# Breach of trust and Remedies for Breach of Trust

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A breach of trust occurs when a trustee acts contrary to the dictates of the trust instrument or where he fails to act as instructed by the terms of the trust. Thus, where he neglects, fails or refuses to do what he ought to do or does what he is not instructed to do, he would be liable for a breach of trust.

A trustee may even be held in breach of trust for failing to act in the overall interest of the trust or the beneficiaries even where such act may not strictly be within the terms of the trust. As facetiously put by Lindley M.R in PERRINS v BELLAMY (1889) 1 Ch. 797, â€˜the great use of a trustee is to commit judicious breaches of trustâ€™.

Thus, the trustee may even be held liable for failing to commit a judicious breach of trust by doing some thing that, though unauthorized, is for the overall benefit of the trust or beneficiaries. As held by the court in LEE v BROWN (1798) 4 Ves. 369, the trustee will not be held liable for an unauthorized act that would have been authorized by the court eventually. As such, he should commit technical breaches of trust when it favours the beneficiaries. Although, the court in that same case was of the opinion that it is more prudent overall to seek approval where the circumstances permit.

In light of the above, there are several acts that may amount to breach of trust. Perhaps unfairly, even innocent or well-intentioned missteps by the trustee can and have been held to amount to breach of trust. And the consequences are not pretty either.

When a trustee has been found to be in breach of a trust, remedies would ordinarily lie to correct the breach and restore the beneficiaries and the trust, as nearly as possible, to the position they were in before the breach.

## Remedies for breach of trust

In line with the appropriate rules of Equity, beneficiaries of a trust will not be left without remedy in the event of an anticipated or completed breach of trust. These remedies will be discussed below.

## Injunction

An injunction would lie to prevent a breach of trust by a trustee. If the beneficiary anticipates that itâ€™s likely thereâ€™d be unauthorized dealing with the trust property, he can apply to the court for an injunction to prevent such dealing or, in appropriate cases, apply for an injunction to compel the trustee to act in accordance with the terms of the trust. See BALLS v STRUTT (1844) 4 Hare 67.

In the case of MILLIGAN v MITCHELL (1833) 1 My & K 446, an injunction was granted to restrain an election of an unqualified person as minister by the trustees of a church. In DANCE v GOLDINGHAM (1873) 8 Ch. App. 902, the court restrained an improvident sale of property. Also, in RIGALL v SHIPWAY, the court restrained an unauthorized mortgage.

## Personal remedy against the trustees

In deserving situations, a trustee would be personally liable for breaches of trust occasioned by his action or inaction. In this wise, his liability may extend to reimbursing the beneficiaries for unauthorized dealing with the trust property or even to imprisonment for fraud and indiscretion.

There are many components of this personal remedy though. They may be examined as follows: **Liability**

First off, the liability of trustees is personal, not vicarious. This means that each trustee is individually liable and cannot be held accountable for the default of others unless in specific instances. The principle is espoused in s. 24 Trustee Act and s. 21 Trustee Law which provide that a trustee is only chargeable for money and securities actually received by him, notwithstanding that he signed any receipt for it and is only answerable for his own acts, receipts, defaults or neglect, unless same happens through his willful default.

See TOWNLEY v SHERBORNE (1634) Bridg. J 35 where the court held that trustees are individually liable unless there is evidence of â€˜dolus malus, or any evil practice, fraud, or ill intentâ€™ that permitted a breach by another trustee. In this case, the trustee who had signed receipts alongside other trustees, was held liable though he received nothing of the embezzled funds because he had done â€˜evil dealingâ€™ by leaving the received money in the hands of his cotrustees.

Also, in BOARDMAN v MOSMAN (1779) 1 Bro. C.C. 581, the court held that a trustee may be liable for breach of trust if he discovers a breach by his co-trustees and conceals it. Where the trustee is newly appointed, he is not liable for prior breaches but he will be liable if he discovers a prior breach and conceals it. Also, a retiring trustee may be liable if his retirement was for the purpose of facilitating a breach.

