CLAIMS AGAINST TRUSTEES

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Obtaining documents and the Data Protection Act

1. Trustees are still in general not obliged to give reasons for the exercise of their discretions. This was implicit in the common ground accepted by the plaintiff in the ***Londonderry*** case.[2]

2. There are exceptions, such as: —

   (1) Where it is in the interests of the beneficiaries generally: ***Breakspear v Ackland***.[3]

   (2) Under the data protection legislation: ***Dawson-Damer v Taylor Wessing LLP***.[4] The legislation is now contained in the General Data Protection Regulation.[5] At the time relevant to the *Dawson- Damer* litigation it was the Data Protection Act 1998.

3. Under section 1(1) of the 1998 Act 'personal data' includes 'any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.' Opinions and intentions of that kind will routinely be held by trustees and their professional advisers, all of whom will be data controllers. Apart from the data protection legislation, beneficiaries will not normally be entitled to know those opinions and intentions or to have access to documents recording them.

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1 Pump Court Tax Chambers www.pumptax.com

2 *In re Londonderry's Settlement, Peat v Walsh* [1965] Ch 918 (CA) reversing [1964] Ch 594.

See also *Schmidt v Rosewood Trust Limited* [2003] UKPC 26 [2003] 2 AC 709 reversing sub nom *Rosewood Trust Limited v Schmidt* (2000-01) 3 ITELR 734.

3 *Breakspear v Ackland* [2008] EWHC 220 (Ch) [2009] Ch 32.

4 *Dawson-Damer v Taylor Wessing LLP* [2017] EWCA Civ 74 [2017] 1 WLR 3255 reversing [2015] EWHC 2366 (Ch) [2016] 1 WLR 28.

5 EU Regulation 2016/679.

4. In the context of trusts, especially discretionary trusts, data of importance might include records of trustee deliberations and settlors' letters of wishes. Under the general law trustees will ordinarily be entitled to withhold such material, but it will rank as personal data.

5. Under section 7 of the 1998 Act an individual is entitled to ask whether a data controller has personal data on him or her and, if so, to have it communicated to him or her. This is known as a 'subject access request'. Section 7 contains an exception to this requirement in cases where data about one subject cannot be disclosed without disclosing data on another individual who has not consented to the disclosure.

6. Another exception is for data protected by legal professional privilege.[6] This is construed strictly. It applies only to privilege as recognized by English law, so that a broader definition of privilege in a relevant overseas statute will not be effective. It was decided in the Dawson- Damer case that it does not include the principle by which trustees are entitled under the general law not to disclose reasons for their decisions.

7. In that case a beneficiary and her two children, faced with trustees resident overseas, made a subject access request to the trustees' then London solicitors in respect of all the material which fell within the definition of their personal data. The Court of Appeal upheld the request.

8. The obligations of trustees have therefore expanded. They must be honest and loyal, avoiding conflicts of interest; they must be ready with their accounts on request; they must exercise the statutory duty of care in investing trust assets &c; they must exercise properly the discretions inherent in the dispositive trusts and powers conferred by the trust instrument; in England and Wales they must also act on subject access requests.

9. *Lewin*[7] suggests that settlors, or trustees with sufficient powers of appointment or amendment, might include a provision in the trust documents removing an individual from the objects of a relevant discretion if he or she insisted on making a subject access request in regard to data not disclosable under the general law, if (for example) the trustees have drawn the beneficiary's attention to the provision in question. Such a provision might be vulnerable to a challenge based on public policy, but less so if the trust enjoys an overseas proper law (as was the case in the Dawson-Damer litigation).

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6 Data Protection Act 1998 Schedule 7 paragraph 10.

7 *Lewin on Trusts* 19th edition (ed L Tucker and others) paragraph 23–127 supplement.

'Not every duty owed by a fiduciary is a fiduciary duty' - discussion.

