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INSURANCE PAYMENTS (MIS)DIRECTED, EQUITABLE MAXIMS (MIS)USED, AND RESTITUTION DOCTRINES MISSED

Shanahan v. *Redmond*

1. Introduction

A donor retains the services of a professional to ensure that the plaintiff will get certain of the donor's property, but the professional directs it instead to the recipient. The intended beneficiary, the plaintiff, has lost and the recipient has gained by virtue of the actions of the professional. In principle, the plaintiff can sue the professional in tort for negligence; it may be that he can in the alternative sue the recipient in restitution.

The negligence action is secure at least since the House of Lords' decision in *White* v. *Jones*.[1] Commenting on that case, Weir suggested that a better solution would be provided by an action based upon the Inheritance (Provision for Family and Dependants) Act 1975, by which the plaintiff could sue the recipient directly.[2] Similarly, a contemporary Irish

1. [1995] 2 A.C. 207 (H.L.). *Cf. Ross* v. *Caunters* [1980] Ch. 297 (Megarry, V.-C.); *Gartside* v. *Sheffield Young and Ellis* [1983] N.Z.L.R. 37 (N.Z.C.A.); *Hawkins* v. *Clayton* (1989) 164 C.L.R. 539 (H.C.A.).

2. Weir, "*A Damnosa Heriditas?*" (1995) 111 L.Q.R. 357.

case, *Shanahan* v. *Redmond*,[3] suggests that the recipient m[illegible]be held to have received the proceeds on trust for the plaintiff. Underpinning both approaches is the view that, were it otherwise, the wrong people would get the money.[4] However, Cretney subsequently pointed out that the 1975 Act is not "concerned to remedy unjust enrichment",[5] and it is submitted here that a proprietary trust action would also usually be inappropriate. Nevertheless, as Matthews has suggested,[6] a personal action in restitution against the recipient ought in principle to be available to the plaintiff, an action which would ensure that the right people would get the money without distorting either statutory inheritance provisions or the law of trusts. This may be illustrated by an analysis of *Shanahan* v. *Redmond*.[7]

2. Insurance payments (mis)directed: the decision in *Shanahan* v. *Redmond*

The donor had originally instructed a life assurance company to name the defendant as beneficiary of a trust comprised in a life assurance savings policy, but subsequently sought to install the plaintiff as the beneficiary in the defendant's place. His first attempt to achieve this by a Deed of Appointment having failed, he gave clear instructions, sufficient according to the terms of the policy, to the insurance company to cancel the policy and replace it with a similar one under which the plaintiff would be the beneficiary. These instructions were never carried out, and the recipient was paid on foot of the policy. Carroll, J., held that the policy must be treated as if it were a substitute policy in which the plaintiff was named as the sole beneficiary in place of the defendant, on the basis of the application of the equitable maxim that equity regards as done that which ought to be done. The obligation on the insurance company under the policy following the written notice ought to be treated as if it had been performed. In effect, the recipient held on trust for the plaintiff (which was the express result of the earlier and similar *McMechan* v. *Warburton*[8]).

Applying the same principle to the facts of *White* v. *Jones*, the beneficiary under the will would therefore be deemed to hold the proceeds on trust for the intended beneficiary. Conversely, the *White* v. *Jones* principle (and its Irish antecedent, *Wall* v. *Hegarty*[9]) could easily have been applied on the facts of *Shanahan* to allow the plaintiff a cause of action in negligence against the insurance company. Of course, if both remedies exist, the plaintiff would have to elect between them rather than have the benefit of both.[10] Of these two competing remedies, the merits of the tort claim have been analysed in the many commentaries on *White* v. *Jones*, of which the notes by Weir and Matthews are important examples; it is submitted here that the proprietory solution in *Shanahan* is not justified in

