

## CHAPTER 20

**UNAUTHORISED PROFITS AND CONFLICTS OF  
INTEREST****2. RENEWALS OF LEASES AND PURCHASES OF REVERSIONS BY  
TRUSTEES****Renewal of leases by trustees—*Keech v Sandford***

*Keech v Sandford*

**20–03** NOTE 5. ADD: For a critical view see Hicks (2010) 69 C.L.J. 287.

**Extension of the rule to purchase of the reversion**

**20–07** AT THE END OF THE SECOND SENTENCE ADD: in circumstances such that the beneficiary can properly be considered to have given a fully informed consent to the purchase.

NOTE 32. AT THE END OF THE FIRST SENTENCE ADD: *Foreman v King* [2008] EWHC 592 (Ch) at [41]–[44].

**Purchase of property associated with trust property**

**20–09** NOTE 39. ADD: But see § 20–28B (online supplement).

**Application of the rule to other fiduciaries and persons interested in lease**

*Partners*

**20–16** NOTE 61. ADD: *Foreman v King* [2008] EWHC 592 (Ch).

**The remedy**

**20–19** AT THE END OF THE FIRST SENTENCE INSERT A NEW NOTE 70A: We do not consider that the remedy of constructive trust under the rule is affected by *Sinclair Investments (UK) Ltd v*

## UNAUTHORISED PROFITS AND CONFLICTS OF INTEREST

*Versailles Trade Finance Ltd* [2011] EWCA Civ 347; [2011] 4 All E.R. 335, see §§ 20–28A and 20–28B (online supplement).

### 3. PROFITS FROM TRANSACTIONS WITH THIRD PARTIES

#### The remedy—general principles

AFTER § 20–28 INSERT THE FOLLOWING NEW PARAGRAPHS:

**20–28A** What is said in the previous paragraph must be read subject to *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*,<sup>16a</sup> a case concerned with the liability of a company director rather than the liability of the trustee of a trust in the strict sense. In that case it was held that a constructive trust of the profit is imposed only where the money or asset constituting the profit is or has been beneficially the property of the beneficiary, or is property which the trustee acquired by taking advantage of an opportunity or right which was properly that of the beneficiary, and in other cases the remedy is limited to a personal liability to account.<sup>16b</sup> The decision in *Sinclair* was based on a number of Court of Appeal decisions (all concerned with companies, none with trusts in the strict sense)<sup>16c</sup> which prevailed<sup>16d</sup> over the Privy Council decision in *Att.-Gen. for Hong Kong v Reid*,<sup>16e</sup> the leading modern authority in favour of the imposition of a constructive trust on profits made by fiduciaries, the soundness of which was doubted by the Court of Appeal in *Sinclair*.<sup>16f</sup> And so it was decided in *Sinclair* that no constructive trust is imposed on the profitable proceeds of a sale by director of shares in a company owned by him in circumstances where the value of his own shares has been inflated

<sup>16a</sup> [2011] EWCA Civ 347; [2011] 4 All E.R. 335; affirming [2010] EWHC 1614 (Ch); [2011] 1 B.C.L.C. 202. See Hayton (2011) 25 Tru.L.I. 3.

<sup>16b</sup> See at [88].

<sup>16c</sup> Principally *Metropolitan Bank v Heiron* (1880) L.R. 5 Ex. D. 319, CA; *Lister & Co. v Stubbs* (1890) 45 Ch.D. 1, CA; *Gwembe Valley Development Co. Ltd v Koshy* [2003] EWCA Civ 1478; [2004] 1 B.C.L.C. 131 and *Halton International Inc. v Guernroy Ltd* [2006] EWCA Civ 801; [2006] W.T.L.R. 1241. Reliance was also placed on *Tyrrell v Bank of London* (1862) 10 H.L. Cas. 26, HL. For a review of the authorities by the CA, see [57]–[71], [77], [84]–[87]. For a mere detailed review of the authorities at first instance, see [2010] EWHC 1614 (Ch); [2011] 1 B.C.L.C. 202 at [35]–[79].

