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RETHINKING THE PERSONAL AND PROPRIETARY DISTINCTION

The Sumitomo Bank Ltd v *Kartika Ratna Thahir & Ors*[1]

This article examines the emergence of the remedial constructive trust in Singapore, and the consequential need to rethink the distinction between personal and proprietary claims. The focus will be on the implications of the constructive trust for the insolvency or bankruptcy regime.

I. INTRODUCTION

THE decision of the English Court of Appeal in *Lister* v *Stubbs*[2] has for long been a problem in English law. Its supporters favour its conservatism regarding property rights, its emphasis on the distinction between "ownership and obligation",[3] in that it reflects the concern that the desire to protect principals and beneficiaries should not be allowed to prejudice the rights of creditors where there is no subtractive enrichment. Its adversaries think it inconsistent given the strict prophylactic approach the law takes to fiduciary obligations elsewhere.[4] The soul of *Lister* is being fought over by the strictures of property law and the structure of remedial equitable liability. Should it be that there is no bright line between the two, such that property law governs property rights, which is to be contrasted with pure equitable personal liability? It would appear not – in a landmark decision, the High Court of Singapore in the *Pertamina* case has acknowledged the emergence of the remedial constructive trust.

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1 [1993] 1 SLR 735 (hereafter the *Pertamina* case).

2 (1890) 45 Ch D 1.

3 *Ibid, per* Lindley LJ at 15. See further *Islamic Republic of Iran Shipping Lines* v *Denby* [1987] 1 Lloyd's Rep 367; RM Goode, "Property and Unjust Enrichment" in *Essays in the Law of Restitution A* (A Burrows ed, 1991); PBH Birks, "Personal Restitution in Equity" (1990) LMCLQ 128.

4 The argument is normally along these lines: A constructive trust was imposed in *Boardman* v *Phipps* [1967] 2 AC 46, and since the bribe situation is worse than the *Boardman* matrix, which involved a mere conflict of interest situation, a constructive trust must be imposed over the bribe. See R Goff & G Jones, *The Law of Restitution* (3rd ed, 1986).

The plaintiffs, an Indonesian State entity in the business of exploration, processing and marketing of oil and its related products set up a wholly owned subsidiary, PTKS. In 1973 and 1974, the latter entered into contracts with certain German construction companies for the building of steel works, amongst other projects. Pertamina remained in financial control of the project. The first defendant's husband, General Thahir, was a senior official and executive officer of the plaintiff company, authorised to contract on behalf of both the plaintiff and PTKS. At General Thahir's death on 23 July 1976, there stood in the joint names of the General and his wife, the first defendant, Kartika Thahir, enormous sums of money in numerous ACU accounts at the Singapore branch of the Sumitomo Bank.[5] These were the fruits of bribes received by the husband from the foreign contractors, partly to ensure that these foreign contractors were paid in preference to the other creditors of Pertamina or PTKS when the group was in difficulties.[6] Save for one account, the money was first paid into the General's sole accounts before being transferred into their joint accounts.

Personal actions aside, were the plaintiffs entitled to the money in specie? This was important given the large amounts of interest involved.[7] The first defendant's competing claim was as the survivor of the joint accounts. Lai J held that the plaintiffs were entitled to succeed on three grounds. First, the first defendant was liable for money had and received. Second, she was a constructive trustee for having received, as a volunteer, money impressed with a trust, *Lister* v *Stubbs* notwithstanding. Third, she was liable as a constructive trustee as she clearly had the requisite degree of knowledge to be implicated as an accessory in a dishonest and fraudulent breach of trust.[8]

A. *Conflict of Laws*

As a necessary preliminary, Lai J had to decide which law was to govern the question of entitlement, a classification and choice of law problem. This was palpably a vital concern since defence counsel argued that Indonesian

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5 DM 53,972,374.12 in seventeen ACU accounts were found by Lai J to be the proceeds of bribes. US$1,202,208.73 in another two were not, Pertamina having failed to satisfy the burden of proof in this regard, *supra,* note 1, at 781-782. The Deutschemark accounts were consolidated into a single US Dollar account in 1981.

6 Crucially, there was an oral admission by Mrs Thahir to General Moerdani, an official of the Indonesian government and later Minister of Defence and Security of Indonesia, that the Deutschemark deposits originated from the foreign contractors, *supra,* note 1, at 771-775. Following Romer LJ in *Hovendon & Sons* v *Millhoff* (1900) 83 LT 41 at 43, the presumption, unrebutted, was that this was a bribe.

7 By 27 March 1992, there had accumulated almost US$81.8 million in the ACU accounts.

8 *Supra,* note 1, at 783 and 784. See too *Barnes* v *Addy* (1874) 9 Ch App 244.

law had no concept of a fiduciary or trust or unjust enrichment, nor was the receipt of commissions per se unlawful there.

