

CHAPTER 43

REMEDIES AGAINST THIRD PARTIES OTHERWISE THAN IN RESPECT OF BREACH OF TRUST

1. THE GENERAL RULE AND DERIVATIVE ACTIONS

Trustees normally proper claimants

- 43–01** INSERT AFTER THE FIRST SENTENCE: Further, normally beneficiaries have no personal cause of action of action in contract or tort against the agents of the trustees,^{1a} though sometimes beneficiaries may bring derivative claims which would otherwise be brought by the trustees,^{1b} and sometimes a personal claim in tort is available to beneficiaries.^{1c}

NOTE 5. ADD: *Roberts v Gill & Co.* [2007] All E.R. (D) 89 (Apr) at [23]–[24]; affd. [2010] UKSC 22; [2011] 1 A.C. 240 (administrator).

Bare trust

- 43–03** NOTE 15. AT THE END ADD: *Roberts v Gill & Co.* [2010] UKSC 22; [2011] 1 A.C. 240 at [63]–[68] (Lord Collins).

AT THE END OF THE TEXT ADD: A beneficiary of a bare trust has no *locus standi* to bring a petition for the winding up of a company.^{17a}

Administration action by beneficiaries

- 43–04** NOTE 18. AT THE END ADD: *Tsang Yue Joyce v Standard Chartered Bank (Hong Kong) Ltd* [2010] HKCFI 981; [2010] 5 H.K.L.R.D. (statement in text approved at [38]).

^{1a} *Royal Sudan Airlines Sdn. Bhd. v Tan* [1995] 2 A.C. 395 at 391, PC; *Roberts v Gill & Co.* [2007] All E.R. (D) 89 (Apr) at [23]–[24]; affd. [2010] UKSC 22; [2011] 1 A.C. 240; *Chvetsos v BNP Paribas Trust Corp. Ltd* [2009] JRC 120; 2009 J.L.R. 217; *Webster v Sandersons* [2009] EWCA Civ 830; [2009] 2 B.C.L.C. 542 at [31]; and cases cited in § 43–06, n.39 (including online supplement).

^{1b} See §§ 43–03 to 43–05 (including online supplement).

^{1c} See section 2 of this chapter.

^{17a} *Hannoun v R Ltd* [2009] C.I.L.R. 124, Cayman GC.

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Derivative action by beneficiaries

43–05 AFTER THE FIRST SENTENCE INSERT A NEW N.20A: This paragraph was cited with approval in *Roberts v Gill & Co.* [2008] EWCA Civ 803; [2009] 1 W.L.R. 531 at [15]; affd [2010] UKSC 22; [2011] 1 A.C. 240.

NOTE 22. AT THE END ADD: *Roberts v Gill & Co.* [2010] UKSC 22; [2011] 1 A.C. 240.

AFTER THE TEXT TO N.23 INSERT: The guiding principle is that there must be exceptional circumstances, which embrace a failure, excusable or inexcusable, by the trustees in the performance of a duty to the beneficiaries to protect the trust estate, or to protect the interest of the beneficiaries in the trust estate.^{23a}

NOTE 24. ADD: *Tsang Yue Joyce v Standard Chartered Bank (Hong Kong) Ltd* [2010] HKCFI 981; [2010] 5 H.K.L.R.D. 628 at [44].

DELETE THE TEXT TO N.31 AND REPLACE BY: Where a beneficiary brings a derivative action in his own name, then the trustees must be joined as defendants. The need for joinder of the trustees is not merely a procedural matter, nor merely to ensure that the trustees are bound by the judgment or to avoid multiplicity of actions. The need for joinder has a substantive basis since the beneficiary has no personal right to sue and is suing on behalf of the estate, or more accurately the trustee.

NOTE 31. AT THE END OF THE FIRST SENTENCE ADD: *Roberts v Gill & Co.* [2010] UKSC 22; [2011] 1 A.C. 240 at [42]–[70] (Lord Collins) with whom Lord Rodger agreed at [86] and Lord Walker at [95]–[112], rather differing views as to the nature and absoluteness of the rule being expressed by Lord Hope at [79]–[84] and by Lord Clarke at [121]–[130]. DELETE THE SECOND SENTENCE AND REPLACE BY: The question whether other beneficiaries need to be joined was not considered by the SC in *Roberts v Gill & Co.*, above. The CA in that case, [2008] EWCA Civ 803; [2009] 1 W.L.R. 531 at [48], considered that the beneficiaries must also be joined if this is necessary to avoid a multiplicity of actions. Arguably a derivative action comes within CPR, Pt 19, r.19.6, so as to make a judgment binding on the

^{23a} *Hayim v Citibank N.A.* [1987] A.C. 730 at 748, PC; *Shang v Zhang* [2007] NSWSC 856; (2007–08) 10 I.T.E.L.R. 521 at [12]; *Roberts v Gill & Co.* [2008] EWCA Civ 803; [2009] 1 W.L.R. 531 at [41]; [2010] UKSC 22; [2011] 1 A.C. 240 at [53].