<sup>16d</sup> See at [73]–[74].

<sup>16e</sup> [1994] 1 A.C. 324, PC.

<sup>16f</sup> See at [80]–[83].

## UNAUTHORISED PROFITS AND CONFLICTS OF INTEREST

in consequence of breaches by him of his fiduciary duties to the company and manipulation of the assets of the company assets.<sup>16g</sup>

**20–28B** Under the law stated in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*<sup>16h</sup> there are three categories of case where a proprietary remedy is available:

- (1) The first is where the money or asset is beneficially the property of the beneficiary, as where it is the traceable product of trust assets, for example where the trustee speculates with property taken from the trust fund.<sup>16i</sup> This category is no more than an application of the proprietary remedy considered elsewhere.<sup>16j</sup> It does not involve the imposition of a constructive trust upon property acquired by the trustees but rather the vindication of the beneficiary's continuing beneficial interest in the property which represents trust property wrongly applied by the trustee in making the profit.<sup>16k</sup>
- (2) The second is where the asset or money constituting the profit has in the past been trust property but has ceased to be trust property before the profit has been made by the trustee. An example of such a case is where money is validly and without impropriety advanced out of the trust to a beneficiary who then uses part of the money to bribe the trustee to make a further and improper advance to the beneficiary. The rationale for imposition of a constructive trust on property which is not trust property but has in the past been trust property is not clear, and perhaps the explanation for this category is that it explains<sup>16l</sup> a case<sup>16m</sup> which might be thought to support a wider view of the circumstances in which a constructive trust is imposed.<sup>16n</sup>

<sup>16g</sup> See at [49]–[56] and [92], approving the first instance decision [2010] EWHC 1614 (Ch); [2011] 1 B.C.L.C. 202 at [81].

<sup>16h</sup> [2011] EWCA Civ 347; [2011] W.T.L.R. 1043.

<sup>16i</sup> See § 20–33.

<sup>16j</sup> See Chap.41.

<sup>16k</sup> See § 41–05.

<sup>16l</sup> *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*, above, at [63]–[64].

<sup>16m</sup> *Re Caerphilly Colliery Company, Pearson's Case* (1877) 5 Ch.D. 336, CA.

<sup>16n</sup> *Re Caerphilly Colliery Company, Pearson's Case*, above, at 339–340, cited in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*, above, at [63].

## UNAUTHORISED PROFITS AND CONFLICTS OF INTEREST

- (3) The third is where the trustee acquired the asset or money by taking advantage of an opportunity or right which was properly that of the beneficiary. It is the third category which is of particular importance in the present context since it covers cases which cannot be explained solely in terms of a vindication of beneficial ownership in the traceable product of trust property. What distinguishes this category from cases where there is a personal remedy only is that the trustee enriches himself by depriving the beneficiary of an asset, rather than by simply doing a wrong to the beneficiary.<sup>16o</sup> The wording of this category<sup>16p</sup> is somewhat vague and it remains to be seen whether it will be narrowly interpreted, or widely applied so as to cover most of the cases which before *Sinclair* were regarded as giving rise to a proprietary remedy. This category covers cases<sup>16q</sup> within the rule in *Keech v Sandford*,<sup>16r</sup> and covers cases<sup>16s</sup> where a trustee purchases property from a third party which the trust has an interest in acquiring and sells it on to the trust at a profit, so that the trustee cannot be heard to say that he acquired the property for himself rather than for the trust.<sup>16t</sup> This category would appear to cover cases where the profit is acquired through the exercise (or non-exercise) of a pre-existing right conferred on the trustee or other fiduciary as legal owner of pre-existing property subject to the trust or fiduciary relationship,<sup>16u</sup> as where a trustee obtains remunerative employment with a company owned by the trust,<sup>16v</sup> and may cover cases where the opportunity and knowledge gained from that position enable the trustee to make a profit, as in *Phipps v Boardman*<sup>16w</sup> and similar cases.<sup>16x</sup>

<sup>16o</sup> *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*, above, at [80].