10. In *Bristol and West Building Society v Mothew*[8] Millett LJ said: —

> 'The expression "fiduciary duty" is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility. In this sense it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty. I would endorse the observations of Southin J in *Girardet v Crease & Co*[9] : —
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> > "The word 'fiduciary' is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth . . . That a lawyer can commit a breach of the special duties [of a fiduciary] . . . by entering into a contract with the client without full disclosure . . . and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words."
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> 'These remarks were approved by La Forest J in LAC *Minerals Limited v International Corona Resources Limited*,[10] where he said "not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty".'[11]

11. This may make it sound as if there were a bright-line distinction between the two types of breach, and that it is always simple to distinguish between them in practice. But sometimes it is not so simple. Take a trustee who has invested the portfolio in authorized investments but has been lazy for several years in reviewing the portfolio. The most obvious analysis is that he has acted in breach of a duty of care. But other circumstances of the case may lead to a different conclusion, for example if his choice of a particular investment was influenced by his own position as a director of the company in question, or if his choice was influenced by a request from the settlor. In the first instance he may have allowed his own personal interest to override his duty to consider the interests of all his beneficiaries, and in the second he has allowed his loyalty to the settlor to override the duties owed to the rest of the beneficiaries. In each case an unwise investment may indeed have been made in breach of his duty of loyalty.

12. Be that as it may, the main reason for emphasizing the difference between fiduciary duties and others, such as a duty of care, is that the remedy for

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8 *Bristol and West Building Society v Mothew* [1998] Ch 1.

9 *Girardet v Crease & Co* (1987) 11 BCLR (2d) 361, 362.

10 *LAC Minerals Limited v International Corona Resources Limited* (1989) 61 DLR (4th) 14, 28.

11 Bristol and West (n 7), 16.

breach of an equitable duty of care by a trustee is virtually the same as the ordinary remedy for breach of the common law duty of care. Also the common law rules relating to causation, remoteness and the measure of damage apply to a breach of an equitable duty of care just as to its common law equivalent. These rules do not apply to the remedies for breach of a fiduciary duty in the strict sense, as will be explored in the next section of this article.

13. Another context in which the difference between fiduciary duties and others is the so-called rule in *Hastings-Bass*. It is said in the leading case of *Pitt v Holt*[12] that the jurisdiction to set aside discretionary dispositions under this rule arises only if there has been a breach of a fiduciary duty. But in many cases the breach relied on is a breach of the duty to take reasonable care to consider the effect of the disposition. And is that a fiduciary duty?

14. The implication of the *Mothew* distinction, if strictly applied, might be that a failure on the part of the trustees to take reasonable care is not itself a breach of any fiduciary duty, leading to the *Hastings-Bass* remedy not being available.

15. By contrast in *Pitt v* Holt both the Court of Appeal and the Supreme Court seem to have used the phrase ‘fiduciary duty’ in a more inclusive sense. In the Court of Appeal Lloyd LJ said: —

> ‘The trustees’ duty to take relevant matters into account is a fiduciary duty, so an act done as a result of a breach of that duty is voidable.’[13]

And in the Supreme Court Lord Walker said: —

> ‘In my view Lightman J[14] was right to hold that for the rule to apply the inadequate deliberation on the part of the trustees must be sufficiently serious as to amount to a breach of fiduciary duty. Breach of duty is essential (in the full sense of that word) because it is only a breach of duty on the part of the trustees that entitles the court to intervene . . . It is not enough to show that the trustees’ deliberations have fallen short of the highest possible standards, or that the court would, on a surrender of discretion by the trustees, have acted in a different way. Apart from exceptional circumstances (such as an impasse reached by honest and reasonable trustees) only breach of fiduciary duty justifies judicial intervention.’[15]

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12 *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108.

13 *Pitt v Holt* (n 11), [127].

14 In *Abacus Trust Co (Isle of Man) Limited v Barr* [2003] Ch 409.

15 *Pitt v Holt* (n 11), [73].