In WILKINS v HOGG and BOOTH v BOOTH (1838) 1 Beav. 125, the court held that a trustee will also be liable if he acquiesces and stands by, knowing that the other trustees are committing or even meditating the commission of a trust of if he leaves the trust in their hands without inquiry.

Even though mere signature of receipt in consequence of a duty to sign does not ground liability, the fact that he signs gives him notice that some money was paid so that he will be liable if he allows the money remain with co-trustees inordinately or without inquiry.

However, it is important to establish that a trustee will not be endlessly liable personally for his actions or omissions. He will only be liable to the extent that his actions were due to willful default. Default, in this case, is willful when the trustee â€˜knows what he is doing and intends to do what he is doingâ€™.

Where liability is alleged, the burden of proof is on the one alleging, as held in RE: BRIER (1884) 26 Ch. D. 238. The trustee may however be exempted from liability by a clause in the trust instrument. Where this is the case, he cannot be held liable. See WILKINS v HOGG (1861) 5 L.T 467

As far as executors are concerned, they are also personally liable only. This is because each executor has full control over pure personalty and can fully deal with it all on his own. Thus, if he deals with it alone or even in conjunction with another executor, there is stronger probability that he has unlawfully received the money. Even if he can disprove unlawful receipt, he may still be liable if he unnecessarily allows the money get into the hands of his coexecutor or remain there.

## Measure of liability

There are two heads of liability here: capital liability and interest liability. Capital liability arises where the breach of trust occasioned loss to the trust property or estate while interest liability arises where the trustee has made an unauthorized investment that results in the trust property being partly or wholly lost.

Thus, as far as capital liability is concerned, if the trustee does anything to occasion loss to the trust property, he is liable for the loss to the extent that the trust property is affected.

However, if a profit accrues from any unauthorized dealing, the beneficiaries may claim it. And if they adopt the transaction that causes loss, that is the end of trusteeâ€™s liability in that respect.

With respect to interest liability, the measure of interest depends on the discretion of the court, although, interest is now usually awarded at 4% of the loss occasioned by the unauthorized or contrary dealing by the trustee as decided in RE: DAVY (1908) 1 Ch. 61. However, interest may be more than 4% in the following cases:

- Where the trustee has received more than 4% from the dealing. See RE: EMNETâ€™s ESTATE (1881) 17 Ch. D. 142
- Where he ought to have received more than he did for the transaction, interest may be charged on how much he should have received
- Where he is presumed to have received more, the beneficiaries can claim either 5% or the profits actually made by the trustee
- Where the trustee is guilty of fraud or serious misconduct, he may be charged with 5% compound interest

## Impounding trusteeâ€™s beneficial interest

In the case of RE: DACRE (1916) 1 Ch. 344, the court held that where a trustee who has beneficial interest in the trust is guilty of breach, he will not be allowed to receive any part of the trust fund until he has made good his default. If he fails to make good on the breach, then his part can be used to offset his default. The rule is that he is deemed to have received his share to the extent to which he is in default.

The rule will also apply to interests he acquired derivatively i.e. by purchasing or inheriting a benefit under the trust. It is deemed that his beneficial interest is conditional upon him doing a good job in administering the trust.

Further, where he assigns his interest in the trust, his assignee is in no better position than he is. This would still be the case even if the default was committed after assigning his beneficial interest. However, the interest cannot be impounded if the person does not become trustee until after the assignment.

If he holds two distinct funds on distinct trusts with a beneficial interest in one and not the other, the court has no power to impound his interest in the beneficial trust to make good on a default in the other.

## Imprisonment

As was held in IRBY v IRBY (No. 3) (1858) 25 Beav. 632, a trustee may be imprisoned for not more than a year if he fails to pay any sum in his possession or under his control as ordered by a court of Equity. In that case, the trustee was found guilty of misappropriation and sentenced him to imprisonment. The same will apply to auctioneers and executors. See CROWTHER v ELGOOD (1887) 34 Ch. D. 691.