<sup>16p</sup> *ibid*, at [88].

<sup>16q</sup> *ibid*, at [58].

<sup>16r</sup> (1726) Sel. Cas. T. King 61. See §§ 20–02 *et seq.* (including online supplement).

<sup>16s</sup> *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*, above, at [58].

<sup>16t</sup> *Tyrrell v Bank of London* (1862) 10 H.L. Cas. 26, HL; *Re Cape Breton Company* (1885) 29 Ch.D. 795 at 803–806, CA.

<sup>16u</sup> Though this would appear to come clearly within the third category, a doubt may arise from observations made at first instance in *Sinclair*, see [2010] EWHC 1614 (Ch); [2011] 1 B.C.L.C. 202 at [76]–[79], in relation to *Halton International Inc. v Guernroy Ltd* [2006] EWCA Civ 801; [2006] W.T.L.R. 1241, echoed to some extent by the CA in *Sinclair* at [87].

<sup>16v</sup> See §§ 20–39 to 20–41 (including online supplement).

<sup>16w</sup> [1967] 2 A.C. 46, HL. In *Sinclair* the CA (see [2011] EWCA Civ 347; [2011] 4 All E.R. 335 at [70]) agreed with view expressed at first instance (see [2010] EWHC 1614 (Ch); [2011] 1 B.C.L.C. 202 at [42]–[47]) that *Phipps v Boardman* is not binding authority for the proposition that

## UNAUTHORISED PROFITS AND CONFLICTS OF INTEREST

**20–28C** The consequences of limitation of the remedy to a personal remedy in cases where a proprietary remedy is not available are these:

- (1) The beneficiaries are unprotected in the event of the trustee’s insolvency and compete along with the trustee’s other unsecured creditors.
- (2) There may be no recovery in respect of any increase after the profit is made in the value of the asset or money constituting the profit or the property from time to time representing the same,<sup>16y</sup> though the Court of Appeal in *Sinclair* has left to the door open, with limited enthusiasm, to the possibility of a personal remedy in respect of such profits.<sup>16z</sup>
- (3) The remedies of dishonest assistance and knowing receipt are not available against third parties who assist in the disposal of the profit after it is made or receive it from the trustee.<sup>16aa</sup>

*Consequences of constructive trusteeship—the proprietary remedy and consequential personal remedies*

**20–29** DELETE THE FIRST SENTENCE AND REPLACE BY: In cases where a profit is held on a

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a constructive trust is imposed in this kind of case. On the other hand, the CA did not say that *Phipps v Boardman* was authority against that proposition, or that the matter was concluded one way or the other by authority. The view at first instance in *Sinclair* supported the same judge’s earlier view in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); [2007] W.T.L.R. 835 at [1546]; and contrasted with the different views expressed by a different judge in *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd* [2007] EWHC 915 (Ch); [2007] 2 All E.R. (Comm.) 993 at [105]; and contrasted with the view subsequently expressed in *Dyson Technology Ltd v Curtis* [2010] EWHC 3289 (Ch) at [187]. Sir Peter Millett in [1993] R.L.R. 7 at 12 (writing before the PC decision in *Att.-Gen. for Hong Kong v Reid* [1994] 1 A.C. 324, PC) considered that it was “obviously appropriate” that the remedy in *Phipps v Boardman* was a constructive trust. A reading of the first instance order ([1964] 1 W.L.R. 993 at 1018) suggests that Wilberforce J. was ready to order a transfer of the shares, but this was stood over, perhaps because on the facts personal accountability (something flowing from imposition of a constructive trust—see § 20–29) gave the successful plaintiffs a better remedy. That perhaps explains why the appellate courts focused on personal accountability while also referring to constructive trusteeship. As to whether information is property and whether property acquired through use of confidential information is the traceable product of the information, see §§ 20–45 and 20–53.

