Singapore Journal of Legal Studies
[1996] 608 – 617

SWAPS: COMPOUND INTEREST AND EQUITABLE PROPRIETARY INTERESTS

Westdeutsche Landesbank Girozentrale v *Islington London Borough Council*[1]

Background

AN interest rate swap agreement between the council and the bank was to run for 10 years from 18 June 1987, with interest to be calculated on a notional principal sum of 25 million pounds payable half-yearly. The bank was the fixed rate payer at 7.5% per annum and the council was the floating rate payer at the domestic sterling London Interbank Offered Rate (LIBOR). The bank also paid to the council, upfront, on 18 June 1987, 2.5 million pounds, which lowered the rate payable by the bank from 9.43%, so that it was almost certain that the bank would be 'in the money' over the relevant period. Simply put, the council was going to be the net payer; with fluctuations in interest rates determining how much it had to pay to the bank. These swaps are in law wagers but they were excluded from the Gaming Acts by section 63 of the Financial Services Act 1986. In substance, they served as a loan by the bank to the council.[2] Over the first two years of the agreement, the council made 4 payments totalling 1.35 million pounds, before refusing to make further payments when the Divisional Court, and then subsequently the House of Lords in *Hazell* v *Hammersmith and Fulham LBC*[3] ruled such agreements *ultra vires* the building societies.

It was accepted by Hobhouse J at first instance and the Court of Appeal that the bank could not, at common law, recover the difference between the payments they received and the initial 2.5 million pounds they paid

1 [1996] 2 WLR 802.
2 The bank hedged their position using a similar agreement with Morgan Grenfell.
3 [1990] 2 QB 697; [1992] 2 AC 1.

on the basis of a total failure of consideration.[4] When referred to in this sense consideration is not legal consideration (which does not exist since the agreement was *ultra vires* and void) but actual benefits received under the purported agreement. Hobhouse J held that there was little authority which supported partial failure of consideration as a recognised 'unjust' factor for restitution.[5] However, his Lordship held that the money was recoverable due to the absence of legal consideration, relying on a series of annuity cases, as well as *dicta* of Lord Browne-Wilkinson in *Woolrich Equitable Building Society* v *Inland Revenue Commissioners*.[6] *Sinclair* v *Brougham*,[7] which denied an action in money had and received on an *ultra vires* deposit arrangement with a building society, was distinguished as a borrowing contract intended to create a debtor/creditor relationship.

The Court of Appeal affirmed,[8] with Dillon LJ, however, also adopting the concept of severance and holding that there was a total failure of consideration in respect of the balance of the money.[9] Although liability at common law was not appealed further, Lord Goff cast some doubt on absence of consideration as a ground for recovery, taking possibly a more generous view of total failure of consideration,[10] although it is not quite as certain what Lord Browne-Wilkinson's position was.[11] Both their Lordships also thought that the reasoning in *Sinclair* was premised on an outmoded view of restitution based on implied contract. [12]

4 [1994] 4 All ER 890; [1994] 1 WLR 938 (CA). At first instance, there was an action against Sandwell LBC, which did not proceed beyond the High Court, in which there was a total failure of the 3rd and 4th swaps under which only the bank had made any payments.

5 His Lordship also rejected a common law claim based on mistake of law.

6 [1993] AC 70 at 197, see also Lord Goff at 166; *cf* Burrows (1993) 143 NLJ 480, who feels that language used was "circular and unhelpful" and highlights the danger that all gifts are now recoverable, although Hobhouse J was probably concerned only with void contracts. Even there, Burrows points out the conflict with authorities such as *Sinclair* v *Brougham* [1914] AC 398 and *Rover International Ltd* v *Cannon Films Sales Ltd (No 3)* [1989] 1 WLR 912 at 923-4 (Kerr LJ).

7 *Ibid*.

