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BARTLETT AND OTHERS *v.* BARCLAYS BANK TRUST CO. LTD. (NOS. 1 AND 2)

[1977 B. No. 4871]

B

1979 May 2–4, 8–11, 14–18, 21–25; June 6–8, 11–15, 19–22, 25–29; July 2–6, 9–12; 31 — Brightman J.

1980 Jan. 11, 14, 15 — Brightman L.J.

C *Trusts—Trustee—Duty of trustee—Trustee corporation specialising in trust management—Trust property comprising majority shareholding in private company—Whether duty of trustee with regard to management of company higher than ordinary trustee*
Trusts—Breach of trust—Compensation—Settlement—Beneficiaries' shareholdings in private company vesting absolutely—Subsequent sale of company as whole—Date when compensation to be calculated—Whether assumed liability for taxation in
D *absence of breach of trust to be deducted from compensation—Rate of interest payable on compensation—Whether payable on disbursements—Whether costs taxable on party and party or common fund basis*

In 1920 a private company was incorporated to take over
and manage certain family properties, and a settlement of the
property, being debenture stock and shares in the company,
E was made by the grandfather of the plaintiff beneficiaries with
the banking predecessor of the defendant trust corporation as
trustee. The affairs of the trust were managed by the trustee
department of the bank which subsequently became the
defendant trust corporation, and it held 99·8 per cent. of the
shares in the property company.

By 1960 the board of directors of the company consisted of
two surveyors, an accountant and a solicitor, but no member of
F the family was any longer on the board and there was no
director who regarded himself as the particular representative
or nominee of the trustee. In 1961 the board announced that
the policy of investment in property would be changed to that
of speculative development in property, and the main objects
clause of the company was redefined to allow for that. The
reason given to the trustee for entering into development pro-
jects was that it would assist the public issue of the property
G company's shares, the public issue thereby raising finance
needed in 1960 for the payment of death duties. Without
seeking the approval of the trustee an investment company was
incorporated as a vehicle for purchasing freeholds and lease-
holds. Until 1973 the board bought properties for develop-
ment, the trustee neither being consulted nor requiring to be
consulted.

H The chief development scheme, for the acquisition of a
site opposite the Central Criminal Court, became known as
the Old Bailey project. Without the prior knowledge or
approval of the trustee an agreement was entered into by the
investment company recently formed and another investment

company S, by which each should provide half the finance for the acquisition and development of the site. The trustee was A advised by merchant bankers that the property company should not go public. Accordingly there was no reason to enter into any development project, yet the trustee did not question its continuance. Planning consent for the site, although sought, was never obtained, yet purchases continued so that the site could be assembled, and purchases for assembling a site at Guildford also continued. In May 1971, unknown to the trustee, the board decided not to dispose of its interest in the B Old Bailey scheme to S for little or no loss but continued to finance the scheme.

The general property boom ended in 1974, by which time the accounts of the family property company were qualified by a note of a contingent deficiency, and by the end of 1975, because the liquid resources of the trust had been spent on the Old Bailey project, an overdraft had to be arranged to raise money for tax purposes. The accounts of the property C company for 1975 were delayed, and the auditors took the view that the investment company, which had been incorporated to purchase freeholds and leaseholds, was insolvent. The shares in the company were sold in September 1978 for £4,490,000. On the plaintiffs' claim that the trustee was liable to make good to the trust fund all loss accruing by reason of it having permitted the property company to engage in property development:— D

Held, allowing the claim, (1) that where a trustee, such as a trust corporation, held itself out as having the skill and expertise to carry on the specialised business of trust management, the duty of care of such a trustee was higher than the standard of care of the ordinary prudent man of business as demanded of a trustee without specialised knowledge; that the trustee, whether the trust corporation or its predecessor the E bank, should not have relied only on information given at annual general meetings of the property company but should have required the board to inform and consult it so that it could intervene if necessary to safeguard the interest of the trust; that if the trustee had carried out that duty it could have intervened to prevent the board from entering into the hazardous speculation of the Old Bailey scheme and from continuing in that scheme and, finally, it could have forced F the board to sell to S its interest at little or no loss and, accordingly, the trustee was liable to make good that loss (post, pp. 532C–G, 534B–535C).

In re Lucking's Will Trusts [1968] 1 W.L.R. 866 applied.

(2) That the trustee was entitled to set off against the loss on the Old Bailey project the profit realised on another property development scheme, also undertaken in breach of trust (post, p. 538C–E). G

After further argument relating to the terms of the order and concerning the calculation of the compensation payable to plaintiffs:—

Held, further, (1) that the compensation should be assessed at the date of the sale of the share holdings and that it should be based in the case of each settled share on an appropriate proportion of the value of the company as a whole and that the settled shares should not be treated as separate and H independent shareholdings to be valued as minority interests; and that having regard to the established principle on which equitable relief was granted, the assessment should not take

A into account the tax liability of individual beneficiaries to reduce the compensation payable (post, pp. 543C–H, 545B–E).

In re Dawson, decd. [1966] 2 N.S.W.R. 211 considered.

British Transport Commission v. *Gourley* [1956] A.C. 185, H.L.(E.) distinguished.

(2) That the proper rate of interest to be awarded, in the absence of special circumstances, to compensate beneficiaries and trust funds for non-receipt from a trustee of money that
B ought to have been received was that allowed from time to time on the court's short term investment account established under section 6 (1) of the Administration of Justice Act 1965; but that, while it was right to award interest on the compensation found due, the defendant could not be charged with interest on costs before such costs had been taxed since until taxation a defendant did not know what he was liable to pay (post, p. 547B–E).

C *K.* v. *K.* (*Divorce Costs*: *Interest*) [1977] Fam. 39, C.A. applied.

The following cases are referred to in the judgment on the claim:

Applegate v. *Moss* [1971] 1 Q.B. 406; [1971] 2 W.L.R. 541; [1971] 1 All E.R. 747, C.A.
Chapman, In re [1896] 2 Ch. 763, C.A.
D *Godfrey, In re* (1883) 23 Ch.D. 483.
King v. *Victor Parsons & Co.* [1973] 1 W.L.R. 29; [1973] 1 All E.R. 206; [1973] 1 Lloyd's Rep. 189, C.A.
Kitchen v. *Royal Air Force Association* [1958] 1 W.L.R. 563; [1958] 2 All E.R. 241. C.A.
Lucking's Will Trusts, In re [1968] 1 W.L.R. 866; [1967] 3 All E.R. 726.
Miller's Deed Trusts In re (unreported) March 21, 1978, Oliver J.
E *Speight, In re* (1883) 22 Ch.D. 727, C.A.; sub nom. *Speight* v. *Gaunt* (1883) 9 App.Cas. 1, H.L.(E.).
Waterman's Will Trusts, In re [1952] 2 All E.R. 1054.
Whiteley, In re (1886) 33 Ch.D. 347, C.A.; sub nom. *Learoyd* v. *Whiteley* (1887) 12 App.Cas. 727, H.L.(E.).
Wynn, decd., In re [1952] Ch. 271; [1952] 1 All E.R. 341.

F The following additional cases were cited in argument on the claim:

Abbey Malvern Wells Ltd. v. *Ministry of Local Government and Planning* [1951] Ch. 728; [1951] 2 All E.R. 154.
Adler's Estate, In re (1937) 299 N.Y.S. 542.
Adye v. *Feuilleteau* (1783) (and see note 3 Swanst. 84) 1 Cox. 24.
Ashbury Railway Carriage and Iron Co. Ltd. v. *Riche* (1875) L.R. 7 H.L. 653, H.L.(E.).
G *Associated Artists Ltd.* v. *Inland Revenue Commissioners* [1956] 1 W.L.R. 752; [1956] 2 All E.R. 583.
Auditore's Will, In re (1928) 164 N.E. 242.
Beaman v. *A.R.T.S. Ltd.* [1949] 1 K.B. 550; [1949] 1 All E.R. 465, C.A.
Beauforte (Jon) (London) Ltd., In re [1953] Ch. 131; [1953] 2 W.L.R. 465; [1953] 1 All E.R. 634.
Becker, Estate of, In re (1972) 202 N.W. 2d 681.
H *Bell Houses Ltd.* v. *City Wall Properties Ltd.* [1966] 2 Q.B. 656; [1966] 2 W.L.R. 1323; [1966] 2 All E.R. 674, C.A.
Cable (Lord), decd., In re [1977] 1 W.L.R. 7; [1976] 3 All E.R. 417.
Charterbridge Corporation Ltd. v. *Lloyds Bank Ltd.* [1970] Ch. 62; [1969] 3 W.L.R. 122; [1969] 2 All E.R. 1185.

City Equitable Fire Insurance Co. Ltd., In re [1925] Ch. 407, C.A. A
Clarke's Estate, In re (1941) 26 N.Y.S. 2d 948.
Dimes v. *Scott* (1827) 4 Russ. 195.
Doelger's Estate, In re (1937) 299 N.Y.S. 565; (1938) 4 N.Y.S. 2d 334.
Elliott v. *Turner* (1843) 13 Sim. 477.
Fletcher v. *Green* (1864) 33 Beav. 426.
French Protestant Hospital, In re [1951] Ch. 567; [1951] 1 All E.R. 938.
Garrett v. *Noble* (1834) 6 Sim. 504.
Gerbereux' Will, In re (1933) 266 N.Y.S. 134. B
German Date Coffee Co., In re (1882) 20 Ch.D. 169, Kay J. and C.A.
Greenberg's Estate, In re (1933) 267 N.Y.S. 384.
Hawkesley v. *May* [1956] 1 Q.B. 304; [1955] 3 W.L.R. 569; [1955] 3 All E.R. 353.
Hubbell's Will, In re (1951) 97 N.E. 2d 888.
Introductions Ltd. v. *National Provincial Bank Ltd.* [1970] Ch. 199; [1969] 2 W.L.R. 791; [1969] 1 All E.R. 887. C
Jobson v. *Palmer* [1893] 1 Ch. 71.
Lee, Behrens & Co. Ltd., In re [1932] 2 Ch. 46.
Midland Bank Trust Co. Ltd. v. *Hett, Stubbs & Kemp* [1979] Ch. 384; [1978] 3 W.L.R. 167; [1978] 3 All E.R. 571.
National Trustees Co. of Australasia Ltd. v. *General Finance Co. of Australasia Ltd.* [1905] A.C. 373, P.C.
O'Hayer v. *de St. Aubin* (1968) 293 N.Y.S. 2d 147. D
Olive, In re (1886) 34 Ch.D. 70.
Oxford Group v. *Inland Revenue Commissioners* [1949] 2 All E.R. 537, C.A.
Parke v. *Daily News Ltd.* [1962] Ch. 927; [1962] 3 W.L.R. 566; [1962] 2 All E.R. 929.
Pauling's Settlement Trusts, In re [1964] Ch. 303; [1963] 3 W.L.R. 742; [1963] 3 All E.R. 1, C.A. E
Peczenik's Settlement Trusts, In re [1964] 1 W.L.R. 720; [1964] 2 All E.R. 339.
Rae v. *Meek* (1889) 14 App.Cas. 558, H.L.(Sc.).
Robinson v. *Robinson* (1848) 11 Beav. 371.
Schnur's Estate, In re (1963) 242 N.Y.S. 2d 126.
Shehan's Will, In re (1955) 141 N.Y.S. 2d 439.
Smethurst v. *Hastings* (1885) 30 Ch.D. 490. F
Smith v. *Smith* [1925] 2 K.B. 144, D.C.
Topping's Estate, In re (1962) 233 N.Y.S. 2d. 968.
Turner, In re [1897] 1 Ch. 536.
United Scientific Holdings Ltd. v. *Burnley Borough Council* [1978] A.C. 904; [1977] 2 W.L.R. 806; [1977] 2 All E.R. 62, H.L.(E.).
Wiles v. *Gresham* (1854) 2 Drew. 258.
Windsor Steam Coal Co. (1901) Ltd., In re [1929] 1 Ch. 151, C.A. G
Witkind's Estate, In re (1938) 4 N.Y.S. 2d 933.
Woods v. *Martins Bank Ltd.* [1959] 1 Q.B. 55; [1958] 1 W.L.R. 1018; [1958] 3 All E.R. 166.

