EQUITY AND THE PROCEEDS OF CRIME

Patricia Loughlan
Faculty of Law
University of Sydney

There is an existing, though ill-defined and distinctly under-utilised, equitable jurisdiction to deprive criminals of the proceeds of their crimes. The thesis of this brief paper is simply that the flexible, conscience-based principles of equity, especially as manifested in the remedial constructive trust, can function to enforce the public policy, curially articulated both at law[1] and in equity,[2] that no criminal shall profit from his own crime.

The imposition of a constructive trust has personal and proprietary consequences for the constructive trustee — it is a dramatic and onerous burden. The beneficiary of the trust has an equitable interest in the property subject to the trust and can assert that proprietary interest both against the constructive trustee and against any subsequent holder of the property except for a bona fide purchaser for value without notice. If the property itself cannot be recovered in full or in part because, for example, it is no longer identifiable and cannot be traced, the constructive trustee, like any other trustee, can be made personally liable to pay equitable compensation to the beneficiary for the loss of the property.

But what is the constructive trust and when can it be imposed? The constructive trust is, at least in principle, ". . . the formula through which the conscience of equity finds expression".[3] It is said to be, ". . . an instrument created by the law to do justice",[4] a trust imposed by law where justice and good conscience require it, regardless of the express or implied intentions of the parties concerned.[5] Unfortunately, it is also, in practice, a trust imposed only when circumstances of any particular case fall within one or more of a few well-established categories of liability, categories which, in England and Australia at any rate, defy any attempt at a unifying and ordered analysis.

In the view of the present writer, however, one or more of these established categories can be developed and used, without violating accepted equitable doctrine, to lassoo the profits of crime and force both the criminals themselves and third persons who take from those criminals to hold such profits on trust. The categories are these: (i)

---

1 *Cleaver v. Mutual Reserve Fund Life Association* [1892] 1 QB 147; *Beresford v. Royal Life Insurance Co.* [1938] AC 586

2 Earnshaw and Pace, in "Let the Hand Receiving It Be Ever So Chaste . . ." (1974) 37 *MLR* 481 at 481 trace this principle of public policy back to the inception of modern equity and describe it as the precursor of the common law rule to the same effect which was later developed in the nineteenth century.

3 *Beatty v. Guggenheim Exploration Co* 225 NY 380 at 386 (1919) per Cardozo J

4 Maudsley, R.H., "Constructive Trusts" (1977) 28 *NJLQ* 123 at 137

5 *Hussey v. Palmer* 1972 1 WLR [1286] at 1289-90; *Baden Delvaux and Lecuit v. Societe General* [1983] BCLC 325

Constructive Trusts imposed on property acquired by reason of an unlawful killing; and (ii) Constructive Trusts imposed to prevent the defendant from being unjustly enriched. It will be argued here that the reach of the first category of constructive trust liability can be extended to cover other crimes besides wrongful killing and other benefits besides payments under wills and life insurance policies. And it will be further argued that the doctrinal key is to be found in the concepts of unconscionability and unjust enrichment found in the second category.

It is clear law that a constructive trust will be imposed to prevent the perpetrator of a wrongful killing from taking a beneficial interest in any property which accrues to him as a direct result of that killing. Where the legal estate becomes vested in the killer,[6] the killer holds it for the benefit of his victim's estate. The slaying of one joint tenant by another entails that, at law, by the *jus accrescendi*, the slayer becomes entitled to the whole of the property held in joint tenancy. And equity has responded by compelling the criminal to hold the entire legal estate on a constructive trust for himself and for the estate of his victim in equal shares.[7]

A number of difficult problems are contained in and masked by those abstract propositions of law,[8] but the issue for present purposes is how close the connection must be between the act of killing and the acquisition of property before the principle of public policy will engage to attach the property. Since the equitable jurisdiction is not penal and the principle requires deprivation but not punishment, the courts scrupulously avoid any return to the ancient and statutorily abolished regime of escheat and forfeiture:[9]

> . . .The principle of public policy operates only to deny the felon the enjoyment of any benefit which might otherwise flow from his felonious act; it does not cross the line and take from him rights or interests which are not consequential upon his felonious act.[10]

---

6 It is often the case that the legal estate never in fact vests in the killer, because the common law, acting under the same principle of public policy, prevents the vesting. Ames, in *Lectures On Legal History* (1897) at 313, distinguished two legal strategies for depriving the criminal of the profits of his act. One is to prevent the legal title from ever passing to the killer and the other is to allow the title to pass but compel the killer to hold it on constructive trust. In "Killing The Goose That Lays the Golden Eggs" (1958) 32 *Aust Law J* 14 at 16, Toohey noted that Anglo-Australian courts have generally used the former strategy and American courts the latter.