8 [1994] 1 WLR 938 at 952-3 (Leggatt LJ); 944-5 (Dillon LJ), relying also on *Barclays Bank Ltd* v *WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (Robert Goff J).

9 *Ibid*, at 945, following Lord Wright in *Fibrosa-Spolka Akcyjna* v *Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 64-5. See also *dicta* of Lord Goff in *Goss* v *Chilcott* [1996] 3 WLR 180 at 188.

10 Lord Goff, *supra,* note 1, at 808.

11 Although his Lordship would probably also accept a broader view of total failure of consideration: "the consideration for one party making a payment is an obligation on the other party to make counter-payments over the whole term of the agreement", *supra,* note 1, at 834. But see Birks [1996] *Restitution Law Review* 1 at footnote 21.

12 Although Lord Goff thought that public policy might still preclude a personal claim in restitution, so that he was reluctant to overrule *Sinclair* v *Brougham* on the issue of equitable proprietary interests, *supra,* note 1, at 813.

The Decision of the House of Lords

The principle issue before the House of Lords was whether compound interest was payable on the sum of money owed by the council to the bank. Both Hobhouse J and the Court of Appeal had held that the result determined at common law could be achieved in equity: the money paid over pursuant to the void contract was held on resulting trust for the bank. Hobhouse J regarded the classification of mistakes of fact or of law as not fundamental in equity, and that it was unconscionable for the recipient to retain the money.[13] Consequently, the council was in a fiduciary position and the courts invoked the equitable jurisdiction to award compound interest on the money received, with the Court of Appeal varying Hobhouse J's order and prescribing interest to run from 18 June 1987, the moment of receipt. The House of Lords, by a majority of 3-2, held that compound interest was not payable.

Lord Goff and Lord Woolf dissented. Where the proprietary claim was concerned, Lord Goff did not feel that broad statements of principle were apposite; confining himself instead to the facts at hand. He considered *Sinclair* v *Brougham*, which had been central to the bank's case, and determinative at both first instance and the Court of Appeal, irrelevant. In *Sinclair*, a building society conducted a banking business, taking deposits, which turned out to be *ultra vires*. The society became insolvent, and its remaining assets had to be distributed between the *ultra vires* depositors and holders of permanent shares. Given the then prevailing view of money had and received as quasi-contractual, the House of Lords held that the depositors were not entitled to such a claim. Instead, Viscount Haldane and Lord Atkinson held that there arose in the circumstances, "a resulting trust, not of active character", although the society was free to use the money as it pleased.[14] Lord Parker thought that the directors of the society received the money as fiduciaries, so that the depositors could trace their money into the assets of the society.[15] In *Westdeutsche*, Lord Goff could not see

[13] [1994] 4 All ER 890 at 937. His Lordship imposed a charge over all the society's assets even though some of the bank's money had been paid into accounts which were subsequently overdrawn, as the burden was on a fiduciary to show that the money was dissipated, citing *Madras Official Assignee* v *Krishnaji Bhat* (1933) 49 TLR 432. See also *Lupton* v *White* (1808) 15 Ves 432; *Space Investments Ltd* v *Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072 (PC). The Court of Appeal did not discuss this issue as bank was solvent, but it is unlikely that this aspect of Hobhouse J's decision will find much support presently, see *Goldcorp Exchange Ltd (in rec)* [1995] 1 AC 74; *Bishopsgate Investment Management Ltd (in liq)* v *Homan* [1994] 3 WLR 1270.

[14] *Supra*, note 6, at 421, 423.

[15] *Supra*, note 6, at 441-2.

how a fiduciary relationship could have arisen on the facts of *Sinclair*; instead he preferred to see that *Sinclair* laid down no general principle but was instead guided by the impulse to practical justice.[16] On the facts of *Westdeutsche* he agreed with Lord Browne-Wilkinson that no resulting trust arose.

