

CHAPTER 39

REMEDIES AGAINST TRUSTEES PERSONALLY

2. PERSONAL ACCOUNTABILITY AND COMPENSATION FOR
BREACH OF TRUST**Introduction**

39–02 NOTE 2. FOR THE REFERENCE TO Underhill and Hayton, *Law of Trusts and Trustees*, SEE NOW (18th edn), § 87.7.

Scope of account in common form

39–05 AT THE END OF THE TEXT ADD: A claim for an account involves at least two steps. First, at the end of the trial the trial judge gives a judgment that the defendant do account to the beneficiaries of the trust estate. Later, after more evidence (usually taken by a Master or district judge, not the trial judge), there is a calculation. Then there is a judgment for the balance thus found due.^{15a}

Breach of equitable duty of skill and care

39–07 NOTE 17. FOR THE REFERENCE TO Underhill and Hayton, *Law of Trusts and Trustees*, SEE NOW (18th edn), § 87.76.

The basic rule

39–09 NOTE 28. ADD: Once the transaction has been completed, in accordance with the contract governing it, there can be no obligation to restore the fund (e.g. the solicitor's client account) which had been held on bare trust: *Target Holdings Ltd v Redfurns* [1996] A.C. 421 at 436D, HL; *Knighton v Duffle Haynes Kentish & Co.* [2003] EWCA Civ 223; *UCB Home Loans Ltd v Grace*, unreported, December 15, 2010, Ch D at [38]–[40].

^{15a} *Brown v Silvera* [2011] ABCA 109 at [152], also representing the practice in England.

REMEDIES AGAINST TRUSTEES PERSONALLY

39–10 NOTE 32. ADD: Not every breach of trust which results in no loss is judicious: *Jeffery v Gretton* [2011] W.T.L.R. 809 at [84] (“a thoughtless breach of trust that happens to have turned out well”).

What loss is recoverable?

39–13 NOTE 40. ADD: It has been said in New Zealand that the fiduciary has a “limited opportunity” to demonstrate that all or some of the loss would have occurred in any event: see *Stevens v Premium Real Estate Ltd* [2009] NZSC 15; [2009] 2 N.Z.L.R. 384 at [85]. We consider that the position in England is as set out by Elias C.J. in her well-reasoned dissenting judgment: *ibid.* at [32]–[41].

39–14 AT THE END OF THE TEXT ADD: The trustees’ performance must, however, not be judged with hindsight.^{46a} Furthermore, on principle, compensation for breach of trust cannot be reduced by reason of contributory negligence on the part of the claimant.^{46b}

Protectors

39–17 NOTE 54. FOR THE REFERENCE TO Parker and Mellows, *The Modern Law of Trusts*, SEE NOW (9th edn), pp.206–207.

Valuation of the loss

39–19 AT THE END OF THE TEXT ADD: It has been said that the remedy “will be fashioned according to the exigencies of the particular case so as to do what is ‘practically just’ as between the parties”.^{66a} This may explain the adoption of different bases of loss in different circumstances, ensuring that the award of equitable compensation operates fairly between the defaulting trustee and the beneficiaries.

^{46a} *Nestle v National Westminster Bank* [1993] 1 W.L.R. 1260 at 1276D (“after the event even a fool is wise”); *Power v Trustees of the Open Text (UK) Ltd Group Life Assurance Scheme* [2009] EWHC 3064 (Ch); [2009] All E.R. (D) 236 (Dec) at [30].

^{46b} *Lloyds TSB Bank plc v Markandan & Uddin* [2010] EWHC 2517 (Ch) at [38]–[43]. See also § 39–26.

^{66a} *Maguire v Makaronis* (1997) 188 C.L.R. 449 at 496, Aus HC, cited with approval in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347; [2011] 4 All E.R. 335 at [47].

REMEDIES AGAINST TRUSTEES PERSONALLY

The date of the valuation

- 39–20** NOTE 68. AT THE END OF THE FIRST SENTENCE ADD: *Jeffery v Gretton* [2011] W.T.L.R. 809 at [82]–[83]. FOR THE REFERENCE TO Thomas and Hudson, *The Law of Trusts*, SEE NOW (2nd edn), § 32.29.

Contributory negligence

- 39–26** NOTE 84. AT THE END OF THE FIRST SENTENCE ADD: *Lloyds TSB Bank plc v Markandan & Uddin* [2010] EWHC 2517 (Ch) at [38]–[43].

