

Choosing remedies in tracing claims

Aside from the loss of the right to trace, remedies in relation to tracing claims will typically include: the establishment of a resulting trust; the establishment of a constructive trust; the establishment of an equitable charge; and subrogation.

Having considered the nature of the tracing process, it is important to consider the types of claim and the forms of remedy which might be imposed as a result of it. The two principal remedies are the charge¹⁵⁷ and the constructive trust;¹⁵⁸ although resulting trust,¹⁵⁹ equitable compensation,¹⁶⁰ lien¹⁶¹ and subrogation¹⁶² are also possible on the basis of decided cases.¹⁶³ The structure is simple: first, the tracing process is carried out in accordance with the principles considered above; then, secondly, having identified the property which is to be the subject matter of the claim, the claimant seeks to impose a trust or some equitable remedy over that property. The various possibilities are considered below. In short, there are no clear rules as to which remedy should be applied in which situation but rather the courts seem to be prepared to impose whichever remedy seems to be most appropriate in the circumstances and whichever remedy provides the most convenient solution for the successful claimant. Therefore, this section will consider all of the principal remedies in turn. First, however, we shall consider in the abstract which form of remedy is likely to be most appropriate in which type of situation: this will make the nature of each remedy easier to appreciate.

19.6.1 What form of remedy would be most appropriate: a charge, a lien or a constructive trust?

The onus is on the claimant to claim the remedy which is most appropriate in the circumstances. Different types of remedy will be more suitable or more appropriate in different circumstances depending on the nature of the property and whether or not there are innocent third parties involved. Usually this issue resolves itself to a choice between a charge over the traced property, or a possessory lien over the property, or the award of proprietary rights in the form of a constructive trust over the property in favour of the claimant. Each of these remedies is considered in detail below but their basic characteristics can be explained here. First, the charge arises only in equity and entitles the claimant to seize the property and seek a court order to sell it if the defendant does not pay the claimant whatever the claimant is owed under the terms of the charge. Secondly, a lien entitles the claimant to take possession of property and to retain that property until the defendant pays the claimant whatever the claimant is owed. Both of these types of remedy are therefore concerned with ensuring that the claimant is paid an amount of money and both require that the property can be identified separately from other property. The third “remedy”¹ is the constructive trust which entitles the claimant to an equitable proprietary interest in the traced property. In theory such a constructive trust could be constructed so that any third party with rights in the traced property would hold the equitable interest in that property in common with the claimant; more usually a constructive trust will be claimed so that the claimant can become the absolute beneficial owner of property so that she can acquire any future increase in value in that property. A

¹ The word “remedy” here is in inverted commas because, strictly, constructive trusts are *institutional* and not *remedial*.

constructive trust is likely to be sought in which circumstances in which the property is intrinsically valuable or when it is likely to be of use to the claimant.

The decision as to which remedy will be the most appropriate will therefore depend on the circumstances. The nature of the property will be particularly important, as outlined above. So, where the property subject to the tracing claim is capable of being separated from other property so that it could form the subject matter of a trust, a constructive trust may be the most appropriate remedy. If the property were not so

152 Now a valid ground for avoidance of a contract: *Kleinwort Benson v Lincoln City Council* [1998] 4 All ER 513.

153 Such as misrepresentation or undue influence: Martin, 1997, 666.

154 *Daly v Sydney Stock Exchange* (1986) 160 CLR 371; *Lonrho plc v Fayed (No 2)* [1992] 1 WLR 1; *El Ajou v Dollar Land Holdings* [1993] 3 All ER 717; *Halifax Building Society v Thomas* [1996] Ch

217. 155 Although, necessarily, that intention would not have been present but for the mistake which

the parties had made as to the validity of the contract.

156 See also *Re Goldcorp* [1995] 1 AC 74.

157 *Re Tilley's Will Trusts* [1967] Ch 1179.

158 *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, at para 19.5.2 below.

159 *El Ajou v Dollar Land Holdings* [1993] 3 All ER 717.

160 *Target Holdings v Redferns* [1996] 1 AC 421; [1995] 3 WLR 352; [1995] 3 All ER 785.

161 *Foskett v McKeown* [2001] 1 AC 102.

162 *Boscawen v Bajwa* [1996] 1 WLR 328. Considered in section 30.7.

