

CHAPTER 40

REMEDIES AGAINST ACCESSORIES**3. IMPOUNDING TO INDEMNIFY BENEFICIARIES****The general principle**

40–06 AFTER THE FIRST SENTENCE INSERT: This principle does not entitle beneficiaries of part of the money in a bank account held on trust to stop the payment to the account holder of other money in the bank account held free from trust in circumstances where the account holder had failed to pay money into that account on trust for the beneficiaries and had instead paid the money into an overdrawn account so that it never became trust property and consequently could not give rise to a right to impound.^{22a}

AT THE END OF THE FIRST PARAGRAPH ADD: As to the application of the impounding principle in relation to concurrence by some but not all of the beneficiaries in a breach of the self dealing rule, see § 20–98.

4. DISHONEST ASSISTANCE**General requirements of liability**

40–09 AFTER THE TEXT TO N.35 INSERT: Though a dishonest assistant may be personally liable to account for profits made from his dishonest assistance,^{35a} it does not follow that such profits made by the defendant become subject to a constructive trust in the proprietary sense, and the remedy of dishonest assistance cannot be used as a route to a proprietary remedy in respect of the profits.^{35b}

^{22a} *Re BA Peters plc* [2008] EWCA Civ 1604; [2010] 1 B.C.L.C. 142.

^{35a} See § 20–53 (including online supplement).

^{35b} *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd* [2007] EWHC 915 (Ch); [2007] 2 All E.R. (Comm.) 993 at [109]–[135].

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Basis of liability—*Barnes v Addy* and *Royal Brunei Airlines Sdn. Bhd. v Tan*

40–10 NOTE 37. ADD: For an Australian judicial account of the development of the remedy see *Bell Group Ltd v Westpac Banking Corp.* [2009] WASC 107; (2008–09) 39 W.A.R. 1 at [4627]–[4838].

AFTER § 40–13 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

Locus standi

40–13A Generally the same rules apply as in connection with breach of trust claims.^{65a} Though a claim will normally be brought by a successor trustee or a beneficiary, the trustee who has committed a breach of trust has *locus standi* to bring a dishonest assistance claim against a third party recipient, even though as between himself and his beneficiary he has committed a breach of trust and the commission of that breach of trust is a necessary ingredient in his cause of action against the assistant.^{65b} A dishonest assistant may seek a contribution from the trustee.^{65c}

Requirement (1)—existence of a trust

Is a fiduciary relationship without any trust property sufficient?

40–16 NOTE 70. ADD: In *Dyson Technology Ltd v Curtis* [2010] EWHC 3289 (Ch) at [210] the court accepted, without considering the relevant authorities, a submission that there had to be in existence a trust fund or property subject to fiduciary obligation, and held that this requirement was satisfied on the basis that the property subject to the fiduciary obligation was a bribe obtained by the fiduciary which had become subject to a constructive trust, though that would not now suffice, see §§ 20–028A to 20–028C.

^{65a} See §§ 39–67 *et seq.*

^{65b} See *Montrose Investments Ltd v Orion Nominees Ltd* [2004] EWCA (Civ) 1032; [2004] W.T.L.R. 1133; *Pulvers v Chan* [2007] EWHC 2406 (Ch); [2008] P.N.L.R. 9 at [380], [385] and [387]–[395]; and compare § 41–46 on the proprietary remedy and §§ 40–02 to 40–05, 42–04 to 42–12 and 42–29A (including online supplement) on other remedies by trustees who have made wrongful or mistaken payments or transfers.

^{65c} See § 40–46A (online supplement).

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AT THE END OF THE TEXT ADD: and at first instance it has been held that a fiduciary relationship without trust property is sufficient.^{71a}

Requirement (3)—assistance by the defendant

40–21 NOTE 88. ADD: *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); [2007] W.T.L.R. 835 at [1509]–[1510].

NOTE 89. ADD: *Law Society of England and Wales v Habitable Concepts Ltd* [2010] 1449 (Ch); [2010] All E.R. (D) 156 (Jun) at [23]. As to cases where the trustee makes a profit from the trust for which he is personally liable to account but which does not become subject to a constructive trust, and the assistance is merely in the disposal of the profit (but not in the breach of duty in making the profit), see § 20–53 (including online supplement).