16. This issue was debated thoroughly in a recent case in the Channel Islands.[16] At first instance the Lieutenant Bailiff had drawn attention to the differences of language just mentioned, and she had difficulty deciding whether the trustees' failure to consider the tax consequences of their decision amounted to a breach of their fiduciary duties. The Court of Appeal concluded that she need not have had those concerns and went on to set aside the disposition in question. In the course of doing so the Court quoted from an extra-judicial comment made by Lord Walker himself: —

> 'But one point made by the critics is that although the obligation of loyalty may be the distinguishing feature of fiduciary duties, not every breach of such duty will display the same degree of disloyalty. Not every breach will evoke the comment "How could a trustee be so disloyal!" For a trustee to enrich himself by taking a secret, unauthorised profit at the expense of the trust would be the depth of disloyalty. For a trustee to cause a loss to the trust by persistently neglecting to review its investments is a less grave order of disloyalty, but as the editors of *Thomas* comment: —
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>> "A fiduciary's duty of care is necessarily inherent in the particular 'true fiduciary duty' which that trustee is carrying out. For example, equity imposes a duty on a fiduciary to ensure that the principal's interests are protected; it arises out of the essential duty of loyalty, because true loyalty demands that the fiduciary exercise care in discharging his responsibility for the property."[17]
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> 'I have some personal interest in this point because in *Pitt v Holt* I expressed the view, without elaboration, that a trustee's duty to inform himself properly, and to deliberate carefully on the exercise of his fiduciary powers, was itself a fiduciary obligation. It seemed — and it still seems — to me that it is a duty so inextricably linked to the exercise of what are undoubtedly fiduciary powers, that it would be absurd to treat it as anything less.'[18]

17. Trustees and their beneficiaries can therefore breathe a sigh of relief. Not only is there a distinction between fiduciary duties and what may be called common-law duties, and there may be a danger of judges involved in Hastings-Bass applications insisting on the claimant identifying a breach of a fiduciary duty. But as long as the duty, even if characterized as a duty of care,

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16 *In re the Richmond Retirement Plan, M v St Anne's Trustees Limited*, Civil Division Appeal No 519.

17 *Thomas on Powers* (2nd ed) para. 10–54.

18 Lord Walker, *The Changing Face of Trust Law,* ACTAPS annual lecture 1 November 2016.

is closely related to the exercise of a fiduciary power or discretionary trust, the breach of that duty is sufficient to invoke the jurisdiction.

18. It remains the case, however, that trustees who rely on professional advice when making their dispositions are unlikely to be entitled to invoke the jurisdiction at all.

19. It is also the case that the Court of Appeal of the Channel Islands is not a court of record in England and Wales. Nevertheless the Guernsey decision was given, on behalf of the whole court, by Sir Michael Birt, formerly the Bailiff of the Royal Court of Jersey, and his analysis is in my view likely to be followed here.

Equitable compensation and the duty to account

20. Breaches of trust come in all shapes and sizes. At one extreme the trustee may steal the trust property. Or he may use trust property in his own business, or as security for his own borrowing. Or he may appoint the property to the wrong beneficiary, such as a person who is not in truth an object of the trustee's power. Or he may act in breach of a truly fiduciary duty, by improperly preferring one beneficiary to another in breach of his loyalty to the rest. Or he may commit what is still known as a fraud on the power, exercising a dispositive power for an improper purpose. Alternatively he may borrow money unwisely, or he may make unwise investments, he may over a period have failed to review his investment policy. And in the context of *Hastings-Bass* cases, he may fail to take professional advice about exercising a dispositive power, or he may simply fail to consider the consequences of the exercise, including its tax consequences.

21. Faced with this constellation of bad behaviour, the courts have reacted with appropriate remedies. This has happened over a long period of time, with the result that some of the language used to describe the available remedies is archaic and sometimes confusing or obscure. In trying to shine some light on all of this, I shall begin by offering a short analysis of the various classes of equitable remedy: —

    (1) In the first place there are proprietary remedies.[19] These are essentially based on the proposition, fundamental to English trust law, that the beneficiaries have an enforceable interest in the trust property, an equitable or beneficial interest.[20] They are regarded as the true

19 Please see paragraph 34 *et seq* below.

20 These rights may also be claimed against third parties, when the claim against the trustee himself fails; these third parties being either (1) persons with knowledge of the breach, (2) volunteers with no such knowledge and (3) so-called *Diplock* recipients; bona fide purchasers

owners of property, in contrast to the trustees who have the legal title to it.[21]

(2) And there are personal remedies, involving money claims for what is usually called equitable compensation. Confusingly some academics like to distinguish between reparatory and substitutive compensation, but that distinction can be ignored for present purposes.

