

CHAPTER 7

**TRUSTS ARISING BY OPERATION OF LAW
GENERALLY****1. INTRODUCTION****Distinction between express, resulting and constructive trusts by reference to intention**

- 7-02** NOTE 10. AT THE END ADD: The following statement has been judicially approved in Australia: “the constructive trust differs in essential respects both from the express and the resulting or implied trust. It differs from the express trust in that it is raised by operation of law without reference to the intentions of the parties concerned and indeed largely contrary to the desires and intentions of the constructive trustee”, see Heydon and Leeming, *Jacob’s Law of Trusts in Australia* (7th edn), § [1301]; *White City Tennis Club Ltd v John Alexander’s Clubs Pty Ltd* [2009] NWSCA 114; (2009–10) 12 I.T.E.L.R. 172 at [65] (reversed on other grounds [2010] HCA 19; (2010–11) 13 I.T.E.L.R. 85).

2. CLASSIFICATION OF RESULTING TRUSTS**The twofold classification of resulting trusts**

- 7-05** NOTE 24. FOR THE REFERENCE TO Thomas and Hudson, *The Law of Trusts*, SEE NOW (2nd edn), §§ 26.10 and 26.11.

Wide theory of resulting trusts

- 7-07** NOTE 40. AT THE END ADD: The different theories of resulting trust are discussed by the New Zealand Court of Appeal in *Re Reynolds: Official Assignee v Wilson* [2007] NZCA 122; (2007–08) 10 I.T.E.L.R. 1064, at [117]–[122], where the view is expressed that there is no resulting trust where a settlor intends a trust to be a sham but the trustee is non-complicit. In such circumstances, the trustee’s conscience is bound by the trust instrument, and not by the settlor’s subjective intentions: *ibid*, at [118]. As to sham, see §§ 4–19 *et seq*.

TRUSTS ARISING BY OPERATION OF LAW GENERALLY

3. CLASSIFICATION OF CONSTRUCTIVE TRUSTS AND CONSTRUCTIVE TRUSTEESHIP

Classes of constructive trusts

Subdivision of remedial constructive trusts

- 7–13 AFTER THE TEXT TO N.59 ADD. These distinctions are particularly important in relation to questions of limitation.^{59a}

Fiduciary duty trusts

- 7–17 AFTER THE TEXT TO N.76 ADD: Where a beneficiary procured an appointment to himself by entering into an agreement with a person whose consent was required for the appointment that the property so acquired would be applied for the benefit of certain grandchildren, a fiduciary obligation was created and the appointee held to be a constructive trustee for the grandchildren.^{76a}

NOTE 78. AT THE END ADD: But see now *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2010] EWHC 1614 (Ch); [2011] 1 B.C.L.C. 202; affirmed [2011] EWCA Civ 347; [2011] 4 All E.R. 335, discussed at §§ 20–28A to 20–28B (online supplement).

Purely remedial trusts

AFTER § 7–23 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

Move towards recognition of remedial constructive trusts?

- 7–23A In the recent decision of the House of Lords in *Thorner v Major*,^{2a} a claimant was awarded certain land in a claim based on proprietary estoppel, where a deceased farmer had made a series of assurances to him over many years that he would inherit the property. On the facts, the extent of the property was liable to fluctuate during the lifetime of the deceased. In his judgment, Lord Scott of Foscote said that he regarded the claimant's equity as being easier to

^{59a} See §§ 44–47 *et seq.*

^{76a} *De Bruyne v De Bruyne* [2010] EWCA Civ 519; [2010] W.T.L.R. 1525. The denial of, or refusal to carry out, the agreement was characterised as unconscionable or inequitable conduct, see at [51].

^{2a} [2009] UKHL 18; [2009] 1 W.L.R. 776.