## Defences

A trustee is not expected to lie down and die when there are allegations of breach or misconduct against him. Since his duties are onerous and his punishment even more so, he is given a number of defences that he can rely on to show his non-liability.

### Relief by the court

The court, by virtue of s. 61 Trustee Act, is empowered to relieve a trustee, either wholly or partially, from personal liability for a breach of trust if he acted honestly and reasonably though he omitted to obtain direction from the court before the breach. This extends to executors as well. Thus, this defence builds on the principle of â€˜willful defaultâ€™ in liability.

Before the court grants the relief though, the burden of establish honest and reasonable action lies squarely with the trustee. He must show at least that he was as prudent as he would have been in relation to his own affairs (although this is a shaky measure of non-liability, he may be naturally tardy in his own affairs). In RE: KAY (1897) 2 Ch. 693, it was however held that thereâ€™s no general rule as to the circumstances where a relief will lie. The court goes from case to case.

The onus of proof on a paid trustee is much higher though. This is because, been a man of skill and having been hired for that skill, he should exercise a much higher standard of diligence and knowledge and will be held to greater account.

**Lapse of time**

The previous position under the Trustee Act was that a claim against an express trustee for breach of trust could not be barred by mere lapse of time and even the expression â€˜express trusteeâ€™ included many constructive trustees.

However, s. 31(1) Limitation Act now stipulates that, in the absence of express provisions to the contrary elsewhere, an action by a beneficiary to recover trust property from a trustee or in respect of any breach of trust shall not be brought after six years from the date on which the right of action accrued. This provision protects personal representatives, express, implied and constructive trustees etc.

However, there would be no period of limitation in respect of an action by a beneficiary in respect of fraud by the trustee or to recover trust property or its proceeds in the possession of the trustee and converted to his use.

Time begins to run against the beneficiary when the breach of trust was committed, whether he knew of it or not. But if he was under a disability, time does not begin to run until the disability is removed. If his interest is reversionary, time only begins to run when his interest falls into possession.

If one beneficiary is barred, then even if another beneficiary brings proceedings against the trustee and benefits, the barred beneficiary cannot also benefit.

**Discharge in bankruptcy**

If a trustee goes bankrupt and obtains a discharge, he is free from further liability in respect of a breach of trust except the breach was fraudulent and he was a party to the fraud.

**Beneficiary acquiescence**

Acquiescence here means that the beneficiary knew about the full facts and failed or refused to take action or concurred in the breach of trust. In such case, he is deemed to have acquiesced. There are two consequences that may arise from acquiescence.

First, he cannot proceed against the trustee for the breach in which he has acquiesced. However, he must be sui juris. If heâ€™s not, he may still be able to proceed against the trustee, not being a party to fraud, if he can show that he was an infant and even if he was of full age, he can show that he was under undue influence from his parents.

Second, if another beneficiary proceeds against a trustee that was instigated to commit the breach by a beneficiary, Equity can order the trustee to be indemnified from the interest of the instigating beneficiary. See s. 62 Trustee Act. However, the order will not be granted unless the beneficiary knew of the facts that constituted the breach of trust. The court has discretion to act though.

**Release or confirmation by beneficiary**

If the trustee is subsequently released from by the beneficiary, it operates as a bar to liability. However, the beneficiary must have been of full age and must have been aware of the full facts constituting the breach. Itâ€™s not clear if the trustee has a right to demand release ordinarily upon completing his trusteeship but he should be able to settle his accounts and not have the spectre of a legal suit always hanging over him.

**Contribution and indemnity**

It should be remembered first, that liability of a trustee here is personal and will only be vicarious where others are guilty of some willful default. In the event that more than one trustee is liable for the breach, they may be proceeded against jointly or severally (individually). The judgment may also be executed against any single one of them and if one of them partly pays up but the other goes bankrupt, the beneficiaries can claim for the full judgment sum in the bankruptcy proceedings.