Requirement (4)—dishonesty of the defendant

The subjective and objective elements of dishonesty

40–23 NOTE 95. AFTER THE REFERENCE TO *Att.-Gen. of Zambia v Meere Care & Desai* INSERT: (reversed on facts [2008] EWCA Civ 1007; [2008] All E.R. (D) 406 (Jul)).

NOTE 97. AFTER THE REFERENCE TO *Att.-Gen. of Zambia v Meere Care & Desai* INSERT: (reversed on facts [2008] EWCA Civ 1007; [2008] All E.R. (D) 406 (Jul)).

AFTER THE PENULTIMATE SENTENCE ADD: The objective standard of dishonesty is a question of law for determination by the court. It does not depend upon an inquiry into what all as distinct from some normal people regard as dishonest and it is irrelevant that there may be a body of opinion which regards the ordinary standard of honest behaviour as being set too high.^{99a}

No need for defendant to be aware of transgressions of ordinary honest standards

40–25 NOTE 12. AFTER THE REFERENCE TO *Att.-Gen. of Zambia v Meere Care & Desai* ADD: (reversed on facts [2008] EWCA Civ 1007; [2008] All E.R. (D) 406 (Jul)); *Cunningham v Cunningham* [2009] JRC 124; 2009 J.L.R. 227 at [36]; *Al Khudairi v Abbey Brokers Ltd*

^{71a} *JD Wetherspoon plc v Van de Berg & Co. Ltd* [2009] EWHC 639 (Ch) at [503]–[520].

^{99a} *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314; [2010] All E.R. (D) 221 (Nov).

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[2010] EWHC 1486 (Ch); [2010] P.N.L.R. 32 at [129]–[134]; *Dyson Technology Ltd v Curtis* [2010] EWHC 3289 (Ch) at [194]–[207]. See too *Starglade Properties Ltd v Nash* [2010] EWCA Civ, above, at [30].

Effect of ignorance of the law

- 40-33** NOTE 34. AT THE END ADD: Compare the effect of ignorance of the law in relation to the proprietary remedy, see § 41–122 and *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2010] EWHC 1614 (Ch); [2011] 1 B.C.L.C. 202 at [92]–[98]; [2011] EWCA Civ 347; [2011] W.T.L.R. 1043 at [102]–[108].

AT THE END OF THE TEXT ADD: It is dishonest for a company director, who knows that the company is insolvent, so as to defeat the claims of a creditor, to cause the company to pay away its assets to other creditors, without obtaining any legal advice as to the propriety of the payments, and his liability does not depend on his knowledge or lack of knowledge of the law concerning voidable preferences.^{35a}

Effect of ignorance of the trust

- 40-34** NOTE 36. AT THE END ADD: *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); [2007] W.T.L.R. 835 at [1500]–[1506]; *Starglade Properties Ltd v Nash* [2010] EWHC 148 (Ch); [2010] W.T.L.R. 1267 at [56] (reversed on other grounds [2010] EWCA Civ 1314; [2010] All E.R. (D) 221 (Nov) but no appeal on this point, see at [18]); *Al Khudairi v Abbey Brokers Ltd* [2010] EWHC 1486 (Ch); [2010] P.N.L.R. 32 at [135].

Note 37. Add: See too *Ultraframe (UK) Ltd v Fielding*, above, at [1507].

Pleading dishonesty

- 40-35** NOTE 38. AT THE END ADD: *Cunningham v Cunningham* [2009] JRC 124; 2009 J.L.R. 227 at [37]–[47].

^{35a} *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314; [2010] All E.R. (D) 221 (Nov).

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Proving dishonesty

- 40–36** NOTE 42. AT THE END ADD: And see *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); [2007] W.T.L.R. 835 at [1508].

Registration by companies of share transfers made in breach of trust

- 40–39** IN THE SECOND SENTENCE: delete the reference to the Companies Act 1985 and replace by a reference to the Companies Act 2006.

NOTE 50. DELETE AND REPLACE BY: Companies Act 2006, s.126, replacing Companies Act 1985, s.360, with effect from October 1, 2009: Companies Act 2006 (Commencement No.8, Transitional Provisions and Savings) Order 2008 (SI 2008/2860); Companies (Tables A to F) Regulations 1985 (SI 1985/805), Table A, Art.5.