3. 21 June 1994, unreported (H.C.: Carroll, J.).
4. Weir (1995) 111 L.Q.R. 357, 359; *cf. White* v. *Jones* [1995] 2 A.C. 207, 278, *per* Lord Mustill.
5. Cretney, "Negligent Solicitors and Wills: A Footnote" (1996) 112 L.Q.R. 54, 55; citing *Re Coventry, dec'd* [1980] Ch. 461.
6. Matthews, "Round and Round the Garden" [1996] LMCLQ 460.
7. *Supra*, fn. 3.
8. [1896] 1 I.R. 435 (Chatterton, V.-C.); *aff'd* [1896] 1 I.R. 441 (C.A.).
9. [1980] I.L.R.M. 124 (H.C.).
10. *United Australia Ltd* v. *Barclays Bank* [1941] A.C. 1; *Tang Ming Sit* v. *Capacious Investments* [1996] 1 A.C. 514 (P.C.); Birks (1996) 112 L.Q.R. 378; Stevens, "Election Between Alternative Remedies" [1996] *Restitution L.R.* 117.

terms of the doctri[illegible] of equity deployed in the case, though a personal remedy in restitution probably would be.

3. Equitable maxims (mis)used

It is the unarticulated consequence of the decision that the recipient held on trust for the intended beneficiary. However, it is a cardinal principle of equity that it will not perfect a gift. This argument gave the Vice-Chancellor in *McMechan* much trouble, though, on the facts, he (dubiously) found an exception; and what the court in effect did in *Shanahan* was impermissibly to perfect a gift in favour of the intended beneficiary.

Again, the beneficiary under a life assurance policy is usually a volunteer. However, "volunteers are unable to take advantage of the maxim" that equity regards as done that which ought to be done;[11] and *Shanahan* has already been criticized in Ireland on the ground that it gave the benefit of this maxim to a volunteer.[12] In this regard, two issues must be separated. First, take the general case posited in the scenario at the beginning of this note. There the intended beneficiary is indeed a volunteer, and he would not be entitled to the benefit of the maxim.

Second, *Shanahan* in fact represents a subtle twist on the general case. When the donor sought to replace the recipient as the beneficiary, he instructed that he, the donor, would be the new beneficiary. Thus, on the facts, both the donor and the intended beneficiary were the same person; the donor was the payor of the premiums on the life assurance policy and, since he had indeed thereby given value, it may be said that the intended beneficiary, who is also the donor, is not a volunteer and is thus properly able to take advantage of the maxim.

However, the courts are astute to distinguish the capacities in which a person acts, and actions done in one capacity may have no effect when that person acts in another capacity. Consequently, in *Beswick* v. *Beswick*,[13] it was held that Mrs Beswick, as a stranger to a contract which had been made for her benefit, could not enforce it in her own right, but could enforce it in her capacity as executrix of one of the parties to the contract. Similarly, here, though the donor and the intended beneficiary happened to be one person, he had two separate capacities, as Mrs Beswick had; in his capacity as the intended beneficiary, he was a volunteer, unable to take advantage of the maxim. Furthermore, a lesson of *Walsh* v. *Lonsdale*[14] is that it is only to the extent that a court will order specific performance that the maxim is properly applicable.[15] Whether or not the donor can compel the professional to carry out his instructions, in the general case the intended beneficiary certainly cannot.

11. Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd edn (Butterworths, Sydney, 1992), para. 340, p. 95.
12. Delany, *Equity and the Law of Trusts in Ireland* (Round Hall Sweet & Maxwell, Dublin, 1995), 32; *cf.* Byrne and Birchy (eds.) *Annual Review of Irish Law 1994* (Round Hall Sweet & Maxwell, Dublin, 1996), 241.
13. [1968] A.C. 58 (H.L.). In its Report on *Privity of Contract: Contracts for the Benefit of Third Parties*: Law Com. No. 242 (1996), the Law Commission has recommended reform of the rule which precluded Mrs Beswick from suing *qua* contract beneficiary (see generally Burrows [1996] LMCLQ 467). A similar rule precluded a contract action on the facts of *White* v. *Jones*, and a more extensive reform than that contemplated by the Commission would add a potential action in contract to the tort action allowed in the case itself and the restitution action canvassed here.
14. (1882) 21 Ch.D. 9.
15. See, e.g., Coughlan, *Property Law in Ireland* (Gill & Macmillan, Dublin, 1995), 311.