Where the common law claim was concerned, Lai J adopted the suggested choice of law solution of Dicey and Morris,[9] previously followed by Hwang JC in *Hongkong & Shanghai Bank* v *United Overseas Bank,*[10] in deciding that the proper law is the place where the ultimate enrichment occurs. But should the question of unjust enrichment not depend on the underlying transaction? Not, it seems, if the action is classified as one of common law money had and received, even where a contractual relationship is present.[11] We look only to the law of the place of receipt. Which then was the relevant point of receipt? The cheque was probably given to General Thahir outside Singapore before being paid into the Singapore branch of the Sumitomo bank. Still, Lai J found the ultimate receipt to be in Singapore. Conceivably, this was because the relevant receipt was by the bank, of the money, as agent for the General. Alternatively, the first defendant Kartika, really a subsequent recipient, only received it when the joint accounts were declared by the General. The first receipt, if relevant, was perhaps only an incidental question.[12] More likely, following the reasoning of Hwang JC in the *Hongkong Bank* case, the *ultimate* enrichment was in Singapore as the right to demand payment of the ACU deposit in cash was in Singapore, regardless of where the bank themselves chose to maintain their ACU funds or credits.

Where the constructive trust claim was concerned, Lai J held that equity acts *in personam* and that the *lex fori* governs issues of equity, *viz,* whether it exists, its nature and remedy, even if the latter were proprietary. The classification is somewhat parochial and the court was really avoiding the choice of law methodology. For example, why was unjust enrichment not the basis of the constructive trust, at least for the purposes of the conflict of laws, as it was for the money had and received action? If it were so, the law of the place of ultimate enrichment would be the choice of law rule for equitable restitution.[13] Furthermore, the use of the *lex fori* in *US Surgical Corp* v *Hospital Products,*[14] cited by plaintiff's counsel, was premised on the defendant being resident in the forum and offending the principles of equity administered by that forum. Put differently, the court

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[9] *The Conflict of Laws* (11th ed, 1987), at 1350, rule 203(2)(c).

[10] [1992] 2 SLR 495. See too *Re Jogia; Trustee in Bankruptcy* v *Pennelliar (D) and Co* [1988] 1 WLR 484 at 495.

[11] *Supra,* note 1, at 787. Lai J ignored the Dicey & Morris sub-classification of rule 203(2), which is that, where an 'obligation arises in connection with a contract', the *lex causae* is the proper law of the contract; *supra,* note 9. See now *Arab Monetary Fund* v *Hashim* [1993] 1 Lloyd's Rep 543.

[12] However, the court took the relevant receipt to be that of General Thahir.

[13] As Hwang JC held in the *Hongkong Bank* case, *supra,* note 10.

[14] [1982] 2 NSWLR 766.

was careful at the jurisdiction stage to choose the appropriate forum, so that the interest of the forum is quite evident there.

More traditionally, Lai J held that a constructive trust is governed by the *lex fori* as a procedural issue, it being a remedy. Even here it has been cogently argued that classifying the constructive trust as remedial and procedural distorts the substantive outcomes that result from the imposition of the constructive trust.[15] No doubt there are difficulties with the characterisation of the cause of action and the localisation of the enrichment but where the constructive trust is concerned, there is a strong argument that the *lex causae* should govern.[16] With a strict property approach this would be the *lex situs* of the debt, which would in any event have been Singapore law.[17] However, in *Chase Manhattan Bank* v *Israel British Bank,*[18] Goulding J characterised the equitable right to trace as a substantive issue to be decided by New York law, the *lex causae,* which was the law governing the underlying transaction, there a mistaken payment. Although the *lex causae* in this sense was probably not argued before the court in *Pertamina,* Lai J was somewhat troubled by defence counsel's argument that nothing unlawful had occurred under Indonesian law, which had at least as much an interest in the whole affair as did the law of the place of ultimate enrichment or the *lex fori.* Put differently, it was argued that there was nothing unjust about the enrichment under Indonesian law and that some deference should be given to the latter. Unfortunately, counsel did not go further with what was really an argument that Indonesian law should have applied as the *lex causae.*[19] Indeed, Lai J accepted the expert evidence that no action for unjust enrichment accrued against either the General or Mrs Thahir under Indonesian law.

II. Personal And Proprietary Claims

Traditionally, one either has a property right or one does not. The differences between proprietary claims and personal claims are manifold, and these

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[15] P Hay, "Unjust Enrichment in the Conflict of Laws: A Comparative View of German Law and the American Restatement 2d" (1978) 26 AJ Comp L 3 at 38.

[16] TW Bennett, "Choice of Law Rules in Claims of Unjust Enrichment" (1990) 39 ICLQ 136.

[17] A debt is situated in the place where the debtor resides. See Dicey & Morris *The Conflict of Laws, supra,* note 9, at 908, rule 115.

[18] [1981] Ch 105. See now *Arab Monetary Fund* v *Hashim, supra,* note 11.

