## NOTES OF CASES

### THE CARRIAN CARCASS?

### *BBM* v. *Osman (No. 1)*[1] *and (No. 2)*[2]

#### *Introduction*

ONCE in a while a case emerges from the dry, stoic recesses of a mahogany court room, fresh from the laundry, as it were, and still impregnated with something of the high drama that gave birth to it. The recent cases *of BBM* v. *Osman (No. 1) & (No. 2)* can bid fair claim to that title.

Reading the judgments in both cases, one is only incidentally referred to the principal player, George Tan. Until 1979 his name is obscure. Two years later, in late 1981 he emerges a great property tycoon who has just bought Gammon House in HK's prestigious central district for just short of HK$lb. Approximately another year later, comes the stunning revelation that his flagship, Carrian Nominee Ltd, is in liquidity trouble. Adverse press reports circulate, almost like wild fire, of his imminent collapse. Then Jalil Ibrahim, an auditor from BMP, is murdered, amidst last ditch attempts by Carrian to obtain financial help from BMP. Such was the high drama that gave birth to our present cases which so far from enlightening continue to point to the "baffling and unexplained enigma behind Carrian's mysterious origins and growth."[3]

The Carrian group of companies were a giant conglomerate built up by George Tan and carrying on diverse businesses in Hong Kong. It transpired that one of Carrian's largest creditors was BMF, a company incorporated in Hong Kong and wholly owned by Bank Bumiputera Malaysia (BBM). BMF was at all material times under the complete control of three directors, Lorrain (who was Chairman), Hashim (director), Rais (alternate director) and Ibrahim (general manager). Hashim and Lorrain were also directors of BBM. BBM had resolved at a meeting attended by Lorrain and Hashim that a Supervisory Committee be appointed to oversee the lending activities of BMF, and further that BMF was not to approve future loans without the consent of that Supervisory Committee. Hashim and Rais were appointed members of the Committee. The Committee had rejected an application by Carrian Nominee Ltd (CNL) for a loan of US$40m. Nevertheless, without the consent of the Committee, Lorrain, Hashim, Rais and Ibrahim had caused BMF to release US$40m

1 [1987] 1 M.L.J. 502.
2 [1987] 2 M.L.J. 633.
3 Ranjit Gill, *The Carrian Saga,* (Pelanduk Publications, 1985) at p. 7.

via third party agents ultimately to CNL. BMF had obtained judgment in Hong Kong against CNL but there was no chance of satisfaction in view of CNL's collapse.

The Malaysian suit was brought by BBM and BMF against Lorrain, Hashim, Rais and Ibrahim, alleging (i) breach of duty as directors/officers of BBM and BMF under section 132 (3) of the Malaysian Companies Act, 1965 and/or under common law; (ii) fraudulent misrepresentation; and (iii) breach of fiduciary duties. (In *BBM* v. *Osman (No. 2)* it transpired that Lorrain had also received about M$28m by virtue of his position as director of BBM and BMF.)

Zakaria Yatim J. was the trial judge and the interesting judgments he rendered shows the wide range of issues that were canvassed. Those issues of some importance to conflict and trust lawyers form the subject of this case-note.

## *The Assignment*

The part of the case which in the present view is the most engaging is the assignment issue. It is not an easy area of law and the full meaning of the leading case of *Trendtex Trading Corp* v. *Credit Suisse*[4] is not easily grasped. The kinds of claims that are advanced moreover can tell us a great deal about the contours of the issue.

We have these facts alleged:-

(i) On December 31, 1983 BMF for full value and benefit assigned to the Bank the benefit of all rights and interests in the debts and security interests and other choses in action together with all other rights and interests held by BMF in relation to the debts owing to BMF. BMF agreed to act under directions from BBM to take such legal proceedings as are necessary for the exercise and/or enforcement and/or protection of such rights.

(ii) On December 17, 1984 BBM for full value and benefit assigned the benefit of all rights and interest as in the first assignment to Petronas; and agreed to act under directions from Petronas to take such legal proceedings as are necessary to recover the debts, etc.