<sup>16x</sup> See §§ 20–44 to 20–46.

<sup>16y</sup> *Lister & Co. v Stubbs* (1890) 45 Ch.D. 1 at 15, CA.

<sup>16z</sup> *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347; [2011] 4 All E.R. 335 at [89]–[91]. The concept of surviving enrichment referred to in § 20–28, n.13 was not considered by the CA.

<sup>16aa</sup> See § 20–53.

## UNAUTHORISED PROFITS AND CONFLICTS OF INTEREST

constructive trust in accordance with the principles stated in §§ 20–28 to 20–28C (including online supplement), it follows that the trustee will, subject to his lien, and like in cases where there is no constructive trust, be personally accountable for the amount or value of the profit, just as he is personally accountable for other assets of the trust.

*Allowance for skill and labour*

- 20–30** NOTE 23. AT THE END ADD: *Estate Realties Ltd v Wignall* [1992] 2 NZLR 615, NZ HC; *Chirnside v Fay* [2006] NZSC 68; (2007–08) 10 I.T.E.L.R. 226 reversing in part [2004] 3 N.Z.L.R. 637, NZ CA.

AT THE END OF THE TEXT ADD. It has been doubted whether an allowance for skill and labour is available where the profit consists of property forming part of the trust property, rather than property obtained from a third party, on the ground that this would involve an impermissible discretionary interference by the court with the property rights of the beneficiaries.<sup>33a</sup>

**Bribes and commissions***Remedies against a trustee who takes a bribe or commission*

- 20-36** DELETE THE LAST SENTENCE AND N.56 AND REPLACE BY: Later the constructive trust remedy was broadened by the Privy Council so as to be available in all cases.<sup>56</sup> But the Court of Appeal has narrowed the constructive trust remedy so that it is now available in England only

<sup>33a</sup> *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); [2007] W.T.L.R. 835 at [1542]–[1545]. This part of the decision in *Ultraframe* should be approached with some caution. The court has a discretionary jurisdiction to authorise payment of remuneration out of the trust property for the past services of the trustee, and though that jurisdiction concerns retrospective authorisation of remuneration for authorised work done, rather than allowances for work done in making unauthorised profits, there are elements in that jurisdiction which overlap with the jurisdiction here under consideration, see § 20–176. The court also has a discretionary jurisdiction to authorise retention of fees made from a remunerative employment with a third party, see § 20–41. The court does not have discretion to determine whether property rights should be conferred or confiscated, but that does not mean that the court can have no discretion in relation to the manner in which relief is granted in relation to equitable proprietary rights see § 41–36.

<sup>56</sup> *Att.-Gen. for Hong Kong v Reid* [1994] 1 A.C. 324, PC; *Corporacion Nacional del Cobre de Chile v Interglobal Inc* (2002–03) 5 I.T.E.L.R. 744, Cayman GC; *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch); [2005] Ch. 119; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); [2007] W.T.L.R. 835 at [1490]; *Dyson Technology Ltd v Curtis* [2010] EWHC 3289 (Ch) at [170]–[191].

## UNAUTHORISED PROFITS AND CONFLICTS OF INTEREST

where the bribe or commission derives from the trust property,<sup>56a</sup> or where it can be said that the trustee has taken advantage of an opportunity or right which was properly that of the beneficiary.<sup>56b</sup>

*Remedies against the other party to the transaction*

**20–38** NOTE 64. FOR THE REFERENCE TO *Clerk and Lindsell on Torts*, SEE NOW (20th edn), §§ 18–55 and 18–56.

NOTE 68. AT THE END OF THE FIRST SENTENCE ADD: considered in *Murad v al-Saraj* [2005] EWCA Civ 959; [2005] W.T.L.R. 1573 at [69]; *Ultraframe UK Ltd v Fielding* [2005] EWHC 1638 (Ch); [2007] W.T.L.R. 835 at [1589]–[1584]; *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd* [2007] EWHC 915 (Ch); [2007] 2 All E.R. (Comm.) 993 at [131]–[134].