The following cases are referred to in the judgment on the form of order:

Bell's Indenture, In re [1980] 1 W.L.R. 1217.
British Transport Commission v. *Gourley* [1956] A.C. 185; [1956] 2 W.L.R. 41; [1955] 3 All E.R. 796, H.L.(E.). H
Chapman, In re (1895) 72 L.T. 66, C.A.
Dawson, decd., In re [1966] 2 N.S.W.R. 211.

A *K.* v. *K.* (*Divorce Costs: Interest*) [1977] Fam. 39; [1977] 2 W.L.R. 55; [1977] 1 All E.R. 576, C.A.
Stevens, In re [1898] 1 Ch. 162, C.A.
Tebbs, decd., In re [1976] 1 W.L.R. 924; [1976] 2 All E.R. 858.
Wrightson, In re [1908] 1 Ch. 789.

The following additional cases were cited in argument on the form of order:

B *Andrews* v. *Barnes* (1888) 39 Ch.D. 133, C.A.
Esso Petroleum Co. Ltd. v. *Mardon* [1976] Q.B. 801; [1976] 2 W.L.R. 583; [1976] 2 All E.R. 5, C.A.
Johnson v. *Agnew* [1980] A.C. 367; [1979] 2 W.L.R. 487; [1979] 1 All E.R. 883, H.L.(E.).
Kellaway v. *Johnson* (1842) 5 Beav. 319.
C *Lucking's Will Trusts, In re* [1968] 1 W.L.R. 866; [1967] 3 All E.R. 726.
Massingberd's Settlement, In re (1890) 63 L.T. 296, C.A.
Parry v. *Cleaver* [1970] A.C. 1; [1969] 2 W.L.R. 821; [1969] 1 All E.R. 555, H.L.(E.).
Phillipson v. *Gatty* (1848) 7 Hare 516.
Radford v. *De Froberville* [1977] 1 W.L.R. 1262; [1978] 1 All E.R. 33.
Raja's Commercial College v. *Gian Singh & Co. Ltd.* [1977] A.C. 312; [1976] 3 W.L.R. 58; [1976] 2 All E.R. 801, P.C.
D *Reed* v. *Gray* [1952] Ch. 337; [1952] 1 All E.R. 241.
Summers v. *Salford Corporation* [1943] A.C. 283; [1943] 1 All E.R. 68, H.L.(E.).
Wallersteiner v. *Moir (No. 2)* [1975] Q.B. 373, 508n.; [1975] 2 W.L.R. 389; [1975] 1 All E.R. 849, C.A.
Weiner, decd., In re [1956] 1 W.L.R. 579; [1956] 2 All E.R. 482.

E

ACTION

On July 23, 1920, Sir Herbert Bartlett made a settlement for the benefit of his wife and issue, the settled property consisting of debenture stock and 498 (later 499) shares in Bartlett Trust Ltd. (BTL) which had been incorporated in the previous May to manage properties owned by Sir Herbert and his wife. The trustee was Barclays Bank Ltd. Each F child had a life interest and power to appoint income to a surviving spouse. Failing issue there was an accruer to the other shares.

At the beginning of 1960, the settlor and his wife both having died, the property of BTL consisted of about 21 freehold properties with a book value of approximately £300,000, ten leasehold properties with about 24–25 years to run and a book value of approximately £250,000. G The rent roll of that property, which was residential and commercial, produced about £93,000 and there were other assets besides. During 1960 the composition of the board of directors changed. The chairman and managing director, Mr. Graham, a solicitor and son-in-law of the settlor, resigned because of illness and also, because of illness, a grandson, David Bartlett, left the board. A Mr. Clee, a surveyor, remained, also H a Mr. Fereday, a partner in a firm of accountants responsible for the company's audit, and a Mr. Roberts, partner in a well-known firm of surveyors and estate agents who acted professionally for BTL. Mr. Roberts and Mr. Fereday were part-time directors but in November 1960

Mr. Roberts was appointed chairman. Shortly after, Mr. Clee became managing director and in 1961 a solicitor, Mr. Albert, joined the board. A
Accordingly there was no beneficiary member of the family on the board and no director who regarded himself as the particular representative or nominee of the trustee.

The affairs of the trust were conducted at the City office of the bank's trustee department. From 1959 to 1965 Mr. C. Mahony was manager. He then became trustee manager of the chief office and was succeeded at B
the City office by a Mr. Dale for a year and then by a Mr. P. L. Daly as manager until 1970. From 1970 to 1975 Mr. Daly held an equivalent position as manager of the City trustee office of the newly formed Barclays Bank Trust Co. Ltd. Mr. Mahony and Mr. Daly gave evidence for the period 1960–1975.

The board of BTL held regular monthly meetings which were meticulously minuted, and approximately 800 pages of minutes were the C
foundation of an almost perfect contemporary documentary notation. During 1960 money had to be raised for death duties and the board was asked to examine the possibility of the introduction of BTL's shares and debentures on to the Stock Exchange. At the same time Mr. Roberts suggested that investments should be made in more risky properties yielding 10 per cent. instead of the 6 per cent. obtained for more steady D
types of property. The board re-stated its investment policy to dispose of leasehold properties in favour of freehold. Messrs. Reed Hurst & Brown, stockbrokers, advised that the shares of the company would be more attractive if the company had a development aspect, and when the board so informed Mr. Mahony he said that the bank would give that favourable consideration provided the life tenants were not left short of income during the development period. He was thinking in terms of not E
more than £600,000 that Mr. Roberts had suggested should be used for development purposes to assist in the flotation. That sum would come from the sale of a certain property. He did not commit the bank. His reservations were overlooked.

At the annual general meeting on June 28, 1961, Mr. Roberts unfolded a major change of direction, but neither Mr. Mahony nor Mr. F
Daly, then or subsequently when the policy of investment changed to that of speculative development, made any particular inquiries. From then on Mr. Roberts introduced a number of development projects which he considered would bring benefit to the trust estate, but divulged to the bank at the annual general meetings only such small items of information as he thought appropriate, and without consulting them.

In December 1961 BTL adopted a new objects clause for its G
memorandum of association, on the advice of its solicitors, because the original clause did not authorise the company to carry on the business of property development. The main object of the company was re-defined:

> "To carry on the business of a property holding company and an investment and trust company and to invest the capital and other moneys of the company for the purpose of investment only in the H
> acquisition . . . of lands etc. . . ."

By 1962, a proposed development at Woodbridge Road, Guildford, A introduced to the board in November 1961 as a redevelopment of a site of about one-tenth of an acre had grown out of all recognition into a plan to acquire a much larger site and develop it at a cost of approximately £1,250,000 within 5 years. At the annual general meeting on June 28, Mr. Mahony neither asked for nor received any details, although it involved twice the sum that, 16 months earlier, he had contemplated might be available for development projects.

B In August 1962 Mr. Roberts and Mr. Fereday, without referring to Mr. Mahony or anyone else in the trust department, approached the banking department of the City office about the possibility of an overdraft of £1 million to finance unspecified schemes. That sum was half the value of BTL's assets and the banking department reported the interview to the trustee department. Mr. Mahony, however, did not question Mr. Roberts.

C Towards the end of 1962 Mr. Roberts and the board embarked on a development known as the Old Bailey Scheme which caused the damage to the trust. The site concerned was opposite the Central Criminal Court and the freehold and leasehold interests lay in some 20 different hands. It was zoned for commercial use, and consent for office user on redevelopment had not, as yet, been granted. A company called Far Investments D Ltd. (Far) was incorporated and used as a vehicle for purchasing the freeholds and leaseholds. The bank's approval was not sought for either the Old Bailey development or for the incorporation of Far. Mr. Mahony, in January 1963, when discussing with Mr. Roberts a merger with a company called Trafford Park Estates, learned from him of the Old Bailey project. He asked Mr. Roberts for information but he did not receive it nor did he remind Mr. Roberts that he had not received the E information. During that same month Mr. Roberts negotiated a joint development scheme for the Old Bailey site between Far and a company called the Stock Conversion and Investment Trust Ltd., each participant providing half the finance for acquisition and development. That agreement was not disclosed to the bank until June and Mr. Mahony did not ask to see a copy of the agreement. In February 1963 the government F laid before Parliament a White Paper on the problems of employment, housing and land in and around London over the next 10 years. Office development in the centre of London was to be discouraged. In March, the bank retained the services of Robert Fleming & Co. Ltd., merchant bankers, to advise them on the terms of the proposed merger with Trafford Park Estates. The advice they received was that BTL should not go public, and they questioned whether shares in Trafford Park G Estates would provide the desired level of marketability. The only reason given to the bank for BTL's entering into development projects had been that it would assist a public issue—but, on the basis that there was to be no public issue, the bank did not question the need for development projects.

In the summer of 1963 Messrs. R. Seifert & Partners, architects, were H instructed to estimate building costs of three alternative schemes for the Old Bailey site. The third scheme, for office purposes only, being the only financially viable scheme, was adopted, and the architects were instructed to seek planning consent despite the existing ministerial policy.