[19] The way counsel argued for the applicability of Indonesian law is somewhat troubling and appears to be based on a double actionability requirement for a breach of fiduciary duty which is unlikely to be a tort. Ultimately, Lai J accepted that there were analogous causes of action under Indonesian law and that the defendant's title was taken through General Thahir and was thus null and void. Under Indonesian law, there would have been a breach of contract, tort, some kind of agency liability or violation of Indonesian Civil Code on the part of General Thahir.

include the ability resting with the former to ask for the subsequent profits made via the initial property; to trace against third parties; to avoid limitation periods[20] and to circumvent the consequences of illegal contracts.[21] Most important is the priority that property rights bring in the bankruptcy or insolvency context. There are thus continuous forces to elevate one's claim from the personal to the proprietary so as to extract property from a debtor's estate that is meant for distribution among its general creditors. In *Pertamina,* however, it was the claim for subsequent profits, the interest earned by the bribe, that emphasised the inadequacy of a personal claim.

A. *Money Had and Received*

Clearly an action for money had and received exists under Singapore law against General Thahir. Common law tracing is not relevant here in a two-party bribe situation, where restitution is sought for a wrong. Burrows has, however, pointed out that we have to guard against conflating the mistaken payments reasoning which partly underlies the action of money had and received with its proprietary reasoning, and that the latter reasoning comes to the fore in the three-party situation, where title to property has to be asserted and identified from the start to the final receipt.[22] Understandably, Lai J cut through this technical defence of the first defendant, Mrs Thahir, and dismissed her argument that Pertamina could not show, at the point of receipt by the defendant, the subsequent recipient, that the money was Pertamina's.[23] Furthermore, there is the issue of interest accumulated on the deposits. Lai J took a proprietary approach to the common law action, with the result that the common law claim carried with it subsequent receipts. Now, while it is true that it may have proprietary characteristics in insolvency, in that a personal action can be brought against the trustee in bankruptcy who receives money legally the claimant's, it is far from clear that one can claim for profits made with the bribe. However, in the *Hongkong Bank* case, Hwang JC also appeared to treat the common law action as one entitling the claimant to proprietary relief. The holding in these two cases, albeit novel to many of us today, may in fact be justified historically. This, though, is a difficult argument to sustain in the light of recent learning.[24]

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[20] As was attempted in *Metropolitan Bank* v *Heiron* (1880) 5 Ex D 319.

[21] *Sinclair* v *Brougham* [1914] AC 398.

[22] "Misdirected Funds-A Reply" (1990) 106 LQR 20.

[23] The common law action is analysed by Yeo Tiong Min in the forthcoming issue of the SJLS. He makes the argument that the restitutionary action in *Pertamina* was only justifiable on the grounds of tracing, using a complex exchange product argument; "Some Problems in Tracing and Three-Party Restitution".

[24] *Supra,* note 10, at 502-503; Hwang JC refers to the court's ability to grant a tracing order

B. *Constructive Trusts*

Conversely, constructive trusts are fashionable vehicles for establishing a proprietary claim, normally for priority in an insolvency context. From his conflict of laws analysis, Lai J seems to have taken an equitable or remedial approach to the constructive trust. However, from the arguments of counsel for the plaintiffs before Lai J on the substantive extant law, it was perhaps possible that the constructive trust in *Pertamina* was substantive rather than remedial.[25] First, counsel referred to those bribery cases which appeared to afford a property remedy, where there were "*unambiguous words of property*".[26] Those, though, were claims heard at common law, and are no more than proprietary talk for a personal action.[27] Second, there were other cases in equity, where the subject matter of the bribe was not money and a proprietary remedy was given.[28] No doubt money should not be treated any differently, but Lai J pointed out that many of those cases did not involve tracing actions but were claims for an equitable debt, a personal action. There was lax talk of a trust when it did not matter whether a personal or proprietary remedy was given; where the defendant was solvent. Third, a line of company law cases was referred to by counsel for Pertamina as 'property' cases, where a proprietary order was given to remedy a breach of fiduciary duty. These were also distinguishable by the fact that the subject matter of the claim did originate from the claimant. In modern terminology, there was a proprietary base, from which the claimant could found his

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whether the action lay at law or equity, relying on *Banque Beige* v *Hambrouck* [1921] KB 321. However, interest was not claimed in the latter case, and in fact Atkin LJ held that the common law action did not carry a proprietary order and was only a money judgment, see at 333-334. In *Sinclair* v *Brougham, supra,* note 21, Lord Parker assumed that a tracing order was available at common law. This, though, goes against the predominant textbook view of money had and received.

[25] There is no magic in the words substantive or remedial. See G Elias, *Constructive Trusts* (1991), at 163-164. Here substantive will be used in the sense that the qualifying conditions for the trust to arise are certain and full property effects are given. The trust arises independently of a court order. Remedial is the obverse. See also *Muchinski* v *Dodds* (1985) 62 ALR 429, 451, where Deane J pointed out that the remedial and institutional trusts do not differ if the principles in the former were worked out, in which case it would not matter what the label is.

[26] *Per* Lai J, *supra,* note 1, at 804.

[27] In *Morison* v *Thomson* (1874) LR 9 QB 480, the defendant was ordered to pay over an amount as money absolutely belonging to his employer but Lai J acknowledged that it was a common law action. It needs a big leap in reasoning to extend this to the situation in equity in that first, law and equity must have fused and second, the common law must afford proprietary remedies.

