Tracing in English law

Tracing in English law is a procedure to identify property (such as money) that has been taken from the claimant involuntarily . It is not in itself a way to recover the property , but rather to identify it so that the courts can decide what remedy to apply . The procedure is used in several situations , broadly demarcated by whether the property has been transferred because of theft , breach of trust , or mistake .

Tracing is divided into two forms , common law tracing and equitable tracing . Common law tracing relies on the claimant having legal ownership of the property , and will fail if the property has been mixed with other property , the legal title has been transferred to the defendant , or the legal title has been transferred by the defendant to any further recipient of the property . Equitable tracing , on the other hand , relies on the claimant having an equitable interest in the property , and can succeed where the property has been mixed with other property .

Defences to tracing are possible , particularly if returning the property would harm an innocent defendant , where the claimant has made false representations that the defendant relied on to his detriment , or where the property has been transferred to an innocent third party without anything given to the defendant in return that the claimant could recover in lieu .

Definition

Tracing is a process that allows for the recovery of property (such as land or money) by the owner if it is taken involuntarily , and the owner has not consented to the transfer of title . This can be through theft , breach of trust , or mistake . Owners can recover their property and perhaps also any profits made from it , or in situations where the property cannot be recovered (as it has been mixed in with other property , or cannot be found) , substitute property . The process has two steps , following and tracing . In Foskett v McKeown , Lord Millett defined them by saying that " [Following and tracing] are both exercises in locating assets which may or may be taken to represent an asset belonging to the [claimants] and to which they assert ownership . The process of following and tracing are , however , distinct . Following is the process of following the same asset as it moves from hand to hand . Tracing is the process of identifying a new asset as the substitute for the old " . Following , therefore , is simply establishing who the original owner of property is , where that property is , and returning it to the original owner . Tracing arises when the property cannot be returned and the court is asked to recognise an interest in new property , such as whatever the defendant received in exchange for the claimant 's original property . Tracing can occur at both the common law and equity . It is not a remedy for breach of trust ; tracing is merely the process of identifying the property . It is then up to the courts to decide what will happen to it .

Tracing in common law

Common law tracing is where the claimant seeks to identify property that belongs to him at common law . This is where physical possession of the property passes , but not legal ownership . The problem with common law tracing is that the property must be identifiable ; if it has been mixed with other property , such as money paid into an account with other money from a different source , it cannot be successfully recovered . It is also essential that the involuntary transfer did not also transfer the legal title , nor any succeeding transfer . If this has happened , the property is also not recoverable under the common law . Someone with an equitable interest in the property but no legal title , as in MCC Proceeds v Lehman Brothers , cannot recover the money under common law . Due to these limitations , " many leading academics and judges " have suggested that common law tracing should be completely merged with equitable tracing .

Tracing in equity

Equitable tracing is based not on legal ownership but on the claimant 's possession of an equitable interest . There are several advantages to equitable tracing ; first , it can trace property now mixed with other property . In Boscawen v Bajwa , Millett justified this by saying that " equity 's power to charge a mixed fund with the repayment of trust moneys enables the claimant to follow the money , not because it is his , but because it is derived from a fund which is treated as if it were subject to a charge in his favour " . A limitation is that where the property has been put into a bank account that no longer contains enough money to repay it , it cannot be traced .

For equitable tracing to be valid , several things must be demonstrated . First , the equitable title must exist ; it can be brought into existence by the courts , such as in Constructive trusts . Secondly , there must be some kind of fiduciary relationship between the claimant and the defendant . If the property was transferred through breach of trust , it will not be necessary to establish such a relationship , because it already exists . In addition , property transferred through breach of trust may be traced to any third party (other than a purchaser in good faith) , even if they did not previously have a fiduciary relationship with the claimant . Historically , the courts have been willing to be " generous in finding that the necessary fiduciary relationship existed " , even going so far as to recognise relationships that did not exist at the time of the transfer .