7 *Rasmanis v. Jurewitsch* (1968) 88 WN (NSW) 59; *Re Stone* 1989 1 Qd.R. 351; *Re K (deceased)* 1985 2 WLR 262; *Schobelt v. Barber* (1966) 60 DLR (2d) 519

8 Whether for example, any form of wrongful killing is sufficient to engage the principle of public policy: see *Public Trustee v. Fraser* (1987) 9 NSWLR 433 and *Re Stone, Supra* (manslaughter with diminished responsibility); and the relevance of a criminal conviction or acquittal to the issue of whether a constructive trust should be imposed: see *Public Trustee v. Evans* (1985) 2 NSWLR 188

9 See Pollock and Maitland, *The History of English Law* (Reissued 1968, ed S.F.C. Milsom) Vol I at 477 for an account of the law in Bracton's day governing the consequences of a declaration of 'outlawry': "Of every proprietary, possessory contractual right he is deprived; the king is entitled to lay waste his land and it then escheats to his lord; he forfeits his chattels to the king."

10 *Rasmanis v. Jurewitsch, supra* n 7 at 63

One important restriction on equity's jurisdiction to impose trusts on the proceeds of crime is therefore the need to ensure that only property which can be attributed to the crime itself can be attached.

The causal nexus between the crime and the benefit must, judging from the cases, be close and direct — an inheritance from the will or the intestacy of the victim or a payment under the victim's life insurance policy or pension fund or a survivorship right under a joint tenancy. But Street J, in the passage cited above, speaks in terms of benefits "flowing from" or "consequential upon" the criminal act, terms which, within the limits of avoiding forfeiture of the criminal's own property, do not suggest that there is a particularly stringent casual connection test.

There is one recent rather spectacular instance of a judicial loosening of the causal connection requirement. In the case of *Rosenfeldt v. Olson*[11], a decision of the British Columbia Supreme Court, a killer was deprived of certain benefits which were found to have accrued to him by reason of crime, in the following unusual circumstances: Olson was a serial killer of children. When he was apprehended, he entered into negotiations with the RCMP which resulted in the payment of $100,000 by the RCMP into a trust fund for the benefit of Olson's family in exchange for information given by Olson as to the location of the bodies of the children whom he had murdered. The monies paid were solely for the benefit of Olson's family and not for the benefit of Olson himself. Some of the parents of the murdered children brought an action claiming, *inter alia*, that the money was impressed with a constructive trust in their favour. The court agreed. Although the judgments proceeded on the basis of the unjust enrichment of the defendant and that Olson was unjustly enriched by the payment, the court had to address the issue of the connection between the act of killing and the receipt of benefit. Trainor J said this:

> The question of whether that fund came into being or was acquired as a direct result of the killings. Is there the necessary causal connection? . . . I know the fund came into being after the killings had occurred, to be paid out in exchange for information of identity and location of bodies, but I have no problem concluding that the establishment of the fund was as a direct result of those killings.[12]

This is little more than unsubstantial assertion and it may be that the notion of a benefit being a 'direct result' of a crime must be an elastic one and dependant upon judicial instinct rather than judicial reasoning. The 'direct result' test does seem, in

11 [1985] 2 WWR 502; reversed [1986] 3 WWR 403 (BCCA); leave to appeal to the Supreme Court of Canada refused

12 *Ibid* at 530. The Court of Appeal decision did not disturb Trainor J's finding on the causal connection between the crime and the acquisition of property. The reversal of the trial court decision was on the basis that, contrary to Trainor J's view, the plaintiffs had not suffered the deprivation necessary to found a constructive trust based on unjust enrichment.

substance, to be a kind of 'but for' requirement — the benefit would not have accrued to the criminal but for the fact of his crime. If money paid to a killer to acquire information about his crime is a benefit that directly results from that crime, then it seems plausible to suggest that profits accruing to a killer from a book written about his crime are also benefits directly resulting from that crime. And if that is true about profits from a book, then what about the sale of movie rights . . . ? This is not, in the view of the present writer, a matter of opening floodgates; it is a matter of opening a window.[13]