From November 1963 BTL granted Mr. Roberts and his wife a flat in Chelsea on favourable terms without consultation with, or the approval A of, the bank. The lease was surrendered in 1973. Planning permission for the Old Bailey site was refused by the City of London on March 19, 1964, because the proposed development was contrary to the zoning in the County of London Development Plan and to the policy set out in the White Paper. The bank was not informed. An appeal was lodged, but abandoned in July 1964. In January 1965 Mr. Mahony was informed by B Mr. Roberts that planning consent had been refused and that development might have to wait for 10 years, but Mr. Mahony did not react. Meanwhile the assembling of the site in the Guildford development had continued. The capital cost of acquisitions there had in January 1964 totalled £55,766 and the annual net income for June 1964 was forecast at only £1,023 before tax. From July 1964 BTL operated in Guildford through a subsidiary called Hardington Investment Co. Ltd., and in C 1966 the net income of that company, after tax, was a mere £527.

The 1965 annual general meeting of BTL was attended by Mr. Dale who had taken over from Mr. Mahony. Mr. Roberts reported that the Guildford development had halted, pending a new over-all planning scheme for the town. By October 1965 the total cost of the Guildford scheme was estimated to be £463,000 and BTL continued trying to get D planning permission. At the March 1971 board meeting the secretary of BTL was instructed to ascertain the loss of revenue over the years that the property had been held, taking account of the cost of the acquisition, but no record of that having been carried out existed in the minutes. In March 1972 the secretary was again instructed to calculate the loss to date, but there was no record of the calculation having been done. About a year later Metropolitan Estates Co. Ltd., offered £350,000 net of E costs for the properties in Woodbridge Road, Guildford. From the first purchase there, 12 years had elapsed and, although the surplus over capital cost was about £271,000, there had been a considerable loss of revenue, and doubtless surveyors' fees had been incurred in the production of a number of abortive plans.

At the beginning of 1966 Mr. Daly took over from Mr. Dale as F manager of the trustee department of the City office. The Old Bailey development scheme was then of three years standing, and since no copy of any report on the prospects of the scheme has been found in the bank's file none presumably had been supplied or requested. Mr. Daly also inherited the system whereby information was only provided to the bank by the BTL board before and at annual general meetings.

At the end of 1967 pursuant to a reconstruction approved by the court, G BTL became a wholly owned subsidiary of Bartlett Trust (Holdings) Ltd. (BTH), the bank thereafter holding £998,000 shares and £998,000 7 per cent. debenture stock 1997 in BTH in place of its shares in BTL, and the assets of BTL became vested in BTH. The purpose of that was to make funds available for the payment of death duties by selling or redeeming the debentures. H

In December 1969 an adjourned annual general meeting of BTH was held but no officer of the bank was present. The loan to Far, standing at £245,650, was written down in the accounts by £40,000. Moreover, in

A November 1969 an agreement had been entered into between BTH and the nominee of Stock Conversion (which held the other half interest in Far) whereby interest charges were waived until accrued arrears had been paid off. The bank was not informed. Nor had the bank been informed that BTH had tried unsuccessfully to find a purchaser for the Old Bailey site; and although in February 1970 death duty and other liabilities amounting to £250,000 had to be met, no questions were asked
B or information volunteered about the Old Bailey project.

By December 1970 the board of BTH decided to explore the possibility of disposing of its interest in Far, and yet consented to the further expenditure by Far of a further £150,000 to purchase premises on the Old Bailey site despite the fact that no office development permit or planning permission had been obtained.

In 1970 the trustee business of the bank was transferred to the
C defendant trust company, Barclays Bank Trust Co. Ltd. At the 1971 annual general meeting of BTH, it was disclosed that properties were still being bought on the Old Bailey site and a further advance had been made to Far of £84,000. Despite the facts that the existing investment had been written down by 16 per cent. since 1968, that the interest on the Far loan was in arrears, that there were planning difficulties, that the trust had
D urgent cash requirements and the development project at Guildford was uncompleted, Mr. Daly did not question the purchases or the size of the total commitment.

Unknown to the bank BTH could have escaped from the Old Bailey scheme with little or no loss in May 1971, because it could have disposed of its interest in Far to Stock Conversion for a sum equal to its loan account plus most of the arrears of interest, but the board of BTH
E decided against that in the light of a valuation of the completed development of £2 million net. The board also intended to propose to the Commercial Union Insurance Co. that it should finance all future development costs. During 1972 the board approved the purchasing of more properties, and at the 1973 annual general meeting Mr. Daly was given to understand that BTH would be putting up further cash to the
F amount of £550,000. Later in 1973, without the bank being consulted sums of £575,000 and £700,000 were spent on site purchases, partially financed out of the proceeds of sale of the Guildford properties. As a result, the loan account of Far, as shown in the 1973 BTH accounts, had increased in a year from £376,000 to £1,035,750.

In November 1974 Mr. Roberts had to tell the board that the Commercial Union did not wish to proceed with any financial transaction.
G The property boom had ended, and the 1974 accounts of BTH were qualified by a note of a contingent deficiency of £300,000 in respect of the loan to Far, due to the depressed state of the property market; but there was no evidence that satisfied the court that there had ever been any real likelihood of the required planning permission being forthcoming at any stage.

H In November or December 1975 the board of BTH arranged an overdraft of £90,000 with Barclays at 3 per cent. over base rate to aid the redemption of £125,000 debentures for tax purposes. That money need never have been borrowed if BTH's ample liquid resources had not been

poured into the Old Bailey scheme. Certain members of the Bartlett
family were by now voicing dissatisfaction with the management of A
BTH. The presentation of the accounts of BTH for the year 1975 were
delayed and the auditors of Far, Messrs. Deloitte & Co., required the
participants to sign letters agreeing not to withdraw the loan capital until
the creditors of Far had been paid—thus indicating that the auditors took
the view that Far was insolvent. In December 1976 the divisional
general manager of the bank was appointed an additional director of B
BTH at the bank's request.

The 1976 accounts showed the Far loan written down by £487,000 to
£550,000. In July 1977, BTH, on counsel's advice, pursuant to clause 5
of the agreement with Stock Conversion, served three months' notice on
Far requiring repayment of its loan. The effect of that notice was to
give Stock Conversion's assignee, Gleniffer, an option to take over BTH's
loan and unpaid accrued interest at par and the shares at market value. C
BTH would be free to liquidate Far in default of payment if such option
were not exercised. That option was not exercised, but Stock Conversion
offered to take over BTH's investment at a discount. The terms agreed
were that BTH should advance a further £12,500 to Far, thus increasing
BTH's loan to £1,080,000; Stock Conversion should take over the loan
and shares at £500,100, leading to a loss on capital account of £580,000, D
payment by December 22; and no payment in respect of interest waived
pursuant to the 1969 agreement. The shares in BTH were sold in
September 1978 for £4,490,000 which was less than they would have
brought if such a large sum had not been lost on the investment in Far.

In August 1977 a writ was issued against Barclays Bank Trust Co.
Ltd., the plaintiffs being Sir Basil Bartlett and six other grandchildren of
the original settlor. The plaintiffs claimed that the defendant trustee E
was liable to make good to the trust fund all loss accruing by reason of it
having permitted BTL and BTH to engage in property development, and
they sought inquiries to establish their loss.

Brightman J. found that Mr. Mahony and Mr. Daly were excellent
witnesses, each doing his best to answer truthfully and frankly in
evidence, and stressed that, although in painting a true picture of the F
facts, it would be impossible at times not to be critical of Mr. Roberts,
he had acted throughout as director and chairman of the companies
"in a way which he thought was justified and which he considered
was calculated to bring great benefit to the trust estate." His Lordship
stated that a development of a site in multiple ownership without prior
planning permission usually offered a successful developer a large profit G
in order to offset the risk of a heavy loss if the scheme failed. The
Old Bailey project was a gamble and, on the evidence, not a very good
gamble. Mr. Roberts did not consider the board was under any obliga-
tion to discuss matters with the bank, and the board estimated that
development projects would redress the balance between the life tenants
and the remaindermen. The board apparently had no fixed idea how the H
Guildford and Old Bailey projects would proceed, but envisaged that the
board probably might sell a share to some financial source in return for
the provision of the money needed to complete the development, BTL's

A share being retained as an investment, or sold in order to realise a capital profit.

E. G. Nugee Q.C. and *Jules Sher* for the plaintiffs. The central issue is whether the bank can shelter behind the fact that the properties were not vested in the bank itself, but were vested in a company in which the bank held 99·8 per cent. of the shares. If the transaction had been carried out by the bank itself, acting through its own officers, it would
B not seriously be suggested that there was no breach of trust or that the bank was not liable to account for the losses suffered by the beneficiaries; but because it was carried out by the company, acting through persons who, though appointed by the bank, were as a matter of law employed by the company, it is said that the position is completely different, and that the loss of over £500,000 capital, and a great deal of income too, is
C something for which the bank is in no way responsible. The bank's main defence is that at all material times it acted, in relation to its holding in the company, as a reasonably prudent man would have acted. The question whether it did so act needs to be considered in two stages.

First, the duty of a trustee who has trust assets vested in himself. A trustee's duty in the management of the trust business is to use such caution as a reasonably prudent man of business would use in respect of
D transactions of a similar nature in which he might be engaged on behalf of persons for whom he felt morally bound to provide; and to avoid all investments and other transactions which are of a speculative nature or are attended with hazard: see *Snell's Principles of Equity*, 27th ed. (1973), p. 204; *In re Speight* (1883) 22 Ch.D. 727; sub nom. *Speight* v. *Gaunt* (1883) 9 App.Cas. 1; *Smethurst* v. *Hastings* (1885) 30 Ch.D. 490,
E 496; *In re Whiteley* (1886) 33 Ch.D. 347; sub nom. *Learoyd* v. *Whiteley* (1887) 12 App.Cas. 727; *In re Olive* (1886) 34 Ch.D. 70 and *Rae* v. *Meek* (1889) 14 App.Cas. 558, 569.

It is the duty of trustees to form their own opinion on whether any particular investment is a prudent one for them to make. They may employ a valuer or other professional man to obtain the data necessary to enable them to form that opinion; but they cannot employ him to
F form the opinion for them; see *Snell's Principles of Equity*, 27th ed., pp. 254–257; *Learoyd* v. *Whiteley*, 12 App.Cas. 727 and *In re Olive*, 34 Ch.D. 70.