[28] *Fawcett* v *Whitehouse* (1829) 1 Russ & M 132. In *Metropolitan Bank* v *Heiron, supra,* note 20, at 325, Cotton LJ thought that previously there was an insufficient definition of what a breach of trust really was in certain situations.

property claim.[29] The problem in most bribe situations is that the most important qualifying condition of the substantive constructive trust, the proprietary base, can seldom be found, since the source of the bribe is a third party.

It is likely that the trust imposed in Pertamina was remedial for Lai J said that

> It follows that when any property is *declared* to be the subject matter of a constructive trust, the *imposition* of the trust by that mere fact will give the beneficiary proprietary interests in the property.[30]

Lai J further opined that the growth of the proprietary restitutionary remedy by the imposition of a constructive trust has been developing with increasing vigour only in the last quarter of a century, and *Lister* v *Stubbs* really is old law. This is only slightly surprising since, while English law has not formally recognised a remedial trust at any stage, there has been *dicta* to that effect.[31] It may also be argued that a remedial trust was imposed implicitly in *Boardman* v *Phipps* when Wilberforce J at first instance imposed a proprietary order over the profits made from an external source.[32] Lai J is quite right in that it would be unsatisfactory for a constructive trust to be imposed in the *Boardman* and not in the *Lister* factual matrix. However, Fox LJ in *Guiness* v *Saunders* thought that only the accounting measure was imposed in *Boardman.*,[33]

Plaintiff's counsel also referred to the extensive fraud that occurred and the fact that General Thahir was an extremely well-placed fiduciary. This sounds somewhat like Goff and Jones' reasoning regarding proprietary remedies being available against very bad fiduciaries but this has led non-restitution lawyers to refer to the "history of well-meaning sloppiness of thought" that characterised restitution law.[34] Ultimately, as Lai J recognised,

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[29] *Eden* v *Ridsdale Railway Lamp and Lighting Co Ltd* (1889) 23 QBD 368; *In Re Morvah Consols Tin Mining, McKay's* case (1875) 2 Ch D 1.

[30] *Supra,* note 1, at 795.

[31] See *Metall und RohstoffAG* v *Donaldson Lufltin & Jenrette Inc* [1989] 3 WLR 563, 621, which classified the constructive trust in the *Boardman* matrix as remedial, but perhaps only for jurisdictional purposes.

[32] [1964] 1 WLR 993. On a substantive trust analysis this can only be the case if we grant information property status. For an economic approach to this problem, see F Easterbrook, "Insider Dealing, Secret Agents, Evidentiary Privileges and the Production of Information" (1981) 11 Supreme Court Rev 309.

[33] [1988] 1 WLR 863 at 870. Birks has further pointed out that Wilberforce J was not all that unequivocal; see *supra,* note 3, at 129.

[34] See R Goff & G Jones, *The Law of Restitution* (3rd ed, 1986). The quote is from Scrutton LJ in *Holt* v *Markham* [1923] 1 KB 504 at 513. This though was about common law money had and received. See also Lord Greene MR in *Morgan* v *Ashcroft* [1938] 1 KB 49 at 62.

Lister v *Stubbs* is not binding on the Singapore courts. This is really quite a refreshing assertion, and opens the door to a law more reflective of our own ideals. Besides, the reality is that the precedent-based English common law methodology leads to openness and choice here. That, though, calls for a greater discussion of policy issues and how other jurisdictions view the matter, as will be seen later.

It was found that there was a correlation between payments to the foreign companies by Pertamina and the passing of cheques to General Thahir, the latter sums being a percentage of the former.[35] This then went into the ACU accounts at Sumitomo Bank. Could the veneer of property law and equitable tracing have been used to found a proprietary remedy? After all, the principal must have paid a greater price due to the bribee not having acted in the best interests of the principal. Quite rightly, Lai J did not carry this train of thought further. The argument lacks candour in that we have to say that some money, the property of the plaintiff in excess of the real value of the asset purchased, has been misapplied by the fiduciary to gain the bribe, the exchange product for himself, so that it still falls within the proprietary base.[36] There is also the need for a setting aside of the agreement before one can claim the property .back.[37]

If General Thahir were a constructive trustee of the bribe for Pertamina, his wife, the first defendant, clearly took the property subject to Pertamina's interest since she was not equity's darling. This is just proprietary tracing. Slightly more vexing is Lai J's suggestion of another way of imposing a constructive trust on Kartika Thahir directly. This is via knowing assistance with the requisite knowledge in a dishonest and fraudulent design.[38] However, in this situation, liability is more tortious than restitutionary. Further, it is hard to see how the claim can be proprietary when there is no receipt of trust property. Even in the United States of America ("USA"), where the remedial constructive trust originated, the knowing assistor is

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[35] There was a one in 500,000 chance of that happening fortuitously, according to the expert evidence; *supra,* note 1, at 781.