As regards contribution, where one liable trustee has to bear the burden of the judgment, he is entitled to claim contribution from the others. The rule is that the trustees must bear the burden equally but itâ€™s not clear if the trustee can sue for contribution or if he can even be entitled to contribution for fraud. Although they may now be allowed in the latter case.

For indemnity, a trustee will be liable to indemnify the others for any judgment debt where:

- He received the trust money and appropriated alone or if the only one that is morally guilty
- He acted as solicitor to the trust and the breach was caused by reliance on his advice
- He is a beneficiary. The rule here is that the breach will be made good as far as possible out of his own beneficial interest even before contribution kicks in. If he was the subject of his breach, he is not entitled to remedy either.

# Proprietary remedy against trust property: Tracing

The case of RE: DIPLOCK (1948) Ch. 465 was an extensive study into the nature and extent of the remedy of tracing. The remedy allows a beneficiary to follow or trace trust property that is in an identifiable form even if it has left the hands of the trustee and entered that of a third party.

This is great for a beneficiary because (a) it is available where there is no effective personal remedy against the trustee (imprisonment cannot restore trust property especially where the trustee is insolvent); and (b) even if the third party goes bankrupt, the beneficiary has first choice on his property as heâ€™s a secured creditor by law.

Thus, tracing can be one of the most effective remedies available to a beneficiary. It can however be obtained only if the circumstances are right. It is apt to consider tracing from the Common Law perspective and tracing at Equity.

## Following at Common law

At Common law, property was only identifiable so long as it did not become mixed up with other property. As was held in RE: DIPLOCK, property purchased with the claimantâ€™s money could also be traced provided there was no admixture as the law could proceed on the basis that the purchase is an act capable of being ratified. Thus, as long as the property was identifiable, the remedy of tracing was available.

However, limitations abounded. First, there was no recognition of equitable rights at Common law so tracing was unavailable to them. A beneficiary could only obtain the remedy by joining the trustee to the action. Second, the remedy was quite limited as it shied away from tampering with mixed funds. So the remedy was gone as soon as it could be shown that the funds had been mixed.

## Following in Equity

Equity, on the other hand suffered no such shyness. If the Common law was content to halt its tracing â€œoutside the bankersâ€™ door, Equity had the courage to lift the latch, walk in and examine the books. See BANQUE BELGE v HAMBROUCK (1921) 1 KB 321.

However, there are conditions that must be satisfied before Equity will exercise this considerable discretion in the favour of a beneficiary. It must be shown that:

### The property is traceable

In many cases, tracing is easy. In many other cases, like where money is mixed with other money in a bank account, tracing is not so easy. When there has been an admixture of money or property, it is for the trustee to prove what property belongs to the trust and which is his own. If he cannot distinguish satisfactorily, the entire will be treated as trust property. See RE: TILLEYâ€™s W.T (1967) Ch. 1179.

Where the trustee has made an attempt at distinguishing, the court can also apply its own rules before arriving at its finding. This is the rule of appropriation of payments and it has wider application than in just tracing. The rule is that whatever a debtor pays is to be applied according to the mode that is laid down by him. The rules applied as follows:

- **First right to debtor**: As stated earlier, a debtor has the right to dictate which of his debts his payment is to be applied to. His direction may be express or implied. He must however make this direction at the time of making the payment. Inward intention is not sufficient. See PARKER v GUINESS (1910) 27 TLR 129
- **Second right to creditor**: If the debtor does not direct/appropriate the payment to any particular debt, it falls to the creditor to make the appropriation. He can do so at any time, even in the witness box in an action. He can decide to appropriate either way, even to the statute barred debt. However, he canâ€™t appropriate to an illegal item if a legal item is still unpaid. See WRIGHT v LAING (1824) 3 B & C 165
- **The rule in CLAYTONâ€™s case**: Also known as the rule of convenience, the rule in CLAYTONâ€™s case (1816) 1 Mer. 572, will apply where there is no express appropriation either way. It only applies where there is a current unbroken account i.e. the same transaction and not separate/distinct debts. The rule is that, in the absence of express intention to the contrary, each payment is appropriated to the earliest outstanding debt that is not statute barred. Thus, it is first in, first out. If the accounts get broken, then the entries before the break cannot be affected by the entries after the break. See RE: SHERRY (1884) 25 Ch. D 692. Although, the bank may treat two similar but separate accounts as the same. The rule is displaced if a contrary intention is shown by the parties.
- **The rule in RE: HALLETâ€™s ESTATE**: The rule in Claytonâ€™s case is sometimes excluded by this rule. The rule is that where a trustee withdraws money from a bank account that contains both his personal funds and trust money, he is deemed to draw on his personal funds first because the presumption is against a breach of trust. The rule applies to more than mere money though. It also applies to shares in a company. See BRADY v STAPLETON (1952) 88 CLR 322.
- **Overdrafts**: If the trustee overdraws on his account (withdraws more money than he has) and then pays in trust money to reduce the deficit, the account and any property purchased with that overdrawn money will be charged with repayment of the trust money. However, the purchased property remains that of the trustee.

