



## PROPRIETARY REMEDIES FOR CONSTRUCTIVE TRUSTS: A 'COMMONWEALTH YARDSTICK' FOR MALAYSIAN COURTS



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### ABSTRACT

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In a previous article published in 2018, the authors had attempted to highlight the issues that will present themselves when a constructive trust is imposed without clear guiding principles pursuant to recent judicial pronouncements on point. Whilst the doctrine of constructive trusts in Malaysia has been accepted as a 'remedial device', there has been little debate on the effects of such a constructive trust on the parties in the claim as well as other parties outside the claim. There is much debate in other commonwealth jurisdictions on these but the Malaysian Courts are yet to catch up with this debate. The primary contribution of this paper is to provide some clarity on the effects of the imposition of constructive trust as a remedial device in Malaysia, some of which could have far reaching implications. This article will attempt to identify and provide some guidance from other commonwealth countries for the Malaysian courts to use as a yardstick when deciding on the imposition of proprietary remedies pursuant to constructive trust.

**Contribution/ Originality:** The paper's primary contribution is to provide clarity on the far reaching effects of the imposition of constructive trusts as a remedial device in Malaysia. The article should provide some guidance from jurisdictions in the Commonwealth countries for the Malaysian courts to use when imposing a constructive trust.

### 1. STATEMENT OF PROBLEM

The Malaysian position on constructive trusts has been clearly laid down in several hallmark judicial pronouncements in recent years. The Malaysian Courts have accepted that constructive trust will be imposed as a 'remedial device' starting from the Court of Appeal decision of *Tay et al. (2009)* (hereinafter referred to as "Tay Choo Foo" followed by the Federal Court decisions of the (RHB Bank Berhad and Travelsight, 2016) (hereinafter referred to as "Travelsight Case") and *Perbadanan and Properties (2017)* (hereinafter referred to as the "Api-Api Case" since the subject matter of the case was in relation to a piece of land in the district of Api-Api, Kuala Selangor). It is a well-known fact that a constructive trust when imposed will give rise to a claim which is proprietary in nature which will then have far reaching implications for third parties (Liew, 2016). There is further trepidation of such implications in circumstances where there are no clear guiding principles given by the courts as seen in the judicial pronouncements above (Iqbal-Singh et al., 2018). This article will attempt to provide some elucidations on

those implications based on guidance from other commonwealth jurisdictions so that the need for clear guiding principles can be further reiterated. Guidance for this will now become important in Malaysia, particularly, when high profile bribe cases are now brought to the courts for decisions. Constructive Trust is one of the methods that can be used to claw back the property that has been wrongfully obtained at the expense of beneficiaries to whom the property rightfully belongs.

## 2. METHODOLOGY OF THE RESEARCH

The researchers have adopted a pure legal research methodology to conduct this research. There have been extensive library and database searches for primary and secondary sources. The primary sources are mainly case laws from Malaysia as well as case laws from other jurisdictions. The secondary sources include journal articles, books and written commentaries on the case law. The researchers have used the content analysis and critical analysis method focusing on doctrinal, content and comparative analysis of the law.

## 3. THE NATURE OF REMEDIAL CONSTRUCTIVE TRUSTS

A constructive trust is a trust that arises by the operation of the law (Ahmad and Mohsin, 2013). One of the types of constructive trust, remedial constructive trust is where the court exercises its inherent discretionary powers in equity and imposes a constructive trust by way of a remedy based on the situation at hand (Hemsworth, 2000). This is starkly different from an institutional constructive trust where the courts' role is merely declaratory in nature, in that, the courts merely declare the crystallization of a trust, the ingredients of which are already in place from the onset (Westdeutsche Landesbank Girozentrale and Islington London Borough Council, 1996); (Zaharah and Anor, 2012); (Ahmad and Mohsin, 2013). One of the main ingredients of an institutional constructive trust is the existence of a fiduciary duty and when such duties are carried out in breach of the 'no profit rule' (Smith, 2013). The 'no profit rule' dictates that the fiduciary should not use the principle's property for his personal benefit.

