



Remedies for breach of confidence

Patrick Lawrence QC and Charles Phipps
4 New Square
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Introduction: the cause of action for breach of confidence

Origins of the law of confidentiality:

Prince Albert v Strange (1848) 1 Mac & G 25

Francis Bacon, *Reading on the Statute of Uses* (1600)

Coco v A.N.Clark (Engineers) Ltd [1968] FSR 415

Campbell v MGN Ltd [2004] 2 AC 457

PJS v News Group Newspapers Ltd [2016] AC 1081

Licence Fee Damages

- *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 1 WLR 798
- *Marathon Asset Management LLP v Seddon* [2017] ICR 791

Constructive Trust

Company X discloses confidential information about a commercial opportunity to Company Y.

Company Y misuses that information by pursuing the commercial opportunity for its own benefit.

Can Company X assert a proprietary remedy against Company Y?

The Leading Canadian Authority

LAC Minerals Ltd v International Corona Resources Ltd [1990] FSR 441 (Canadian Supreme Court)

La Forest J:

...it is not the case that a constructive trust should be reserved for situations where a right of property is recognized. That would limit the constructive trust to its institutional function, and deny to it the status of a remedy, its more important role...

Institutional and remedial constructive trusts

Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669, per Lord Browne-Wilkinson at 714-715:

Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such trust having arisen (including the possibly unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion. A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court.

English Authorities

Attorney-General v Guardian Newspaper (No.2) [1990] 1 AC 109 (Spycatcher)

Ocular Sciences Ltd v Aspect Vision Care Ltd [1997] RPC 289

Satnam Ltd v Dunlop Heywood Ltd [1999] 3 All ER 652

United Pan-Europe Communications NV v Deutsche Bank AG [2000] 2 B.C.L.C. 461

English Rejection of Remedial Constructive Trusts

Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd [2012] Ch 453, per Lord Neuberger MR at [37]:

Whether a proprietary interest exists is a matter of property law, and is not a matter of discretion: see Foskett v McKeown [2001] 1 AC 102, 109 per Lord Broune-Wilkinson. It follows that the courts of England and Wales do not recognise a remedial constructive trust as opposed to an institutional constructive trust.

Bribes and Secret Commissions

FHR European Ventures LLP v Cedar Capital Partners LLC [2015] AC 250, at [47]:

...the notion, adopted by Cotton and Brett LJ that a trust might arise once the court had given judgment for the equitable claim seems to be based on some sort of remedial constructive trust which is a concept not referred to in earlier cases, and which has authoritatively been said not to be part of English law...

“The Rule”

At [7]:

...at least in some cases where an agent acquires a benefit which came to his notice as a result of his fiduciary position, or pursuant to an opportunity which results from his fiduciary position, the equitable rule (“the rule”) is that he is to be treated as having acquired the benefit on behalf of his principal, so that it is beneficially owned by the principal. In such cases, the principal has a proprietary remedy in addition to his personal remedy against the agent, and the principal can elect between the two remedies.

The Respondents’ Formulation

At [30]:

The respondents’ formulation of the rule, namely that it applies to all benefits received by an agent in breach of his fiduciary duty to his principal, is explained on the basis that an agent ought to account in specie to his principal for any benefit he has obtained from his agency in breach of his fiduciary duty, as the benefit should be treated as the property of the principal... More subtly, it is justified on the basis that equity does not permit an agent to rely on his own wrong to justify retaining the benefit: in effect, he must accept that, as he received the benefit as a result of his agency, he acquired it for his principal.

The Appellants’ Formulation

At [31]:

The appellant’s formulation of the rule, namely that it has a more limited reach, and does not apply to bribes and secret commissions, has... various different formulations and justifications. Thus, it is said that, given that it is a proprietary principle, the rule should not apply to benefits which were not derived from assets which are or should be the property of the principal... It has also been suggested that the rule should not apply to benefits which could not have been intended for the principal and were, rightly or wrongly, the property of the agent... In Sinclair... it was suggested that the effect of the authorities was that the rule should not apply to a benefit which the agent had obtained by taking advantage of an opportunity which arose as a result of the agency, unless the opportunity “was properly that of the [principal]”.

Breach of Confidence and Breach of Fiduciary Duty

Duties of confidence are not to be confused with fiduciary duties:

Indata Equipment Supplies Ltd v ACL Ltd [1998] FSR 248, at 256 and 262.

But they often co-exist.

Analogy from Breach of Fiduciary Duties

...equity does not permit an agent to rely on his own wrong to justify retaining the benefit: in effect, he must accept that, as he received the benefit as a result of his agency, he acquired it for his principal...

As with the agent, why not with the confidant?



NEW SQUARE

4 NEW SQUARE LINCOLN'S INN
LONDON WC2A 3JF
WWW.NEWSQUARE.COM
T: +44 (0) 7822 20000
UK L19E 0118
E: CLERKS@NEWSQUARE.COM