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beneficiaries, on the basis that the trustees represent the beneficiaries and the claimant is standing in the shoes of the trustees, though it is not correct to say that the claimant is the representative of the other beneficiaries. If the claim comes within CPR, Pt 19, r.19.7, a representation order could be made under that sub-rule. Alternatively, it may be argued that, once the trustees have been joined as defendants in their capacity as such, the claim comes within CPR, Pt 19, r.19.7A, and, though the trustee will not take an active part in the proceedings, the beneficiary stands in the shoes of the trustees and the same practice, so far as joinder of beneficiaries is concerned, should be applied as if the trustees were the claimants (as to which see § 43–01 (including online supplement)), especially where the beneficiaries are numerous or include minor, unborn or unascertained persons. Distinct from the question whether the beneficiaries must be joined to avoid a multiplicity of actions is the question whether directions should be given to ascertain the views of the other beneficiaries. This is another question which was left open by the CA in *Roberts v Gill & Co.*, above, at [48]. If there has been no *Beddoe* application in relation to the claim, and there are other beneficiaries with substantial interests who may be prejudiced by the claim, for example if the trust has assets which are vulnerable to a costs order against the trustees if the claim fails, there is a good argument that a procedure should be devised for canvassing the views of the other beneficiaries in a similar way to the *Beddoe* procedure (on which see § 21–130), especially as the CA in *Roberts v Gill & Co.*, above, at [43], did decide that the court must take into consideration the financial impact of bringing the claim on the trust (see the text added below).

AFTER THE TEXT TO N.31 INSERT: If a beneficiary brings a personal claim against a third party, and then seeks permission to amend his claim to a derivative action before the expiry of the limitation period, the amendment may be allowed.^{31a} But if permission is sought after the expiry of the limitation period, permission will be refused because the amendment would not be allowed unless the trustees were added as defendants but they cannot be added as defendants since they are not necessary parties to the existing personal claim.^{31b} The court must consider the financial impact of bringing the claim on the trust, in particular the

^{31a} *Roberts v Gill & Co.* [2008] EWCA Civ 803; [2009] 1 W.L.R. 531 at [34]–[35]; (point not considered on appeal [2010] UKSC 22; [2011] 1 A.C. 240); and CPR, Pt 17, r.17.4(4).

^{31b} *Roberts v Gill & Co.* [2010] UKSC 22; [2011] 1 A.C. 240 at [42]–[70] (Lord Collins) with whom Lord Rodger agreed at [86] and Lord Walker at [95]–[112], rather differing views as to the nature and absoluteness of the rule being expressed by Lord Hope at [79]–[84] and by Lord Clarke at [121]–[130]; CPR, Pt 19, r.19.5; Limitation Act 1980, s.35.

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vulnerability of the trust order to a costs order against the trustees if the claim fails, and the consequential potential adverse effect of such an order on other beneficiaries.^{31c} In *Roberts v Gill & Co.*,^{31d} the Court of Appeal considered that an estate which had no assets other than the claim, and its administrator, were not vulnerable to an order for costs where the claim was brought by a legally aided claimant. But, leaving aside legal aid cases, a trust is vulnerable to such an order, and even if there are no assets apart from the claim, the trustee may be personally vulnerable since their liability to pay costs in third party claims is not limited to the trust assets,^{31e} and so there may be an objection to a derivative action by a beneficiary of an impecunious trust where there are doubts as to the beneficiary's ability to meet a costs order if the claim fails.

NOTE 35. ADD: but see *Lidden v Composite Buyers Ltd* [1996] FCA 1613; (1996) 139 A.L.R. 549 at [18]–[27].

2. CLAIMS IN TORT BY BENEFICIARIES FOR NEGLIGENCE

Introduction

43–06 NOTE 39. AT THE END ADD: And see *Royal Sudan Airlines Sdn. Bhd. v Tan* [1995] 2 A.C. 395 at 391, PC; *Roberts v Gill & Co.* [2007] All E.R. (D) 89 (Apr) at [23]–[24]; affd. [2010] UKSC 22; [2011] 1 A.C. 240, [2008] EWCA Civ 803; [2009] 1 W.L.R. 531; *Chvetsos v BNP Paribas Trust Corp. Ltd* [2009] JRC 120; 2009 J.L.R. 21; *Webster v Sandersons* [2009] EWCA Civ 830; [2009] 2 B.C.L.C. 542 at [31].

Assumption of responsibility to beneficiaries

43–09 NOTE 58. INSERT AT THE BEGINNING: *Webster v Sandersons* [2009] EWCA Civ 830; [2009] 2 B.C.L.C. 542 at [31] and see

Negligent physical damage to trust property

^{31c} *Roberts v Gill & Co.* [2008] EWCA Civ 803; [2009] 1 W.L.R. 531 at [43] (point not considered on appeal [2010] UKSC 22; [2011] 1 A.C. 240).

^{31d} Above (point not considered on appeal [2010] UKSC 22; [2011] 1 A.C. 240).

^{31e} See §§ 21–54 to 21–58.

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- 43–11** AFTER THE THIRD SENTENCE OF THE TEXT INSERT: 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.^{62a}

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^{62a} *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180; [2011] Q.B. 86 at [111]–[144].