

CHAPTER 21

INDEMNITY OF TRUSTEES

**2. INDEMNITY OUT OF TRUST PROPERTY IN RESPECT OF
ADMINISTRATION EXPENSES****The general principle**

Excluding, restricting or enhancing the statutory right of indemnity

21–08 NOTE 25. DELETE AND REPLACE BY: See § 39–138.

The liabilities of trustees and their rights of indemnity

Liability in contract

21–11 NOTE 38. AT THE END ADD: A provision in a mortgage of trust property limiting the personal liability of the trustee under the mortgage to that property does not give the trustee priority against the mortgagee to payment out of the proceeds of the property of third party liabilities incurred by the trustee in respect of the property, see *Dominion Corporate Trustees Ltd v Capmark Bank Europe plc* [2010] EWHC 1605 (Ch); (2010–11) 13 I.T.E.L.R. 154.

NOTE 41. Trusts (Guernsey) Law 1989, s.37 has been replaced by Trusts (Guernsey) Law 2007, s.42 with effect from March 17, 2008.

UK and foreign fiscal liabilities

21–18 NOTE 68. For the reference to *Whiteman on Capital Gains Tax*, see now *Whiteman & Sherry on Capital Gains Tax* (5th edn), §§ 34.142 to 34.156.

NOTE 69. ADD: Mere personal inconvenience to a trustee's travel arrangements is not, however, enough, see *Sutton v England* [2009] EWHC 3270 (Ch); [2010] W.T.L.R. 335 at [53]–[54] (reversed on appeal on other grounds *sub nom. Southgate v Sutton* [2011] EWCA Civ 637; [2011] W.T.L.R. 1235).

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Indemnity of particular trustees*Constructive trustees*

- 21–28** NOTE 7. AT THE END ADD: *Provident Capital Ltd v Agusta Pty Ltd* [2011] NSWSC 258 at [47], citing this passage.

Mode of satisfaction of the right to indemnity*A trustee's charge or lien on the trust property*

- 21–33** NOTE 35. ADD: *McKnight v Ice Skating Queensland Inc.* [2007] QSC 273; (2007–08) 10 I.T.E.L.R. 570.

NOTE 41. DELETE AND REPLACE BY: *Re Knox's Trusts* [1895] 2 Ch. 483, CA.

AT THE END OF § 21–33(3) ADD: A trustee must make proper inquiries as to what the contingent or future liabilities consist of and the extent of his potential liability at the time that he asserts a right of retention.^{44a}

Property or income subject to the charge or lien

- 21–34** NOTE 55. AT THE END ADD: See too *White v Williams (No.2)* [2011] EWHC 494 (Ch); [2011] W.T.L.R. 899 at [66] (charity).

Rights of creditors and other claimants against the trust property—subrogation

- 21–38** NOTE 68. ADD: *Official Assignee of Bainbridge v Menzies* [2011] NZHC 87 at [41]–[43] and Australian cases there cited.

Right of subrogation not co-extensive with right of indemnity

- 21–41** NOTE 93. AT THE END ADD: *Re Pumfrey* (1882) 22 Ch.D 255 at 263; *Re Wilson* [1942] V.L.R. 177 at 183; *Deancrest Nominees Pty Ltd v Nixon* [2007] WASC 304; (2007) A.C.L.C. 1681 at [49]; *Zen Ridgeway Pty Ltd v Adams* [2009] QSC 117; (2009) 3 A.S.T.L.R. 44 at [13]; but see *Re Geary* [1939] N.1. 152 at 162.

^{44a} *Wester v Borland* [2007] EWHC 2484 (Ch); [2007] All E.R. (D) 204 (Oct).

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Interest

- 21-43 NOTE 98. DELETE AND REPLACE BY: CPR, Practice Direction, Pt 40A—Accounts & Inquiries, para.14.

4. COSTS OF THIRD PARTY PROCEEDINGS**The position as between the trustee and the third party**

- 21-51 NOTE 29. Supreme Court Act 1981 is renamed Senior Courts Act 1981 from October 1, 2009, see Constitutional Reform Act 2005, Sch.11, para.1 and Constitutional Reform Act 2005 (Commencement No.11) Order 2009 (SI 2009/1604).

5. COSTS OF TRUST PROCEEDINGS**Trustee's costs—effect of statute and rules of court***Statutory provisions*

- 21-71 TEXT TO N.26. Supreme Court Act 1981 is renamed Senior Courts Act 1981 from October 1, 2009, see Constitutional Reform Act 2005, Sch.11, para.1 and Constitutional Reform Act 2005 (Commencement No.11) Order 2009 (SI 2009/1604).