That the principle of public policy is indeed a principle and not an inflexible rule of law was recognised by Young J in *Public Trustee v. Evans*, who found that is open to a judge to pronounce the limitations of the principle in keeping with the requirements of the particular age.[14] The current widespread social concern, reflected in legislation, over the spectacle of criminals retaining and prospering from the benefits of their crimes may mean that in our age the principle can rightly expand in scope. But persuading the courts of equity to expand the reach of constructive trust hitherto restricted to circumstances such as killers taking benefits under wills may require the exposition of some more established doctrinal basis than a principle of public policy. That doctrinal basis can be found, it is suggested, in the rapidly developing equitable jurisdiction to impose a constructive trust where, in the opinion of the court, it would be unconscionable to allow the person with legal title to property to deny the beneficial interest in that property to the claimant.[15] In *Public Trustee v. Fraser*, Kearney J expressly recognised that the principle of public policy requiring the attachment of benefits accruing to a criminal from his crime is, "itself a rule deriving from the broader concept of unconscionability"[16] and he drew an analogy between that rule and the constructive trust imposed on the basis of "unconscionable assertion or retention of the benefit of property . . . and of unjust enrichment".[17] Kearney J found that where the constructive trust is expressly imposed on the basis of preventing unconscionable conduct and unjust enrichment, the court's role becomes, "not only ascertaining the nature of the crime but also looking to the circumstances in order to evaluate the moral culpability" of the offender.

There is a further problem of the identity of the trust beneficiary. That is, the profits may be held on a constructive trust, but on a constructive trust *for whom*? In *Rasmanis v. Jurewitsch*, Street J vigorously denounced any principle founding the

13 The argument here is directed to equity's inherent jurisdiction, through the extension of established doctrine, to impose a constructive trust on the proceeds of crime. It should be noted that in California, a *statute* provides for the mandatory imposition of a constructive trust on profits received by a convicted criminal from the sale of the story of his crime: *Calif Civil Code* s 2225 (West Supp 1988). For a commentary on the constitutional implications of the statute, see Okuda, Sue S. "Criminal Antiprofit Laws: Some Thoughts in Favour of their Constitutionality" (1988) 76 *Calif L Rev* 1353

14 [1985] NSWLR at 192

15 *Muschinski v. Dodds* (1986) 60 ALJR 52; *Baumgarter v. Baumgarter* (1987) 76 ALR 75. The domestic context in which the conflict of these two High Court cases arose should not limit the breadth of the principles therein articulated.

16 [1987] 9 NSWLR at 443

17 *Ibid* at 444

constructive trust on a compensatory basis, "public policy requires deprivation of the felon; it does not require compensation to the victim."[18] In fact, in that case, the benefit was held on a constructive trust for the victim's estate:

> The result is due to equity acting in personam so as to preclude the felon's unconscientious action gaining him this benefit. *A home for the benefit must be found and the estate of his victim is the only available destination.* (emphasis added)[19]

The statutory constructive trust in California, referred to above, is imposed in favour of the criminal's victims, for injury or loss resulting from the crime. There is a defined time period within which the victims must file claims and if the time passes without such claims being made, the criminal himself receives the benefit of the trust.[20] The equitable constructive trust under discussion here, however, is based on the principle that it would be unconscionable to allow a criminal to hold the proceeds of his crime for his own benefit. The fact that in any particular case there may be no victims to claim the money should not be a sufficient ground to reverse the operation of the principle.

In *Rosenfeldt v. Olson*, Trainor J accepted that the parents of the victim were legitimate equitable claimants to the beneficial interest in the fund[21] and found that the money, "was a quantification of the loss inflicted by the criminal acts which led to the fund".[22] That finding can be explained by the fact that the constructive trust in the case was expressly based on a principle of unjust enrichment which required both an enrichment of the defendant and a corresponding deprivation of the plaintiff. A deprivation on the part of the parents had to be found to justify the imposition of the trust and, as noted above, the Court of Appeal found that the parents had not suffered the required deprivation:

> The payment to [the trustee] did not deprive the plaintiffs of money which, if it had not been paid to [the trustee], would properly have been payable to the plaintiffs. Thus, the payment to [the trustee] did not result in any correspondending deprivation of the plaintiffs.[23]

But if the constructive trust is founded not on a restitutionary basis but on the basis of unconscionability, then such a deprivation need not be found. And it is suggested that there should be no blanket rule. Where a court decides that a constructive trust should be imposed on the basis that it would be unconscionable for a criminal to retain the beneficial interest in property which accrues to him as a direct result of his crime, then, in the words of Street J, a home for the benefit must be found and it is up to the court, looking to all the circumstances of the case, to find it. It may be that in most cases the only appropriate beneficiary is the victim or the victim's estate. It may be that in other cases, the property ought to return to the Crown as *bona vacantia*. The critical point is that the criminal is prevented from retaining the beneficial interest in property where it would be unconscionable for him to do so.

---

18 *Rasmanis v. Jureswitsch, supra* n 7 at 63
19 *Ibid* at 64
20 *Calif Civil Code* s 2225(e)(3) (West Supp 1988)
21 *Rosenfeldt v. Olson, supra* at 533
22 *Ibid* at 526
23 *Rosenfeldt v. Olsen* [1986] 3 WWR 403 at 408