What we have from these facts is a two-fold argument of seemingly devastating force. First, by these assignments BBM not only purchased the right to sue the defendants but also sold that right to Petronas. Therefore, Petronas was the only party with standing to sue and because in bringing the suit BBM was not acting under directions from Petronas, the suit by BBM was misconceived for want of authority. Secondly, by virtue of the assignments, BMF and BBM had consented, adopted, affirmed, ratified and validated the loan to CNL. Therefore BBM could not now sue the defendants on the basis of acts which it had ratified.

[4] [1982] A.C. 679.

Looking first at the effect of the assignment on standing to sue, Zakaria Yatim J.'s answer is perhaps too hasty. He accepted the submission that the claims against the defendants were personal claims involving personal obligations to BBM and BMF. If the assignments included these claims, they would to that extent be void; and there would thus be no obstacle to BBM pursuing its own claims (although not BMF's) against the defendants.

A question of champerty is obviously raised. The leading case is *Trendtex Trading Corp* v. *Credit Suisse* in which it was held that where from the inception of a transaction, a defendant has relied upon the circumstances of that transaction in making a considerable outlay to the plaintiff, an agreement between the plaintiff and defendant whereby the plaintiff would assign its cause of action arising from that transaction to the defendant would not be void for champerty. The reason is that the defendant would have a genuine pre-existing financial interest in maintaining the solvency of the plaintiff. In the recent case of *Brownton* v. *Edward Moore Inbucon,* Lloyd L.J. explains the holding in *Trendtex* as follows:[5]

"A bare right to litigate, the assignment of which is still prohibited, is a cause of action, whether in tort or contract, in the outcome of which the assignee has no genuine interest."

It would not be inaccurate to say that *Trendtex* decides that a personal cause of action of a contract can be asssigned provided the assignee has a genuine commercial interest in the subject matter. What is controversial is whether the rule in *Trendtex* extends to all causes of action, including torts and equitable causes of action.

Lord Denning M.R. in the Court of Appeal thought that a similar approach would operate comprehensively although he took the view that an assignee could have no possible legitimate and genuine interest in a personal tort action such as damages for libel or slander. However, Lloyd L.J.'s formulation in the *Brownton* case of what is a bare right to litigate suggests the legal possibility of a genuine commercial interest in a tort action.

We have little guidance from the House of Lord's judgments in *Trendtex* and so the matter is largely speculative. Although the case of *Martell* v. *Consett Iron*[6] is approved, it is approved for its broad approach rather than expressly for purposes of asserting that a legitimate and genuine interest will justify an assignment of a tort action. However, the formulation of Lord Roskill (and indeed also of Oliver L.J.) could reach and permit such assignment.

In principle there may exist a need for such assignment. A director of Company A commits a breach of his tortious duty of care. It should be possible for Company A to assign its cause of action against the director to Company B which wholly owns Company A. But the matter becomes

5 [1985] 3 All E.R. 499,509.
6 [1955] Ch. 363.

more difficult with a case like *Hill* v. *Archbold*[7] where the National Union of Teachers was held to be justified in maintaining an action brought by its senior officials for libel and slander on the ground of legitimate and genuine interest in an action fairly ancillary to the work of the officials and to the business of the Union. Suppose the senior officials had assigned their causes of action to the Union. One wonders whether some interest more strict should be demanded rather than mere genuine interest, and for that matter, commercial interest.

Given the state of the law, no firm conclusions are yet possible; but it is nonetheless clear that there is more to the point than at first blush seems to be the case. Zakaria Yatim J. accepts that BBM's actions are personal actions. But actions for fraudulent misrepresentation and conspiracy would not seem to be as personal in character as actions for libel and slander. Moreover, assuming that the assignments were intended to assign and did assign BBM's rights to sue to Petronas, it has further to be considered whether Petronas had a genuine commercial interest in the assignment, because then the assignment would have been valid and BBM would no longer be entitled to sue. As for the equitable causes of action, to the extent that they give rise to proprietary interests, their assignments might be well within *Ellis* v. *Torrington;*[8] arguably also where equitable debts are created. On all these issues, given the view taken by the judge as to the personal character of the actions, there could of course be no discussion.

Perhaps Zakaria Yatim J.'s second answer diminishes the need to arrive at a firm conclusion. He thought it was evident that the claims did not fall within the assignments because what was agreed in them concerned choses in action and rights in interest. This is not convincing because the right to sue is also a chose in action. Even if the right to sue were not so, this would not be true of the claim based on breach of fiduciary duties against Lorrain. As will be discussed later, at the very least the claim to the money received by Lorrain would be based on an equitable debt and would be a chose in action within the terms of the assignments.

