unambiguous statutory rule which requires the courts in Singapore to give a greater weight to punishing the plaintiff than to protecting the interest of the defendant, the submission of counsel for [QBE Insurance], …, would, in our view, amount to an unwarranted extension of the principle in *Birkett* v. *James,"*

Secondly, the line of cases including *The Splendid Sun,*[31] *The Hannah Blumenthal*[32] and *The Antclizo*,[33] may be significant, although they involve long delays in seeking arbitration in which there is no inherent power in the court to intervene by way of dismissal for want of prosecution. Nevertheless, one can imagine a case which would not warrant dismissal but which might be regarded as abandoned within the principle laid down in those cases.

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30 At p. 665.
31 [1981] Q.B. 694.
32 [1983] 1 A.C. 854.
33 [1987] 2 Lloyd's Rep. 130.

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