A higher standard of diligence and knowledge is expected of a bank or similar institution which advertises itself as undertaking the administration of trusts than of a non-professional trustee: see *National Trustees*
G *Co. of Australasia Ltd.* v. *General Finance Co. of Australasia Ltd.* [1905] A.C. 373, 381; *In re Windsor Steam Coal Co.* (1901) *Ltd.* [1929] 1 Ch. 151, 164, 165; *In re Waterman's Will Trusts* [1952] 2 All E.R. 1054; *Midland Bank Trust Co. Ltd.* v. *Hett, Stubbs & Kemp* [1979] Ch. 384 and *Woods* v. *Martins Bank Ltd.* [1959] 1 Q.B. 55, 69–73, which recognise that a higher standard of care is expected at common law of a person who
H professes to have some special skill. It would be strange if common law and equity reached different conclusions, having regard to the fusion of law and equity: compare *United Scientific Holdings Ltd.* v. *Burnley Borough Council* [1978] A.C. 904, 924–925, 944–945, 957. On the

general question of relief under section 61 of the Trustee Act 1925, the trustee must have acted reasonably, even if the investment is authorised: see *In re Turner* [1897] 1 Ch. 536.

Second, the duty of a trustee who holds a controlling block of shares in a private company. There is very little English authority on this question, but clearly the principles must be the same. In the present case, if the current scale of fees had been applicable, the bank would have been entitled to fees of over £650,000 during the period from 1960 to 1978. It cannot be right that, for fees of this magnitude, the only duty imposed on the bank, as it contends, is to appoint directors, read the annual report and accounts, attend the annual general meeting and do nothing else unless it comes to its notice that the value of the trust's shareholding is so imperilled that no prudent man of business could fail to act. Where trustees hold the whole or virtually the whole of the shares of a private company, the property of the company is regulated by the memorandum and articles of the company and the trust deed together; and the duties of the trustees in relation to the assets of the company are in some respects the same as if the assets were vested in themselves as trustees. *In re Lucking's Will Trusts* [1968] 1 W.L.R. 866, which supports these propositions, is the only English authority directly in point. *Snell's Principles of Equity*, 27th ed., p. 254 quotes that case as authority for the statement that a trustee of a trust estate which includes a controlling block of shares in a private company will be liable if he fails properly to supervise the directors. See also *Abbey Malvern Wells Ltd.* v. *Ministry of Local Government and Planning* [1951] Ch. 728, 735–736, 738–739 and *In re French Protestant Hospital* [1951] Ch. 567, 570 572. However wide the wording of clause 15 of the settlement may appear to be, the trustees cannot properly alter the memorandum and articles of the company to authorise it to do something which, if they did it themselves, would be a breach of trust.

The law has been developed further in the United States. See *In re Auditore's Will* (1928) 164 N.E. 242; *In re Gerbereux' Will* (1933) 266 N.Y.S. 134; *In re Greenberg's Estate* (1933) 267 N.Y.S. 384; *In re Adler's Estate* (1937) 299 N.Y.S. 542; *In re Doelger's Estate* (1937) 299 N.Y.S. 565; on appeal (1938) 4 N.Y.S. 2d 334; *In re Witkind's Estate* (1938) 4 N.Y.S. 2d 933; *In re Clarke's Estate* (1941) 26 N.Y.S. 2d 948; *In re Hubbell's Will* (1951) 97 N.E. 2d 888; *In re Shehan's Will* (1955) 141 N.Y.S. 2d 439; *In re Schnur's Estate* (1963) 242 N.Y.S. 2d 126; *O'Hayer* v. *de St. Aubin* (1968) 293 N.Y.S. 2d 147 and *In re Estate of Becker* (1972) 202 N.W. 2d 681.

Those decisions are in accordance with the principles of the English law of trusts, and with the only English decision on the point, *In re Lucking's Will Trusts* [1968] 1 W.L.R. 866. If they correctly state the extent of the duty of a trustee holding a controlling shareholding in a private company, the bank clearly failed to discharge that duty. Expenditure on the Old Bailey project was not authorised by the company's memorandum but was ultra vires. On the construction of the memorandum, see *Ashbury Railway Carriage and Iron Co. Ltd.* v. *Riche* (1875) L.R. 7 H.L. 653 and *In re German Date Coffee Co.* (1882) 20 Ch.D.

A 169. On the meaning of "ancillary" objects, see *Smith* v. *Smith* [1925] 2 K.B. 144, 149; *Oxford Group* v. *Inland Revenue Commissioners* [1949] 2 All E.R. 537, 545; *Associated Artists Ltd.* v. *Inland Revenue Commissioners* [1956] 1 W.L.R. 752, 759–761 and *Bell Houses Ltd.* v. *City Wall Properties Ltd.* [1966] 2 Q.B. 656.

No part of Sir Basil Bartlett's right of action is barred by the Limitation Act 1939. On the facts, the bank has failed to prove that B any part of the loss of income suffered by Sir Basil was attributable to the properties purchased in breach of trust more than six years before the issue of the writ. Section 26 of the Act provides an answer. The bank was under a duty to give Sir Basil information with respect to the mode in which it had dealt with the trust fund (*Hawkesley* v. *May* [1956] 1 Q.B. 304, 315–316, 321–322) and its failure to do so prevents time C running in its favour: *Kitchen* v. *Royal Air Force Association* [1958] 1 W.L.R. 563; *Applegate* v. *Moss* [1971] 1 Q.B. 406 and *King* v. *Victor Parsons & Co.* [1973] 1 W.L.R. 29. The bank should not be permitted to set off the profit it made fortuitously on the Guildford project against the losses incurred on the Old Bailey project. No such set-off is permitted unless it can be said that the profit and loss arose in the same transaction: *Snell's Principles of Equity*, 27th ed., p. 276; *Halsbury's Laws* D *of England*, 3rd ed., vol. 38 (1962), p. 1046; *Adye* v. *Feuilleteau* (1783) (and see note 3 Swan. 84) 1 Cox. 24; *Dimes* v. *Scott* (1827) 4 Russ. 195; *Robinson* v. *Robinson* (1848) 11 Beav. 371; *Wiles* v. *Gresham* (1854) 2 Drew. 258 and *Fletcher* v. *Green* (1864) 33 Beav. 426. The separate purchases of different properties at the Old Bailey site can be regarded as forming part of one transaction, but the purchase of development E properties at Guildford formed a separate transaction.

Paul Baker Q.C. and *Alan Sebestyen* for the defendant trustee. In the management of trust business a trustee should exercise the same diligence and prudence as an ordinary prudent man of business would exercise in conducting the business as if it were his own: see *In re Whiteley*, 33 Ch.D. 347, 355, 358; sub nom. *Learoyd* v. *Whiteley*, 12 App.Cas. 727; *In re Speight*, 22 Ch.D. 727; sub nom. *Speight* v. *Gaunt* F 9 App.Cas. 1. The standard of an ordinary prudent man of business is objective. On the one hand one does not consider any special qualities or degree of intelligence on the part of the trustee nor on the other that he is personally unbusinesslike: see *Rae* v. *Meek*, 14 App.Cas. 558.

The fact that a trustee is paid does not mean that a higher standard of diligence or knowledge is required of him: see *Jobson* v. *Palmer* G [1893] 1 Ch. 71. Dicta to the contrary in *In re Waterman's Will Trusts* [1952] 2 All E.R. 1054 are obiter. Payment is relevant in considering the question of relief but not when considering the degree of diligence a prudent man would exhibit.

The trustees in the present case are charged with omissions, not positive acts. A positive act can be tested against the trust instrument, H but a failure to act in regard to investment will rarely be a breach of some express provision of the trust instrument. The rule of law is that where trustees bona fide exert themselves to discharge their duty and merely commit an error of judgment, then unless there is a plain violation of the trust instrument, they will not be visited severely. The fair exercise of their judgment is a protection to them although the consequences may be bad: see *Garrett* v. *Noble* (1834) 6 Sim. 504, 505, 506 and *In re Chapman* [1896] 2 Ch. 763. A

In this case the investment was a controlling block of shares in a company. The same test applies. The trust business is the proper handling of the block of shares and the rights which attach to them. How would a prudent man of business holding the shares act in the situation? B There is no absolute rule that the trustees must ensure that the company avoids speculative or hazardous transactions. There is no rule that the trustees cannot leave it to the directors to make decisions on policy. There is no rule that if the trustees hold all the shares their duties are the same as if the assets of the company were vested in themselves. The directors are not to be equated with agents for the trustees. C The former have independent responsibilities under the memorandum and articles of association and the general law which cannot be diminished by the mere fact that some, most or all the shares are held by a trustee. In *In re Lucking's Will Trusts* [1968] 1 W.L.R. 866 an important feature was that the trustee made liable was himself a director. The trustee who was not a director was not held liable. Also it was a case of an improper milking of the company's assets by the managing director D of which the trustee/director was aware.

It cannot be said that no prudent man of business concerned for his investment in the company would have acquiesced in the decisions of the board relating to the development project as they transpired. The bank was entitled to rely on what it was told as accurate unless there was some positive reason to the contrary. The following facts E justified their acquiescence: (1) the calibre of the board was high; (2) the performance of the company as a whole was good; (3) going into development was not a major change of policy, the company remained what it always had been, a property investment company; (4) the affairs of the company were closely considered from time to time by the auditors, by Freshfields and by Flemings, and none sought to warn the bank of the imprudence of the board's management; F (5) the bank's managers had a good working relationship with the board, there was no air of concealment; (6) there were good reasons for the company investing in development schemes, it diversified the portfolio and would assist in obtaining a quotation; (7) until the final purchases the amounts involved were relatively modest in relation to the total assets; (8) the final purchases involved difficult decisions responsibly taken in the light of G the estate duty position and rapidly rising market; (9) the board's confidence was corroborated by Stock Conversion's participation.

Even if the bank is otherwise liable it can rely on section 19 of the Limitation Act 1939, in respect of income lost on money paid away six years before the issue of the writ. The omission to give accounts to or otherwise inform the plaintiffs is not a concealment of the cause of H action by fraud for the purposes of section 26 (*b*). The bank's conduct was not unconscionable as it did not know it was acting in breach of trust; see *Kitchen* v. *Royal Air Force Association* [1958] 1 W.L.R.

A 563; *Applegate* v. *Moss* [1971] 1 Q.B. 406 and *King* v. *Victor Parsons*
& Co. [1973] 1 W.L.R. 29.

The bank is entitled to be relieved under section 61 of the Trustee
Act 1925. The fact that a trustee is paid does not disentitle him to
relief, but is a factor to be weighed against him: see *In re Pauling's*
Settlements Trusts [1964] Ch. 303; *National Trustees Co. of Australasia*
Ltd. v. *General Finance Co. of Australasia Ltd.* [1905] A.C. 373 and *In re*
B *Windsor Steam Coal Co.* (1901) *Ltd.* [1929] 1 Ch. 151. The following
factors are material (1) the fee paid to the bank was very small; (2) the
bank exerted itself on behalf of the beneficiaries and acted very beneficially
as regards estate duty saving; (3) the losses arose from an unprecedented
fall in the value of land which scarcely any expert foresaw.