Examples of liability*Breach of duty in relation to companies in which the trust has an interest—reflective loss*

- 39–37** NOTE 7. ADD: *Webster v Sandersons* [2009] EWCA Civ 830; [2009] 2 B.C.L.C. 542. See generally on the principles concerning the recovery of reflective loss, Joffe, Drake, Richardson and Lightman, *Minority Shareholders*, (4th edn), §§ 4.78 *et seq*, and particularly in relation to the case where a wrongdoer causes loss to a company whose shares are held by the trustees of a settlement, at §§ 4.119 *et seq*.
- 39–38** NOTE 14. ADD: See too *Ellis v Property Leeds (UK) Ltd* [2002] EWCA Civ 32; [2002] 2 B.C.L.C. 175 at [17], *per* Peter Gibson L.J.
- 39–39** NOTE 16. AT THE END ADD: See too *Freeman v Ansbacher Trustees (Jersey) Ltd* [2009] JRC 003; (2009–10) 12 I.T.E.L.R. 207 at [97(vi)], where the point was discussed, but not decided. In *Hotung v Ho Yuen Ki* [2010] HKCA 385, it was considered that the applicability of the rule against reflective loss was far from clear in a case where the defendant trustee was merely a shareholder, and not a trustee, of the company.
- 39–41** NOTE 22. ADD: In *Waddington Ltd v Chan Chun Hoo Thomas* [2008] HKCFA 86; [2009] 2 B.C.L.C. 82 at [88], Lord Millett N.P.J. expressed the view that *Giles v Rhind* [2002] EWCA Civ 1428; [2003] Ch. 618 was wrongly decided. There is, however, no proper basis for the English courts to decline to follow it, and the decision remains binding at all levels below the Supreme Court, see *Webster v Sandersons* [2009] EWCA Civ 830; [2009] 2 B.C.L.C. 542 at [36]. See Joffe, Drake, Richardson and Lightman, *Minority Shareholders* (4th edn), § 4.178,

REMEDIES AGAINST TRUSTEES PERSONALLY

for the view that *Giles v Rhind* is inconsistent with the decision in *Johnson v Gore Wood & Co.* [2002] 2 A.C. 1, HL.

- 39–43** AT THE END OF THE TEXT ADD: In *Freeman v Ansbacher Trustees (Jersey) Ltd*,^{24a} it was acknowledged that the application of the no reflective loss rule to claims against trustees is uncertain, and the court refused to strike out a claim for breach of trust by the object of a discretionary trust.

Accounts on the footing of wilful default*Time for proof*

- 39–49** NOTE 41. DELETE THE REFERENCE TO THE FOOTNOTES AND REPLACE BY: nn.39, 40.

Breaches of trust concerning investment*Investments of unauthorised kinds—options*

- 39–55** NOTE 73. FOR THE REFERENCE TO Underhill and Hayton, *Law of Trusts and Trustees*, SEE NOW (18th edn), § 87.75.

Interest*Interest on compensation generally*

- 39–58** NOTE 82. ADD: See too Ridge (2010) 126 L.Q.R. 279 at 296–300.

3. LOCUS STANDI FOR A BREACH OF TRUST ACTION**Beneficiaries with an equitable vested or contingent interest under the trust**

- 39–68** AT END OF TEXT ADD A NEW N.32A: See *Freeman v Ansbacher Trustees (Jersey) Ltd* [2009] JRC 003; (2009–10) 12 I.T.E.L.R. 207 at [44], where the text in this paragraph was approved by the court. At [45], it was said that the court has a discretion whether to grant relief in any particular case. The court also expressed the view, at [49], that where a party with standing to bring a claim for breach of trust failed to do so and allowed his claim to become statute-

^{24a} [2009] JRC 003; (2009–10) 12 I.T.E.L.R. 207 at [97]. The court described §§ 39–037 to 39–043 of this text as a helpful summary of the current position.

REMEDIES AGAINST TRUSTEES PERSONALLY

barred, and later procured a beneficiary to bring the claim as his “stool pigeon”, relief may be refused as a matter of discretion.

Objects of discretionary trusts and fiduciary powers

39–69 NOTE 36. FOR THE REFERENCE TO *Snell’s Equity*, SEE NOW (32nd edn), § 22–005.

4. CONTRIBUTION BETWEEN TRUSTEES**Contribution under the 1978 Act**

39–78 NOTE 68. *Charter plc v City Index Ltd* was affirmed on appeal on this point, see [2008] EWCA Civ 1382; [2008] Ch. 313.

NOTE 70. DELETE (not repeated in 17th edn) AND REPLACE BY (not repeated in later editions).

Establishing the primary liability

39–79 NOTE 74. DELETE AND REPLACE BY: CPR, Pt 6, rr.6.30 *et seq.*

Assessing the contributions

39–81 NOTE 85. DELETE THE FIRST SENTENCE AND REPLACE BY: See *Clerk and Lindsell on Torts*, 19th edn, § 4–12 *et seq.* (not in 20th edn).