The action for an account; equitable compensation

22. What cannot completely be ignored is that the traditional means of mounting a claim for what is know called equitable compensation was an action for an account. The basic idea is that it is a fundamental duty of the trustee to be ready with his accounts. Any beneficiary is entitled to ask the trustee for an account of his trusteeship, and if he does not comply the court can order an account.

23. In procedural terms the case is transferred to a Chancery Master, where the trustee sets out the assets under his control, including all assets formerly under his control, and describes what has happened to them. The beneficiaries are entitled to challenge the propriety of transfers and payments made by the trustee. This process is called 'falsifying' the relevant entries in the account. When the Master has concluded the account, and if the account shows a deficit (representing the unauthorized payments and transfers made by the trustee), the court orders the trustee to make good the deficit by adding money back to the trust fund.

24. There is another process called 'surcharging' an account. Here the beneficiaries may claim that the trustee ought to have had more assets than in fact he did have under his control. An account which includes surcharging is known as an account on the footing of willful default.[22]

25. Both operations of falsification and surcharging have the effect of increasing any deficit shown on the trustee's account. In each case the deficit is finally the subject of a court order for restitution of the trust fund, and it is this which is today described as equitable compensation. In fact it is comparatively rare for a claim to be expressed in terms of an account, though some academics, and some judges (Lord Millett for one), are apt to state that all forms of (non-

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with no knowledge of the breach are immune from the proprietary claim.

21 Some jurisdictions, while recognising trusts in principle, do not regard the beneficiaries as having anything like an equitable or beneficial interest in the trust property, their only remedy being a personal one for compensation.

22 Another section of this article includes a short description of an account on the footing of wilful default: se paragraph 37 below.

proprietary) equitable compensation can be analysed in terms of taking an account.

26. In all of this analysis it should be remembered that it applies not only to trustees in the strict sense of settlement trustees and will trustees, but also to others holding property in trust for others. This includes, for example, a solicitors firm holding money in its client account in trust for its clients.

27. Equitable compensation is sometimes called equitable damages, but many practitioners and judges are careful not to use the word damages in this context. The reason is that some of the rules surrounding common-law damages for negligence do not apply to equitable compensation. In particular the rules about causation, remoteness of damage and the measure of damage do not apply. The primary rule is that, if the trustee has made an unauthorized payment away of trust property, his duty is to reconstitute the fund or, if that is impossible, to make restitution by paying compensation (theoretically at least, by way of an account with the payment away falsified).

28. Some enterprising litigants have seized on this difference by making a claim for equitable compensation where an ordinary claim for damages will not work. At the risk of teaching you to suck eggs, *Target Holdings Limited v Redferns*[23] was a case in point.

The facts of Target

29. The dramatis personae were a borrower, a mortgage lender, and the firm of solicitors instructed to act for both of them in the purchase of a commercial property: —

    (1) The real purchase price of the property was £775,000, but the borrower falsely persuaded the mortgage lender that it was worth £2 million.

    (2) The lender transferred £1.525 million to the solicitors to hold it pending completion, not to be released until receipt of the executed conveyance and charge deed. This created a trust with the solicitors as bare trustees for the mortgage lender of the sum held in their client account.

    (3) In breach of that trust the solicitors released the money to the vendor before obtaining the executed conveyance and charge deed.

    (4) Subsequently the conveyance and charge deed were duly provided.

23 *Target Holdings Limited v Redferns* [1996] AC 421 (HL).

(5) Later still the borrower defaulted. The lender sold the property, recovering only £500,000, and sued the solicitors for the balance of their loss.