A remedial constructive seems to have been identified as the constructive trust with "no prior existence" (Ahmad and Mohsin, 2013). It is a trust where the courts using principles of equity, deem fit to impose an obligation onto the wrongdoing party to hold the property that he has obtained unconscionably for the benefit of the rightful owner. Authorities suggest that in this category of constructive trusts, a trust comes into play "at the discretion of the judge, who has the liberty to consider whether or not to create new property rights on a case-by-case basis" (Liew, 2016) as a "judicial remedy" (Westdeutsche Landesbank Girozentrale and Islington London Borough Council, 1996) and the imposition of a "trust by way of a remedy" (Ultraframe (UK) Ltd and Fielding, 2005). It has been submitted that, therefore, if there is no fiduciary obligation present in the circumstances, the courts will need to use the constructive trust as a 'remedy' in the form of a remedial constructive trust (Iqbal-Singh et al., 2018).

The application of the law in *Tay Choo Foo* seems to have been done along the lines of remedial constructive trusts. Similarly, in the *Travelsight Case*, the concept of remedial constructive trust was accepted and a proprietary remedy was allowed. Whilst this case accepted the application of a remedial constructive trust, there was little guidance given to the application of constructive trusts in this domain. Further, in the *Api-Api Case*, which is the most recent *Federal Court* case on point it was held that constructive trusts should be imposed as a 'remedial device' on the basis of 'unjust enrichment' which suggests its imposition as a remedial constructive trust.

In the *Api-Api Case*, the somewhat 'three pronged test' was introduced, bringing together various principles of constructive trusts from case law. Predominantly, the problematic portion on point where the courts held that a constructive trust "...is a remedial device that is employed to prevent unjust enrichment. It has the effect of taking the title to the property from one person whose title unjustly enriches him, and transferring it to another who has been unjustly deprived of it" Tay et al. (2009).

It has been submitted that these elements laid down in the *Api-Api Case*, seem to lack "...clarity as to the parameters of the elements laid down" (Iqbal-Singh *et al.*, 2018). If remedial constructive trusts are to be imposed based on discretion, then it is submitted that decisions could be arrived at using different parameters for a proprietary remedy which results from a constructive trust. This has a potentially detrimental effect on various parties (Liew, 2016).

#### 4. EXERCISE OF DISCRETION IN ACCORDANCE TO SETTLED PRINCIPLES

Remedial constructive trusts are generally argued to be imposed based on the discretion of the judge and the courts are guided only by whether it is just to do so when they decide to impose a constructive trust in the case at hand (Neuberger, 2014). If this is the case, it becomes very difficult to predict whether or not a constructive trust will or will not be imposed and claimants have "no rights born of any facts which have happened outside the court" (Birks, 2000).

*Peter Millet* had made it clear that whilst all equitable remedies are indeed discretionary, any such discretion must be exercised in accordance to settled principles of law (Millet, 1998).

*Bruce Collins QC* noted that the Australian position of the remedial constructive trust as laid down in the case of *Muschinski and Dodds (1985)* requires that the remedy only be exercised when "warranted by established principles or by legitimate processes of legal reasoning" (Collins, 2014). He also commented that after the *Muschinski v Dodds* case there "were important limitations and qualifications that were placed on upon the circumstances in which the remedy of constructive trust will be imposed" by many Australian cases some of which are *Baumgartner and Baumgartner (1987)*; *Bathurst City Council and PWC Properties Pty Ltd (1998)*; *Giumelli and Giumelli (1999)* and *Grimaldi and Chameleon Mining NL (2000)* (hereinafter referred to as "*Grimaldi*").

In all these cases, *Bruce Collins QC* is of the view that the Australian position is "one of institutional classification where remedial classification can co-exist". Accordingly, "there is a continued acceptance of the traditional and institutional" constructive trusts where by operation of the law, the "trust self-generates at the time the circumstances giving rise to it have occurred". The Australian position does not seek to aggressively vary this approach. The primary requirement is that the courts must first decide if there are "other means to quell the controversy" i.e. firstly if there is any other equitable remedy that can be used before, secondly, a constructive trust is used only if it is the most appropriate option for a remedy (Collins, 2014).