[36] See further AW Scott & WF Fratcher, *The Law of Trusts* (4th ed, 1989), s 502. It is just as artificial to say that information or corporate opportunities are property rights. Professor Goode feels that these soft assets are deemed agency gains and the constructive trust that is imposed over it is really remedial, *supra,* note 3.

[37] See *Daly v Sydney Stock Exchange Ltd* (1986) 65 ALR 193; *Abdul Ghani El Ajou* v *Dollar Land Holdings* (as yet unreported, 12 June 1992). After the setting aside of the contract, the equitable title is treated as having been vested in the claimant for the purposes of tracing. However, in the *Banque Beige* case, *supra,* note 24, at 332, Atkin LJ pointed out that a voidable title is set aside when the claim is brought. Yeo, *supra,* note 23 argues that *Pertamina* can be analysed in terms of tracing the money, at common law, and hence *a fortiori* in equity, from the hands of the principal Pertamina to Kartika through an exchange product argument, *dehors* the contract.

[38] *Barnes* v *Addy* (1874) 9 Ch App 244.

normally only personally accountable.[39] Calling such liability constructive trusteeship is a misnomer. It is no more than a personal liability to account in equity. Presently, there are signs of a more fastidious use of terminology due to the ramifications of imposing a property right[40] in such situations.

Interestingly, Lai J suggested that for a constructive trust to arise there is a need to prove a fiduciary relationship. From our experience with this requirement in equitable tracing, however, this is no check on the constructive trust concept, and is no more than an *ex post facto* rationalisation.[41] The argument will be made that the concept and its consequences have still to be reined in.

III. Policy Ramifications of The Constructive Trust

Most of our policy concerns have to do with the insolvency or bankruptcy process given that Jacksonian theory is that pre-bankruptcy entitlements should not be altered in an insolvency context, as that would give people the incentive to trigger off the insolvency processes to reorder their rights.[42] With such concerns in the background, we will now look at arguments in favour of imposing a constructive trust over bribes which are 'false starts'.

One argument is that with the constructive trust imposed on the seller of land, there is no proprietary base until the imposition of the constructive trust, so that not requiring one in the bribe situation is not inconsistent with present jurisprudence. However, the purchaser-interest constructive trust is visible through the device of registration. Registering all constructive trust interests is an impossible panacea and we have to accept that many are really secret liens. Further, any argument that the creditors of the bribed debtor do not deserve to have their common pool inflated by the bribe ignores the fact that creditors could have dealt with the bribed debtor in reliance on the latter's ostensible property holdings or balance sheet, which included the bribe or its exchange product. Besides, not all unsecured creditors have taken the risk of the debtor's insolvency. The tort victim is the much-used example. Conversely, why should the social costs be borne by the unsecured

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[39] See GG Bogert & GT Bogert, *The Law of Trusts and Trustees* (2nd ed, 1978), ch 43; AW Scott, *Law of Trusts* (3rd ed, 1967), ch 9 topic 3. In fact one could assist in a breach of fiduciary duty where no trust property is involved. See *DPC Estates* v *Consul Developments Pty Ltd* (1975) 132 CLR 373.

[40] See Millett J's introduction in *Commercial Aspects of Trusts and Fiduciary Obligations* (E McKentrick ed, 1991).

[41] See F Oditah, *Legal Aspects of Receivables Financing* (1991), at 93 where he argues that the existence of a fiduciary relationship is a consequence rather than a pre-requisite of tracing. See also *Sinclair* v *Brougham, supra,* note 21; *Chase Manhattan NA* v *Israel British Bank Ltd, supra,* note 18.

[42] TH Jackson, *The Logic and Limits of Bankruptcy Law* (1986).

creditors when a beneficiary may himself have taken the risk of his fiduciary's insolvency?[43]

The Cork Committee on Insolvency Law and Practice has pointed out that, as it is, unsecured creditors get very little in an insolvency.[44] With the liberal acceptance of secret liens, in the longer run, the cost of unsecured borrowing will increase, offsetting any economic advantages gained by the creation of transparent security in the first place.[45] The proliferation of secret liens could also mean that bankruptcy reorganisation would not be triggered off at the right time, and could even be frustrated since secret liens do not show up as a balance sheet liability. Professor Goode has documented the breakdown of German insolvency law due to the widespread existence of secret liens.[46]

Secret liens are especially pernicious in the context of international insolvency. A world-wide common pool problem could result, with a multifarious number of secret liens recognised by one forum and not another. The concept of unity of bankruptcy, which presupposes the administration of a cross-border insolvency in one forum, would be even more remote. Reorganisation or even going-concern liquidation would be impossible since few nations would send the debtor's property to the seat of bankruptcy if that would jeopardise the claims of their priority creditors. In fact the Strasbourg Convention, the most recent multilateral treaty in international insolvency, only envisages the transfer of assets to the main forum net of secured and preferential claims in the situs.[47] To achieve the first best solution, there is a need for the approximation of laws and this involves the restriction of the constructive trust concept since many nations do not recognise it.