We may note that Zakaria Yatim J.'s third answer may not obviate the need to conclude the position on whether there was genuine commercial interest in either assignment. He thought that since no notice of the assignment had been given to the defendants (and until such time notice had been given), BBM was entitled to sue.[9] But it is likely that the beneficial interest had passed to Petronas if it could pass at all and so it would still be necessary to determine whether BBM was entitled to sue in its own right.

The ratification point as raised by counsel for Hashim and Lorrain would seem to be untenable and Zakaria Yatim J. was not to be persuaded. The argument made more elaborate was that the first assignment from BMF to BBM amounted to ratification of the loan to CNL. Therefore

7 [1968] 1 Q.B. 686.
8 [1920] 1 K.B. 399.
9 Argument based on s. 4 (3) Civil Law Act. Zakaria Yatim J. also cites s. 101 (1) (a) Civil Law Act as enabling BBM to sue the defendants.

there could be no action for breach of fiduciary duty against Hashim and the other defendants.

The untenability of this argument is not at once apparent. But since BBM is suing in its own right on causes of action which it is seized, the first assignment can make no difference. It may be that BMP, by assigning away its rights to sue the defendants, has on its part ratified the acts of the defendants; but how can this matter as far as BBM is concerned?

And so what we have is a non-starter of an issue. In order then to make sense of the ratification point, we have to press and press the argument of counsel into something along these lines:-

(1) Accept that the first assignment is immaterial.

(2) Nevertheless, BBM was the assignee of the right to recover the debt from CNL and by assigning away that right in turn to Petronas BBM had ratified the acts of the defendants.

So certainly we can try and seek to find ratification in the second assignment, but are we not up against a fundamental obstacle?:— that the acts of which BBM is complaining are in a real sense independent of the debt recoverable from CNL. Indeed, although BBM has received value from Petronas in respect of the assignment of the CNL debt, there is no reason why BBM may not recover any shortfall or loss from the defendants in respect of its own independent causes of action.

Zakaria Yatim J.'s consideration of the ratification point must be read as assuming that the fundamental barrier does not exist. Nevertheless, it is entirely convincing and full of practical good sense. He said:[10]

> "In the instant case was Hashim acting on behalf and for the benefit of BMF and the Bank when he took part in the decision to release US$47 million to the Carrian group? The answer is certainly "no". Instead he was acting to the detriment of BMF and the Bank as a result of which both BMF and the Bank suffered loss and damage.
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> When BMF sued CNL and obtained judgment in Hong Kong, BMF was compelled to take such step. There was certainly no option open to BMF but to sue CNL to recover the debt. Furthermore, BMF and the Bank did not have full knowledge of the facts at that time. I find that the filing of the suit in Hong Kong does not amount to ratification or even election."

### *Constructive Trust*

The constructive trust point, of interest to equity lawyers, is unfortunately the least satisfactorily dealt with. It arose only in Lorrain's case because Lorrain, as alleged, had received M$27.6 m as secret profits, and therefore it was contended that he held the money on constructive trust for BBM

[10] [1987] 1 M.L.J. 502, 511.

and BMF. The case as put by counsel for Lorrain denied there was any constructive trust on the ground that the money was never BBM's in the first place but accepted that Lorrain, if liable, was liable as in debt according to the well-known case of *Lister* v. *Stubbs.*[11]

The story of the fate of *Lister* v. *Stubbs* could itself make for a fascinating narrative. In that case, the defendant employed as a foreman who regularly bought in supplies equally regularly took bribes over a 10-year period and the English Court of Appeal held that the employer could not trace to the land and other investments that the defendant had bought with the bribes. The defendant owed the employer a debt in equity and the property remained the defendant's.

But the serenity with which *Lister* v. Stubbs was greeted was to be shattered by the decision in *Boardman* v. *Phipps.*[12] For that equally well-known case seemed to go on the assumption that a fiduciary who makes secret profits out of his position holds them on constructive trust for the benefit of the principal, however honest he may have been.