30. The lender could see that he had no claim against the solicitors in tort or for breach of contract. They had properly obtained the title documents, just a bit late, and their failure to do so on time had not itself caused the lender's loss. But the solicitors had acted in breach of trust, and the primary remedy for that was to reconstitute the trust fund, even though the breach had not caused the loss; in taking an account, the solicitors had received £1.525 million, and they would have had to show that their dealing with the money was authorized, which it was not.

31. But, although that claim shows how a case of this kind must be analysed in terms of the trustee's account, the lender's analysis turned out to be wrong, for a subtle reason. That was that the breach did not technically consist of the payment of the money but of the failure to obtain the title deeds first. And the solicitors had in fact remedied that breach already by obtaining the title deeds before any loss was incurred.

32. In the end the House of Lords concluded that the lender was entitled to recover a loss only on a 'but-for' basis, i.e. that he had suffered a loss which he would not have incurred but for the breach of trust. In Target the lender would have incurred the loss even if the solicitors had acted strictly in accordance with their instructions, so no loss was recoverable at all. In some cases this works against the trustee. He may be liable to reconstitute the fund, if the loss would not have occurred in the absence of his breach of duty, even if the immediate cause of the loss was something outside the trustee's control, and even if it was caused by the dishonesty of a third party.

33. The remedy for breach of a non-fiduciary duty is different. Here the but- for test is irrelevant, and the common-law concepts of causation and remoteness apply instead. The claimant will have to show that the scope and purpose of the duty in question was to protect the claimant from the harm which he has in fact suffered, even if he can satisfy the but-for test.

The proprietary remedy

34. For a tax practitioner the proprietary remedy is likely to be more important than the personal one. Here the claimant relies on his equitable and beneficial interest in the property, and he asserts and vindicates that interest by demanding its return into his own name. His ownership of the asset will therefore have tax consequences. His entitlement will also extend, in theory

at least, to the income which has been derived from the asset during its absence as a result of the breach, and that will have tax consequences too.

35. That simple description covers the simple case of a trustee appropriating a trust asset without authority and keeping it until ordered to restore it. In real life things are not so simple: —

(1) The trustee may have sold the asset.

(2) The trustee may have then used the proceeds of sale to buy another asset.

(3) In doing that he may have used not only the proceeds of the trust asset but also some of his own money, or the proceeds of an asset belonging to a different trust.

(4) Alternatively the trustee may have used the trust property as security for borrowing, and proceeded to use the borrowed money, perhaps mixed with other money of his own (or the property of third parties), in a business venture.

(5) Or the trustee may have given the trust asset, or its proceeds of sale, away to a third party, or left it to the third party in his will; and the third party may have sold it, given it away, or died leaving it to someone else altogether.

36. This is where tracing and following come in.[24] These words have distinct, though related meanings, and occasionally judges get them confused, using the word trace where they mean follow, though rarely vice versa. The concept of following is to follow an asset into different ownership, while tracing means regarding the value of an asset as being represented by a different asset in the same ownership. Tracing occurs typically when an asset is sold, and the beneficiary's interest in the original asset is traced into the proceeds of sale.

37. The only way in which this process of following an asset into someone else's ownership is stopped is where that third party is a bona fide purchaser of the asset without notice of the trust, meaning without notice of the facts which are construed as constituting the trust.

38. Taking the simple case of a breach of trust by which the trustee has misappropriated a trust asset and retained it in his own possession. Here the beneficiary normally has a choice of remedy, personal and proprietary. In some cases the trust instrument will include an explicit exoneration clause, and that may remove the personal claim, in which case the beneficiary is left

24 Tracing and following are not themselves remedies; they are the means by which the true remedy may be analysed and quantified.

with the proprietary claim only. (In fact an exoneration clause will not help a trustee in a case of simple misappropriation.) He will not be able to succeed with both claims, but he does not have to make up his mind about the choice until judgment in the action.