The bank is entitled to have the profits from one transaction set off
against the losses of another. All the cases where the rule has been
C applied are of two separate transactions entered into by the trustees of
which the beneficiaries can adopt one and not the other. Here the
trustees did not enter into any transaction. They committed one breach
only, failing to exercise proper supervision over the directors, and the
inquiry is as to the true measure of loss from that breach.

D *Cur. adv. vult.*

July 31. BRIGHTMAN J. read the following judgment and, having
stated the facts summarised above, said that he would use the expression
" bank " to refer to both Barclays Bank Ltd. and Barclays Bank Trust
Co. Ltd., and when referring to Bartlett Trust Ltd. (BTL) and Bartlett
Trust (Holdings) Ltd. (BTH) would use the initials " BT " where differen-
E tiation was not necessary. His Lordship continued: When Mr. Mahony
came on the scene in 1959 as manager of the City Office branch, his
predecessor impressed on him, when handing over, the need for liquidity
because of the ages of the life tenants, the heavy estate duty liabilities that
would arise when they died, and the fact that most of the reversioners
would be more interested in cash than shares in a private property
F company. Mr. Mahony did not know Mr. Roberts personally before 1960.
He achieved a fairly close relationship with him on an informal basis, and
Mr. Roberts would always find time to see him at short notice. He
accepted that Mr. Roberts was not going to refer matters to the bank
in the same way as Mr. Graham had done when he was chairman. Mr.
Mahony viewed the board as a well-equipped team of professionals who
knew their job, and nothing occurred to change his opinion. He was
G never given any details at all about any development project but was quite
satisfied that that should be so. His attitude was that he had agreed in
principle to a measure of development (as he put it) and that the board
should be left to carry out that policy. He placed complete confidence in
the board and assumed they knew what they were doing and would do
nothing stupid. He did not direct his mind to the problem how develop-
H ment projects would be financed. With hindsight, he was disposed to
agree that he might have asked more questions. At the time he was
content that all decisions in relation to the management of Bartlett Trust
Ltd. (BTL) and the conduct of its affairs should be left to the board.

When Mr. Daly took over in 1966, he regarded the Old Bailey project as a dormant matter. He learned that there was a site opposite the Old A
Bailey where certain properties had been acquired in conjunction with Stock Conversion and Investment Trust Ltd. (Stock Conversion), and that it was the intention to assemble the site when conditions were favourable, and ultimately to demolish the existing buildings and erect a new one. He did not have a plan of the site, and knew nothing of the planning difficulties. He was not worried because he was aware that Mr. Mahony B
was content with the position and had reposed complete confidence in the board. Mr. Daly himself considered the directors to be highly competent and professional. Mr. Roberts always expressed himself to Mr. Daly as extremely confident that the Old Bailey development would be successfully completed within a reasonable period. Mr. Daly was under the impression that Mr. Roberts was enthusiastic about it, and he knew nothing of the proposal in 1972 to sell out to Stock Conversion. The C
decision to buy into the site had been made at an earlier time. He was sure that it had been considered in depth both by Mr. Mahony and the board, and he did not think that it was for him to reconsider it. Furthermore, a well-known and prosperous development company was backing the scheme with an equal participation. He saw no cause for alarm. He believed that the Old Bailey project would turn out to be a very valuable D
asset. As regards finance, he understood that there would be no question of committing the assets of BTL in any way, and that the money would be put up on some participation basis by an insurance company.

The situation may be summed up as follows. Bartlett Trust (Holdings) Ltd. (BTH) made a large loss as a result of the involvement of itself and BTL in the Old Bailey project. This loss reduced the value of the BTH shares and thereby caused a loss to the trust fund of the 1920 settlement. E
The bank, had it acted in time, could by reason of its shareholding have stopped the board of BTL embarking upon the Old Bailey project; and, had it acted in time, could have stopped the board of BTL and later the board of BTH (it is unnecessary to differentiate) from continuing with the project; and could, had it acted in time, have required BTH to sell its interest in Far Investments Ltd. (Far) to Stock Conversion on the no-loss F
or small-loss terms which (as I find) were available for the asking. This would not have necessitated the draconian course of threatening to remove, or actually removing, the board in favour of compliant directors. The members of the board were reasonable persons, and would (as I find) have followed any reasonable policy desired by the bank had the bank's wishes been indicated to the board. The loss to the trust fund could have been avoided (as I find) without difficulty or disruption had the bank G
been prepared to lead, in a broad sense, rather than to follow.

What, then, was the duty of the bank and did the bank fail in its duty? It does not follow that because a trustee could have prevented a loss it is therefore liable for the loss. The questions which I must ask myself are (1) What was the duty of the bank as the holder of 99·8 per cent. of the shares in BTL and BTH? (2) Was the bank in breach of H
duty in any and if so what respect? (3) If so, did that breach of duty cause the loss which was suffered by the trust estate? (4) If so, to what extent is the bank liable to make good that loss? In approaching these

A questions, I bear in mind that the attack on the bank is based, not on wrongful acts, but on wrongful omissions, that is to say, non-feasance not misfeasance.

The cases establish that it is the duty of a trustee to conduct the business of the trust with the same care as an ordinary prudent man of business would extend towards his own affairs: *In re Speight* (1883) 22 Ch.D. 727, *per* Sir George Jessel M.R. at p. 739 and Bowen L.J. at p. 762; B affirmed on appeal, *Speight* v. *Gaunt* (1883) 9 App.Cas. 1, and see Lord Blackburn at p. 19. In applying this principle, Lindley L.J. (who was the third member of the court in the *Speight* case) added in *In re Whiteley* (1886) 33 Ch.D. 347, 355:

> "... care must be taken not to lose sight of the fact that the business of the trustee, and the business which the ordinary prudent man is C supposed to be conducting for himself, is the business of investing money for the benefit of persons who are to enjoy it at some future time, and not for the sole benefit of the person entitled to the present income. The duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other D people for whom he felt morally bound to provide. That is the kind of business the ordinary prudent man is supposed to be engaged in; and unless this is borne in mind the standard of a trustee's duty will be fixed too low; lower than it has ever yet been fixed, and lower certainly than the House of Lords or this Court endeavoured to fix it in *Speight* v. *Gaunt*."

E See on appeal *Learoyd* v. *Whiteley* (1887) 12 App.Cas. 727, where Lord Watson added, at p. 733:

> "Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments F of that class which are attended with hazard."

That does not mean that the trustee is bound to avoid all risk and in effect act as an insurer of the trust fund: see Bacon V.-C. in *In re Godfrey* (1883) 23 Ch.D. 483, 493:

> "No doubt it is the duty of a trustee, in administering the trusts of a will, to deal with property intrusted into his care exactly as any G prudent man would deal with his own property. But the words in which the rule is expressed must not be strained beyond their meaning. Prudent businessmen in their dealings incur risk. That may and must happen in almost all human affairs."

The distinction is between a prudent degree of risk on the one hand, H and hazard on the other. Nor must the court be astute to fix liability upon a trustee who has committed no more than an error of judgment, from which no business man, however prudent, can expect to be immune: see Lopes L.J. in *In re Chapman* [1896] 2 Ch. 763, 778:

> "A trustee who is honest and reasonably competent is not to be held responsible for a mere error in judgment when the question which he has to consider is whether a security of a class authorized, but depreciated in value, should be retained or realized, provided he acts with reasonable care, prudence, and circumspection."

If the trust had existed without the incorporation of BTL, so that the bank held the freehold and leasehold properties and other assets of BTL directly upon the trusts of the settlement, it would in my opinion have been a clear breach of trust for the bank to have hazarded trust money upon the Old Bailey development project in partnership with Stock Conversion. The Old Bailey project was a gamble, because it involved buying into the site at prices in excess of the investment values of the properties, with no certainty or probability, with no more than a chance, that planning permission could be obtained for a financially viable redevelopment, that the numerous proprietors would agree to sell out or join in the scheme, that finance would be available upon acceptable terms, and that the development would be completed, or at least become a marketable asset, before the time came to start winding up the trust. However one looks at it, the project was a hazardous speculation upon which no trustee could properly have ventured without explicit authority in the trust instrument. I therefore hold that the entire expenditure in the Old Bailey project would have been incurred in breach of trust, had the money been spent by the bank itself. The fact that it was a risk acceptable to the board of a wealthy company like Stock Conversion has little relevance.

I turn to the question, what was the duty of the bank as the holder of shares in BTL and BTH? I will first answer this question without regard to the position of the bank as a specialist trustee, to which I will advert later. The bank, as trustee, was bound to act in relation to the shares and to the controlling position which they conferred, in the same manner as a prudent man of business. The prudent man of business will act in such manner as is necessary to safeguard his investment. He will do this in two ways. If facts come to his knowledge which tell him that the company's affairs are not being conducted as they should be, or which put him on inquiry, he will take appropriate action. Appropriate action will no doubt consist in the first instance of inquiry of and consultation with the directors, and in the last but most unlikely resort, the convening of a general meeting to replace one or more directors. What the prudent man of business will *not* do is to content himself with the receipt of such information on the affairs of the company as a shareholder ordinarily receives at annual general meetings. Since he has the power to do so, he will go further and see that he has sufficient information to enable him to make a responsible decision from time to time either to let matters proceed as they are proceeding, or to intervene if he is dissatisfied. This topic was considered by Cross J. in *In re Lucking's Will Trusts* [1968] 1 W.L.R. 866, more fully reported in [1967] 3 All E.R. 726. In that case nearly 70 per cent. of the shares in the company were held by two trustees, L and B, as part of the estate of a deceased; about 29 per cent. belonged to L in his own right, and 1 per cent. belonged to L's wife.

A The directors in 1954 were Mr. and Mrs. L and D, who was the manager of the business. In 1956 B was appointed trustee to act jointly with L. The company was engaged in the manufacture and sale of shoe accessories. It had a small factory employing about 20 people, and one or two travellers. It also had an agency in France. D wrongfully drew some £15,000 from the company's bank account in excess of his remuneration, and later became bankrupt. The money was lost. Cross J. said, at
B p. 874:

> "The conduct of the defendant trustees is, I think, to be judged by the standard applied in *Speight* v. *Gaunt*, namely, that a trustee is only bound to conduct the business of the trust in such a way as an ordinary prudent man would conduct a business of his own. Now what steps, if any, does a reasonably prudent man who finds himself
> C a majority shareholder in a private company take with regard to the management of the company's affairs? He does not, I think, content himself with such information as to the management of the company's affairs as he is entitled to as shareholder, but ensures that he is represented on the board. He may be prepared to run the business himself as managing director or, at least, to become a non-executive director while having the business managed by someone
> D else. Alternatively, he may find someone who will act as his nominee on the board and report to him from time to time as to the company's affairs. In the same way, as it seems to me, trustees holding a controlling interest ought to ensure so far as they can that they have such information as to the progress of the company's affairs as directors would have. If they sit back and allow the
> E company to be run by the minority shareholder and receive no more information than shareholders are entitled to, they do so at their risk if things go wrong."