Since then we have had many views; at first that *Lister* v. *Stubbs* ought to be regarded as wrongly decided, but now, as the case seems able to defy its staunchest critics, that *Lister* v. *Stubbs* was in fact rightly decided. The story is by no means ended with the recent approval of the case by the Court of Appeal in *A-G's Reference (No. 1 of1985)*[13] and its recent application in *Islamic Republic of Iran Shipping Lines* v. *Denby*;[14] because the first was a criminal case and the second, as Peter Birks has remarked, is infected by a "want of enthusiasm".[15]

The second case, *Denby,* obviously came too late to be of use to Zakaria Yatim J. The first case appears not to have been cited to him. One may however wonder whether had the case been cited, it would have exerted much influence on the judge's mind. In refusing to apply *Lister* \. *Stubbs* and in preferring *Boardman* v. *Phipps, Zakaria* Yatim J. was apparently much persuaded by the form of declaration in *Industrial Development Consultants* v. *Cooley*,[16] *viz,* "Declaration defendant trustee for plaintiffs of profits of his contracts with Eastern Gas Board . . . ". One would have thought, at first blush at any rate, that the case before the judge was closer to *Lister* v. *Stubbs* than to *Cooley's* case. Can the judge's decision be justified?

On the one hand, there is much force in explaining *Lister* v. *Stubbs* as a case where the property was never the plaintiffs nor even intended to be the plaintiffs. So how could the plaintiff ever assert a proprietary interest in it? Moreover Professor Goode writes:-[17]

11 (1890)45 Ch.D. 1.
12 [1967] 2 A.C. 46.
13 [1986] Q.B. 491.
14 [1987] 1 Lloyd's Rep. 367.
15 P. Birks, "Personal Restitution in Equity", (1988) LMCLQ 128, 131.
16 [1972] 2 All E.R. 172.
17 R.M. Goode, "Ownership and Obligation in Commercial Transactions" (1987) 103 L.Q.R. 443,444.

> "To accord the plaintiff a proprietary right to the benefit obtained by the defendant, and to any profits or gains resulting from it, at the expense of the defendant's unsecured bankruptcy creditors seems completely wrong, both in principle and policy, because the wrong done to the plaintiff by the defendant's improper receipt is no different in kind from that done to creditors who have supplied goods and services without receiving the bargained-for payment, so that the debtor's default has swelled his assets at their expense."

On both grounds, the decision rejecting *Lister* v. *Stubbs* would be hard to justify.

On the other hand, there are other older company cases, not cited to the judge, which may support the decision he made. Only one case need be mentioned, namely the case of *Nant-Y-Glo and Blaina Ironworks Co* v. *Grave.*[18] A director received a gift of fully paid up shares as inducement to becoming a director and it was held that the plaintiff company had the option of either claiming the shares or suing for damages assessed as being the highest value of the shares over the relevant period. There can be no question that Bacon V.C. thought that such director would be a trustee of the shares because "(h)is duty and his interest were in conflict, and it comes within that description of cases which the Court has so often to deal with between trustees and *cestuis que trust.*"[19] A little later in his judgment, there occurs a very interesting remark, namely:-[20]

> "The shares were the shares of the company. If they had remained in the hands of the promoters, the company could have compelled the relinquishment of those shares by those who had so received them. Is there any difference between the promoters who had received them and Mr Grave in that sense a promoter, who knowing that they had come from the company to the original promoters, takes them from them by way of a present, in order that he may discharge the office of director of the company? It would be fraught with the greatest danger to society if any such principle could for a moment be maintained."

In the foregoing remarks we have, it is suggested, the key to the present problem. We have to inquire whether the M$27.6 m paid to Lorrain came in fact from BBM's funds. If yes, Lorrain must hold the sum of money as constructive trustee. If no, he is only personally accountable under the principle in *Lister* v. *Stubbs.*

### *Applicable Law in Tort and Constructive Trust*

Cases on applicable law in the area of constructive trust are rare. In a few instances where the question might have arisen, courts have avoided it because there was no conflict, or only a false conflict of laws. Thus, in *Chase Manhattan Bank* v. *Israel-British Bank (London) Ltd.*,[21] Goulding

18 (1878) 12 Ch. D. 738. See also *Eden* v. *Ridsdales Railway Lamp and Lighting Co.* (1889) 23 Q.B.D. 368.
19 *Ibid*, at p. 746.
20 *Ibid.*
21 [1981] Ch. 105.