TRUSTS ARISING BY OPERATION OF LAW GENERALLY

establish via a remedial constructive trust. He said^{2b} that the trust created by the common intention or understanding of the parties regarding the property on the basis of which the claimant had acted to his detriment was a remedial constructive trust. None of the other Law Lords discussed this point or decided the case on this basis. It is unclear whether this opens the door for a move towards the recognition of remedial constructive trusts, as suggested by Lord Browne-Wilkinson.^{2c} A common intention constructive trust arises at the time of the conduct relied on,^{2d} which was not so with the equity awarded to the successful claimant in *Thorner v Major*, where the identity of the property concerned was not capable of precise definition until the death of the representor. Using Lord Scott's formulation, the award does seem to involve the imposition of a trust on a defendant who knowingly retains property of which the claimant has been (in the court's view) unjustly deprived, thus possibly making it more likely that the higher courts will recognise a purely remedial constructive trust in the foreseeable future.^{2e} But for the lower courts, the position would appear to remain that there is no purely remedial constructive trust in English law.^{2f} This has, however, not prevented at least one first instance judge from refusing to strike out a claim seeking an award of a remedial constructive trust, on the basis that the authorities, and in particular *Stack v Dowden*,^{2g} do not preclude such a trust.^{2h}

4. CONSTRUCTIVE TRUSTS IMPOSED ON CERTAIN ACQUISITIONS

Property obtained by fraud or theft

7–26 NOTE 6. ADD: See also *Box v Barclays Bank plc* [1998] Lloyd's Rep. Bank. 185; *Papamichael v National Westminster Bank plc* [2003] EWHC 164 (Comm); [2003] 1 Lloyd's

^{2b} *ibid.*, at [20], relying especially on *Re Basham (Deceased)* [1986] 1 W.L.R. 1498.

^{2c} See § 7–23.

^{2d} See § 9–66.

^{2e} The question was also discussed, and left open, by Etherton J. in *London Allied Holdings Ltd v Lee* [2007] EWHC 2061 (Ch); [2007] All E.R. (D) 153 (Sep) at [259]–[264].

^{2f} *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2010] EWHC 1614 (Ch); [2011] 1 B.C.L.C. 202 at [23], Lewison J., saying that such a trust would involve the court taking a proprietary right away from its existing owner; and see the same judge's previous observations in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); [2007] W.T.L.R. 835 at [1546]. The lack of recognition of the remedial constructive trust in English law was also recognised by the CA in *Sinclair*, see [2010] EWCA Civ 347; [2011] 4 All E.R. 335 at [37].

^{2g} [2007] UKHL 17; [2007] 2 A.C. 432.

^{2h} *Clarke v Meadus* [2010] EWHC 3117 (Ch); [2010] All E.R. (D) 08 (Dec) at [83], Warren J. There was also an arguable claim in proprietary estoppel, and the judge indicated that the claimant still had to surmount the hurdle of showing the availability of the remedy in English law.

TRUSTS ARISING BY OPERATION OF LAW GENERALLY

Rep. 341 at [241]; *Commerzbank Aktiengesellschaft v IMB Morgan plc* [2004] EWHC 2771 (Ch); [2005] 2 All E.R. (Comm) 564 at [36]; *London Allied Holdings Ltd v Lee* [2007] EWHC 2061 (Ch); [2007] All E.R. (D) 153 (Sep) at [275]–[276]; *Bank of Ireland v Pexxnet Ltd* [2010] EWHC 1872 (Comm); [2010] All E.R. (D) 284 (Jul) at [55]–[57].

Rescission and rectification

7–27 NOTE 14. ADD: In *Papamichael v National Westminster Bank plc* [2003] EWHC 164 (Comm); [2003] 1 Lloyd’s Rep. 341, at [241], a contract was described as a “supervening barrier”, preventing the imposition of a constructive trust merely because an asset had been obtained by fraud.

NOTE 16. FOR THE REFERENCE TO Thomas and Hudson, *The Law of Trusts*, SEE NOW (2nd edn), § 27.27.

Trust arising from pre-existing relationship

7–28 NOTE 20. ADD: This may apply only when the director receives company property, and not where he receives property from a third party in breach of his fiduciary duty to the company: *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2010] EWHC 1614 (Ch); [2011] 1 B.C.L.C. 202 at [72]; affirmed [2010] EWCA Civ 347; [2011] 4 All E.R. 335; considered in §§ 20–28A and 20–28B (online supplement);.

Property acquired by unlawful killing*Operation of the constructive trust*

7–31 NOTE 41. FOR THE REFERENCE TO Parry and Clark, *The Law of Succession*, SEE NOW (12th edn), § 14–79.