The standard boilerplate argument with fiduciaries is that there is institutional harm caused even if there is no personal harm suffered by a beneficiary where a fiduciary breaches his duty of loyalty.[48] English courts, however, do not feel that this outweighs the need to protect the unsecured

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[43] However, to have everything depend on the question of risk is untenable: see DM Paccioco, "The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors" [1987] Canadian BR 315 at 325, note 48.

[44] (Cmnd 8558 of 1982) paras 233, 1396-7, 1478-80, 1485-8, 1609, 1634. In fact it was suggested that 10% of the assets covered by the floating charge be set aside for the unsecured creditors.

[45] See TH Jackson and A Kronman, "Secured Financing and Priorities Among Creditors" 88 Yale LJ 1143 (1979), *cf* A Schwartz, "Security Interests and Bankruptcy Priorities: A Review of Current Theories" (1981) 10 J Legal Studies 1.

[46] "The Death of Insolvency Law" (1980) Vol 1 The Company Lawyer 123 at 128.

[47] The European Convention on Certain International Aspects of Insolvency, Art 14, European TS No 136 (1990). See further JH Dalhuisen, *International Insolvency and Bankruptcy* (1986).

[48] As IM Jackman, "Restitution for Wrongs" [1989] CLJ 302 points out.

creditor. The integrity of the facilitative institutions of society does not necessitate the punishment of the fiduciary's unsecured creditors. The remedy ought to target the wrongdoer and this can be achieved efficiently by making the wrongdoer *personally* liable not only for the principal profits that he gained but also all subsequent profits that he made through his efforts with the initial gain. Prophylactic considerations are satisfied in this way.[49] Even if we feel that the fiduciary relationship is some kind of quasi-property right, there is no reason why all the incidents of property should be associated with it. Put differently, it is better to categorise it as a remedial constructive trust and truncate its full property consequences where circumstances demand it.

Professor Goode has pointed out that to "strengthen the equitable rights to trace by expanding the constructive trust along American lines...is to tinker with a problem of much wider implications"[50] "Fraud" becomes "trust" which becomes "property" irrespective of what was intended."[51] Yet his fears of American constructive trust jurisprudence are not mirrored in other Commonwealth jurisdictions. Australia and New Zealand seem to be developing in the direction pioneered by the USA with unconscionability as the basis of its remedial constructive trust.[52] However, it is not without its critics; for one, unjust enrichment in Canada as a cause of action has been criticised by Justice Gummow for not offering any guidelines for distinguishing personal from proprietary remedies.[53]

Yet the association of the free ranging constructive trust with American law may not be strictly accurate. The Federal courts have cut back on the constructive trust, a state law concept, with the requirement of tracing.[54] It has also been held that the conversion of the mere equity to an equitable interest is too late post-commencement of insolvency proceedings because the bankruptcy provisions only exclude "[p]roperty in which the debtor holds, as of the commencement of the case, only legal title...."[55] Put

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[49] PBH Birks, "Personal Restitution in Equity" (1990) LMCLQ 128 at 134.

[50] "The Right to Trace and its Impact in Commercial Transactions II" (1976) 92 LQR 528 at 565.

[51] JD Davies, "Constructive Trusts, Contract and Estoppels: Proprietary and Non-Proprietary Remedies for Informal Arrangements Affecting Land" (1980) 7 Adel LR 200 at 212.

[52] Millett J actually favours this development; see *Lonrho plc* v *Fayed (No 2)* [1991] 4 All ER 961 and cases discussed therein, especially *English* v *Dedham Vale Properties Ltd* (1978) 1 WLR 93. For the remedial trust in Australia see *Daly* v *Sydney Stock Exchange* (1986) CLR 371; *Muchinski* v *Dodds, supra,* note 25. For New Zealand, see *Elders Pastoral* v *Bank of New Zealand* [1989] 2 NZLR 180.

[53] "Unjust Enrichment, Restitution and Proprietary Remedies" in *Essays on Restitution* (PD Finn ed, 1990) ch 3, at 75, commenting on *Pettkus* v *Becker* (1980) 2 SCR 834; 117 DLR (3d) 257.

[54] *Re USN Co* 32 Bankr 675 at 678 (Bankr SDNY 1983); *Re Black & Geddes Inc* 35 Bankr 830 (Bankr SDNY 1984).

[55] S 541 (d) Bankruptcy Code, USC Title 11.

differently, it has treated the remedial constructive trust as having only prospective effect. To be sure, US Federal Bankruptcy law may have gone too far since even the substantive institution could be wiped out by the Trustee in Bankruptcy being put into the position of a bona fide purchaser for value without notice as of the commencement of the case.[56] The Federal Courts of Appeal are not unanimous on this latter development, and it is now for the Supreme Court to lend its voice to the issue. Clearly, though, it seems that the property label may not always carry all the traditional incidents of property in the USA. The *pari passu* principle is a constant countervailing concern.