Despite this, Lord Goff and Lord Woolf found for the bank on the issue of compound interest. Their Lordships took the view that what appeared to be restrictions on the award of compound interest in equity laid down by Lord Brandon of Oakbrook in *President of India* v *La Pintada Compania Navigacion SA*[17] went to discretion, not jurisdiction. Lord Goff thought that this was a case where equity should act in aid of the common law; Lord Woolf likened it to the discretionary grant of specific performance. Both their Lordships held that the discretion should be exercised in order to achieve full restitution: "Equity, in the case of both simple and compound interest, will look at the benefit which the payee has derived."[18] Given that the House of Lords in *National Bank of Greece SA* v *Pinios Shipping Co No 1*[19] had sanctioned the banking custom of charging compound interest, the benefit derived by the council was not having to borrow elsewhere at such interest.[20] The weight to be attributed to their dissenting speeches is, however, weakened by the fact that the council did not fully argue its case. Lord Lloyd, in particular, did not quite approve of Lord Goff's unprompted reference to the decision of the Australian High Court in *Hungerford* v *Walker*,[21] which supports the view that compound interest can be awarded when justice so demands.[22] Further, the anomaly highlighted by their Lordships in the judgment of Hobhouse J in *Kleinwort Benson Ltd* v *South Tyneside Metropolitan Borough Council,*[23] where the equitable jurisdiction to award compound interest was restricted to cases where the claim was proprietary in nature, as distinct from a personal liability to make restitution, already exists elsewhere.[24]

Lord Browne-Wilkinson (with whom Lord Slynn and Lord Lloyd agreed)

16 *Supra*, note 1, at 810-813. According to Goff and Jones, *The Law of Restitution* (1st ed, 1966) at 43, *Sinclair* v *Brougham* "is a case which is support for any proposition but authority for none".

17 [1985] AC 104 at 116.

18 Lord Woolf, *supra,* note 1, at 852.

19 [1990] 1 AC 637.

20 *Supra,* note 1, Lord Goff at 816, Lord Woolf at 842.

21 (1989) 171 CLR 125 at 148 (Mason CJ, Wilson J).

22 *Westdeutsche*, *supra*, note 1, at 860.

23 [1994] 4 All ER 972.

24 S*upra,* note 1, Lord Goff at 819-821; Lord Woolf at 849-852, but see in the context of knowing receipt and tracing, *Re Montague Settlement Trusts* (1987) Ch 264, *Yogambikai Nagarajah* v *Indian Overseas Bank* (Singapore CA), *infra,* note 49. But compare *Abdul Ghani El Ajou* v *Dollar Land Holdings* [1993] 3 All ER 717 at 739-740, *Polly Peck* v *Nadir* [1992] 2 Lloyd's Rep 238.

viewed Lord Brandon's *dicta* differently. His Lordship thought that the authorities established that, in the absence of fraud, equity only awarded compound interest against a defendant trustee or one in a fiduciary position in order to recoup an improper profit made by him.[25] It was not appropriate for equity to aid the common law where Parliament had refused to authorise the court to award compound interest in the exercise of its common law jurisdiction. Consequently, it was vital to the bank's claim that they had retained an interest in the 2.5 million pounds initially paid over. After an extensive review of the relevant authorities and academic commentaries on the matter, Lord Browne-Wilkinson decided that there was no resulting trust of the initial payment. His Lordship was concerned that the liberal importation of equitable proprietary principles into commercial law would create the uncertainty of unseen liabilities behind every balance sheet which the recipient may not know of. Lord Lloyd was a more recent convert to this view.[26]