#### 5. THE PROPRIETARY RIGHT OF THE CLAIMANT

When a constructive trust is imposed, a proprietary claim may arise when "property has been subjected to the trust" (Panesar, 2016). Where a wrongdoer acquires property at the expense of the person that should truly benefit from the same (a 'true beneficiary'), the property will be held on constructive trust in favour of the 'true beneficiary'. In these instances, the 'true beneficiary' will acquire an equitable beneficial interest in the property and on this basis, the property will be held for the person with the equitable beneficial interest. As long as the property can be traced into the hands of the wrongdoing individual or any third party who is not a bona fide purchaser for value without notice, the beneficiary will be able to successfully make that proprietary claim.

In the *Travelsight case*, the *Federal Court* quoted the English case of *Lonrho Plc and Fayed and Others (No 2) (1992)* where *Millett J* cited Meagher, Gummow and Lehane, *Equity, Doctrines and Remedies* and reiterated that only when it is appropriate to do so, the courts will allow a proprietary remedy to return to the claimant the property that rightfully belongs to the claimant for which the claimant has been deprived off by the defendant's wrongdoing. This is also to prevent the defendant from retaining and benefitting from the property.

*Millet J* however cautioned that this is done only when it is appropriate to do so but it is not "desirable, to attempt an exhaustive classification of the situations" (when it will be appropriate to do so) and the court of equity may retain an "inherent flexibility and capacity to adjust to new situations".

## 6. EFFECTS OF A PROPRIETARY REMEDY – THE ‘CONSEQUENCE APPROACH’

*Swadling* writes that there are various effects of a proprietary remedy seen from different aspects and areas (*Swadling, 2008*). These are elaborated below;

### 6.1. Prioritization of Claimant’s Right over Rights of Creditors

Firstly, the effect on the law of insolvency. A claimant who has obtained a proprietary award will take priority in the distribution of the bankrupt defendant’s property as against the defendant’s personal creditors (*Jones, 2007*) especially those with personal rights on the defendant’s property (*Birks, 2005*). This suggests that a proprietary remedy has a negative effect on insolvency practices in that it bypasses the rights of creditors. In *Sanmaru Overseas Marketing Sdn Bhd and Anor and PT Indofood Interna Corp & Ors (2009)* the Court of Appeal held, if the defendant goes bankrupt, the property becomes unavailable for the defendant’s general creditors but rather is held in favour of the claimant on constructive trust.

The justifications for this ‘prioritisation’ is primarily when the defendant (or the constructive trustee) has gone bankrupt, a trustee in bankruptcy will take all the rights of the bankrupt defendant ‘subject to all encumbrances’ (*Swadling, 2008*). Making reference to the English cases of *Wallis (1902)* and *Re Caine’s Mortgage Trusts (1918)* *Swadling* argues that the claimant’s proprietary right becomes an encumbrance (or burden) on the property and so the value of the property is reduced.

Further, justifications put forth revolve around the fact that the ‘claimant does not take insolvency risks’ and that the particular assets which are a result of the defendant’s breach should never be part of the pool of the defendant’s assets which are subject matter of distribution to the creditors. This is to prevent resulting in an ‘undeserved windfall’ to the creditors (*Birks, 2005*).

However, it has also been argued that if claimants in such situations are to be given ‘prioritization’ in the pool of property available for distribution, such ‘prioritization’ should be allowed by statute and the legislature. In *Swadling’s* words, by the “fine-tuning of a change to the insolvency legislation to cure the problem, not the blunt instrument of the award of proprietary rights” (*Swadling, 2008*). This was the stark reminder given earlier by *Mummery LJ* in the *English Court of Appeal* decision of *Re Polly Peck International Plc (In Administration) No. 2 (1998)*. In that case, his Lordship thought that the imposition of a remedial constructive trust should not be the way forward as it would go against “the scheme imposed by statute for a fair distribution of the assets of an insolvent company”.