**6. DEFENCE OF CONCURRENCE, ACQUIESCENCE OR RELEASE AND
CONFIRMATION BY A BENEFICIARY****Acquiescence**

39–104 NOTE 65. AT THE END ADD: See too *Byrnes v Kendle* [2011] HCA 26; (2011–12) 14 I.T.E.L.R. 299 at [24]–[30], [74]–[80] and [126]–[140].

REMEDIES AGAINST TRUSTEES PERSONALLY

7. DEFENCE UNDER EXCULPATORY PROVISIONS**The permitted scope of special indemnity clauses**

39–124 NOTE 23. AT THE END OF THE FIRST SENTENCE ADD: and see *Fattal v Walbrook Trustees (Jersey) Ltd* [2010] EWHC 2767 (Ch) at [11] and [67]–[82].

AFTER THE TEXT TO N.25 ADD: Similar considerations apply to other professional trustees.^{25a}

NOTE 29. FOR GUERNSEY, Trusts (Guernsey) Law 1989, s.34(7) HAS BEEN REPLACED WITH AMENDMENTS BY Trusts (Guernsey) Law 2007, s.39(7) and (8) with effect from March 17, 2008, and in relation to breaches of trust not covered by statutory provision, see *Spread Trustee Co. Ltd v Hutcheson* [2011] UKPC 13; (2011–12) 14 I.T.E.L.R. 37, applying English law as determined in *Armitage v Nurse* [1998] Ch. 241, CA, and not the Scottish cases referred to at the end of n.29. The decision includes an interesting discussion as to the sources of Guernsey trust law, which is beyond the scope of this work.

Debenture trust deeds

39–125 NOTE 30. Companies Act 2006, ss.532 and 750 came into force on April 6, 2008: see Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings) Order 2007 (SI 2007/3495).

AFTER § 39–127 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

Directors

39–127A Section 232 of the Companies Act 2006^{34a} invalidates^{34b} any provision in a company's articles of association, any contract with the company or otherwise^{34c} which purports to exempt to any extent any liability that would otherwise attach to a director of the company in connection with any negligence, default, breach of duty or breach of trust in relation to the company, and also invalidates^{34d} any such provision, with certain exceptions,^{34e} which to any extent purports

^{25a} *Fattal v Walbrook Trustees (Jersey) Ltd*, above, at [81].

^{34a} Replacing Companies Act 1985, s.310 with amendments.

^{34b} Companies Act 2006, s.232(1).

^{34c} See *ibid.*, s.232(3).

^{34d} *ibid.*, s.232(2).

REMEDIES AGAINST TRUSTEES PERSONALLY

to indemnify the director against any liability so attaching to him. No distinction is drawn between dishonest, negligent or innocent breaches of duty or trust. In view of the width of the section it is unnecessary to consider what is the difference in this context between a breach of duty and a breach of trust by a company director.^{34f} The section does not, however, prevent a company's articles from making such provision as had previously been lawful for dealing with conflicts of interest.^{34g} Nor does the section prohibit the ratification of directors' acts in accordance with prescribed procedures.^{34h}

Interpretation of special indemnity clauses

The construction of limiting words

39–134 NOTE 62. ADD: See too *Woodland-Ferrari v UCL Group Retirement Benefits Scheme* [2002] EWHC 1354 (Ch); [2003] Ch. 115 at [68] (wilful default is not the same as fraudulent breach of trust).

Do special indemnity clauses exclude the principle that ignorance of the law is no defence?

39–135 NOTE 69. *Bonham v Fishwick* was affirmed on appeal, see [2008] EWCA Civ 373; [2008] P. & C.R. D14.

8. POWER OF COURT TO RELIEVE A TRUSTEE FROM PERSONAL LIABILITY

The court's discretion

39–145 NOTE 18. AT THE END OF THE FIRST SENTENCE ADD: *Cherney v Neuman* [2011] EWHC 2156 (Ch) at [321].

^{34c} *ibid.*, ss.233 to 235.

^{34f} See § 7–16 as to directors as quasi-trustees.

^{34g} Companies Act 2006, s.232(4).

^{34h} *ibid.*, s.239.

REMEDIES AGAINST TRUSTEES PERSONALLY

9. CIVIL IMPRISONMENT AND CRIMINAL RESTITUTION**The Debtors Act 1869**

“Court of Equity”

39–148 NOTE 25. 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).

Procedure

39–157 NOTE 52. FOR THE REFERENCE TO *Civil Procedure* (2007), Vol.1, pp.2045–2069, 2204–2207, SUBSTITUTE *Civil Procedure* (2011), Vol.1, pp.2280–2313, 2421–2427.

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