

CHAPTER 41

**PROPRIETARY REMEDY AND TRACING AGAINST
TRUSTEES AND THIRD PARTIES****2. GENERAL****Breach of trust and effect of overreaching**

- 41–13** NOTE 24. FOR THE REFERENCE TO Megarry and Wade, *The Law of Real Property*, SEE NOW (7th edn), §§ 6–052 to 6–056

Overreaching and section 2(1) of the Law of Property Act 1925

- 41–15** NOTE 29. AFTER THE REFERENCE TO Megarry and Wade, *The Law of Real Property*, ADD: (not in 7th edn).

NOTE 32. FOR THE REFERENCE TO Megarry and Wade, *The Law of Real Property*, SEE NOW (7th edn), §§ 12–036 to 12–038.

NOTE 40. FOR THE REFERENCE TO Ruoff and Roper, *Registered Conveyancing*, SEE NOW §§ 13.003 to 13.004.

Imposition of new trust despite destruction of old trust of land through registration

- 41–16** NOTE 49. AFTER THE REFERENCE TO Megarry and Wade, *The Law of Real Property*, ADD: (not in 7th edn).

Evidence to establish what property or money is subject to the proprietary remedy

General principle in relation to trustee

- 41–21** AFTER THE FIRST SENTENCE INSERT: This principle does not absolve the claimant from the need to prove that his property can be traced into a particular mixed fund, nor allow the claimant to proceed on the basis that all property held by the trustee belongs to the claimant

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unless the trustee can prove the contrary.^{64a} The principle is of narrow application and concerns identification of property in a particular mixed fund into which it can be proved by the claimant that his money or property went, and the inferences that can properly be drawn from the evidence before the court, the burden on the defaulting trustee being no more than a balance of probabilities.^{64b}

The proprietary remedy against a trustee*Character of alternative remedies*

41–31 NOTE 97. ADD: See too *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); [2007] W.T.L.R. 835 at [1461]–[1469]; *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2010] EWHC 1614 (Ch); [2011] 1 B.C.L.C. 202 at [23]–[24] (affirmed [2011] EWCA Civ 347; [2011] 4 All E.R. 335).

NOTE 99. ADD: *Serious Fraud Office v Lexi Holdings plc* [2008] EWCA Crim 1443; [2009] Q.B. 376 at [19]–[43].

Locus standi

41–35 NOTE 20. ADD: As to the *locus standi* of a trustee who has made a transfer in breach of trust to recover the property from a third party, see § 41–46.

Proprietary remedy against purchasers with notice and volunteer recipients*Diplock recipients*

41–42 NOTE 42. DELETE AND REPLACE BY: See § 41–30.

Claim by trustee who has made the transfer in breach of trust

41–46 NOTE 58. ADD: Compare § 42–07 on knowing receipt and other personal remedies.

^{64a} *Serious Fraud Office v Lexi Holdings plc* [2008] EWCA Crim 1443; [2009] Q.B. 376 at [52]–[55].

^{64b} *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2010] EWHC 1614 (Ch); [2011] 1 B.C.L.C. 202 at [143]–[157]; [2011] EWCA Civ 347; [2011] 4 All E.R. 335 at [135]–[141].

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Comparison of the proprietary remedy with a constructive trust imposed by the profit rule

- 41–51** DELETE THE LAST TWO SENTENCES AND REPLACE BY: The circumstances in which a constructive trust, as distinct from a personal liability to account, is imposed under the profit rule is now narrower than was formerly thought to be the case, and is limited to cases where the asset or money 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.^{71a}
- 41–52** IN THE SIXTH SENTENCE OF THE TEXT AFTER while under the profit rule INSERT: (if applicable—see §§ 20–28 to 20–28C and 41–51 including online supplement).

The proprietary remedy and unjust enrichment*Substituted asset traced into hands of defendant*

- 41–55** NOTE 86. FOR THE REFERENCE TO Underhill and Hayton, *Law of Trusts and Trustees*, SEE NOW (18th edn), §§ 90.6 to 90.9.

NOTE 89. AT THE END ADD: See too *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); [2007] W.T.L.R. 835 at [1520].

Defence of change of position

- 41–57** NOTE 6. AFTER THE REFERENCE TO Underhill and Hayton, *Law of Trusts and Trustees*, ADD: (not repeated in 18th edn, but see §§ 98.40 to 98.44 on defence to personal liability). For the reference to Thomas and Hudson, *The Law of Trusts*, see now (2nd edn), §§ 33–93 *et seq.*
- NOTE 12. FOR THE REFERENCE TO *Snell's Equity*, SEE NOW (32nd edn), §§ 12–016 *et seq.*

^{71a} See §§ 20–28 to 20–28C (including online supplement), and *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347; [2011] 4 All E.R. 335.

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4. MIXED SUBSTITUTIONS—ACQUISITIONS AND INSURANCE**Introduction**

41–69 NOTE 62. DELETE AND REPLACE BY: See § 41–30.

Assets bought with money withdrawn by trustee or other wrongdoer from a mixed bank account—the lien under the *Oatway* rule

41–73 NOTE 75. DELETE AND REPLACE BY: See § 41–30.