I do not understand Cross J. to have been saying that in every case where trustees have a controlling interest in a company it is their duty to ensure that one of their number is a director or that they have a nominee on the board who will report from time to time on the affairs of the
F company. He was merely outlining convenient methods by which a prudent man of business (as also a trustee) with a controlling interest in a private company, can place himself in a position to make an informed decision whether any action is appropriate to be taken for the protection of his asset. Other methods may be equally satisfactory and convenient, depending upon the circumstances of the individual case. Alternatives
G which spring to mind are the receipt of copies of the agenda and minutes of board meetings if regularly held, the receipt of monthly management accounts in the case of a trading concern, or quarterly reports. Every case will depend on its own facts. The possibilities are endless. It would be useless, indeed misleading, to seek to lay down a general rule. The purpose to be achieved is not that of monitoring every move of the
H directors, but of making it reasonably probable, so far as circumstances permit, that the trustee or (as in the *Lucking* case) one of them will receive an adequate flow of information in time to enable the trustees to make use of their controlling interest should this be necessary for the

protection of their trust asset, namely, the shareholding. The obtaining of information is not an end in itself, but merely a means of enabling the trustees to safeguard the interests of their beneficiaries.

The principle enunciated in the *Lucking* case appears to have been applied in *In re Miller's Deed Trusts* (unreported), March 21, 1978, a decision of Oliver J. No transcript of the judgment is available but the case is briefly noted in the Law Society's Gazette published on May 3, 1978. There is also a number of American decisions proceeding upon the same lines, to which counsel has helpfully referred me.

So far, I have applied the test of the ordinary prudent man of business. Although I am not aware that the point has previously been considered, except briefly in *In re Waterman's Will Trusts* [1952] 2 All E.R. 1054, I am of opinion that a higher duty of care is plainly due from someone like a trust corporation which carries on a specialised business of trust management. A trust corporation holds itself out in its advertising literature as being above ordinary mortals. With a specialist staff of trained trust officers and managers, with ready access to financial information and professional advice, dealing with and solving trust problems day after day, the trust corporation holds itself out, and rightly, as capable of providing an expertise which it would be unrealistic to expect and unjust to demand from the ordinary prudent man or woman who accepts, probably unpaid and sometimes reluctantly from a sense of family duty, the burdens of a trusteeship. Just as, under the law of contract, a professional person possessed of a particular skill is liable for breach of contract if he neglects to use the skill and experience which he professes, so I think that a professional corporate trustee is liable for breach of trust if loss is caused to the trust fund because it neglects to exercise the special care and skill which it professes to have. The advertising literature of the bank was not in evidence (other than the scale of fees) but counsel for the defendant did not dispute that trust corporations, including the bank, hold themselves out as possessing a superior ability for the conduct of trust business, and in any event I would take judicial notice of that fact. Having expressed my view of the higher duty required from a trust corporation, I should add that the bank's counsel did not dispute the proposition.

In my judgment the bank wrongfully and in breach of trust neglected to ensure that it received an adequate flow of information concerning the intentions and activities of the boards of BTL and BTH. It was not proper for the bank to confine itself to the receipt of the annual balance sheet and profit and loss account, detailed annual financial statements and the chairman's report and statement, and to attendance at the annual general meetings and the luncheons that followed, which were the limits of the bank's regular sources of information. Had the bank been in receipt of more frequent information it would have been able to step in and stop, and ought to have stopped, Mr. Roberts and the board embarking on the Old Bailey project. That project was imprudent and hazardous and wholly unsuitable for a trust whether undertaken by the bank direct or through the medium of its wholly owned company. Even without the regular flow of information which the bank ought to have had, it knew enough to put it upon inquiry. There were enough obvious points at which the bank should have intervened and asked questions. Assuming, as I do, that the questions would have been answered truthfully, the bank would have discovered the gamble upon which Mr. Roberts and his board were about to embark in relation to the Old Bailey site, and it could have, and should have, stopped the initial move towards disaster, and later on arrested further progress towards disaster. I have indicated in the course of this judgment a number of obvious points at which the bank should have intervened, and it would be repetitive to summarise them.

I hold that the bank failed in its duty whether it is judged by the standard of the prudent man of business or of the skilled trust corporation. The bank's breach of duty caused the loss which was suffered by the trust estate. If the bank had intervened as it could and should have, that loss would not have been incurred. By " loss," I mean the depreciation which took place in the market value of the BT shares, by comparison with the value which the shares would have commanded if the loss on the Old Bailey project had not been incurred, and reduction of dividends through loss of income. The bank is liable for the loss so suffered by the trust estate, except to the extent that I shall hereafter indicate.

The bank's defences to the main charge simply do not stand up to examination. For instance:

(1) Paragraph 15 of the defence: " the trustees maintained close and regular contact with the board of the company, and in particular with Mr. Roberts." This is untrue in any meaningful sense.

(2) Paragraph 19: " the bank, acting by Mr. Mahony . . . reached the conclusion that the best prospects for [BTL] lay in the field of property development."

In fact, the bank, through its officers, merely accepted, without proper examination, a series of faits accomplis.

(3) Paragraph 25: The participation of Stock Conversion " was considered by the bank . . . to be of great benefit to the eventual success " of the development. Mr. Mahony knew nothing whatever about Stock Conversion's participation until months after the event, and even then the name meant nothing to him at the time.

(4) Paragraph 34 (1): " Mr. Roberts . . . fulfilled the role of a nominee of the trustees." He did not.

(5) Paragraph 34 (2): The bank gave " full and anxious consideration to the future direction of the company's efforts." The bank gave neither full nor anxious consideration to those efforts in so far as they were directed towards the Old Bailey development.

(6) Paragraph 34 (4): " The trustees discussed with Mr. Roberts on several occasions what steps, if any, were necessary or desirable in connection with the Old Bailey site." No significant discussions ever took place on this topic.

(7) Paragraph 36: The Old Bailey project was not " a speculative adventure." It not only was but could always be seen to be.

(8) Paragraph 46: " given the primary duty of the trustees under

clause 1 of the settlement "—i.e. to retain the shares in their present state A
unless for the purposes of division or for some other good and sufficient
cause a sale is necessary or desirable—" the economic position in the
early 1960s and the then portfolio of the old company, it was the act of
a reasonably prudent man to allow the old company to engage in
property development." None of these three factors would have
persuaded a prudent trustee to allow BTL to accept the hazards of the B
Old Bailey project.

(9) Paragraph 46 (2): " the trustees at all times received full information as to the developments which occurred in relation to the Old Bailey site project." I would substitute the word " inadequate " for the word " full."

Mr. Baker, in his able submissions on behalf of the bank, put the
defence on a broader basis, in the light of the documentary and oral C
evidence. The real issue, he said, was whether it was the duty of the
bank (a) to ensure that it received regular reports from the board, either
by its nominee or otherwise, or (b) to probe only if and when alerted.
He submitted that in the context of this type of company and calibre of
board trustees are entitled to rely on the information dispensed annually
until something occurs to warn them that, as prudent men of business, D
they should exercise greater vigilance. He submitted that the board of
this company was of high calibre, and was rightly trusted. If one accepts,
as I accept, what was said by Cross J. in the *Lucking* case, this argument
breaks down at the outset. The judge said, and I agree, that a reasonably
prudent man who finds himself a majority shareholder in a private
company does not content himself with such information as to the
management of the company's affairs as he is entitled to as a shareholder. E
Still less does he do so if his shareholding in the company represents his
entire fortune; so far as I am aware, there were never any assets of
significance in the settlement at the relevant time except the debentures
and shares in BT. I do not think that the calibre of the board is relevant,
save that the extent and regularity of the information that a trustee should
be content to receive must be much greater in the case of an inexperi- F
enced board. Everyone without exception spoke highly of the calibre
of the BT board when it confined itself to estate management. But as an
expert on development Mr. Roberts and his colleagues had no claim to
exceptional ability. His initial costings of the Old Bailey project were
easily faulted in cross-examination, his forecasts were continually falsified
by events and he claimed and displayed no expertise in matters of finance
or planning. G

The bank also relies on clauses 18 and 26 of the settlement. Clause 18 entitled the bank to

> " act in relation to the Bartlett Trust Ltd. or any other company and
> the shares securities and properties thereof in such way as it shall
> think best calculated to benefit the trust premises and as if it was the
> absolute owner of such shares, securities and property." H

In my judgment this is a clause which confers on the bank power to engage in a transaction which might otherwise be outside the scope of its authority; it is not an indemnity protecting the bank against liability for a transaction which is a breach of trust because it is one that a prudent man of business would have eschewed. Clause 26 will be recognised by conveyancers of an earlier generation as a not unusual "apportionment clause" at the end of which the draftsman tagged on a purported power to determine all questions of doubt. It has no conceivable relevance. For the clause, and its undoing, see *In re Wynn* [1952] Ch. 271.

Two particular defences remain. The Limitation Act 1939 is pleaded. It is relied on in relation to any income lost by Sir Basil on money spent in breach of trust prior to August 19, 1971, six years before the writ was issued. The defence is sound unless it can be said that the right of action in relation to the lost income was "concealed by the fraud" of the bank within the meaning of section 26 (*b*) of the Act. The purpose of the Limitation Act is to protect a defendant against stale claims, particularly where evidence for the defence may have been obscured or lost by passage of time. Nothing like that has happened here. The beneficiaries never received the annual accounts or reports of BT, or copies of board minutes or the chairman's statements. Sir Basil could not be expected by the bank to know of the various wrongful purchases into the Old Bailey site at inflated prices, or the diminished income resulting therefrom. Nor is it usual, in my experience, for life tenants to be sent annual trust accounts. "Fraud," in the context of section 26 (*b*), does not mean common law fraud or deceit. But it does seem to envisage conduct which, if not fraudulent in the more usual sense, is unconscionable having regard to the relationship between the parties: see *Kitchen* v. *Royal Air Force Association* [1958] 1 W.L.R. 563. "Fraud" is used in the equitable sense to denote conduct by the defendant or his agent such that it would be against conscience for him to avail himself of the lapse of time.