AFTER § 40–46 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

Contribution

- 40–46A** A defendant who is held liable for dishonest assistance, or who enters into a *bona fide* settlement or compromise of such a claim, may seek contribution under the Civil Liability (Contribution) Act 1978^{67a} from any other person liable in respect of the same damage, including the trustee and other persons held liable for dishonest assistance in the breach of trust concerned. In a case where a defendant is made vicariously liable for dishonest assistance on the part of a partner or employee,^{67b} the personal innocence of other partners or the employer is not a factor to be taken into account in apportioning liability between the firm or employer on the one hand and persons who are not partners and employees on the other hand, though it is relevant to take into account the undisgorged profits of participants in the breach of trust.^{67c} Where a firm is trustee, the firm may, as between itself in respect of its liability for breach of trust and an employee in respect of the employee's liability for

^{67a} On which see generally §§ 39–78 to 39–83.

^{67b} See §§ 40–43 and 40–44.

^{67c} *Dubai Aluminium Co. Ltd v Salaam* [2002] UKHL 48; [2003] 2 A.C. 366; *Pulvers v Chan* [2007] EWHC 2406 (Ch); [2008] P.N.L.R. 9 at [397]–[405].

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dishonest assistance in the breach of trust, expect to obtain a full indemnity from the employee if the partners are innocent.^{67d}

5. DIRECTORS OF CORPORATE TRUSTEE**General position**

40–48 LAST SENTENCE: DELETE are AND REPLACE BY: were formerly.

NOTE 72. For the reference to Gower and Davies, *Principles of Modern Company Law*, see now (8th edn), Chap.16.

NOTE 75. AFTER THE FIRST SENTENCE INSERT: Trusts (Guernsey) Law, s.70 was repealed by Trusts (Guernsey) Law 2007, s.83(1) and (3), with effect from March 17, 2008, save in respect of proceedings instituted prior to that date against a trustee in respect of a breach of trust committed by that trustee.

Claims by beneficiaries against directors

40–49 NOTE 76. AT THE END ADD: *McNulty v McNulty* [2011] NZHC 1173; (2011–12) 14 I.T.E.L.R. 361 at [74]–[85].

NOTE 77. AFTER THE SEMI-COLON INSERT: *McNulty v McNulty*, above, at [86]–[91].

Indirect or “dog leg” action

40–51 NOTE 83. *Alhamrani (Sheikh) v Alhamrani (Sheikh)* is reported at 2007 J.L.R. 44. AT THE END ADD: *Gregson v HAE Trustees Ltd* [2008] EWHC 1006 (Ch); [2009] 1 All E.R. (Comm.) 457 at [22]–[69].

^{67d} *Pulvers v Chan*, above, at [404].

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6. REMEDIES IN TORT**Economic torts**

40–54 NOTE 89. FOR THE REFERENCE TO *Clerk and Lindsell on Torts*, SEE NOW (20th edn), §§ 24–90 *et seq.*

NOTE 91. FOR THE REFERENCE TO *Clerk and Lindsell on Torts*, SEE NOW (20th edn), §§ 24–14 *et seq.*

NOTE 93. FOR THE REFERENCE TO *Clerk and Lindsell on Torts*, SEE NOW (20th edn), §§ 24–29 to 24–32.

NOTE 97. FOR THE REFERENCE TO *Clerk and Lindsell on Torts*, SEE NOW (20th edn), §§ 24–70 *et seq.*

NOTE 98. FOR THE REFERENCE TO *Clerk and Lindsell on Torts*, SEE NOW (20th edn), §§ 24–57 *et seq.*

Conversion, trespass to land and nuisance

40–55 NOTE 5. FOR THE REFERENCE TO *Clerk and Lindsell on Torts*, SEE NOW (20th edn), §§ 17–06 *et seq.*

NOTE 10. FOR THE REFERENCE TO *Clerk and Lindsell on Torts*, SEE NOW (20th edn), § 19–10.

NOTE 11. FOR THE REFERENCE TO *Clerk and Lindsell on Torts*, SEE NOW (20th edn), § 20–63.

AT THE END OF THE TEXT ADD: Nevertheless, a beneficial owner or co-owner of property who has an absolute beneficial entitlement to or share in the property can sue for reasonably foreseeable loss suffered by him in consequence of negligent damage to the property, provided that the legal owner is joined as a defendant.¹² It has not been decided whether a similar rule applies to a claim in nuisance.¹³

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¹² *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180; [2010] 3 W.L.R. 1192 at [111]–[144].

¹³ *Shell UK Ltd v Total UK Ltd*, above, at [151].