In the specific example of *Shanahan*, where donor and intended beneficiary are the same person, if these capacities are likewise distinguished, then such specific performance would still be unavailable to the plaintiff *qua* intended beneficiary.

Thus, the equitable maxim that equity regards as done that which ought to be done does not provide any foundation upon which to predicate liability both in our general case and on the facts of *Shanahan* (and, parenthetically, the rules that equity will not perfect a gift, that a volunteer cannot call in aid the maxim that equity regards as done that which ought to be done, and that it is only if equity can order specific performance that it will give a plaintiff the benefit of the maxim, are all therefore seen to amount to three different expressions of a similar idea).

4. Restitution doctrines missed

Nevertheless, underlying the result in *Shanahan* is the intuition that the intended beneficiary should have a remedy as against the recipient. Equally, it is the reason why Weir seeks beyond the law of tort for a remedy on the facts of *White* v. *Jones*, and why Matthews turns to the law of restitution. Such a result may be explained on the basis that the remedy prevents the recipient's being unjustly enriched at the expense of the intended beneficiary.[16]

(a) Unjust enrichment

Given that the insurance payment constitutes an enrichment, the question must then be addressed whether, for the purposes of the law of restitution, it can properly be said that the recipient's enrichment is *unjust*. The best candidate "unjust" factor is "ignorance"; which is "that factor which calls for restitution when wealth is transferred to a defendant wholly without the knowledge of the plaintiff".[17] The condition of receipt by the defendant without the plaintiff's knowledge is satisfied both when the plaintiff expects to receive the enrichment and subsequently discovers that it is has in fact gone to the recipient, and when the plaintiff does not know that he was to have been the recipient until after the defendant's receipt. Thus, on the facts of both *White* v. *Jones* and *Shanahan* there would seem to be at least a *prima facie* case in favour of a remedy in restitution.

Of course, as is almost inevitable in a dynamic and developing subject, such a simple analysis is contestable. First, Barker suggests that such an action in restitution ought not to be available, principally because to do so "provides little incentive to the negligent solicitor to take care".[18] However, rather than have the restitution claim displace the tort action, the hortatory threat of the negligence action remains if the claims are concurrent.[19] Second, and more fundamental, is the notion of ignorance as an unjust factor, which is deeply controversial. Thus, it has been doubted "whether ignorance can properly be of itself the ground of restitutionary claim",[20] though, if that which renders an enrichment unjust in principle is that it has been received without plaintiff's consent, it is difficult to resist Birks' conclusion that receipt without the plaintiff's knowledge is a paradigm example of such an unjust enrichment.[21]

16. A proposition regarded as self-evident in the U.S. case of *Estate of Tolin* (1993) 622 So. 2d 988; [1995] *Restitution L.R.* §291.

17. Birks, *An Introduction to the Law of Restitution* (Clarendon Press, Oxford, 1985, revised 1989) (hereafter "*Birks*"), 142.

18. Barker, "Are We Up To Expectations? Solicitors, Beneficiaries and the Tort/Contract Divide" (1994) 14 O.J.L.S. 137, 138–139; discussing Cane, "Negligent Solicitors and Doubly Disappointed Beneficiaries" (1983) 99 L.Q.R. 346, 349.

19. *Supra*, fn. 10.

(b) At the expense of the plaintiff

Where a defendant directly takes the plaintiff's money, he is enriched by subtraction from the plaintiff. Where, however, the defendant intercepts money certainly intended for the plaintiff, then, for Birks, he is as surely enriched at the plaintiff's expense: "[i]f the wealth in question would certainly have arrived in the plaintiff if it had not been intercepted by the defendant *en route* from the third party, it is true to say that the plaintiff has lost by the defendant's gain".[22] Such an enrichment by intervention Birks describes as an "interceptive subtraction", and it has come in for cogent criticism from Smith,[23] especially on facts such as those in *White* v. *Jones* or *Shanahan*. His critique is primarily twofold. First, he argues[24] that it is difficult in fact to be sure that the enrichment would, in Birks' words, "certainly" or "indubitably" have reached the plaintiff.[25] Second, Smith argues that in principle the intended beneficiary has lost nothing, since the recipient "has been enriched at the expense of the donor, not of the intended beneficiary".[26] As to certainty, difficulties of fact should never impugn the validity of a principle (any principle); such factual problems merely serve to limit the number of successful cases. Furthermore, in both *McMechan* and *Shanahan*, it was specifically held that the donor's instructions to the solicitor and insurance company respectively were sufficient.[27]