This approach to avoid the negative consequences of the imposition of a constructive trust and a proprietary remedy was taken in *Lister & Co and Stubbs (1890)* (hereinafter referred to as “*Lister*”) by the English *Court of Appeal*. In English Law, it was in *Lister* and *Attorney General for Hong Kong and Reid (1994)* (hereinafter referred to as “*Reid*”) that the concern for creditors had permeated although the courts arrived at a different consideration in both cases.

In the case of *Lister, Lindley L.J. (Lister & Co and Stubbs, 1890)* said that such an imposition would have far reaching implications that if the defendant became bankrupt then the consequences would be that that the property “would be withdrawn from the mass of his creditors and handed over bodily to” the claimant, *Lister & Co*. His lordship went on to say that in the same breath, the defendants could be made to account the claimants “not only for the money with interest, but for all the profits which he might have made by embarking in trade with it”. These, according to his Lordship, cannot be right.

In *Reid* on the other hand, the *Privy Council* concluded that an unsecured creditor must never be put in a better position as compared to his debtor and this light, cannot be allowed to claim what his debtor was not entitled to in the first place (*Houghton, 2016*). In this case, a public prosecutor in the public service in Hong Kong had taken bribes in order not to prosecute certain criminals. The bribe money was used to purchase freehold property in New Zealand, two of which were placed in his name. The Attorney General of Hong Kong’s attempt to renew the caveats

on the properties in New Zealand was refused on the basis that the Hong Kong Government did not have an interest in equity over the property. Since there was no equitable interest, there was no basis to allow for a proprietary claim in the High Court and the Court of Appeal. The Privy Council on the other hand held that *Lister* was inconsistent with duties of a fiduciary and used policy reasoning that the bride was evil and that it cannot be condoned and allowed to flourish in the hands of the wrongdoer.

Whilst the Privy Council in *Reid* was merely persuasive in nature, *Lister* was followed in *Sinclair Investments (UK) Ltd and Versailles Trade Finance Ltd (In Administration) (2011)* (hereinafter referred to as “*Sinclair Investments*”) many years later where the courts disallowed a proprietary remedy and allowed only a personal claim. This case decided that if a constructive trust were to exist, it must be shown that the unauthorised gain is beneficially linked to the principal. This takes the form of an equitable interest in the unauthorised gain or that the unauthorised gain that was derived from an opportunity that belonged to the principal.

Lord Goff in *Westdeutsche Landesbank Girozentrale and Islington London Borough Council (1996)* also had rejected the submission in that case that the local was the bank's trustee. His Lordship had questioned the need for a plaintiff being given additional benefits which result from a proprietary claim like the “benefit of achieving priority in the event of the defendant's insolvency”. His Lordship took the view that since the parties had entered into a commercial transaction, they should be acting at arms-length and should take the risk of insolvency of the defendant, “just like other creditors who have contracted with it, not to mention other creditors to whom the defendant may be liable to pay damages in tort”.

This concern was also at the forefront of the mind of the judges in *Sinclair Investments, FHR European Venture LLP and Cedar Capital Partners LLC (2014)* (hereinafter referred to as the “*FHR*”) and the *Australian Federal Court* case of *Grimaldi*.

### 6.2. Claimant Entitled to Increase in Value of Property

Secondly, the claimant will become entitled to any increase in value pursuant to the English rule in *Saunders and Vautier (1841)*. If the property which is the subject matter of the constructive trust has been invested and the value of that property has increased, the claimant will be entitled to that increase in the value as a result of the constructive trust and the proprietary remedy that is imposed. This follows that the claimant will also be entitled to better interest rates (i.e. compound interest becomes available) when a proprietary remedy is available.