> "The section applies whenever the conduct of the defendant or his agent has been such as to hide from the plaintiff the existence of his right of action, in such circumstances that it would be inequitable to allow the defendant to rely on the lapse of time as a bar to the claim." *per* Lord Denning M.R. in *Applegate* v. *Moss* [1971] 1 Q.B. 406, 413.
>
> "If the defendant was, however, quite unaware that he was committing a wrong or a breach of contract, it would be different." *per* Lord Denning M.R. in *King* v. *Victor Parsons & Co.* [1973] 1 W.L.R. 29, 34.

In the instant case there was no cover-up by the bank. The bank had no inkling that it was acting in breach of trust. The defence is, in my judgment, available to the bank if its conscience permits it to rely upon it having regard to the fact that the passage of time caused no prejudice whatever to the bank.

It follows that Sir Basil is not entitled to claim against the bank a share in any increased dividends which ought to have been declared by Bartlett Trust over the six years prior to the issue of the writ.

Section 61 of the Trustee Act 1925 is pleaded. There is no doubt that the bank acted honestly. I do not think it acted reasonably. Nor do I think it would be fair to excuse the bank at the expense of the beneficiaries. A

There remains this defence, which I take from paragraph 26 of the amended pleading:

> "In about 1963 [BTL] purchased a site at Woodbridge Road, Guildford, pursuant to the policy pleaded in paragraph 19 hereof, for the sum of £79,000, and re-sold the same for £350,000 to MEPC Ltd. in 1973. The net profit resulting from such sale was £271,000. B If, which is denied, the defendant is liable for breach of trust, whether as alleged in the amended statement of claim or otherwise, the defendant claims credit for such sum of £271,000 or other sum found to be gained in taking any accounts and inquiries."

The general rule as stated in all the textbooks, with some reservations, C is that where a trustee is liable in respect of distinct breaches of trust, one of which has resulted in a loss and the other in a gain, he is not entitled to set off the gain against the loss, unless they arise in the same transaction: see *Halsbury's Laws of England*, 3rd ed., vol. 38 (1962), p. 1046; *Snell's Principles of Equity*, 27th ed. (1973), p. 276; *Lewin on the Law of Trusts*, 16th ed. (1964), p. 670 and *Underhill's Law of Trusts and Trustees*, 12th ed. (1970), p. 634. The relevant cases are, however, not altogether D easy to reconcile. All are centenarians and none is quite like the present. The Guildford development stemmed from exactly the same policy and (to a lesser degree because it proceeded less far) exemplified the same folly as the Old Bailey project. Part of the profit was in fact used to finance the Old Bailey disaster. By sheer luck the gamble paid off handsomely, on capital account. I think it would be unjust to deprive the bank of this element of salvage in the course of assessing the cost of E the shipwreck. My order will therefore reflect the bank's right to an appropriate set-off.

There is one final point. BTL and BTH by the terms of their respective memoranda of association existed for the purpose only of investment. It is pleaded by the plaintiffs that participation in the Old Bailey project was ultra vires. I think that may well be correct. If so, it F would have been a breach of trust for the bank to have permitted the board to pursue activities ultra vires the company. It is not, however, necessary that I should reach a concluded view on this point, and I content myself with recording a doubt.

This action has lasted well over 40 days. It was obvious from the time when the documentation was complete that most of the matters G alleged in the defence were unsustainable. It was equally obvious that the defence could not succeed in this court unless I were persuaded to depart from the law as stated by Cross J. in *In re Lucking*. Furthermore, the defence could not succeed if the advice given to trust managers and officers in the bank's current rule book was correct. The plaintiffs' counsel made it clear in opening his case, and at a later stage, that his H clients had no desire to squeeze the last penny from the bank, and that they were open to reasonable suggestions for resolving the dispute. This offer was not taken up. In the circumstances I think it is a pity that a

A large and responsible trust corporation should have put the Bartlett family to the expense and anxiety of a marathon court proceeding.

Draft minutes of order to be drawn up.
Matter to be restored to judge in case of disagreement.

B

Solicitors: *Frere, Cholmeley; Simmons & Simmons.*

[Reported by MRS. F. ALLEN MCLEAN, Barrister-at-Law]

C Disagreements having arisen as to the draft minutes of the order, the matter was restored to his Lordship on January 11, 1980, for argument and decision.

E. G. Nugee Q.C. and *Jules Sher* for the plaintiffs. The liability of a trustee who has committed a breach of trust is restitutionary, that is to say, he is liable to place the trust estate in the same position as it
D would have been in if no breach had been committed. This necessarily involves that where he has to pay monetary compensation in lieu of restoring the assets in specie, the amount of compensation is to be assessed at the date of payment, and not at some earlier date, such as the date of the breach of trust or the date when the plaintiff became entitled to his interest. The best discussion of the law is in *In re Dawson, decd.* [1966] 2 N.S.W.R. 211, part of the judgment in which is quoted
E in *Underhill's Law of Trusts and Trustees*, 13 ed. (1979), p. 702. See also *In re Massingberd's Settlement* (1890) 63 L.T. 296, where the trustees were held bound to replace stock sold, i.e., to pay whatever was necessary at the time of payment to purchase that amount of stock, and not merely to pay the value of the stock at the life tenant's death. And see *Kellaway* v. *Johnson* (1842) 5 Beav. 319, where the life tenant died in
F 1834 and the trustees were held bound to replace stock in 1842, and *Phillipson* v. *Gatty* (1848) 7 Hare 516. The question is whether the loss would have happened if there had been no breach: see *In re Dawson, decd.* [1966] 2 N.S.W.R. 211, 215. Clearly, in the present case, whether there was a breach or not, no minority shareholder would have been advised to try to sell his shares separately, but the sale to Phoenix would have taken place in exactly the way that it did, except that the
G price would have been considerably greater. The bank's contention appears to be based on supposition that the plaintiffs' claim was a claim for damages. That contention is a heresy; there is no such remedy as damages for breach of trust. Equity does not award damages; it requires the trustee to account, and if necessary to reconstitute the trust fund, or if that is not literally possible, to restore to the trust estate
H the monetary value of what should have been there had there been no breach of trust.

If the remedy *had* been an action for damages, it would not follow that the damages would be assessed at the date of the breach. As to

contract, see *Johnson* v. *Agnew* [1980] A.C. 367, *per* Lord Wilberforce A
at p. 400, and *Radford* v. *De Froberville* [1977] 1 W.L.R. 1262. As to
tort, the guiding principle is that damages should be such as will, so far as
money can, restore the plaintiff to the position in which he would have
been had he not suffered the wrong complained of, and the plaintiffs would
have been entitled to recover the loss suffered by them on the sale of the
shares if it would have been reasonable for them to have held on to their
shares until the sale to Phoenix took place, and to sell them together with B
all other shareholdings rather than separately, as a minority shareholding;
compare *Summers* v. *Salford Corporation* [1943] A.C. 283, 297, and *Esso
Petroleum Co. Ltd.* v. *Mardon* [1976] Q.B. 801, 821, 829, 833. In *In re
Lucking's Will Trusts* [1968] 1 W.L.R. 866, Cross J. made no reduction
for the fact that the plaintiff had only a minority shareholding of about
8·7 per cent.

The rate of interest should reflect rates currently obtainable; compare, C
Wallersteiner v. *Moir* (*No.* 2) [1975] Q.B. 373, 388. A rate fixed by
reference to minimum lending rate would be appropriate.

Interest should be allowed on costs from the time they were paid by
plaintiffs: *K.* v. *K.* (*Divorce Costs: Interest*) [1977] Fam. 39, is distin-
guishable because there the costs had not been paid at the date of the
order, and the plaintiff was seeking interest for a period when the D
money was still in her hands. Stephenson L.J. contemplated, at p. 57,
that hardship to the payee should be mitigated in special cases by
special order.

Costs should be awarded on the common fund basis. The court has
always had jurisdiction to do so, and has done so in particular, where
there is a fiduciary relationship between the plaintiff and the defendant, E
and it has taken the view that the trustee's conduct has been
unmeritorious, as the court has here: see the last paragraph of the
judgment. See *Andrews* v. *Barnes* (1888) 39 Ch.D. 133, 139, for the
principle; and *In re Chapman* (1895) 72 L.T. 66 and *Reed* v. *Gray*
[1952] Ch. 337, 343, 348, for illustrations. The jurisdiction is now
confirmed by R.S.C., Ord. 62., r. 28 (3).

Alan Sebestyen for the defendant. Logically the correct point at F
which to assess damages or compensation for a breach of trust is the
date at which the beneficiary's interest vested absolutely in him. Once a
beneficiary has ceased to be such, he cannot complain of a subsequent
breach of trust by the trustee. So far as compensation to the trust
fund itself is concerned the correct date is of course the date of com-
pletion of the inquiry into damages. When the trust came to an end G
in respect to any particular beneficiary, e.g., in Sir Basil's case as at
January 25, 1974, the duty of the defendant as trustee was to transfer
to him, as beneficiary, the shares to which he had become entitled, and
pending such transfer to exercise no dominion or control over the
shares except at the instance of the beneficiary concerned. The
trustee's duties became those of a bare trustee or nominee.

Although damages or compensation is to be assessed as at today's H
date, it must be in relation to the loss which occurred as at January 25,
1974, when Sir Basil became absolutely entitled to the shares. If there

had been no sale to Phoenix, the beneficiary's loss would have been the diminution in the value of his shares. The three sets of plaintiffs cannot receive more by suing together, than they would have been entitled to receive had they sued separately. The only effect of the sale to Phoenix is that it marked the end of the diminution in value of the shares. Each beneficiary's share must be valued as a minority shareholding, and not as a fraction of the value of the shares as if they were all sold to the same purchaser at the same time. It is not legitimate to seek to change the whole basis upon which damages would otherwise be assessed. In *In re Lucking's Will Trusts* [1968] 1 W.L.R. 866 the breaches of trust had preceded the beneficiary's attaining of an absolute interest. No specific claim for damages is made in respect of any specific plaintiff. There is nothing in the statement of claim which differentiates between different plaintiffs. On the day before the sale to Phoenix the court would have laid down the principle that each shareholding must be valued in isolation: there should be no change in principle to be applied on the day after the sale. The value of a shareholding must be determined by asking what price it would fetch if sold separately. It cannot be right to value a 25 per cent. holding by dividing by four the value of a 100 per cent. holding, though doubtless if that were the correct method the Inland Revenue would be delighted. The mere fact of a sale having taken place cannot alter the measure of damages.