As to Smith's second point, it is telling and could prove fatal. Nevertheless, it may be objected that, if the donor has intended to part with the enrichment, and has done all that he can do to direct the enrichment to the intended beneficiary, it is difficult to understand how anyone's enrichment in respect of something with which the donor has intentionally parted can be an enrichment at *his* (the donor's) expense. Consequently, if the recipient's enrichment is at anyone's expense, it must be at the expense of the intended beneficiary. Thus, in *HKN Invest OY* v. *Incotrade PVT Ltd*,[28] Costello, J., held that, where a promoter purports to contract in the name of a company to be incorporated, and without fraud receives a commission for services which the company is to render, "he has received the commission for the benefit of the company which is to be incorporated and not for his own

20. Goff and Jones, *The Law of Restitution* 4th edn (Sweet & Maxwell, London, 1993) (hereafter "*Goff & Jones*"), 107, subsuming it within mistake. *Cf.* Virgo (1996) 10 T.L.I. 20; Swadling [1996] LMCLQ 63; and note, admitting the possibility of ignorance grounding a restitutionary claim, but in the context of the treatment of mistake, Mason and Carter, *Restitution Law in Australia* (Butterworths, Sydney, 1995), para. 409, pp. 117–118.

21. *Birks*, pp. 140–146; Burrows, *The Law of Restitution* (Butterworths, London, 1993) (hereafter "*Burrows*"), 139.

22. *Birks*, 133–134.

23. Smith, "Three-Party Restitution. A Critique of Birks' Theory of Interceptive Subtraction" (1991) 11 O.J.L.S. 481 (hereafter "*Smith*").

24. *Smith*, 486–487.

25. *Birks*, 133, 136.

26. *Smith*, 517.

27. Hence Carroll, J.'s invocation of the equitable maxim in *Shanahan*; *cf. Smith*, 486, fn. 21.

28. [1993] 3 I.R. 152 (H.C.); [1993] *Restitution L.R.* §162.

benefit".[29] This is an express holding that the promoter's en[illegible]ment is at the expense of the company, or, in the situation here, that the recipient's enrichment is at the expense of the intended beneficiary.

Therefore, the concepts of ignorance and interceptive subtraction are contestable, but if the controversy is resolved in their favour, then these concepts provide a ready explanation for the result in *Shanahan*. Indeed, the ease with which these concepts explain the intuition underlying *Shanahan* suggests strongly that the issues of principle should be resolved in their favour. Any such remedy in restitution would in the first instance be a personal one, consisting of a duty to pay the value of the enrichment received. Indeed, since this remedy is personal and not proprietary, it does not undermine the property rules established by the Wills Act 1837 (or equivalent legislation such as Ireland's Succession Act 1965).[30]

(c) A restitutionary proprietary remedy?

Any restitutionary proprietary remedy, such as a constructive trust,[31] would require to fulfil further conditions, the precise scope of which is still contested.[32] Nevertheless, in *A.G. for Hong Kong* v. *Reid*,[33] Lord Templeman held that the recipient of a bribe was to account for it to his principal at the moment when he received it; and, as equity regards as done that which ought to be done, the very money he received became, in equity, the property of his principal, who could thus maintain a proprietary claim to the money and property purchased with it. Controversy surrounds both the proprietary result[34] and the application of the maxim to that end,[35] and, as we have already seen, it is certainly inapplicable both in our general case and on the facts of *Shanahan*.