39. Things are seldom that simple. Suppose the trustee has sold the trust property to a bona fide purchaser and used the proceeds, together with other funds of his own, to buy a second property. Here the beneficiary cannot follow the property into the hands of the purchaser. But he can trace his interest into the proceeds, and can then trace those proceeds into the second property. Several questions might arise : —

    (1) Can the beneficiary claim the whole of the second property? The short answer is No.

    (2) Can he claim a proportionate share in it? Yes.

    (3) Or is he limited to a charge on the property representing the amount of the proceeds of sale of the original property?

40. The answer is that the beneficiary has a choice between (2) and (3). If the second property has increased in value he will choose (2). One feature of choice (3) is that this is not truly a proprietary claim at all. It is a claim to a lien imposed so as to enforce his personal claim. It will therefore fall away if the trustee has a defence to the personal claim (which will not be the case with a simple misappropriation). The lien extends to the whole of the mixed property, and the interest of the aberrant trustee is subordinated to his own claim. This means that the equities of the beneficiary and trustee are not equal. The beneficiary's claim is satisfied first, and the trustee will be entitled only to the balance. This will be worse for the trustee if the second property has fallen in value.

41. A difference between the claim to a proportionate share in the second property and the claim to a lien to enforce the personal claim is that the proprietary claim will carry the right to the income from the second property, while the personal claim will carry interest, either simple or compound, and the better view seems to be that this interest is not added to the security. This may affect tax issues for the beneficiary, and indeed for the trustee.

42. That is only the beginning of the complexities. Sometimes there is a mixture of following and tracing, personal and proprietary claims, and the available fund has to be divided between four or even five competing interests: —

    (1) The beneficiary;

    (2) The trustee;

    (3) A bona fide purchaser for value;

(4) An innocent volunteer;

(5) A so-called *Diplock* recipient.

43. The person with the strongest position is the bona fide purchaser. To the extent of his purchase, any proprietary claim of the beneficiary will fail.

And the person with the weakest position is the trustee. Assuming that the assets in question have fallen in value, as tends to be the case, the claimant beneficiary will be relying on his personal remedy of a lien, and the interest of the trustee will be subordinated to the claim of the beneficiary. The innocent volunteer will normally be in no better position than the trustee. As a result of the decision of the Court of Appeal in the *Diplock* case,[25] so-called Diplock recipients are placed on an equal footing with the beneficiary. These are people to whom trust property has been distributed in breach of trust in the mistaken belief of the trustee that they were proper objects of their discretion. They are not subordinated to the claim of the beneficiary, and they share the fund with him pari passu.

44. Helpfully the editors of *Lewin*[26]25 have provided an example: —

A trustee T, having no power to sell chattels, sells chattels (A) for £200,000 to a purchaser P who does have knowledge of the breach. T spends the proceeds and later goes bankrupt. P sells the chattels A for the price he paid (£200,000) and uses the proceeds, together with £400,000 of his own money, to buy an asset (B). Asset B halves in value to £300,000.

The analysis is that the beneficiaries could follow chattels A into the hands of P but no further. But they have a personal claim against P for knowing receipt of trust property, and they can enforce that claim by way of a lien for £200,000 over the asset B.[27] Everyone else's interest is subordinated.

P is found to have spent £200,000 of his own money to buy chattels A and has then spent a further £400,000 of his own money to buy asset B, and is left with £100,000.

45. For a tax adviser one question is the extent to which P's loss is allowable for the purposes of capital gains tax. He has spent £600,000 on asset B, which is now worth £300,000. In addition the beneficiaries will have a personal claim against him for £200,000 on the basis of knowing receipt. But this personal claim will not be added to P's acquisition cost or other allowable

25 *In re Diplock* [1948] Ch 465 (CA). Numerous charities and other bodies received distributions from an estate left on trust for 'charitable or benevolent' purposes, before this was found to be void.

26 *Lewin* (n 6) [41–042].