Reverting to first principles, Lord Browne-Wilkinson held that equity works on the conscience of the owner with the legal interest.[27] To be a trustee of property, the recipient cannot be ignorant of facts alleged to affect his conscience.[28] In *Westdeutsche*, the 2.5 million pounds was identifiable up to the time the local authority's account went into overdraft in late June 1987. At that time, it was still unaware of the circumstances which could give rise to a resulting trust. Lord Browne-Wilkinson thought that in *Sinclair* v *Brougham*, the judges were only dealing with the due administration of assets of a company in liquidation, where there were no competing claims. Like Lord Goff, he also found Viscount Haldane and Lord Parker's speeches flawed. His Lordship thus overruled *Sinclair* as it pertained to substantive proprietary rights. The decision of Goulding J in *Chase Manhatten Bank NA* v *Isreal British Bank (London) Ltd*[29] was justified on the grounds that the defendant bank knew of the mistake made by the paying bank within two days of the receipt of the moneys, [30] although it did nothing for a month before successfully petitioning for a voluntary winding up.

25 *President of India*, *supra*, note 17, at 116.

26 "As one who has in the past attempted to keep open the availability of equitable remedies in commercial disputes, I am now conscious of the strength of the arguments the other way", *supra,* note 1, at 862.

27 *Supra*, note 1, at 832.

28 Unconscientious receipt could differ from the substantive action in unconscionability; Birks and Chin, "On the Nature of Undue Influence" in Beatson and Friedman ed, *Good Faith and Fault in Contract Law* (1995) Ch 3.

29 [1981] Ch 105.

30 Although Goulding J himself had thought this irrelevant. Lord Goff declined to comment on *Chase Manhatten*, *supra*, note 1, at 815. But see *Bank Tejarat* v *Hong Kong and Shanghai*

Analysis of Equitable Proprietary Interests

Millett LJ has stated extra-judicially that the issue of proprietary remedies is the "most pressing question which faces the equity lawyer today."[31] It was certainly thought that in void contracts, equitable proprietary interests were retained, given that there is no consideration in the legal sense, although there may be gratuitous consideration made pursuant to the terms of the void contract.[32] Conversely, in voidable contracts, avoidance is necessary before an equitable interest revests. This is because the original owner only has a mere equity, which although offers some protection is not the same thing as an equitable interest.[33] It binds volunteers but not purchasers of the legal or equitable interest without notice. And until the plaintiff elects to set the contract aside, no constructive trust or fiduciary relationship can arise.[34]

If this mode of thinking was once possible, it certainly has to be re-considered in the light of Lord Goff's and, particularly, Lord Browne-Wilkinson's speech in *Westdeutsche*. The distinction their Lordships draw is not between void and voidable contracts; instead, the concern is with the conscience of the recipient.[35] Knowledge seems to be quite crucial. Without unconscionable conduct, the transfer of legal title would bring with it the equitable, if title is undivided.[36]

Westdeutsche may also call for a reconsideration of local decisions such

Banking Corp Ltd [1995] 1 Lloyd's Rep 239 at 248; *Standard Chartered Bank* v *Sin Chong Hua*, *infra*, note 37*; Or Chor Seng* v *Tjinta Pte Ltd (in liq) infra*, note 38.

31 (1995) 9 *Trust Law International* 35 at 41, (1995) 111 LQR 517.

32 See, *eg*, S Worthington (1995) 9 *Trust Law International* 113.

33 *Latec Investments Ltd* v *Hotel Terrigal Pty Ltd* (1965) 113 CLR 265 at 277, following Lord Westbury in *Phillips* v *Phillips* (1861) 4 De G F & J 208.

34 In *Lonrho* v *Fayed (No 2)* [1992] 1 WLR 1, Millett J stated that if the representee elects to avoid the contract and set aside any transfer of property, it may be that the beneficial interest will be deemed to have been vested in him from the outset for the purposes of tracing, under an under "an old fashioned institutional resulting trust." *Abdul Ghani El Ajou*, *supra*, note 24, at 734. See also *Daly* v *Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 387-390 (Brennan J). There is, however, "no mechanism which would allow the claimant to pause, as it were, half-way through the delivery of the present judgment and elect at last to rescind." *Re Goldcorp*, *supra*, note 13, at 102.