Life insurance policy*The remedy*

41–82 NOTE 5. DELETE AND REPLACE BY: See §§ 41–30, 41–41, 41–42, 41–44, 41–47.

Indemnity insurance policy

41–88 AT THE END OF THE THIRD SENTENCE ADD: and is sufficiently closely connected with the land or chattels held in trust that it may be described as a graft upon it.^{17a}

5. MIXTURES AND PROBLEMS OF IDENTIFICATION**Making new products out of raw material**

41–92 NOTE 35. DELETE AND REPLACE BY: See §§ 20–28 to 20–28C, and 41–50 and 41–51 (including online supplement) as to the circumstances in which a trust may be imposed by the profit rule. The case here is closely similar to cases of graft upon the original trust property.

6. IMPROVEMENTS TO LAND AND CHATTELS**Is there a mixed substitution so that the proprietary remedy is available?**

41–96 NOTE 45. DELETE AND REPLACE BY: See §§ 41–30, 41–41, 41–42, 41–45.

^{17a} See §§ 20–28 to 20–28C, 41–51 and 41–52 (including online supplement) for a consideration of the circumstances in which a constructive trust (as distinct from mere personal liability to account) is imposed by the profit rule.

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Improvement of *Diplock* recipient's land or chattels with trust money

41–100 NOTE 59. FOR THE REFERENCE TO *Snell's Equity*, SEE NOW (32nd edn), § 44–034.

7. WHEN TRUST ASSETS BECOME UNTRACEABLE**Overdrawn bank account***Purchasing assets with the aid of an overdraft*

41–108 NOTE 78. DELETE AND REPLACE BY. A constructive trust may not now be imposed by the profit rule in the case considered in the text, but a personal remedy would be available, see §§ 20–28 to 20–28C, 41–51 and 41–52 (including online supplement).

Unauthorised employment of trust money in bank trustee's general business

41–112 NOTE 93. FOR THE REFERENCE TO Underhill and Hayton, *Law of Trusts and Trustees*, SEE NOW (18th edn), §§ 90.50 to 90.52.

IN THE FIRST SENTENCE DELETE THE TEXT AFTER N.93 AND REPLACE BY: and attempts to give effect to the dictum have been rejected by the Court of Appeal,^{93a} and also, specifically in the context of unauthorised application of trust money by a bank, by the Chancery Division.^{93b}

Destruction of leasehold interest on sale of freehold

41–113 NOTE 5. DELETE AND REPLACE BY: See §§ 20–28 to 20–28C, 41–51 and 41–52 (including online supplement) for a consideration of the circumstances in which a constructive trust (as distinct from mere personal liability to account) is imposed by the profit rule. The case here is closely similar to cases of graft upon the original trust property.

^{93a} *Serious Fraud Office v Lexi Holdings plc* [2008] EWCA Crim 1443; [2009] Q.B. 376 at [44]–[58].

^{93b} *Re Lehman Brothers International (Europe)* [2009] EWHC 3228 (Ch) at [166]–[198] (reversed in part on appeal on other grounds [2010] EWCA Civ 917; [2010] All E.R. (D) 15 (Aug)).

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8. PURCHASE WITHOUT NOTICE**Requirement (1)—purchase for value**

41–115 NOTE 18. FOR THE REFERENCE TO Megarry and Wade, *The Law of Real Property*, SEE NOW (7th edn), § 8–008.

Requirement (2)—acquisition of the legal estate

Legal estate taken in the name of nominee

41–117 NOTE 27. FOR THE REFERENCE TO *Snell’s Equity*, SEE NOW (32nd edn), § 4–025. FOR THE REFERENCE TO Megarry and Wade, *The Law of Real Property*, SEE NOW (7th edn), § 8–011.

Requirement (4)—purchase without notice

41–120 AT THE BEGINNING OF THE TEXT INSERT: The test of knowledge, as developed in the context of knowing receipt, under which liability depends upon whether the defendant’s state of knowledge is such as to make it unconscionable for him to retain the property received, does not apply to the defence of purchase without notice.^{37a}

Doubtful equities

41–122 NOTE 46. AT THE END OF THE FIRST SENTENCE ADD: *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] 4 All E.R. 335 at [102]–[108].

Commercial transactions

41–131 NOTE 76. ADD: *Macmillan Inc. v Bishopsgate Investment Trust plc (No.3)* [1995] 1 W.L.R. 978 at 1000, 1014 (affirmed [1996] 1 W.L.R. 387, CA); *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2010] EWHC 1614 (Ch); [2011] 1 B.C.L.C. 202 at [88]–[91]; [2011] EWCA Civ 347; [2011] 4 All E.R. 335 at [99]–[101].

^{37a} *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2010] EWHC 1614 (Ch) at [83]–[88]; [2011] 1 B.C.L.C. 202; affirmed [2011] EWCA Civ 347; [2011] 4 All E.R. 335.

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Requirement (5)—no notice at the time of transfer of the legal estate

Getting in the legal estate after notice without any breach of trust being involved—land

41–134 NOTE 85. FOR THE REFERENCE TO *Snell's Equity*, SEE NOW (32nd edn), § 4–026.

NOTE 88. FOR THE REFERENCE TO Megarry and Wade, *The Law of Real Property*, SEE NOW (7th edn), § 8–014.

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