The Civil Procedure Rules

- 21-75 NOTE 37. At the end add: The title to CPR, Pt 48, r.48(4) is now misleading. It should be read with Practice Direction Pts 43 to 48—The Costs Practice Direction, para.50A.1 to 50A.3.

Assessment of costs under the Civil Procedure Rules

- 21-76 NOTE 43. AT THE END ADD: In the Cayman Islands there is no requirement for trustees' costs on the indemnity basis to be subject to a process of taxation or agreement, see *Re Ojeh Trust* [1994-95] C.I.L.R. 118 at 124, 125, Cayman GC.

Beneficiaries' costs

- 21-77 NOTE 48. For the reference to *The Chancery Guide* (2005), see now *The Chancery Guide* (6th edn, 2009), para.25.8.

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Basis of assessment of costs in favour of beneficiaries and against trustees

21–78 TEXT TO N.51. For the reference to *The Chancery Guide* (2005), see now *The Chancery Guide* (6th edn, 2009), para.25.8.

NOTE 52. For the reference to *Civil Procedure* (2007), Vol.1, 44.4.3 substitute *Civil Procedure* (2011), Vol.1, 44.4.3.

Construction proceedings

21–79 NOTE 54. AT THE END OF THE LAST SENTENCE ADD: *Singapore Airlines Ltd v Buck Consultants Ltd* [2011] EWCA Civ 1542 at [64]–[78], approving the statement of the *Buckton* principles in this para. at [67].

AT THE END OF THE TEXT ADD: The determination of the category into which a particular case falls is a question of law, not an exercise of discretion on the facts, and so may be appealed.^{61a}

A fourth category?

21–80 AT THE BEGINNING INSERT: The categories of proceedings enumerated in *Re Buckton*^{61b} are not closed.^{61b} A further category is where an issue of construction is pursued by a third party acting in dual capacity in part for the benefit of beneficiaries (whom he is ordered to represent for the purpose of the issue) and in part for his own benefit by way of defence to a hostile claim against him. This category falls neither within *Buckton* category (2) nor within *Buckton* category (3).^{61c} The appropriate order for a case within this category is for a proportion of the costs that would have been borne by the fund had the case fallen within *Buckton* category (2), prima facie a half share, to be paid out of the trust fund.^{61d}

^{61a} *Singapore Airlines Ltd v Buck Consultants Ltd*, above, at [73].

^{61b} [1907] 2 Ch. 406.

^{61b} *Singapore Airlines Ltd v Buck Consultants Ltd*, above, at [75], citing this para.

^{61c} *ibid* at [71]–[75].

^{61d} *ibid* at [76]–[77].

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The role of the trustee and his costs

- 21–81** AT THE END OF THE FIFTH SENTENCE ADD: and likewise where there is a class of beneficiaries with an opposing interest none of whom is willing to participate in the proceedings.^{68a}

NOTE 69. INSERT AT THE BEGINNING: *Re Hemming* [2008] EWHC 8565 (Ch); [2008] W.T.L.R. 1833 at [40].

Beneficiaries' costs

- 21–82** AFTER THE FOURTH SENTENCE ADD: Beneficiaries who have used construction proceedings as a vehicle for raising issues not germane to the proceedings have not only been deprived of costs, but also been ordered to pay the costs of the trustees in reading and responding to their evidence, the costs being assessed on the indemnity basis in view of those beneficiaries' disgraceful conduct.^{75a}

Prospective costs orders for beneficiaries

- 21–83** AFTER THE TEXT TO NOTE 80 ADD: Prospective costs orders in favour of beneficiaries will usually be made only where the court is satisfied that the proceedings fall within *Buckton* category (1) (or category (2)), and so where the court considers that it is unclear whether the proceedings are of that character or that the proceedings might turn into a *Buckton* category (3) case, a prospective costs order will not be made.^{80a}

NOTE 81. ADD: A model form of order is contained in the appendix to this practice direction.

Costs of appeal

- 21–84** NOTE 88. AT THE END ADD: but see the authority cited in the next footnote (electronic supplement).

AFTER THE TEXT TO N.88 ADD: Further, where there is an appeal by another party, unless a trustee has good reason to think that its actions will be subject to criticism or there is some

^{68a} *State Street Bank and Trust Co. v Sompo Japan Insurance Inc.* [2010] EWHC 1461 (Ch) at [28]–[30].

^{75a} *Greider v Dresden* [2009] EWHC 500 (Ch); [2010] W.T.L.R. 1163.

^{80a} *International Committee of the Red Cross v Thommessen* 2009–10 G.L.R. 377. See too § 21–120.