J. found that the equitable right to trace monies paid under a mistake existed both under New York and English law. Again, in *USS Corp* v. *Hospital Products International Pty Ltd*[22] the question whether a fiduciary relationship existed between a manufacturer and a distributor would have been answered in the same manner by both the law of New York and New South Wales. The appellate courts therefore found it unnecessary to discuss the matter. The judgment of Zakaria Yatim J. joins the ranks of this sparse list of cases, but unlike them, purports to be the first in the Commonwealth to take a conclusive position. Zakaria Yatim J. held that the applicable law in all the substantive issues was the law of Malaysia.

As far as tort is concerned, it seems quite well settled that the rule as to choice of law is contained in the judgment of Lord Wilberforce in *Chaplin* v. *Boys*.[23] The rule has been described as the double actionability rule; the claim must be actionable by the *lexfori* and also "actionable" by *lex loci delicti.* But in an exceptional case, which *Chaplin* v. *Boys* was, the claim need not be governed by the *lex loci delicti.* So, where England was the most closely connected jurisdiction, and there was no Maltese interest that would be undermined by denying application of Maltese law, English law alone was applied as the *lexfori.*

But it may not be altogether easy to ascertain when the exception may be invoked. According to Lord Wilberforce:[24]

> "the necessary flexibility can be obtained . . . through segregation of the relevant issue and consideration whether, in relation to that issue, the relevant foreign rule ought, as a matter of policy … to be applied. For this purpose it is necessary to identify the policy of the rule, to inquire to what situations, with what contacts, it was intended to apply; whether not to apply it, in the circumstances of the instant case, would serve any interest which the rule was devised to meet."

This exception:-

> "Will not be invoked in every case … or even, probably, in many cases. The general rule (of double actionability) must apply unless clear and satisfying grounds are shown why it should be departed from what solution, derived from what other rule, should be preferred."

Obviously, it would have been uncharacteristic for Lord Wilberforce to attempt fully to work out the scope of the exception. That task is left to future judges and so also the more particular question whether the exception could be invoked to avoid the *lex fori* in favour of the *lex causae* remains to be answered.

When one comes to the present case from that position of the law the judgment of Zakaria Yatim J. begins to assume perplexing aspects. It is necessary to reproduce the relevant passages extensively:[25]

22 [1982] 2 N.S.W.L.R. 766.
23 [1971] A.C. 356; see *Coupland* v. *Arabian Gulf Petroleum* [1983] 3 All E.R. 226.
24 At p. 391.
25 See p. 507.

> "In the instant case, the plaintiffs' claim against Hashim and the other defendants is based on at least three causes of action. The first cause of action is August 9, 1985, it is evident that Lorrain was, at the material times, resident in Kuala Lumpur and his place of business was Rooms 14.06-14.10, Wisma Stephens, Jalan Raja Chulan, Kuala Lumpur. Several meetings of the BMF Board of Directors were held at this address when they considered the loans to the Carrian group. It should be added here that from the documentary evidence the facts complained of occurred not only in Hong Kong but also in Malaysia.
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> In view of the circumstances of the present case I come to the conclusion that the law applicable to the substantive matters in issue in the present proceedings is the law of Malaysia."

And for completeness, the following remarks are reproduced from the (No. 2) case at page 634:

> "In that judgment *(i.e.* (No. 1) case) I decided that the law applicable … is the law of Malaysia. My decision is the same in respect of the question on applicable law raised by Lorrian."

There is no question that Zakaria Yatim J. adopted *Chaplin* v. *Boys* as containing the choice of law rule. What seems curious is his application of it. If he was applying the interpretation of *Chaplin* v. *Boys* in Dicey and Morris,[26] namely that the governing law is the *lex fori* subject to civil liability under the *lex loci delicti,* there would be no need to consider as he did the circumstances of the case. The applicable law would be Malaysian law as the *lex fori.* One would only have regard to the unusual circumstances of the case, where there would be no liability under the *lex loci delicti.* Notwithstanding the absence of liability under that law, one might still, in an exceptional case and where the circumstances warant so doing, apply the *lexfori* (or even it seems another proper law). The learned judge does not ask whether the exception may be invoked. But perhaps he is in effect considering whether the case might be exceptional when he examines at page 507 the situation in the present case and in effect comes to a positive answer.