AT THE END ADD: On the question whether the briber can be made accountable in equity (rather than at common law) for the bribe paid or profit made by the trustee as distinct from the briber's own profit, see § 20–53.

**Remunerative employment with third party**

**20–39** NOTE 70. DELETE AND REPLACE BY: See §§ 20–28 to 20–29 (including online supplement), especially 20–28B(3). In view of *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347; [2011] W.T.L.R. 1043, mere misuse of a fiduciary position in order to obtain remunerative employment would not be enough for a proprietary as distinct from personal remedy. But different considerations apply where the employment is obtained through the exercise (or non-exercise) of pre-existing voting rights attached to company

<sup>56a</sup> *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347; [2011] 4 All E.R. 335 at [64]; and see § 20–28B(2) (online supplement). Note that in *Williams v Barton* [1927] 2 Ch. 9 the commission derived from the trust property (though that was not the reason why a trust was imposed in that case) and in most cases of open commissions, the commission derives, at least indirectly, from the trust property. See too *Cadogan Petroleum plc v Tolley* [2011] EWHC 2286 (Ch) at [14]–[39].

<sup>56b</sup> *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*, above, at [88]; and see § 20–28B(3) (online supplement). Where the trustee as seller of trust property is entitled to brokerage in respect of the sale, it may be said that the right to obtain brokerage is properly that of the beneficiary so that the trustee cannot be heard to say that he obtained the brokerage on his own account rather than for the trust. Trust instruments often permit professional trustees to retain brokerage. See too *Cadogan Petroleum plc v Tolley*, above.

## UNAUTHORISED PROFITS AND CONFLICTS OF INTEREST

shares comprised in the trust property, though even here there may be a doubt whether a constructive trust remedy is available, see § 20–28B, n.16u.

**Profit obtained by third party**

*Claim based on connection between third party and trustee*

**20–49** NOTE 8. AT THE END ADD: *Ultraframe UK Ltd v Fielding* [2005] EWHC 1638 (Ch); [2007] W.T.L.R. 835 at [1561]–[1564]. The parenthetical statement in the text to this footnote should not be read out of context. It is not suggested in the text that it is enough to establish a substantial interest. The purpose of the parenthetical statement is to make it clear that a company in which the defendant’s interest is less than 100% can (but not necessarily will) be one which is a cloak or alter ego, as for example where some shares in the company are owned by persons connected with the defendant so as to give an (incorrect) appearance of autonomy. See too § 42–43 (concerned with receipt in the context of knowing receipt).

NOTE 9. AT THE END ADD: critically considered in *Ultraframe UK Ltd v Fielding*, above, at [1565]–[1576], [1584]–[1585].

AT THE END OF THE FIRST SENTENCE ADD: or which could have been taken by the trustee but which is arranged by him to be taken by a company.<sup>9a</sup>

NOTE 10. AT THE END ADD: *Ultraframe UK Ltd v Fielding*, above, at [1588].

NOTE 11. AFTER THE REFERENCE TO *Timber Engineering Co. Pty Ltd v Anderson* INSERT: (considered in *Ultraframe UK Ltd v Fielding*, above, at [1536]–[1542]). AT THE END ADD: As to the circumstances in which a trust (as distinct from mere personal liability to account) will be imposed, see §§ 20–28 to 20–28C (including online supplement).

*Claim based on participation in breach of fiduciary duty*

**20–53** NOTE 26. AT THE END OF THE FIRST SENTENCE ADD: *Warman International Ltd v Dwyer* (1995) 182 C.L.R. 544 at 564–565, Aus. HC; *Ultraframe UK Ltd v Fielding* [2005] EWHC 1638 (Ch); [2007] W.T.L.R. 835 at [1589]–[1594]; but see *Sinclair Investment Holdings SA v*

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<sup>9a</sup> *Comax Secure Business Services Ltd v Wilson* [2001] All E.R. (D) 222 (Jun), considered in *Ultraframe UK Ltd v Fielding* [2005] EWHC 1638 (Ch); [2007] W.T.L.R. 835 at [1598]–[1599]; see to at [1576].