35 Also see Lord Goff, *supra,* note 1, at 814, excepting fundamental mistakes. See further *Neste Oy* v *Lloyds Bank Plc* [1983] 2 Lloyd's Rep 658 (Bingham J).

36 This is consistent with *Re Bond Worth Ltd* [1980] 1 Ch 228 in the Romalpa context where the relevant clause specified the retention of equitable title. It was held that absolute title passed to the buyer and a charge was then granted back to the supplier, which required registration. It may of course be that no title, legal or equitable, ever passes; where, for instance, the transferor had no title at all due to claw-back provisions in bankruptcy law:

as *Standard Chartered Bank* v *Sin Chong Hua Electric & Trading Pte Ltd*[37] and *Or Chor Seng* v *Tjinta Pte Ltd (in liq)*.[38] In the first case, Goh JS J held that moneys paid under a fraudulent scheme pursuant to a letter of credit (bricks instead of generators were delivered in satisfaction of the underlying contract) were paid under a mistake of fact. There was thus clearly an action for money had and received against the recipients of the funds. However, the moneys had moved on from the first defendant to other defendants, and it was thus necessary to identify a proprietary interest to commence a tracing exercise. His Honour held that the plaintiffs retained a persistent equitable proprietary interest, following *Chase Manhatten*.[39] The difficulty is that a misrepresentation, even one that is fraudulent, only makes a contract voidable, not void. Even though the defendant's conscience was clearly affected from the moment it received the moneys, the problem, as is often the case, was that the fraud was not discovered before the moneys had been disbursed. It is uncertain whether they were still identifiable at that time for a trust to arise.

Tjinta's case involved a sale and purchase of land in which both vendor and purchaser thought that the property was subject to rent control. In proceedings to remove a caveat lodged by the purchasers, Amarjit Singh JC held that the question of whether a common or mutual mistake prevented title from passing was a serious issue to be tried, again relying on *Chase Manhatten*. While it is certainly true that title to money passes more readily than other forms of property, especially land, *Westdeutsche* would still require the mistake to be sufficiently fundamental[40] or that there has been unconscionability on the part of the recipient-purchaser.

But how is the recipient's conscience relevant at all? Professor Birks had argued that a resulting trust would arise in cases of vitiated transfers since there is nothing to rebut the presumption that the transferor retained title to the property.[41] Lord Browne-Wilkinson, however, preferred WJ Swadling's view that any intention that was inconsistent with an intention

The Trustees of the Property of FC Jones & Sons v *Anne Jones* (The Times, 13 May, 1996) *per* Millett LJ.

37 [1995] 3 SLR 863.

38 [1995] 1 SLR 48. See further Hwang & Chan, "Trends in Core Areas of Singapore Law – Equity" in *Review of Judicial and Legal Reforms in Singapore between 1990 and 1995* (Singapore Academy of Law, 1996) at 200.

39 See A Loke [1996] SJLS 251, querying the right to trace under a voidable, rather than a void, agreement. *Westdeutsche*, however, shows that there is both a need for rescission as well as unconscionable conduct while the property is still identifiable.

40 Lord Goff, *supra*, note 1, at 814.

41 "Restitution and Resulting Trusts" in Goldstein ed, *Equity: Contemporary Legal Developments* (1992).

to retain title, and not just an intention to make a gift or advancement, would suffice.[42] The danger with Professor Birks' argument, which the House of Lords recognised was to "test the temperature of the water" is that it implicitly accepts "no consideration" as an unjust factor when he had himself rejected it in the context of common law restitutionary claims.[43] But Professor Birks has pointed out that if his view of equity is rejected, the "resulting trust has to absorb a contradiction, namely, that which founds the trust when presumed, when affirmatively proved destroys it."[44] Simply put, it is better not to lead evidence of the void contract and leave it completely to presumptions. But courts today generally downplay the role of presumptions.[45] Both the transferor's intention and the recipient's state of mind matter.