Furthermore, once we accept the remedial constructive trust, the next logical step is to relax tracing rules still further. If identification is not important for the constructive trust, then still to require it for tracing is not satisfactory.[57] We appear to be headed that way. Liberal use has been made of the charge over a mixed fund, in that once property enters a mixed fund all subsequent withdrawals will taint other mixtures.[58] Tracing has also been possible through an intermediary even though the intermediary first paid out its own money to the defendants before the plaintiff's money was received by the intermediary.[59] In the *Hongkong Bank* case. Hwang JC allowed the plaintiffs to trace their money into the hands of the defendant bank even though it was an ACU account and any US Dollars deposited in the account were probably in the New York Clearing System.[60] In addition, the money was mixed by the defendant bank.[61] Hwang JC referred to the

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[56] S 544(a) Bankruptcy Code, USC Title 11.

[57] Anomalously, J Glover, "Bankruptcy and Constructive Trusts" (1991) Aust Bus Law Rev 98, while commenting on the Australian law of constructive trusts accepted that identification is still needed for tracing, despite not having the same requirement for the remedial constructive trust. PBH Birks argues that the right to trace is akin to a floating charge, which only crystallises when the power to vest property in oneself is exercised; *An Introduction to the Law of Restitution* (1985), at 92.

[58] The "victims of fraud can follow their money in equity through bank accounts where it has been mixed with other moneys because equity treates the money in such accounts as charged with repayments of their money" *per* Millett J in *Abdul Ghani El Ajou* v *Dollar Land Holding* (as yet unreported, 12 June 1992). Can we however, as Millett J does, call this an institutional resulting trust? PBH Birks points out that in the USA it is so theorised, *Commercial Aspects of Trusts and Fiduciary Obligations* (E McKentrick ed, 1991), ch 8, at 157.

[59] See *Agip (Africa) Ltd* v *Jackson* [1991] 3 WLR 116.

[60] [1992] 2 SLR 495. Actually there was probably no physical money involved, merely a set of debits and credits in the CHIPS or Fedwire system.

[61] This is the *Space Investments Ltd* v *Canadian Imperial Bank* [1986] 1 WLR 1072 problem since the usual tracing presumptions in *Re Hallett's Estate* (1880) 13 Ch D 696 are of little help in multi-party mixing, the classic example of which is when a bank mixes trust money with money belonging to itself and its depositors. Lord Templeman would impose a charge over all assets, ununcumbered, belonging to the bank. This is rather drastic. See now

authority of *Banque Beige pour l'Etranger* v *Hambrouck* but there the plaintiffs were not tracing against Spanoque's Bank but really against the account of Spanoque.[62] The tracing was against the chose in action that was fed. We may need to be careful not to create too onerous a form of liability where banks are concerned. As things already stand, commercial banking is really a volume business. Besides, fault-based personal actions of knowing receipt or assistance would be otiose since there is a better proprietary remedy which is strict, and which awards a charge over all the unencumbered assets of the bank as suggested in *Space Investments,* and is thus not premised on the continued identifiability of property. Perhaps one way out is to say that banks provide valuable consideration.

The argument that secret liens frustrate the free flow of assets is not new.[63] *Lister* v *Stubbs is* a reflection of the view that what sets up a personal liability should not also bring about an equitable proprietary liability for fear that Pandora's box will be opened. It reinforces Dawson's "rudimentary psychology" that "loss done is a grievance. But if this loss can be located and identified in the gain received by another, the anguish caused by the loss will be felt as more than doubled."[64] This is the guiding principle behind the substantive constructive trust, the need for a proprietary base. After all, reified property is reflective of the personality of the owner. But Lai J is sensitive to the fact that the law has gone beyond protecting hard assets. So called 'soft assets' are stretching substantive trust concepts to a breaking point, and it is artificial to say that information or corporate opportunities are species of property.[65] Professor Goode acknowledges that with soft assets, the trust is really remedial. He is of the view that no such trust arises in a bribe situation.[66] This, however, is a distinction without a difference. If we can accept that a remedial constructive trust arises in the former category, then it is the unconscionable denial of another's interest that gives rise to a constructive trust rather than a proprietary base. The

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Westdeutsche Landesbank Girozentrale v *The Council of the London Borough of Islington* (judgment of Hobhouse J, as yet unreported, 12 February 1993); noted by A Burrows (1993) 143 NLJ 480.

62 [1921] 1 KB 321. Employee(A) of Banque Belge(B) fraudulently obtained money of B by way of cheques made payable to A without the authority of B. The money ended up in the account of A's mistress Mlle Spanoque, after having been mixed in A's own account. Mlle Spanoque's bank paid the money into court and thereby disassociated itself from the action. Bankes LJ at 328 said that the tracing was against the customer and not the bank.

63 W Goodhart & G Jones, "The Infiltration of Equitable Doctrine into Commercial Law" (1980) 43 MLR 489, at 512 and 513.

64 *Unjust Enrichment: A Comparative Analysis* (1951).

65 *Keech* v *Sandford* (1726) Sel Cas t King 61; *English* v *Dedham Vale Properties Ltd* [1978], *supra,* note 52.