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other special reason, it should normally be unnecessary for a trustee to make representations or be represented at the hearing of an appeal (save for instructing a note-taker), where the trustee's stance on the issues dividing the other parties is neutral; and directions can be sought at a relatively early stage in the appeal to enable the trustee to make submissions (possibly in writing) if the trustee's assistance is required or on which the trustee desires to have a say.^{88a}

NOTE 89. AT THE END OF THE FIRST SENTENCE ADD: *Re IMG Pension Plan* [2010] EWHC 321 (Ch); [2010] P.L.R. 131 (application granted). DELETE THE THIRD TO SIXTH SENTENCES AND REPLACE BY: The application for a prospective costs order for an appeal on a construction question by a beneficiary who lost in the HC may be based on two alternative grounds. One ground is that the beneficiary's costs of the appeal will be payable out of the trust fund whatever the outcome (see § 21–120). Normally an application based on that ground will fail, see *Chessels v British Telecommunications plc* [2002] P.L.R. 141 and *Re IMG Pension Plan*, above. That is because, even though the case falls within *Buckton* category (1) or (2) (see § 21–79 referring to *Re Buckton* [1907] 2 Ch. 406), the principle that costs should be paid from the trust fund whatever the outcome applies at first instance (see § 21–83) but not on appeal (see text to n.86 in § 21–84). The alternative ground is that the application satisfies the special principle applicable to pension schemes and other trusts where the beneficiaries are not volunteers, formulated in *McDonald v Horn* [1995] 1 All E.R. 961 at 973–975 (see § 21–100). The alternative ground is not restricted to hostile litigation and so may be relied upon, where appropriate (as in the context of an appeal), in cases coming within *Buckton* categories (1) and (2), see *Re IMG Pension Plan*, above, at [41]–[52].

NOTE 90. AT THE END ADD: There is no express provision on this matter in the UKSC Practice Directions, but it would normally be appropriate to follow the former practice pursuant to UKSC Practice Direction 5.1.1.

Directions sought for the guidance or proper protection of the trustee on administration questions

21–85 NOTE 94. FOR THE REFERENCE TO *The Chancery Guide* (2005), SEE NOW *The Chancery Guide* (6th edn, 2009), para.25.8.

^{88a} *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc* [2011] EWCA Civ 227 at [102]–[105].

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Proceedings seeking the assistance of the court under statutory provisions*Section 203(5) of the Law of Property Act 1925*

- 21–89** LAST SENTENCE. Supreme Court Act 1981 is renamed Senior Courts Act 1981 from October 1, 2009, see Constitutional Reform Act 2005, Sch.11, para.1 and Constitutional Reform Act 2005 (Commencement No.11) Order 2009 (SI 2009/1604).

Proceedings for the enforcement of rights of beneficiaries against the trustee*Claims for production of accounts or information by the trustee*

- 21–91** NOTE 34. DELETE AND REPLACE BY: *Wingate v Butterfield Trust (Bermuda) Ltd (Costs)* [2008] SC (Bda) 6; [2008] W.T.L.R. 593. See §§ 23–23, 23–28 and 23–30 as to when there is no reasonable doubt about provision of information.

NOTE 34. DELETE AND REPLACE BY: See § 23–05.

Breach of trust proceedings*Successful defence by trustee*

- 21–98** NOTE 75. ADD: *Hayman v Equity Trustees Ltd* [2003] VSC 353; (2003) V.R. 548; *Close Trustees (Switzerland) SA v Vildósola* [2008] EWHC 1267 (Ch); (2007–08) 10 I.T.E.L.R. 1135 at [19].

DELETE NN.79 AND 80 AND THE TEXT TO THEM AND REPLACE BY: As between the beneficiaries, the costs of the successful trustee may be ordered to be borne primarily by the unsuccessful claimant’s share of the trust fund.⁷⁹ But it is an oversimplification to say that the costs will necessarily be borne in this way and it is relevant to have regard to whether other beneficiaries would have benefited had the action succeeded.⁸⁰ The trustee’s unrecovered costs of an unsuccessful claim by an income beneficiary have been ordered to be paid out of the beneficiary’s income held by the trustees at the time when the right of indemnity becomes

⁷⁹ *National Trustees Executors and Agency Co. of Australasia Ltd v Barnes* (1941) 64 C.L.R. 268 at 276, Aus. HC.

⁸⁰ *Close Trustees (Switzerland) SA v Vildósola* [2008] EWHC 1267 (Ch); (2007–08) 10 I.T.E.L.R. 1135 at [19] at [45]–[59].