The reasoning of Lord Browne-Wilkinson does not offer much encouragement for proponents of strict liability in knowing receipt. His Lordship suggested that the mere fact of receipt of property from a trustee does not also make the recipient one. Consequently, the personal liability of a constructive trustee cannot also arise until there is the requisite degree of knowledge.[46] Lord Browne-Wilkinson would, however, allow stolen monies to be traceable in equity, albeit under a constructive, not a resulting, trust.[47] The common law could now offer another avenue if legal title does not pass to the thief, given that the action for money had and received also has proprietary consequences.[48] Where tracing from an *existing* proprietary base is concerned, Lai KC J, giving the judgment of the Court of Appeal in *Yogambikai Nagarajah* v *Indian Overseas Bank*[49] has confirmed that knowledge is irrelevant where a proprietary, in contrast to a personal, claim is asserted.

42 "A New Role for Resulting Trusts" (1996) 16 LS 110.

43 Birks, 'No Consideration: Restitution after Void Contracts' (1993) 23 UWALR 195.

44 Birks, "Proprietary Rights as Remedies" in *Frontiers of Liability* Vol 2 (1994) Ch 16 at footnote 48; *supra*, note 41, at 347.

45 *Neo Tai Kim* v *Foo Stie Wah* [1985] 1 MLJ 397 (PC) (presumption of advancement), *cf Tinsley* v *Milligan* [1994] 1 AC 340 (HL); but see now *Nelson* v *Nelson* (1995) 184 CLR 538 (HCA); *Tribe* v *Tribe* [1996] 1 Ch 107 (CA). In Singapore, see *Goh Swee Fang* v *Tiah Juah Kim* [1994] 3 SLR 881 at 889; Hwang & Chan, *supra*, note 38, at 216.

46 *Supra*, note 1, at 830. But compare Millett J (as he then was) in "Tracing the Proceeds of Fraud" (1991) 107 LQR 71 at 81. See also Auld LJ in *Macmillan Inc* v *Bishopsgate Investment Trust (No 3)* [1996] 1 All ER 585 at 604. Lord Browne-Wilkinson's fault-based approach obviates the need for a change of position defence.

47 Citing *Bankers Trust Co* v *Shapira* [1980] 1 WLR 1274, 1282 (Lord Denning MR). See also *Black* v *Freeman* [1910] 12 CLR 105 at 110 (O'Connor J). However, his Lordship accepted the tracing rules formulated in *Re Diplock* [1948] Ch 465 (CA), *viz*, the need for a fiduciary relationship. See also *Boscawen* v *Bajwa* [1996] 1 WLR 328 at 335 (Millett LJ).

48 *The Trustees of the Property of FC Jones & Sons* v *Anne Jones*, *supra*, note 36.

49 Unreported, Civil Appeal No 189 of 1995, 14 August 1996. But see *Polly Peck* v *Nadir* [1992] 2 Lloyd's Rep 238 at 242 (Scott LJ), criticised by Bryan (1993) 109 LQR 368.

Westdeutsche appears to signal a further retreat from *AG of Hong Kong* v *Reid*[50] and *Lord Napier & Ettrick* v *Hunter*,[51] authorities seemingly more liberal with the *creation* of equitable proprietary interests. However, it is submitted that the concept of unconscionable denial has been consistently applied in these cases. A fiduciary that receives a bribe, for example, cannot be heard to say that it had not received the bribe for its principal.[52] But there has to be something unconscionable in denying that the property belongs to another, for, without it, the concept risks becoming too circulous.[53] In *Westdeutsche*, there was no prior fiduciary relationship; the argument, which was rejected, was that mere receipt was sufficient to create such a relationship.