### 6.3. Criminalization of the Defendant's Conduct

Thirdly, when a proprietary remedy is imposed, this may result in the criminalization of the defendant's conduct (*Shadrokh-Cigari, 1998*). The proprietary remedy crystallizes the ‘possession of the property belonging to another’ in the hands of the defendant and this may attract criminal liability for theft.

### 6.4. Tracing Becomes Possible

Lastly, the claimant who has obtained a proprietary remedy may have the ability to reach into the pockets of the remote recipients of that property which is the subject matter of the constructive trust via the mechanisms available in tracing.

## 7. ARGUMENTS AGAINST THE ‘CONSEQUENCE APPROACH’

*Swadling* further delves into the merits of the ‘consequence approach’ taken by the courts when granting a proprietary remedy (*Swadling, 2008*). This is where the courts ‘worry’ about the consequence of the granting of a proprietary remedy on other parties outside the transaction that is being dealt with in the constructive trust.

There are arguments that show that the consequence of the decision taken by the court should not be the deciphering factor. *Elizabeth Houghton* had echoed and advocated the “complete decoupling of the award of

proprietary rights and the consequences in insolvency” (Houghton, 2016). She was of the view that it’s either that the claimant is entitled to the proprietary award or otherwise. If such an entitlement is established, the mere fact of insolvency of the defendant “is not a sufficient reason from withholding” the proprietary remedy from the claimant.

To this, *Birks* also argues that the decision of whether or not to grant a proprietary remedy should not be based on the answering the question for the legislators as to which and how creditors should be treated as “lawyers have no special competence in distributive justice. They cannot be expected to say who deserves what” (Birks, 2000).

*Elizabeth Houghton* is of the view that it is unfortunate that the courts “often accept without questions the premise that a hypothetical unsecured creditor is deserving of protection” and worse still, if this “disadvantages equally innocent and real claimants” (Houghton, 2016). She argues that it is often taken for granted that only the unsecured creditors are disadvantaged when a proprietary claim is allowed. She is of the view that there are other deserving third parties who also may be disadvantaged.

Accordingly, she submits that the current approach in the English Courts is as that set out by the *English Supreme Court* in *FHR*, a case of bribes and secret commission. The *Supreme Court* noted that the reason why the court needs to be vigilant in whether or not to grant a proprietary or personal remedy is because of the impact that such a remedy would have on unsecured creditors. The *Supreme Court* considered the case in a ‘hypothetical insolvency’ situation as the agent in question was not in fact insolvent.

In *FHR*, the *Supreme Court* held that the prejudice to unsecured creditors have a limited impact in situations of bribes and secret commission. This is due to the fact that such unauthorized gain does not belong to the principal but may have reduced the benefit that should have been obtained by the principal and so can fairly be deemed as the ‘property of the principal’. On this basis, the *Supreme Court* concluded that the constructive trust should be held in the case and held that it was just for the claimant to have the advantage of tracing and this was balanced out against the disadvantage on the unsecured creditors.

*Elizabeth Houghton* further argues that, if at all there is prejudice against unsecured creditors by an award of proprietary remedy, then the “exercise of judicial discretion in an individual case” needs to be used to remove that prejudice and not merely by “modifying the general rule applicable in all cases” (Houghton, 2016). She argues that the “latitude given to potential unsecured creditors is unwarranted and disproportionate” and she raised four objections.

Firstly, the plight of the unsecured creditors seems to have been used to influence the decision making as a “general rule rather than as an exception”.

Secondly, as mentioned above, the insolvency is not usually operational and the courts would decide the case based on a hypothetical insolvency’ situation and “no actual creditors before the court will be prejudiced”.

Thirdly, the interest of the unsecured creditors is elevated and is secured in the pot of assets that should otherwise belong to the insolvent’s estate. The courts should not be influenced by the hypothetical situation of an unsecured creditors being disadvantaged since the unsecured creditors has no direct right to the pool of the insolvent’s property which is legitimately obtained. This follows that the unsecured creditors should also not have a direct right to property that is illegitimately obtained.

Fourthly, the focus on unsecured creditors may obscure the fact that there are other deserving parties in the picture who must also be considered and are deserving of protection.