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exercisable^{80a} and out of future income,^{80b} but they have also been ordered to be paid out of capital of a share of the trust fund in which the income beneficiary is interested.^{80c} In a case where the income beneficiary's unsuccessful claim relates to the income of the trust fund, it is reasonable to expect that the unrecovered costs will be primarily borne by income, but where the claim relates to the capital of the trust fund, and would if successful have resulted in an augmentation of capital, it is doubtful whether such costs, which have a capital character, will be liable to be borne by income.^{80d}

AT THE END OF THE TEXT ADD: The trustee is entitled to retain capital to cover his contingent indemnity pending the resolution of the beneficiary's claim, even if the capital would apart from the claim be distributable and the beneficiary wishes to have access to capital to fund his claim.^{81a} However, the court, while accepting that income may in general terms be retained by a trustee if a contingent liability, if it becomes payable, will or may be liable to be borne by income, has refused an application by trustees to retain part of an income beneficiary's income pending resolution of a claim by that beneficiary against the trustees and others which if successful would result in an augmentation of the capital of the trust fund which was sufficient without any augmentation to cover the trustee's costs.^{81b}

Proceedings for or concerning the removal of trustees

21–102 FOURTH SENTENCE. AFTER THE WORDS the court might normally be expected to make an order for costs against the trustee, INSERT A NEW FOOTNOTE 95A: *Re E, L, O and R Trusts* [2008] JRC 150; (2009–10) 12 I.T.E.L.R. 1.

AFTER THE TEXT TO N.98 INSERT: A beneficiary who unsuccessfully seeks the removal of a trustee will normally be ordered to pay costs.^{98a}

^{80a} *D'Oechsner v Scott* (1857) 24 Beav. 239.

^{80b} *Re Andrews* (1885) 30 Ch.D. 159 at 161.

^{80c} *Thompson v Clive* (1848) 11 Beav. 475.

^{80d} *Close Trustees (Switzerland) SA v Vildósola*, above, at [2], [31], [45]–[45].

^{81a} *Hayman v Equity Trustees Ltd* [2003] VSC 353; (2003) V.R. 548.

^{81b} *Close Trustees (Switzerland) SA v Vildósola*, above.

^{98a} *Isaac v Isaac* [2005] EWHC 435 (Ch); [2009] W.T.L.R. 265 at [96]–[97].

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6. COSTS OF PROCEEDINGS AGAINST THE TRUST OR THE TRUST PROPERTY

Claims by settlor's creditors or trustee in bankruptcy under the insolvency legislation

21–107 NOTE 44. ADD: *Re Hemming* [2008] EWHC 8565 (Ch); [2008] W.T.L.R. 1833.

Claims based on an adverse equitable proprietary claim binding the trust property

21–108 NOTE 50. AT THE END ADD: See too *Chan Gordon v Lee Wai Hing* [2011] HKCFI 273.

AT THE END OF THE TEXT ADD: In a case where the question of an adverse proprietary claim to company assets arises in a liquidation, and the costs of determination of the question would be disproportionate to the value of the assets concerned, the court may protect the liquidator by authorising him to act on counsel's opinion (on matters of law as well as fact), subject to notice being given to potential claimants.^{52a}

Claims based on money laundering

21–109 AT THE END ADD: For the position as to a trustee's costs in civil recovery proceedings, see *Serious Organised Crime Agency v Szepietowski*^{53a} and § 46–143 (online supplement).

7. BEDDOE APPLICATIONS

Procedure on *Beddoe* applications

21–124 NOTE 15. DELETE AND REPLACE BY: ACD Direction, para. 4.3. Permission to issue the claim form under CPR, Pt 8, r.8.2A is required: *The Chancery Guide* (6th edn, 2009), para.25.4.

NOTE 16. DELETE THE REFERENCE TO *The Chancery Guide*.

NOTE 19. DELETE THE REFERENCE TO *The Chancery Guide*.

^{52a} *Re Equilift Ltd* [2009] EWHC 3104 (Ch); [2010] B.P.I.R. 116. And see § 27–17A (online supplement).

^{53a} [2009] EWHC 344 (Ch); [2009] 4 All E.R. 393.

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NOTE 21. AT THE END ADD: With effect from October 1, 2011 the ACD is amended to provide that *Beddoe* applications will be disposed of without an oral hearing in the first instance; and that any request for an oral hearing must be stated in evidence giving the reasons why.

The evidence

21–125 NOTE 24. DELETE THE REFERENCE TO *The Chancery Guide*.

NOTE 26. DELETE THE REFERENCE TO *The Chancery Guide*.

Procedure where the other party to the main action is a beneficiary

21–126 NOTE 34. *Three Individual Present Professional Trustees of Two Trusts v An Infant Prospective Beneficiary of one Trust* IS REPORTED AT [2007] W.T.L.R. 1631.

NOTE 36. DELETE THE REFERENCE TO *The Chancery Guide*.

NOTE 37. DELETE THE REFERENCE TO *The Chancery Guide*.

Consultation with beneficiaries

21–130 FIRST SENTENCE. DELETE THE REFERENCE TO *The Chancery Guide*.

Urgent applications

21–132 NOTE 46. DELETE THE REFERENCE TO *The Chancery Guide*.

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