Halifax Building Society v *Thomas*[54] fits less comfortably with the reasoning above. Thomas impersonated another person and deceived Halifax into providing him with a mortgage to purchase a flat. Thomas defaulted, Halifax took possession and subsequently sold the flat, which had risen in value. The issue was whether the increase in value belonged to Thomas (actually the Crown Court had made a confiscation order against Thomas, so that the money would have gone to the Crown Prosecution Service) or to the Building Society. The Court of Appeal, affirming the decision of the lower court, held that the money belonged to Thomas.

Peter Gibson LJ cited both *Lister* v *Stubbs*[55] and *Daly* v *Sydney Stock Exchange Ltd* with approval. In the latter case, Gibbs CJ thought that the reasoning in *Lister* was "impeccable when applied to the case in which the person claiming the money has simply made an outright loan to the defendant."[56] The difficulty is that the recipients were stockbrokers who, in breach of their fiduciary duties, had accepted the money from an investor without disclosing their parlous financial position. However, the investor *intended* that the stockbrokers receive the money beneficially. Similarly, in *Halifax*, the Court of Appeal was satisfied that the Privy Council decision

50 [1994] 1 AC 324 (PC).

51 [1993] AC 713 (HL).

52 Millett J, "Bribes and Secret Commissions" [1993] *Restitution Law Review* 7; *Boscawen*, *supra*, note 47, at 339.

53 See also *Re Goldcorp*, *supra,* note 13 (difficulty in creating the proprietary base to commence tracing; no retained interest in money paid over). There has to be a link between the unconscionability and proprietary claim, *Lonrho* v *Fayed (No 2)* [1992] 1 WLR 1.

54 [1996] Ch 217.

55 (1890) 45 Ch D 1 (CA)

56 *Supra*, note 34, at 379. "To describe someone as a fiduciary, without more, is meaningless.", *Re Goldcorp supra*, note 13, at 98. *Cf DPC Estates Pty Ltd* v *Grey and Consul Development Pty Ltd* [1974] 1 NSWLR 443 at 470-1 (Hutley JA). But see Birks (1996) 10 *Trust Law International* 2.

in *AG of Hong Kong* v *Reid* could be distinguished on the basis that there was no fiduciary relationship between Thomas and the Society in respect of the mortgage; they were only debtor and creditor respectively.

It may be thought that the focus on the transferor's intent and the transferee's conscience can seem artificial when we speak of retaining ownership of property, and particularly troubling when so much is at stake. Although Peter Gibson LJ stated that English law has yet to recognise the remedial constructive trust,[57] Lord Browne-Wilkinson in *Westdeutsche* believed that the proper development of proprietary restitutionary remedies lay in that direction.[58] Both unjust enrichment and unconscionability could trigger off the remedy, which, as has been suggested, could take into account the interests of third parties.[59] There are signs that a remedial approach could find favour with some of our judges here.[60]

TJIO HANS*

57 *Supra*, note 54, at 229.

58 *Supra*, note 1, at 839. *Cf* Lord Mustill, *Re Goldcorp, supra*, note 13, at 99, 104, 109-110; see also SR Scott, "The Remedial Constructive Trust in Commercial Transactions" [1993] LMCLQ 330.

59 See, *eg*, AJ McClean (1982) 16 UBCLR 155, DWM Waters QC, "The Nature of the Remedial Constructive Trust" in Birks ed, *Frontiers*, *supra*, note 44, Ch 13; Lord Parker, *Sinclair* v *Brougham, supra*, note 6, at 444-5. But see Birks, *supra*, note 11, at 14-15, fearing an untrammelled discretion.

60 See, *eg*, Lai KC J in *Kartika Ratna Thahir* v *Pt Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1993] 1 SLR 735, discussed Tjio [1993] SJLS 198, but affirmed on the basis of *AG of Hong Kong* v *Reid, supra,* note 50, [1994] 3 SLR 257; see Hwang & Chan, *supra*, note 38, at 188.

* BA (Cantab); LLM (Harv); Advocate & Solicitor (S'pore); Lecturer, Faculty of Law, National University Singapore.