## UNAUTHORISED PROFITS AND CONFLICTS OF INTEREST

*Versailles Trade Finance Ltd* [2007] EWHC 915 (Ch); [2007] 2 All E.R. (Comm.) 993 at [109]–[135] in which the proposition in the text was not treated as conclusively settled in English law. AFTER THE SECOND SENTENCE INSERT: The remedy is a personal one and the third party does not become a constructive trustee of the profit made by him so as to enable the claimant to pursue a proprietary remedy in respect of the profit, see *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd*, above.

AT THE BEGINNING OF THE SENTENCE WHICH IS THE TEXT TO N.29 INSERT: It has been held in Canada that

AFTER THE TEXT TO N.29 INSERT: But this wide principle has not been accepted in England: a dishonest assistant is liable to pay compensation in respect of the loss to the trust fund resulting from the trustee's breach of trust and is liable to account for his own profit, but is not liable to account for a profit made by the trustee or another dishonest assistant which has caused no corresponding loss to the beneficiaries.<sup>29a</sup> The dishonest assistant may, however, be accountable for a profit which he could have made for himself but which he arranges to be taken by a company.<sup>29b</sup>

NOTE 31. ADD: In *Ultraframe UK Ltd v Fielding* [2005] EWHC 1638 (Ch); [2007] W.T.L.R. 835 at [1489] it was considered that property which becomes trust property under the profit rule counts as trust property for the purpose of knowing receipt. But a profit made by a trustee is not necessarily subject to a trust in favour of the beneficiaries and may give rise to no more than a personal remedy to account against the trustee, see *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347; [2011] W.T.L.R. 1043 and §§ 20–28A to 20–28C (online supplement). In cases where there is no trust, the remedy of knowing receipt is not available (nor is any remedy of dishonest assistance available in relation to the disposal of the profit after it has been made), see *Apcoa Parking (UK) Ltd v Perera*, unreported, October 14, 2010, Ch D. But if there is a trust, both remedies are available, see *Dyson Technology Ltd v Curtis* [2010] EWHC 3289 (Ch) at [170]–[211].

NOTE 34. ADD: *Ultraframe UK Ltd v Fielding* [2005] EWHC 1638 (Ch); [2007] W.T.L.R. 835 at [1482, [1574], agreeing with the statement in the text.

<sup>29a</sup> *Ultraframe UK Ltd v Fielding* [2005] EWHC 1638 (Ch); [2007] W.T.L.R. 835 at [1595]–[1601].

<sup>29b</sup> *Comax Secure Business Services Ltd v Wilson* [2001] All E.R. (D) 222 (Jun), considered in *Ultraframe UK Ltd v Fielding*, above, at [1598]–[1599] (and compare § 20–49).

## UNAUTHORISED PROFITS AND CONFLICTS OF INTEREST

#### 4. PURCHASE OF TRUST PROPERTY BY TRUSTEES AND OTHER SELF DEALING TRANSACTIONS

##### The self dealing rule

**20-63** NOTE 89. AT THE END ADD: As to the scope of *Holder v Holder* [1968] Ch. 353, CA and whether it confers any discretion on the court to disapply the self-dealing rule, see *Re Thompson's Settlement* [1986] Ch. 99 at 115; *Re One.Tel Networks Holdings Pty Ltd* [2001] NSWSC 1065; (2001) 40 A.C.S.R. 83 at [54]; *Re Carrington* [2008] NZHC 2126; (2008-09) 11 I.T.E.L.R. 693; *Calvo v Sweeney* [2009] NSWSC 719 at [230]–[242], where the rule was held to be mandatory, and the court had no power to disapply the rule in its discretion.

