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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. 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. Similarly, a contemporary Irish

case, Shanahan v. Redmond, suggests that the recipient of a gift is 2 held to have received the proceeds on trust for the trust. Underpinning both approaches is the view that, were it otherwise, the wrong people would get the money. However, Creney subsequently pointed out that the 1975 Act is not “concerned to remedy unjust enrichment,” 3 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 McMechnan v. Warburton). 8

Applying the same principle to the facts of White v. Jones, the beneficiary under the will would therefore be held to have received the proceeds on trust for the intended beneficiary. Conversely, the White v. Jones principle (and its Irish antecedent, Wall v. Hegarty) 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. 9 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 proprietary solution in Shanahan is not justified in terms of the doctrine 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 McMechnan 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 the same 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.

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7. supra, fn. 3.
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 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 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 horitory 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


benefit." This is an express holding that the promoter’s enrichment 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 interceptrion 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).

(c) A restitutionary proprietary remedy?

Any restitutionary proprietary remedy, such as a constructive trust, would require to fulfill further conditions, the precise scope of which is still contested. Nevertheless, in A.G. for Hong Kong v. Reid, 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 and the application of the maxim to that end, and, as we have already seen, it is certainly inapplicable both in our general case and on the facts of Shanahan.

Again, in Westdeutsche, 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. Consequently, the imposition of a trust upon the recipient to prevent his unjust enrichment at the expense of the intended beneficiary is inappropriate. 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 restitutitional action is available and would have the same effect.

Eoin O’Dell*

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 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 performed for such remedies in Goiff & Jones (pp. 93–102), with Burrows’ assertion that in general there is “no convincing justification for giving proprietary, rather than personal, restitutional 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.).
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 Buckley v. Wilford (1834) 2 C. & P. 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 Handle, “Negligent Solicitors and Wills” (1994) 110 L.Q.R. 55; Elias, Explaining Constructive Trusts (Oxford, 1990), 66–71. Cf. Seagrave v. Kirwan (1828) 1 Beav. 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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