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# Proprietary Claims in Equity: Prerequisites and other Requirements

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In order to maintain an equitable proprietary claim, the claimant must firstly be asserting recovery of property based on an equitable proprietary interest.<sup>1</sup>

The second and more debatable prerequisite is that there must be in existence a fiduciary duty, in which the breach of resulted in property being misapplied.<sup>2</sup> As for common law, it did not require the existence of fiduciary relationship as the tracing claim is based on the owner's legal title.<sup>3</sup> The equitable requirement stemmed from passages in *Re Diplock*<sup>4</sup> and had been doubted to have even been a requirement<sup>5</sup> or that it need not be established before the "transaction" occurred but that it may arise as a result of the transaction - a quasi fiduciary duty.<sup>6</sup> This would seem to relate to the fact that equity binds the conscience of the recipient and acts on unconscionability. This also accords with statement by Millet J in *Agip (Africa) Ltd v. Jackson*<sup>7</sup> that it is sufficient that the person in question was a person "whose fiduciary position gave him control of (property/funds) or enabled him to misapply them".

However the requirement of fiduciary duty has somewhat been relaxed in its application in Australia, notably cases allowing victims of theft to trace stolen property<sup>8</sup> and where "...the conscience of the recipient is subjected to a fiduciary duty to respect his (claimants) proprietary rights".<sup>9</sup>

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1 *Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd* [1981] Ch 105 at 120.

2 *Boscawen v. Bajwa* [1995] 4 All ER 769 at 777.

3 *Agip (Africa) Ltd v. Jackson* (CA) [1991] Ch 547 at 563.

4 [1948] Ch 465 at 530.

5 *El Ajou v. Dollar Land Holdings* [1993] 3 All ER 717 at 734.

6 *Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd* [1981] Ch 105 at 119-120.

7 [1990] 1 Ch 265 at 290.

8 *Black v. S Freeman & Co* (1910) 12 CLR 105.

9 *Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd* [1981] Ch 105 at 109.

Once these are established, it gives rise to tracing, which is not strictly an equitable remedy but is "primarily a means of determining the rights of property"<sup>10</sup> and is thus a technique for identifying property belonging to a claimant as a preliminary step to recovering it from the recipient.

Therefore a limitation on the right to trace is that the plaintiff's property must be able to be identified.<sup>11</sup> The property must not have been dissipated, for example by spending money on dinner<sup>12</sup> or alterations or improvements to property<sup>13</sup> but the fact that property of the claimant had been mixed with property of the person who misappropriated it would not preclude tracing in equity<sup>14</sup>, a position which was not taken by common law.<sup>15</sup>

Maintaining the identification restriction, tracing in equity was prohibited when there was intervention by a third party who acquired the claimants property *bona fide* for value without notice.<sup>16</sup> However this did not restrict recovery of the proceeds of sale nor any personal remedies against the fiduciary who breached their obligations. Compare this to the common law position which was not restricted by such acquisitions, unless the asset was money.<sup>17</sup>

Secondly, as equity acts in discretion, tracing would be denied if it would produce an inequitable result.<sup>18</sup> *Re Diplock*<sup>19</sup> held that this might occur when an innocent volunteer had used the claimant's property to alter or improve his land or to pay off debts (unsecured or secured). This may now seem to be subsumed into the defence of change of position.

Historically, the courts were reluctant to recognise such a defence<sup>20</sup>, however it is clearly now established<sup>21</sup> particularly in Australia by *David Securities Pty Ltd v. Commonwealth Bank*<sup>22</sup>, where the central element is that "the defendant has acted to his or her detriment on the *faith of the receipt*".<sup>23</sup> In Queensland, the defence is entrenched in *Trusts Act 1973* s.109(3) which applies to both legal and equitable interests and it would seem that the observations in the cases would be applicable to the statutory defence.<sup>24</sup> It should be noted, that although *David Securities* has yet to be explicitly recognised as applying to equitable claims, it is most likely, given

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10 *Re Montagu's Settlement Trusts* [1987] Ch 264 at 285.

11 *Borden (UK) Ltd v. Scottish Timber Products Ltd* [1981] Ch 25 at 46.

12 *Re Diplock* [1948] Ch 465 at 521.

13 *Ibid* at 547.

14 *Brady v. Stapleton* (1952) 88 CLR 322 at 336.

15 *Re Diplock* [1948] Ch 465 at 518.

16 *Ibid* at 539.

17 *Banque Belge pour L'Etranger v. Hambrouck* [1921] 1 KB 321.

18 *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] 2 WLR 802 at 816.

19 [1948] Ch 465 at 546-548.

20 *Ministry of Health v. Simpson* [1951] AC 251.

21 *Lipkin Gorman v. Karpnale Ltd* [1991] 2 AC 548 at 581.

22 (1992) 175 CLR 353.

23 *Ibid* at 385.

24 A J Oakley *Proprietary Claims and their Priority in Insolvency* (1994) 47, QUT occasional paper.

comments in *Lipkin Gorman and Trusts Act 1973* (Qld) s.109(3).

Finally, s.109(2) of the *Trusts Act 1973* states that all remedies available to the claimant against the trustee or personal representative must be exhausted before any remedy is sought against the recipient of the property, this being excepted by leave of the court. It is arguable that this section applies only to claims in personam and not in rem.<sup>25</sup>

Once the claim has succeeded the main proprietary remedies able to enforce tracing claims include :

- equitable lien or charge<sup>26</sup>
- recovery of the property directly<sup>27</sup>
- constructive trust - as noted by Deane J in *Muschinski v. Dodds*<sup>28</sup>, constructive trusts can be both an institution and a remedy. As a remedy, there is some controversy. Gummow J in *Stephenson Nominees*<sup>29</sup> called for “[c]are... against over-emphasising the role of the constructive trust in this area.” This can be compared with Lord Browne-Wilkinson’s comment in *Westdeutsche*<sup>30</sup> that “[t]he remedial constructive trust... may provide a more satisfactory road forward. The court by way of remedy might impose a constructive trust on a defendant who knowingly retains property of which the plaintiff has been unjustly deprived.” As an institution, it is more readily accepted<sup>31</sup> and to most extents overlaps with tracing.

Above-all, “the law relating to the creation and tracing of equitable property interests is still in a state of development”<sup>32</sup> and therefore principles such as unjust enrichment<sup>33</sup> and application of unconscionability as the key factor in allowing recovery<sup>34</sup> will no doubt extend tracings flexibility in both application and remedying.

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25 *Hagan v. Waterhouse* (1991) 34 NSWLR 308.

26 *Stephenson Nominees Pty Ltd v. Official Receiver* (1987) 16 FCR 536 at 554.

27 *Stephens Travel Service International Pty Ltd v. Qantas Airways Ltd* (1988) 13 NSWLR 331 at 348.

28 (1985) 160 CLR 583.

29 *Stephenson Nominees Pty Ltd v. Official Receiver* (1987) 16 FCR 536 at 553.

30 *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] 2 WLR 802 at 839.

31 *Keith Henry & Co Pty Ltd v. Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342 at 350 - “... a trustee must not use his position as trustee to make a gain for himself: any property acquired, or profit made, by him in breach ... is held by him in trust for his cestui que trust.”

32 *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 at 109.

33 As per Toohey J in *Muschinski v. Dodds* (1985) 160 CLR 583.

34 Along the lines of *Chase Manhattan Bank NA v. Israel - British Bank (London) Ltd* [1981] 1 Ch 105.