It is suggested that the learned judge is in fact applying the exception to double actionability. But why is it necessary to go through all this exercise? The exception requires the issue to be segregated and having regard to the peculiar facts of the case to see whether justice requires exceptional departure from the general rule. Where there is no difference between the *lex fori* and the *lex loci delicti,* the purported exercise of determining the applicable law would seem to be otiose.

Thirdly, Zakaria Yatim J. applies the double actionability rule to breach of statutory duties. It may be observed that one allegation involved breach of statutory duty in Malaysia, *i.e.* section 132 (3) of the Malaysian Companies Act, 1965. This might be established in the case of Lorrain and Hashim who were also directors of BBM. But unless section 132 (3) had

26 See rule 205 in Dicey & Morris, *The Conflicts of Laws,* (11th ed., 1987).

extra-territorial application, it could not reach Rais and Ibrahim, who were directors only of the Hong Kong registered BMP. Rais and Ibrahim might have breached the corresponding Hong Kong statute which may be territorially limited.

If then the breach of director's duty is characterised as an independent issue and not as a species of negligence, it is hard to see how there can be actionability by the *lexfori* and hence satisfaction of the double actionability rule.[27] Nevertheless, this difficulty would seem to be an academic one. The tort of negligence is virtually territorially limited in scope. It must be committed in some country. Nevertheless, we have no difficulty in transposing all the facts to the forum and asking, if all the facts had been local, whether there would have arisen an actionable tort. Likewise, we should have no problem in thus subjecting breach of statutory duty to the double actionability rule.

Fourthly, the highlight of the present case must be the application of the double actionability rule to breach of fiduciary obligations. The reasons for not differentiating between tort and breach of fiduciary obligations are not given, although they would have been extremely useful.

Potentially, there are at least 5 possibilities:[28]

(i) the *lexfori.* It would lead to forum shopping because the choice of law would vary with the choice of forum. But it cannot be rejected out of hand because it is arguable that the principles governing breach of fiduciary obligations are equitable principles administered by the forum, even if similar principles form no part of the applicable law.[29]

(ii) the law of the place of breach.[30] This would be consonant with the vested rights doctrine. It however suffers from the disadvantage that the place of breach may be fortuitous.

(iii) the double actionability rule. The principal criticism of the rule is that it is marred by the potential arbitrariness of both the *lex fori* and the law of the place of breach.

(iv) the law with which the transaction has its closest and most significant relationship. Whilst this rule avoids potential arbitrariness it may be difficult to apply with confidence.

(v) the *lex situs.* This would be a distinct possiblity in constructive trust cases. In most cases it would coincide with the law of the place of breach, but it need not. If, for example, a trustee admini-

27 See Sykes and Pryles, *Australian Private International Law,* (2nd ed., 1987), p. 513.
28 It may be observed that the Hague Convention on *Choice of Law in Trusts* cannot apply to constructive trusts.
29 See McLelland J. in the *Hospital Products* case [1982] 2 N.S.W.L.R. 797, 798; generally, R.W. White, "Equitable Obligations in Private international Law: The Choice of Law", (1986) 11 Syd. L.R. 92. *Cf. Chase Manhattan Bank* v. *Israel-British (London) Ltd* [1981] Ch. 105 which implicitly rejects the *lexfori.*
30 *Cf.* rule 170 in Dicey & Morris, *The Conflicts of Laws,* (11th ed., 1987), at p. 1079.

stering a Singapore trust in Singapore converts trust property in Malaysia to his own use, the breach occurs in Singapore but the *lex situs* would be Malaysian law. In cases of constructive trusteeship however, the *lex situs* would be meaningless.

(vi) the law of the place of business. This is a novel suggestion, but it would make sense where the rights of creditors may be affected.

It is tentatively suggested that a distinction must be maintained between breach of fiduciary obligations which results in a constructive trust being imposed and that which gives rise to purely personal remedies. Where proprietary remedies are available, the rights of creditors may be affected. It would be unfair to a creditor if he was pre-empted by the forum court declaring the existence of a constructive trust when either the *lex situs*[31] or the law of the place of business would not impose one. Different considerations apply to the constructive trusteeship. Here the "proper law" approach might be appropriate.

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31 McLelland J. thought that the question of the existence of a constructive trust of property in N.S.W. had to be governed by the law of N.S.W.

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