163 Contrary to Professor Birks's argument that it is not appropriate to talk of 'rights' and

'remedies' but rather only of 'rights' which necessarily imply their remedies (Birks, 2000:1), this is one context in which the rights of the claimant may lead to the realisation of any one of a number of remedies dependent on the context, one of which (equitable compensation) necessarily involves some judicial discretion; see generally Barker, 1998, 319.

segregated, then it would not be possible to impose a trust over that property because the subject matter of that trust would not be separately identifiable.¹⁶⁴ If, for example, the traceable proceeds of the claimant's original property were mixed with property belonging to other innocent parties, the more appropriate approach would be to award a charge to each party in proportion to their contribution to the total fund. Alternatively, the

claimant might be awarded a lien in circumstances in which compensation in money would be appropriate, but so that the claimant would have the protection of a lien in the event that payment was not made. Each of these claims is considered further below.

The advantage of the constructive trust is that the claimant acquires equitable title in specific property. However, a fixed charge does grant property rights which will be enforceable in the event of an insolvency by means of granting the claimant a right to be paid an amount of money but, if the debtor defaults, giving the claimant a right to seize the specified property to realise its claim.¹⁶⁵ The shortcoming of a charge is that once the repossessed property is sold, the claimant is entitled only to recover the amount of the debt, not to take absolute title in the property, having to account to the debtor instead for any surplus. Were the claimant to establish a right under a trust, as considered below, the claimant would be entitled to take title in the property and thus take title in any increase in value in that property. So, this raises the question: which remedy should be applied in which circumstances. Lord Millett held the following in *Foskett v McKeown*:²

“As Ames pointed out in "Following Misappropriated Property into its Product" (1906) Harvard Law Review 511, consistency requires that, if a trustee buys property partly with his own money and partly with trust money, the beneficiary should have the option of taking a proportionate part of the new property or a lien upon it, as may be most for his advantage.”

The detail of these dicta need not detain us at the moment – we shall consider the obligations of trustees shortly. What is significant is the acceptance by Lord Millett here that there is no single remedy which the court is obliged to impose: rather, the court will impose whatever remedy is appropriate bearing in mind the convenience to the claimant. Thus, when I identified the most important remedies as being the constructive trust, the charge and the lien, I was doing so on the basis of what judges have tended to do in practice. At the time of writing there is no clear, single judicial statement of which remedy should be applied in which context and therefore we shall have to formulate an understanding of why judges impose given remedies in given situations for ourselves.

The main principles, it is suggested, are as follows, once the tracing process has been successfully pursued and the target property has been successfully identified, if the original property which was taken from the trust can be identified separately from all other property, then a following claim will be sufficient for the court to declare that that property belongs beneficially to the beneficiaries of the trust.³ For the other principles we must assume that the original property cannot be identified separately from all other property and that instead that property is mixed with other property. If the property is of a fungible sort – like money in a bank account or salt in a salt cellar – and if the claimant wants the property itself, then the claimant will seek a constructive trust over the entire fund so that the claimant is beneficially entitled to an appropriate proportion of that fund.

Alternatively, if the property is not property which the claimant would wish to own but if the claimant would prefer to have the cash equivalent of her loss as a beneficiary, then she will prefer to have a charge or a lien over the entire mixture of property. As discussed below, a charge will entitle the claimant to petition the court for seizure of the

² [2001] 1 AC 102, 127.

³ *Foskett v McKeown* [2001] 1 AC 102, 127.

property if the defendant does not pay her the cash amount required; or alternatively a lien will entitle the claimant to take possession of the property until such time as payment in an amount sufficient to settle the claim is made to her, and if payment is not so made then the claimant will petition the court for seizure of the property. So, if the property acquired with the trust's money was a component in a large industrial machine, the claimant might have no use for that component. Therefore, she would prefer to have a charge over the entire machine to secure her right to money from the defendant, but so that she could insist on the sale of the machine if payment were not made. If the property acquired with the trust's money was something more portable, like an oil painting which is not expected to increase much in value, then the claimant would prefer to take a lien over the painting – such that she would take physical possession of the painting – until such time as she is paid enough money to settle her claim by the defendant. If the defendant does not pay up then the claimant would apply to the court for permission to sell the painting. So, we can see that much will depend on the nature of the property involved as to which remedy is the most appropriate, and also much will depend on whether or not the claimant would have any use for the type of property which the defendant had acquired with the misapplied trust fund.