Relief from the forfeiture rule

7–33 NOTE 48. AT THE END OF THE FIRST SENTENCE ADD: *Mack v Lockwood* [2009] EWHC 1524 (Ch).

TRUSTS ARISING BY OPERATION OF LAW GENERALLY

Proprietary estoppel

7–34 NOTE 49. FOR THE REFERENCE TO *Snell’s Equity*, SEE NOW (32nd edn), §§ 12–016 *et seq.*

AFTER THE TEXT TO N.50 ADD. More recently, however, Lord Scott of Foscote has expressed the view that proprietary estoppel cannot be relied on to enforce an agreement which is void under section 2 of the 1989 Act for want of writing.^{50a}

NOTE 53. AT THE END ADD: See § 7–23A (online supplement) on the comments by Lord Scott of Foscote in *Thorner v Major* [2009] UKHL 18; [2009] 1 W.L.R. 776 on the ability of the court to make an award based on a remedial constructive trust instead of proprietary estoppel. He did not discuss the issue whether a proprietary estoppel award was itself an institutional or a remedial constructive trust. See too n.50a.

NOTE 55. AT THE BEGINNING ADD: This view would seem to be supported by the approval by Lord Scott of Foscote in *Yeoman’s Row Management Ltd v Cobbe* [2008] UKHL 55; [2008] 1 W.L.R. 1752 at [17], in the context of proprietary estoppel, of the statement of Deane J. in *Muschinski v Dodds* (1985) 160 C.L.R. 153, Aus. HC, that a constructive trust remains predominantly remedial. Cf. § 7–23.

Unconscionable assertion of title to money payments by agents

7–36 NOTE 62. FOR THE REFERENCE TO *Bowstead and Reynolds on Agency*, SEE NOW (19th edn), § 6–41.

AFTER § 7–36 ADD THE FOLLOWING NEW PARAGRAPH AND HEADING

Trust of damages for carer

7–37 Following the decision of the House of Lords in *Hunt v Severs*,⁶⁷ a personal injury victim holds any damages received in respect of gratuitous services provided by voluntary carers on

^{50a} *Yeoman’s Row Management Ltd v Cobbe* [2008] UKHL 55; [2008] 1 W.L.R. 1752 at [29]. As he points out, there is no exception for estoppel in s.2(5) of the 1989 Act. This supports the view that there is a distinction between proprietary estoppel and the common intention constructive trust, see § 9–81.

⁶⁷ [1994] 2 A.C. 350 at 363. See also *H v S* [2002] EWCA Civ 792; [2003] Q.B. 965.

TRUSTS ARISING BY OPERATION OF LAW GENERALLY

trust for the carer. This rule, not followed in Australia⁶⁸ or New Zealand,⁶⁹ means that where the tortfeasor is also the victim's carer, no damages are recoverable (*i.e.* from insurers) in respect of the defendant's care as they would both be payable by the defendant and held on trust for him. The basis of this trust is uncertain, and seems to have been intended largely to bring English law into line with that of Scotland.⁷⁰ The trust is an institutional constructive trust which arises in favour of the carer's estate even if the carer dies before the damages in respect of his care have been awarded or assessed.⁷¹ The trust is perhaps best viewed as imposed as a matter of public policy, and not on established principles concerning constructive trusts.⁷²

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⁶⁸ *Grincelis v House* [2000] HCA 42; (2000) 201 C.L.R. 321.

⁶⁹ *New Zealand Guardian Trust Company Ltd v Siemonek* [2007] NZCA 494; [2008] 2 N.Z.L.R. 202.

⁷⁰ See Administration of Justice Act 1982, s.8 (not applicable in England, see s.77(3)).

⁷¹ *Hughes v Lloyd* [2007] EWHC 3133 (Ch); [2008] W.T.L.R. 473.

⁷² *ibid.*, at [29]. See also Underhill and Hayton, *Law of Trusts and Trustees* (18th edn), § 8.259 (suggesting that the victim has the right to change carer despite the imposition of a constructive trust); *McGregor on Damages* (18th edn), § 35–234; Matthews [1994] C.J.Q. 302.