= = = Mixture of trust funds with trustee 's funds = = =

Equitable tracing 's greatest strength is its ability to trace into mixtures of money . Different rules apply in different situations ; where the money has been mixed with the money of a trustee , where a trust fund has been mixed with another trust fund (or money belonging to an innocent volunteer) , and where money has been transferred by mistake rather than malicious intent . Where the money has been mixed with the money of a trustee , the court 's decision depends on the motive of the trustee . Because a trustee is expected to invest trust property and behave honestly , the courts may choose to find that the trustee transferred the money to further the goal of the trust . Since the trustee is assumed to behave honestly , any profits made may be assumed (by this " convenient fiction ") to be made by the trust money , and any losses from the trustee 's personal funds .

The alternate approach taken is the " beneficiary election " approach . This is that where trust funds are wrongly mixed with the trustee 's personal funds , used for an investment , and the money is thus not recoverable , the beneficiaries are allowed to " elect " whether the investment is to be held as a security for the amounts owed to them , or whether to take the unauthorised investment as part of the trust fund . This is considered the exception , rather than the rule ; in Foskett v McKeown , Millett said that " The primary rule in regard to a mixed fund , therefore , is that gains and losses are borne by the contributors rateably . The beneficiary 's right to elect instead to enforce a lien to obtain repayment is an exception to the primary rue , exercisable where the fund is deficient and the claim is made against the wrongdoer and those claiming through him " .

= = = Innocent parties and mistake = = =

Where funds are mixed with those of another trust , or mixed with the funds of an " innocent volunteer " , certain general principles apply . As laid out in Re Diplock , the principle applied is that the claimant 's entitlement ranks pari passu to that of the volunteer ; each has an equal claim to their funds . Whether the fund decreases or increases in value , each party can claim a percentage equal to their contribution . The problem here comes if the mixed funds are used in unequal chunks to acquire other property . The long @-@ standing rule is that established in Clayton 's Case ; that the money deposited first is deemed to be spent on the first property purchased . The problem with this is that if the first property becomes less valuable than the second property purchased , the first claimant loses some of their money while the second claimant is able to claim their money in its entirety . The alternate approach is the previously mentioned pari passu idea ; whatever the total property is worth , the claimants get a share proportionate to their input , without assuming that the first claimant 's money is tied to the first property purchased and the second claimant 's money to the second property . In Barlow Clowes International v Vaughan , the Court of Appeal applied a similar set of principles , holding that the size of the contribution and the amount of time the money was part of the mixed fund were the factors to be considered .

Where payments have been made by mistake claimants may or may not be able to recoup their losses . The leading case is Westdeutsche Landesbank Girozentrale v Islington LBC , where Lord Browne @-@ Wilkinson declared that a constructive trust would be created when the recipient of the funds became aware of the mistaken transfer . As such , ignorance of the mistake would not create a fiduciary relationship , therefore not a trust , and the property would be untraceable .

= = Loss of the right to trace and defences = =

The right to trace may be lost if the property cannot be found , or no longer exists . Defences to tracing are possible . The " change of position " defence is where the defendant has received property and giving it back would change his personal circumstances . This was concisely defined by Lord Goff in Lipkin Gorman v Karpnale as " Where an innocent defendant 's position is so changed that he will suffer an injustice if called upon to repay or to repay in full , the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution " . Such a defence is closely linked with unjust enrichment , and has limitations . Any bad faith on the part of the defendant will invalidate the defence , such as if the recipient of the property has encouraged the payer to transfer it or has received it by mistake and then used it without making enquiries . The defence is also not available to people who act illegally , as in Barros Mattos v MacDaniels Ltd . Activity which constitutes a " change of position " can be broadly defined as taking steps which would not otherwise have been taken , or not taking steps which otherwise would have been taken , as a result of receiving the property .

Another defence is that of " estoppel by representation " . This is similar to " change of position " , and comes about when the defendant can show that the claimant made some false representation to him , which he acted upon to his detriment . Traditionally , the entire property would be the defendant 's if the defence was successful . In National Westminster Bank plc v Somer International , however , the Court of Appeal decided that the defendant was only allowed to retain property equal to his losses due to the claimant 's representation . Another defence similar to " change of position " is that of passing on , where the defendant has passed the property on to a third person without any benefit for the defendant ; it is thus impossible to trace the property as the defendant has neither the property nor any proceeds from transferring it .