Again, in *Westdeutsche*,[36] Lord Browne-Wilkinson held that a constructive trust may be imposed to reverse an unjust enrichment where the defendant is aware of the factors which render the enrichment unjust. On facts similar to those in *White* v. *Jones* or *Shanahan*, this requirement is usually not satisfied: the recipient under the will or insurance policy will usually be unaware that the donor had intended and sought to change the direction of the enrichment.[37] Conseq[illegible]ly, the imposition of a trust upon the recipient to prevent his unjust enrichment at the expense of the intended beneficiary is inappropriate.[38] It will also usually be unnecessary: on the facts of both *Shanahan* and *White* v. *Jones*, the personal remedy would have been sufficient.

5. Conclusion

Where a donor hires a professional to ensure that an intended beneficiary will get certain of the donor's property, but the professional directs it instead to the recipient, in principle the intended beneficiary can sue either the professional in tort or the recipient in restitution. Certainly, the trust in *Shanahan* had this latter effect, and if it is justified then it may provide a mechanism by which Weir's preferred solution could be implemented. In any case, personal restitutionary action is available and would have the same effect.

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29. [1993] 3 I.R. 152, 162, *per* Costello, J. Likewise when the promoter receives after incorporation, and/or fraudulently.

30. Similarly, "if the arrangement made was not testamentary . . . then the legislative provisions . . . have no application": *Lynch* v. *Burke* [1995] 2 I.R. 159, 167; [1996] 1 I.L.R.M. 114, 121, *per* O'Flaherty, J. (holding that joint deposit accounts are neither testamentary nor incomplete gifts held on resulting trust for the donor; see Capper (1996) 47 N.I.L.Q. 28). Likewise, here, the policy is clearly not testamentary, consequently the succession legislation has no application; *cf. White* v. *Jones* [1995] 2 A.C. 207, 278, *per* Lord Mustill.

31. As in *Tolin* (*supra*, fn. 16).

32. Contrast, for example, the relatively active role perceived for such remedies in *Goff & Jones* (pp. 93–102), with Burrows' assertion that in general there is "no convincing justification for giving proprietary, rather than personal, restitutionary remedies" (*Burrows*, p. 43; *cf.* pp. 369 *et seq.*), and consider *Lord Napier and Etterick* v. *Hunter* [1993] A.C. 713 (H.L.); *Re Goldcorp Exchange* [1995] 1 A.C. 74 (P.C.); and *Westdeutsche Landesbank Girozentrale* v. *Islington L.B.C.* [1996] A.C. 669 (H.L.).

33. [1994] 1 A.C. 324 (P.C.).

34. E.g., Crilley, "A Case of Proprietary Overkill" [1994] *Restitution L.R.* 57; Pearce, "Personal and Proprietary Claims Against Bribees" [1994] LMCLQ 189.

35. Oakley, "The Bribed Fiduciary as Constructive Trustee" [1994] C.L.J. 31, 32–33; Gardner, "Two Maxims of Equity" [1995] C.L.J. 60, 61–63.

36. [1996] A.C. 669, 705; Cope (1996) 112 L.Q.R. 521; Jones [1996] C.L.J. 432. For a fundamental critique of his Lordship's approach, see Birks, "Trusts Raised to Reverse Unjust Enrichment" [1996] *Restitution L.R.* 3.

37. It follows that, where the recipient *is* so aware, he holds on trust; see the example discussed by his Lordship (*ibid.*). This may explain the result in *Bulkley* v. *Wilford* (1834) 2 C. & F. 102; 6 E.R. 1094, where the negligent attorney was himself the recipient, and was deemed to hold the estate on trust for the intended beneficiary. See Handley, "Negligent Solicitors and Wills" (1994) 110 L.Q.R. 55; Elias, *Explaining Constructive Trusts* (Oxford, 1990), 66–71. *Cf. Seagrave* v. *Kirwan* (1828) 1 Beatt. 157; *Lysaght* v. *McGrath* (1882) 11 L.R.(Ir.) 142.

38. Note, however, that in *Shanahan*, Carroll, J., found that the donor "had a falling out with" the recipient (Transcript, 4). If, as a consequence, the recipient had knowledge of the donor's change of plans in relation to the policy, then he would have been within Lord Browne-Wilkinson's formulation; but Carroll, J., did not make this finding of fact.

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