Once the trust property gets dissipated, tracing becomes impossible. Thus, if it is exhausted, it ceases to exist and tracing is at an end. See RE: DIPLOCK. This would be the case if it was spent on consumables that are then consumed or if it is used to repay secured or unsecured loans.

### There is an equity to trace

Even where the trust property is traceable, there would be no Equity to trace unless s fiduciary relationship exist. It is not enough to show a case of unjust enrichment. Thus, it is necessary to prove the trust relationship. See RE: DIPLOCK.

### Tracing will not produce an inequitable result

Tracing must not be contrary to equitable principles. Thus, it was held in SINCLAIR v BROUGHAM (1914) AC 398 that the right to trace cannot be exercised against a bonafide purchaser for value without notice. There also can be no tracing claim by claimants that have acquiesced in the mixing. See BLAKE v GALE (1886) 32 Ch. D 571

Equity will not also allow tracing where the result will work injustice. For instance, if a volunteer has taken trust money and used it to alter or improve his property, tracing would force him to sell the property in order to make good on the trust money. This would however be equitable as the alterations may not have increased the market value of the property and it would be unjust to deprive him of the whole of his house. However, if the trust money was used to purchase property, the effect would be different as it would give both volunteer and beneficiary equal share in the property. See R v DIPLOCK

### Effect of right to trace

Generally, the situation is relatively simple when a trustee has appropriated the funds of a single trust and mixed them with his own funds. The rules as disclosed above will apply. However, it is a bit more difficult where the trustee combines the funds of two or more trusts in his account or issues of interest on the appropriated trust money.

- **First charge**: Where the trustee has mixed funds in his account, consisting of trust money in part, the general rule is that the beneficiaries are entitled to a first charge on the account or on any land, securities or assets purchased with the money. See. RE: PUMFREY (1882) 22 Ch. D. 255. However, if the trustee uses the first part of the money in his account to purchase shares and what is left is enough to repay the trust money, the rule in RE: HALLETâ€™s case would ordinarily apply. What then happens if the trustee dissipates what is left in the account? The rule is that the charge will attach to the entire fund i.e. the trustee will be entitled to be paid out of the value of the shares and if a profit is made, they are also entitled to a proportionate amount of the profit.
- **Equal Equities**: What happens in the event of mixed funds from separate trusts? The first step is to identify the money that has been mixed. After identification, the rule in CLAYTONâ€™s case will apply. Where the rule in CLAYTONâ€™s case does not apply, the beneficiaries of the separate trusts will share the money pari passu either with each other or with volunteer. See SINCLAIR v BROUGHAM.
- **Interest**: There is no general right to interest on property that has been traced. However, if the funds have been used in an asset that has appreciated, the beneficiaries are entitled to a proportionate amount of the profit.

## Personal remedy against recipients of trust property

Where the property is not identifiable or where it has been dissipated, tracing fails. In such instances, Equity may give the claimant a personal remedy against the person that wrongly received the trust property. This has been applied in several cases of payment to the wrong person under a will or intestacy but is not so well established in cases of trusts.