

Tracing

The Loss of the Right to Trace

1. Introduction: The Nature of Tracing

1.1 Consistently with the conceptual and linguistic difficulties associated with the topic of tracing, there is no uncontroversial way of framing the title of the subject that is dealt with in this paper, namely the circumstances in which tracing is not available.

1.2 The difficulties referred to centre on trying to understand the true juridical nature of tracing. In Snell's Equity [33rd Edition: page 792] the word used to describe the circumstances in which tracing can be said to be unavailable is, one, well known to litigators, namely "defences". However "defence" properly describes the basis on which a respondent to a claim can successfully resist the claim. Thus the use of the word "defences" presupposes that tracing is itself a claim.

1.3 The proposition that tracing amounts to a claim would appear to be no longer sustainable. The corrective analysis was provided by Lord Millett in the following well-known passage at page 128D of Foskett v McKeown [2001] 1 AC 102:

"Tracing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property. Tracing is also distinct from claiming. It identifies the traceable proceeds of the claimant's property. It enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim. But it does not affect or establish his claim."

1.4 This passage was repeated almost verbatim (but not formally cited) by Chao Hick Tin J, delivering the judgment of the Singaporean Court of Appeal in Caltong (Australia) Pty Ltd v Tong Tien See Construction Pte Ltd [2002] 2 SLR (R) 94 at paragraph 53.

Foskett v McKeown and Caltong are both, correctly, cited as stating the current legal position in Halsbury's Laws of Singapore [Volume 9[4]: 2012 Reissue: Equity and Trusts, at paragraph [110.1006] on page 372, under the heading "The nature of tracing"].

- 1.5 Given that tracing is "... neither a claim nor a remedy" but merely a process of identification of recoverable assets, it is submitted that, properly speaking, there are no "defences" to tracing. On the contrary, what can be discerned from the authorities are a number of definable circumstances in which tracing ceases to be available to a prospective claimant. Accordingly this paper refers, in its title, to "The loss of the Right to Trace", the author gratefully adopting the same heading as appears above paragraph [110.1011] of Halsbury's Laws of Singapore [supra]. The deprecation of the use of the word "defences" is also to be found in Tan Yock Lin's "Personal Property Law" [Academy Publishing: 2014] where, at page 749, paragraph 15.101, the following is stated:

"The reference [to "defences"] is unfortunate. The terminology of defences misleadingly suggests that the contents of the so-called defences are relevant to the extinguishment of the property rights to be claimed ... However, these defences are in truth limits to the identification in equity of a substitution."

- 1.6 Though there are some obvious cross-overs and similarities between the circumstances in which the right to trace is lost, nevertheless four broad sub-headings can be identified, as follows:

- (1) where the property is in the hands of a bona fide purchaser for value without notice:
- (2) where the property has been dissipated:

- (3) where it would be inequitable to allow the claimant to trace his property: and
- (4) where the property is in the hands of a person who can show that, following receipt, he has changed his position in good faith.

Each of these four is considered, briefly, below.

2. Bona Fide Purchaser

2.1 The origin of this inhibition on the right to trace is to be found in the judgment of Lord Greene MR in In Re Diplock [1948] 1 Ch 465 where the following is stated, at page 539:

“Where the moneys are handed by way of transfer to a person who takes for value without notice, the claim of the owner of the moneys is extinguished just as all other equitable estates or interests are extinguished by a purchase for value without notice.”

2.2 It is to be noted that the “for value” element is usually construed widely. It is not limited to “new” value but includes the discharge of a pre-existing debt. Thus the exception can be relied on by a bank which receives money in discharge of an overdraft or some other debt, [see Bishopsgate Investment v Homan [1995] 1 All ER 347, cited in Snell [supra at page 792, paragraph 30-064, footnote 275, and the detailed analysis in Lionel D. Smith’s “The Law of Tracing” [Clarendon Press: 1997] at 386 to 396. Dr Smith’s work is, incidentally, cited with approval by Lord Millett in Foskett McKeown [supra] at page 129A].

2.3 The application of the bona fide purchaser inhibition in Singapore has been established by the Court of Appeal in Caltong [supra] where, at para 57, Chao Hick Tin JA said:

“... if a particular asset has gone into the hands of a bona fide purchaser for value without notice of the breach, then in so far as that asset is concerned, the tracing must end, and no claim may be made by the beneficiary against that bona fide purchaser...”

This passage is cited by Tan Yock Lin in “Personal Property Law” [supra] at page 747, paragraph 15.102, footnote 172.

3. Dissipation

3.1 Dissipation, which is a conceptual sibling to acquisition by a bona fide purchaser, is recognised as being fatal to tracing both in Halsbury’s Laws of Singapore [supra: at paragraph 110.1011] and in Snell [supra].

3.2 The relevant passage in Snell is to be found at page 792, paragraph 30.064 and is in the following terms:

“Failure of identification and dissipation of proceeds. If it is established by the rules of following and tracing that the specific proceeds of the claimants’ property have been dissipated then there will be no foundation for a proprietary remedy against the assets of the trustee. In the absence of such specific identification, the claimant may not assert a general lien over the trustee’s assets to reflect the extent to which they might have been swollen by the contribution of the claimant’s money. Accordingly the effect of the trustee’s paying the claimant’s money into an overdrawn bank account is generally to render the money untraceable.”

4. Inequitability

4.1 This heading covers, together, the two points referred to in paragraph 1.6 (3) and (4) above as, in reality, the unconscionability, or inequity, of an outcome, whether as regards a claimant to, or a recipient of, property, are two sides of the same coin.

4.2 Both the leading Singaporean and UK authorities (respectively, Personal Property Law [supra: at pages 749-750, paragraph 15.103] and Snell [supra: at pages 792-

paragraph 30-066] acknowledge that the scope and range of the inhibition that inequity places on the process of tracing remain uncertain and not yet fully explored by the Courts in either jurisdiction.

- 4.3 In Snell it is contended that inequity, consequent upon a property recipient's change of position, does halt the tracing process in respect of prospective restitutionary claims founded on unjust enrichment;

“... the rationale ... is that the liability of a person should be reduced or extinguished if his position has been so changed by the receipt of the claimant's money that it could be inequitable for him to make restitution of all or part of the money received. The defence is not available to a wrongdoer. This includes a person who changes his position knowing the facts of the claimant's cause of action against him. Accordingly the defence is unlikely to be available to a claim for knowing receipt. The pre-condition to liability in that action is the defendant's knowledge of the facts making his receipt of the money's unconscionable.”

- 4.4 Where, according to Snell, the position “... remains uncertain ...” is as to the extent to which want of equity restricts the process of tracing in prospective breach of trust claims. As is explained,

“The authorities are divided on whether change of position should be available as a defence to a claim to a proprietary remedy founded on tracing or following. In general, the enforcement of a proprietary right against a third party does not depend on questions of inequity to the third party, and the enforcement of a property right against a substituted asset is said to depend on questions of unjust enrichment. In an earlier case [this is a reference to In Re Diplock: supra], however, it was held that an innocent volunteer who used the claimant's money to improve buildings on his land or to repay a loan secured by a charge should not be liable to a proprietary remedy enforceable against the land since enforcement of the remedy would be “inequitable”.”

It is anticipated that these uncertainties as to the current scope of tracing as an aid to breach of trust claims will be considered and debated in the session, at the Singapore Conference, that is scheduled for the morning of Thursday 5 March 2015.

MARK CUNNINGHAM QC

Maitland Chambers
Lincoln's Inn
London
February 2015