66 RM Goode, "Property and Unjust Enrichment", *supra,* note 3.

classification of deemed agency gains and bribes is thus not sufficiently rigorous.[67]

IV. CONCLUSION

The truth is that we have not really learned how to deal with modern forms of property such as the chose in action, which has not altogether shaken off its early conception as a mere right of action, or quasi-property, *viz,* information, or corporate opportunities. Perhaps we should accept that there is no property characteristic that is common to all forms of property. Rather, like the fiduciary institution, with its different standards of duties, there are various forms of property that carry within them different bundles of rights. There is therefore a need for a rethinking, where the remedial constructive trust is concerned, of the personal and proprietary distinction. While, it is true that *Lister* v *Stubbs* is not binding on us, the alternative should not be one of two polarised extremes – property or no property. Indeed, the way forward may be to split up the bundle of rights or remedies associated with the constructive trust label. Cotton LJ appeared to do this in *Metropolitan* v *Heiron* where the plaintiff attempted to ground his claim in breach of trust in order to evade the Statute of Limitations. He opined that the bribe situation was

> very different from the case of the *cestui que trust* seeking to recover money which was his own before any act wrongfully done by the trustee. The whole title depends on its being established by a decree of a competent Court that the fraud of the trustee has given the *cestui que trust* a right to the money, and although no time will run in such a case till the *cestui que trust* knows of the fraud, yet a Court of Equity, whether by analogy or in obedience to the statute, will hold such a claim barred if the *cestui que trust* stands by and takes no proceedings for six years from the time when he became aware of the fraud.[68]

In other words, the remedial constructive trust is no good as far as the limitation period is concerned.

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[67] In *Metropolitan Bank* v *Heiron, supra,* note 20, Brett LJ felt that a bribe situation was different from other cases where had the fiduciary had been honest he would have paid money over to the principal. Here if he had been honest he would never have received it. However, why can we not go even further with the presumption of honesty gleaned from *Re Hallett's Estate, supra,* note 61 and *Re Oatway* [1903] 2 Ch 356? One could argue that there is no difference between a duty to acquire something for your principal and a duty to transfer something to your principal. In other words, the fiduciary is presumed to be so honest that he will not deny that he is really taking the bribe for the principal.

[68] *Supra,* note 67, at 325.

There are further signs that property rights may vary with the factual matrix. In *Polly Peck* v *Nadir,*[69] Scott LJ held that tracing property in the commercial context against a third party depended on that third party having the requisite knowledge of the claimant's equitable interest. This cuts a swath through well-enshrined property law that equitable rights bind the world except for the bona fide purchaser for value of the legal estate without notice. What we now call property does not appear any longer to be sacrosanct. This, though, really shows that labels do not count. What we have to do is to work out the qualifying conditions for foreseeable corresponding consequences to arise.[70]

However, there may be problems as to which property rights arise in the various situations. Certainty is a great component of justice. The alternative is a nightmare in terms of litigation as the law gravitates towards greater efficiency. Even in striving for certainty there is a lot of work to do, especially in the earlier stages of the concept. We should guard against conflating the proprietary with the personal by equating equity with proprietary. The reality is that liability is sometimes personal, and this is so for common law money had and received, or knowing assistance. More freely available property characteristics like the right to subsequent profits should be divorced from other, more far-reaching incidents of property, priority in bankruptcy being one.[71] In *Pertamina,* Lai J took the conventional route and held that full property effects were attached to the constructive trust. "The property, in consequence, does not form part of the assets of the trustee in the case of the trustee's insolvency."[72] It has, however, been argued previously that third party interests should be factored in. In the insolvency context, there are two ways to do this. At the pre-bankruptcy stage we could work out the various incidents of property that are attached to a particular form of constructive trust. Or, we can leave it to the insolvency regime, as is the case in the USA. Professor Goode has suggested that we do the latter with remedial trusts via the use of preference laws.[73] The problem is the need for some *mens rea* in English preference laws which cannot be found with a court-declared remedial constructive trust.

Further questions remain to be answered after Lai J's important recognition of the remedial constructive trust in Singapore. Is the remedial trust to be retrospective or prospective? The latter is more transparent and we would be less worried about granting full property effects were this the

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[69] [1992] 2 Lloyds Rep 238.

[70] See A Ross, "Tu-tu" (1957) 70 Harv L Rev. 812; F Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35 Colum L Rev 809.

[71] Birks, "Personal Restitution in Equity", *supra,* note 49.

[72] *Supra,* note 1, at 795.

[73] Goode, *supra,* note 3.

case.[74] When does the substantive institution which is not reliant on a court order arise, with all its consequential property rights? What has also to be worked out is the purely personal liability side of the remedial trust, in that (1) its role would be lessened but (2) liability could be strict as well. Suggestions have already been made that the action for common law money had and received and knowing receipt should be unified, and both squared with the proprietary tracing action.[75]

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[74] Bogert, *supra,* note 39, § 472 feels that the remedial trust is retrospective in the USA, in which case its effects are as severe as the institutional trust, where at least the principles are more certain.

[75] *Abdul Ghani El Ajou* v *Dollar Land Holding, supra,* note 58. Millett J suggested that they all turn on the doctrine of notice. But that is really the flip side of strict liability where the innocent volunteer is concerned.

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