27 This lien may look like part of a proprietary claim, but it is a personal claim against someone other than the trustee.

expenditure. If he sells asset B to meet the personal claim (or if the beneficiaries force a sale in reliance on their lien) P will realise an allowable loss of £300,000. In theory the beneficiaries could instead have pursued a proprietary claim to beneficial ownership of one-third of asset B (recovering only £100,000 from its sale), and in that case the allowable loss would be shared between them and P in the proportions one-third and two-thirds. But in practice the beneficiaries would rely on their personal claim, because asset B had fallen in value.

46. Anyone with an interest in the non-tax side of this area of law should study *Foskett v McKeown*.[28]

Accounting on the footing of wilful default

47. This section is a small addendum to the section on taking an account. In that section the main emphasis was on cases were the trustee (in the broad sense of the word) had wrongly paid trust property away from his control, to the detriment of the trust fund or that of a beneficiary. In the traditional language of taking an account, the claimant's only weapon was to 'falsify' the account by showing that the payment in question was unauthorised, leading to the account being taken as if the unauthorised payment had not been made. This resulted in a deficit on the trustee's account, which the court will then order to be paid in restitution to the trust fund or to the beneficiary.

48. But in that kind of account it was not open to the claimant to demonstrate that the trustee should have had more property then he did in fact have. The trustee's duty under an ordinary account is to demonstrate his proper dealing with trust assets actually under his control. And indeed the duty is on the trustee to do that, not on the claimant to prove that he has not dealt properly with those assets.

49. This is where the account on the footing of wilful default comes in. The archaic language may conceal the simplicity of the distinction. If for example the claimant beneficiary claims that the trustee, in breach of duty, failed to lay out trust money in proper investments, then he is said to 'surcharge' the account, requiring the account to be taken as if the missing investments were included. This turns the account into an account on the footing of wilful default. It has a similar effect to falsification, in making the aberrant trustee account for more than he actually has under his control. But there are important differences: —

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28 *Foskett v McKeown* [2001] 1 AC 102 (HL).

(1) The claim does now require a pleading that the trustee has acted in breach of trust. This is always hostile litigation.

(2) It also authorizes a far wider inquiry into the trustee's trusteeship, and it is open to the beneficiaries to examine other failures to acquire trust property.

Limitation defences and laches

50. This is an enormous subject in itself, as are some of the other sections of this article. The following notes are no more than a bare outline.

51. One of the policies of the Limitation Act 1980 is that there is no time-limit for claims based on fraudulent breach of trust. Another is that there is no time-limit on claims for trust property in the hands of the trustee. So section 21(1) of the Act provides that there is no statutory limitation of action for claims in those categories.

52. Other claims for breach of trust are subject to a six-year time-limit: —

'Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued.[29]

53. This applies to quasi-trustees such as constructive trustees, executors and directors, if they have control of assets. But it does not apply to non- trustees. If trust assets are followed into the hands of a third party, not a bona fide purchaser, then he is a constructive trust and there is no statutory time-limit. If the claim is a personal claim against a third party on the basis of knowing receipt, that is not covered by section 21. But there is another provision of the Act which imposes a six-year limit.

54. In a case where the statutory time-limit does not apply, by virtue of section 21(1) or otherwise, the existence of the six-year limit in section 21(3) does not prevent a defendant from relying on the equitable defence of laches. This is an equitable defence, which applies only to equitable claims.

55. Laches is not just about the passage of time, although time is an important factor. The real test is whether in all the circumstances it is unconscionable to permit the beneficiary to pursue the claim. Factors other than the mere passing of time include —

29 Limitation Act 1980 section 21(3).

(1) What has happened in the interval, such as a change of position on the part of the defendant;

(2) The loss of evidence, often a factor with a long delay; this could affect either party.

56. Generally, for the trustee to make good the defence, he would need to show that the claimant knew the relevant facts, and that the passage of time can be regarded as amounting to acquiescence, or that there is prejudice or detriment to the defendant. In *Schulman v Hewson*[30] the claimant knew about the matters complained of, and waited 14 or 15 years to make the claim. In the meantime important witnesses had died or become unavailable and documents had been lost. The defence succeeded.

30 *Schulman v Hewson* [2002] EWHC 855 (Ch).