This alternative view was also taken by *Rimer J* in *Shalson v Russo*. His lordship ruled that when a claimant is granted a proprietary remedy, that does not amount to awarding him any rights of preference over the creditors. The effect would merely be to assist the claimant to realise his right to the property which the creditors will have no interest in.

*Elizabeth Houghton* also further submits that the courts should tailor make a rule that is robustly catered first between the wrongdoer and the principal before any consideration is given for rules to govern effect on third parties (Houghton, 2016). She uses the analogy of the protection given for Bona Fide Purchasers for Value without

notice or 'Equity's Darling'. For such a purchaser without notice, equity affords protection against a proprietor who may not have valid title so that the purchaser of the property does not lose his interest if the proprietor does not have a valid title. When such a purchaser is involved, it becomes a tripartite dispute (involving the two parties in the property transaction and the purchaser as the third party). The courts in all these situations, do not determine the remedies available when the core parties (the two parties in the property transaction) are disputing ownership by always taking into account the position of the bona fide purchaser. The Bona purchaser's interest becomes a concern only when he exists in the picture.

She argues that the courts would never suggest that "because a bona fide purchaser might exist therefore the claimant should be not be entitled to assert his proprietary rights or claim for proprietary remedies in circumstances where they would otherwise be entitled to do so". So only when there are third party interests involved, should those interests then be considered separately as in *Grimaldi*. In this case, the *Federal Court of Australia* refrained from granting a constructive trust as there would be a real impact on innocent third party shareholders and stakeholders who would have had to enter into an unwanted commercial relationship with the claimant principal if a constructive trust was held in that case.

Therefore, there should be a first a general rule that governs the two parties involved. In addition to the general rule, there can be exceptions where there is a third party's interest at stake. The courts should not be influence by a hypothetical situation but should look at the third parties interests only when it is truly operational. The third parties would not only be unsecured credits but other third parties that may be affected as per the case of *Grimaldi* and the risk should be true and operational. Otherwise, just one rule will "lack the agility to respond to the many and varied situations in which unauthorized fiduciary gains are obtained". This would defeat the whole purpose of having an equitable remedy in the first place because "equity attempts to do more perfect and complete justice than would result if parties were left to their remedies at common law" (*Wilson and Northampton and Banbury Junction Railway Co, 1874; Houghton, 2016*).

## 8. CONCLUSION

A proprietary remedy, if imposed, will have effects and implications on third parties. Whilst there are arguments that courts can consider when imposing a remedy of this nature when a constructive trust is used, it is important that any discretion is exercised based on guiding principles.

It is important to note that the English Courts, when allowing for a proprietary remedy have done so in recognition of an institutional constructive trust. That is the reason why a proprietary claimant will take priority over unsecured creditors (*Goode, 2011*).

In this light, *Peter Millet* had made if the discretion is done in accordance to settled principles, "... the grant of a proprietary remedy causes no injustice to the creditors of an insolvent defendant. The doctrine of English Law is that, proprietary remedies should be granted only in defined circumstances and then ordinarily as a matter of course, so that rights of property may be fixed and ascertainable in advance" (*Millet, 1998*).

It is interesting to note that the Australian position as discussed above also insists on caution when the courts are faced with a situation and that remedial constructive trust is not be used as the first remedy that comes to mind. There is no uncontrolled exercise of judicial discretion. The Australian Courts may have done so on a different basis, since constructive trusts in Australia are imposed as a remedial constructive trust.

It is well established that the Malaysian Courts have stated that in Malaysia, a constructive trust will be imposed as a remedial device. However, in light of the arguments shared above, it is important that the Malaysian Courts first identify the parameters of the exercise of any discretion or such a remedial device. It is humbly submitted that the Malaysian courts could use these views from academicians and cases across the commonwealth as a 'commonwealth yardstick' when exercising discretion whether or not to impose a constructive trust whilst rearranging the perspective of the law to suit the Malaysian flavor and circumstances.

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