**20-64** NOTE 1. AT THE END ADD: Where a trustee is expressly authorised to act notwithstanding a conflict of interest, there is no such burden on the trustee: *McNulty v McNulty* [2011] NZHC 1173; (2011-12) 14 I.T.E.L.R. 361 at [108]–[109].

##### Application of the self dealing rule to transactions other than purchase of trust property

###### *Leases of trust property*

**20-66** NOTE 6. ADD: *Walker v Walker* [2007] EWHC 597 (Ch); [2010] W.T.L.R. 1617 at [232]–[237].

##### Indirect purchase by trustee and purchase by former trustee

###### *Purchase by former trustee*

**20-75** NOTE 34. AT THE END ADD: See too *Holder v Holder* [1968] Ch. 353 at 398, CA, *per* Harman L.J; *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248 at [56].

##### Purchase with concurrence of beneficiaries

**20-98** AT THE END ADD: In relation to requirement (7), concurrence by one or more of a class of beneficiaries may have the consequence that the concurring beneficiaries have any accretion to their entitlement arising from the defaulting trustee being held to account impounded,

## UNAUTHORISED PROFITS AND CONFLICTS OF INTEREST

leaving the non-concurring beneficiaries free to benefit, in proportion to their share of the fund which is augmented.<sup>29a</sup>

**Purchase with the sanction of the court**

*Non-concurring or opposing adult beneficiaries*

**20–102** NOTE 37. AT THE END ADD: *Holder v Holder* [1968] Ch. 353, CA was not followed in *Re Carrington* [2008] NZHC 2126; (2008–09) 11 I.T.E.L.R. 693, though the question whether the purchasing trustee might be authorised by the court to repurchase the property was not considered.

**5. INTEREST OF TRUSTEES IN EXERCISE OF DISPOSITIVE POWERS****The problem with trustees' powers**

**20–124** NOTE 8. AT THE END ADD: *Royal Bank of Scotland plc v Chandra* [2011] EWCA Civ 192 at [24].

**Construction of the power and role of the self dealing rule**

**20–129** NOTE 30. AT THE END OF THE FIRST SENTENCE ADD: *Breakspear v Ackland* [2008] EWHC 220; [2009] Ch. 32 at [114]; *Rafferty v Philp* [2011] EWHC 709 (Ch) at [34]–[35], [69] (statement in text approved). AT THE END ADD: See too *Dever v Knobloch* [2009] NZHC 2013 at [37]–[54] as to the position in New Zealand.

**Exclusion of the rule where the trustee does not place himself in a position of conflict**

**20–131** NOTE 41. AT THE BEGINNING INSERT: *Breakspear v Ackland* [2008] EWHC 220; [2009] Ch. 32 at [122].

NOTE 42. AT THE END ADD: Nor was the exception applied to a successor trustee in *Breakspear v Ackland*, above, see at [122].

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<sup>29a</sup> *Jones v Firkin-Flood* [2008] EWHC 2417 (Ch); [2008] All E.R. (D) 175 (Oct) at [224], *per* Briggs J.

## UNAUTHORISED PROFITS AND CONFLICTS OF INTEREST

**Express and implied exclusion of the rule by the terms of the trust**

**20–132** AFTER THE SECOND SENTENCE INSERT: It is clear that the self dealing rule can be excluded by the terms of the trust.<sup>47a</sup>

AFTER THE FOURTH SENTENCE INSERT: A provision conferring power on the trustees to enter into any transaction concerning the trust fund notwithstanding that any of the trustees is interested in the transaction other than as one of the trustees has, in the context of the terms of the settlement as a whole and admissible evidence as to the background of the settlement, been broadly construed so as to encompass an addition of a trustee to the class of beneficiaries under a power of addition and a subsequent appointment to that trustee under a power of appointment in favour of the beneficiaries.<sup>47b</sup>

AFTER § 20–132 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

**No rescue for bad timing**

**20–132A** If neither of the exceptions considered in §§ 20–131 and 20–132 is available, the self dealing rule might needlessly be engaged as a result of bad timing, but the court will not rescue the trustee from the application of the self dealing rule for that reason.<sup>50a</sup> If it is contemplated that a beneficiary will both benefit under a power of appointment conferred on the trustees and be appointed as one of the trustees, the appointment under the power of appointment will not be impugned if the existing trustees make the appointment in favour of the beneficiary and subsequently the beneficiary is appointed as a trustee. But if the appointment in favour of the beneficiary is made after the beneficiary's appointment as a trustee then it will be caught by the self dealing rule. The difference between the two cases is one of substance, and the court cannot approach the matter as though the relevant deeds had been executed in a different order from the order in which they were actually executed or formed a single composite deed when they did not. In the first case the beneficiary has no fiduciary functions in relation to the exercise of the power of appointment even if it is contemplated that the beneficiary will become a trustee subsequently. In the second case the beneficiary, having already become a

<sup>47a</sup> *Breakspear v Ackland* [2008] EWHC 220; [2009] Ch. 32 at [114] and [117]–[125]; *McNulty v McNulty* [2011] NZHC 1173; (2011–12) 14 I.T.E.L.R. 361 at [40]–[73].

<sup>47b</sup> *Breakspear v Ackland*, above, at [114] and [117]–[125].

<sup>50a</sup> *Breakspear v Ackland* [2008] EWHC 220; [2009] Ch. 32 at [115], [127]–[128], *per* Briggs J.

## UNAUTHORISED PROFITS AND CONFLICTS OF INTEREST

trustee, even though for a short time, does have fiduciary functions in relation to the exercise of the power of appointment and cannot say that those functions were not performed since that would, if correct, itself taint the exercise of the power of appointment.

## 6. PURCHASE OF BENEFICIAL INTEREST FROM BENEFICIARY

### The fair dealing rule

**20–136** AT THE END ADD: It has been held in Australia that the fair dealing rule does not apply to the purchase by one partner from another of his partnership share in circumstances where title to the partnership property is vested in the purchasing partner on trust for the partners. In such a case the relevant obligations are those arising between partners under partnership law, not the more extensive obligations imposed by the fair dealing rule on a trustee buying a beneficial interest from a beneficiary of the trust.<sup>59a</sup>

## 7. REMUNERATION OF TRUSTEES

### Remuneration authorised by order of the court

#### *The inherent jurisdiction*

**20–175** NOTE 25. ADD: *Regent Trust Co. Ltd v RJD* [2009] JRC 117.

AFTER THE TEXT TO N.25 ADD: And the court may be persuaded to do so even where the application is opposed by the beneficiaries and the trustee is an unlicensed trust company which inadvertently failed to transfer the trusteeship to another trust company which acted as though the trusteeship had been transferred.<sup>25a</sup>

#### *Remuneration for work already done*

**20–176** NOTE 37. AT THE BEGINNING INSERT: *Regent Trust Co. Ltd v RJD* [2009] JRC 117 (where a trust company charged fees for 37 years in accordance with its scale in force from time to time having overlooked the terms of the charging clause which authorised only the scale applicable at the date of the settlement).

<sup>59a</sup> *Beale v Trinkler* [2009] NSWCA 30; (2008–09) 11 I.T.E.L.R. 862.

<sup>25a</sup> *Landau v Anburn Trustees Ltd* [2007] JRC 084; [2008] W.T.L.R. 487.

UNAUTHORISED PROFITS AND CONFLICTS OF INTEREST

**8. *BONA VACANTIA*; ADVERSE TITLE; *JUS TERTII***

**Total failure of beneficiaries**

**20–183** NOTE 59. DELETE Companies Act 1985, s.654 AND REPLACE BY Companies Act 2006, s.1012.

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