The orders which the plaintiffs seek do not allow for deduction of tax, but the plaintiffs are not entitled to more, as damages, than the loss they have actually suffered. If tax would have been deductible from distributions made to them, as it clearly would have been, the plaintiffs would have received sums not liable to tax, except perhaps for tax chargeable at the higher rate. If a beneficiary's financial position was such that he normally paid 98 per cent. tax, the measure of his loss would be £2 per £100. *British Transport Commission* v. *Gourley* [1956] A.C. 185 should be applied. [Reference was made to *Raja's Commercial College* v. *Gian Singh & Co. Ltd.* [1977] A.C. 312; *Parry* v. *Cleaver* [1970] A.C. 1 and *In re Bell's Indenture* [1980] 1 W.L.R. 1217.

The value that a beneficiary of a settled share can recover must be the value of his settled share, which is necessarily different from the share of a beneficiary whose interest has vested absolutely. If the trustee had kept the shares of the trust fund and those shares had risen in value, he would have been accountable for the rise in value. If the trustee had unlawfully sold the shares at a profit he would have been bound to put back into the beneficiary's share that which he had unlawfully taken away, the trustee's duty is to put the trust fund back into the state in which it would have been had there been no breach of trust.

As to wilful default, it is only necessary to prove one breach of trust to be entitled to an account on the basis of wilful default.

As to interest the usual rule in 1973 was that interest was chargeable at 4 per cent. There was no doubt then as to settled practice of the court. [Reference was made to *Snell's Principles of Equity,* 27th ed.,

p. 276; *Underhill on the Law of Trusts and Trustees* 13th ed., p. 706 and *Wallersteiner* v. *Moir* (*No.* 2) [1975] Q.B. 373,] The approach adopted A does not seem to have been to inquire what rate of interest could have been earned. To fix a rate is to pre-empt the function of the inquiry as to damages.

Interest cannot be awarded on costs until after they have been quantified. [Reference was made to *K.* v. *K.* (*Divorce Costs: Interest*) [1977] Fam. 39]. B

As to the scale of costs, the plaintiffs obtained an order for costs on July 31, 1979, on the party and party basis; the court should not depart from that basis. That costs can be awarded on a common fund basis is not disputed, but the court has already exercised its discretion and that exercise should not be departed from. [Reference was made to *In re Chapman,* 72 L.T. 66 and *Reed* v. *Gray* [1952] Ch. 337.] C

Nugee Q.C. in reply. *British Transport Commission* v. *Gourley* [1956] A.C. 185 has no application. The bank's liability is to account, and if there is less in the trust fund than there should have been but for their breaches of trust the court will require them to reconstitute the trust fund or, if the lost assets cannot be restored in specie, to make monetary compensation equal to the value of the lost assets at the date of payment. Only after the trust fund has been ascertained in this D way does the question of liability to tax arise. The bank's contention is based on a misconception as to the remedy of a beneficiary whose trustee had been guilty of a breach of trust, and on the heretical supposition that the remedy is, or is akin to, an action for damages.

BRIGHTMAN L.J. Questions now arise as to the form of order following E upon the judgment in the action. A number of issues have arisen between the parties. The first issues relate to the general form which the order ought to take in order to establish the compensation payable by the defendant to make good the breaches of trust. The plaintiffs, who represent the persons interested in three-quarters of the trust fund, say that, first the court should determine the extent to which the assets of the company were wrongly depleted in consequence of the defendant's F breaches of trust. I should add that in this judgment it is not necessary for me to draw any distinction between BTH and its predecessor BTL or between the bank and the bank's trust company. Secondly, the plaintiffs say that the court should determine the additional proceeds of sale which would have accrued on the disposal of the respective shareholdings if the assets of the company had not been depleted. Lastly, one G calculates as a simple mathematical exercise the additional proceeds of sale referable to each plaintiff or settled share.

In so doing, it has to be remembered that there was an outside shareholding of 0.2 per cent. comprised in the sale to Phoenix, which has nothing to do with this action. There is also the other quarter of the trust fund, held by or in trust for persons who are not parties to this H action.

The defendant challenges the plaintiffs' method of calculating the compensation. The challenge is based on the fact that each of the first

A three plaintiffs became absolutely entitled to 83,000-odd shares in the
company on January 25, 1974, when Mrs. Irene Bartlett died. The total
shareholding in the company was sold to Phoenix Assurance Ltd. at a
subsequent date in September 1978. The defendant submits accurately
that it held each block of 83,000 shares in the capacity of bare trustee
for each such plaintiff as from January 25, 1974, and not in the character
of trustee of any subsisting settlement. In these circumstances the
B defendant argues that the capital loss suffered by the three plaintiffs
ought to be assessed as at January 25, 1974, when the settlement came
to an end quoad the three blocks of 83,000 shares, and not at the date
when those shareholdings were realised by the sale to Phoenix.

In my judgment the defendant is seeking to introduce a distinction
which is not justified. As was pointed out by the plaintiffs' counsel, the
obligation of a defaulting trustee is essentially that of effecting restitu-
C tion to the trust estate: see *Underhill's Law of Trusts and Trustees*,
13th ed. (1979), p. 702, where there is a useful quotation from the
judgment in the Australian case of *In re Dawson, decd.* [1966] 2
N.S.W.R. 211, with which I respectfully agree. Until restitution has
been made, the default continues because it has not been made good.
For example, if there are two settled shares in a trust fund, part of
D which has been lost in breach of trust, the measure of default is in my
opinion precisely the same in each case, notwithstanding that one settled
share has vested absolutely a month, or a year, or five years before the
default is made good, unless the person absolutely entitled has, by virtue
of his absolute entitlement, in some way lessened the responsibility of
the trustee. No such point arises here, because the last of the Old Bailey
purchases was made in October 1973, which was before the three
E plaintiffs as shareholders could exercise any control over the activities
of the company.

The defendant also submits, and I think that this is another facet of
the same argument, that the individual and the trust shareholdings ought
to be viewed as entirely separate and independent holdings for the purpose
of calculating the compensation to which each shareholding is entitled.
F Non constat, it was argued, that on February 25, 1974, it could be
predicted that all the shareholdings would be sold en bloc in September
1978, so as to realise for each shareholding a due proportion of the
asset value of the company. This was described as valuing each share-
holding of the first three plaintiffs as if it were a minority interest, which
of course it was.

G In my judgment such an approach is unrealistic and wrong. As I
have said, the obligation of the defaulting trustee is essentially that of
restitution. It was plain from the evidence, and I hold, that a beneficiary
properly advised would not have sold his shareholding on its own and
without regard to its value as a proportion of the total assets of the
company. The unwinding of the Old Bailey speculation removed an
H impediment to such en bloc realisation, and the sale to Phoenix followed
very shortly thereafter. I reject the defendant's submissions.

The defendant also seeks to introduce qualifying words into the order
so that if the compensation found to be payable to the plaintiffs, or to the

settled shares, escapes taxation which would otherwise have been payable had the breach of trust not been committed, the defendant is not required A to pay over more than the appropriate net sum.

The point, based upon the decision in *British Transport Commission* v. *Gourley* [1965] A.C. 185, arises both in respect of capital compensation (capital gains tax being relevant), and in respect of income compensation. This seems to be a point upon which there is no reported authority, although it may have been touched on in *In re Bell's Indenture,* B decided on January 26, 1979, by Vinelott J. and briefly mentioned in (1979) 123 S.J. 322. The point can conveniently be illustrated in the context of income compensation.

Inquiry no. 2 in the unamended draft minutes of order is

> "An inquiry what further distributions, if any, of income, in addition to those actually made ought properly to have been made C by [BTL] or [BTH] during the said period and on what dates to the defendant by way of dividend, after making due allowance for the retention by the said companies out of the income for each year of an appropriate sum to meet proper expenditure reasonably foreseen, but on the footing that the said companies had respectively received or possessed the amounts of income and capital respectively found on inquiry no. 1." D

Order no. 1 is an order that the defendant makes the following payments to the following persons:

> "To each of the plaintiffs a sum equal to the proportion of the further distributions of income which, on inquiry no. 2, it is found ought properly to have been made, corresponding to the proportion E of the income of the said trust fund to which such plaintiff was entitled from time to time under the trusts of the said settlement."

The defendant seeks to qualify this order by some such words as

> "Provided that such sums shall not exceed the net loss, if any, respectively suffered by such plaintiffs by reason of the non-payment of the further distributions of income, if any, which ought properly F to have been made."

The defendant says that the sum payable to each plaintiff under order no. 1 is not, or may not, be taxable in his or her hands. If free from taxation, the compensation payable should not exceed the net amount which the plaintiff would have been left with after taxation had the relevant losses not been made by the company and had larger dividends G accordingly been declared. The form of order sought by the defendant would require the court to decide at some time during the inquiries, as between the plaintiffs and the defendant, whether any and, if so, what tax could properly be demanded by the revenue from the plaintiffs on sums yet to be assessed.

Consideration of this problem is complicated by the fact that the H claims in this case are not and cannot be for restitution in the strictest sense. The shortfall in capital and income, of which complaint is made, flowing from the unauthorised speculations, was primarily suffered by the company. Restitution to the company is not and never could have been an appropriate remedy. The company, if it still exists, no longer has anything to do with the trust; nor formerly did the trustees own all the shares in the company. The defendant could never properly have been ordered to make good to the company the losses suffered by the company. Indeed, the defendant, who was a shareholder in and not a director of the company, did not owe any duty to the company. The so-called restitution which the defendant must now make to the plaintiffs, and to the settled shares, is in reality compensation for loss suffered by the plaintiffs and the settled shares, not readily distinguishable from damages except with the aid of a powerful legal microscope.

In such circumstances there is, in my view, at least a plausible argument for taking tax into account in assessing the compensation. With some hesitation, I have reached the conclusion that the defendant's submission is wrong and that tax ought not to be taken into account. My reasoning is this: the obligation of a trustee who is held liable for breach of trust is fundamentally different from the obligation of a contractual or tortious wrongdoer. The trustee's obligation is to restore to the trust estate the assets of which he has deprived it. The tax liability of individual beneficiaries, who have claims qua beneficiaries to the capital and income of the trust estate, do not enter into the picture because they arise not at the point of restitution to the trust estate but at the point of distribution of capital or income out of the trust estate. These are different stages despite the fact that they coalesce in the draft minutes.

I think that this may produce a somewhat unjust bias against the fiduciary wrongdoers as compared with the contractual or tortious wrongdoer in a case such as the present, where the breach of trust has not enriched the defaulting trustee; but I do not feel that the established principles upon which equitable relief is granted enable me to apply the *Gourley* [1956] A.C. 185 principles to this case.

The next question relates to cheap residential accommodation, which the defendant suffered some of the directors to allocate to themselves, or their families, at the expense of the trust estate. This was not pleaded by the plaintiffs as a breach of trust and, indeed, the full facts did not start to emerge until cross-examination in the action; and I think that the facts have not been completely investigated even now, save in the case of Mr. Roberts. To explain the point, I read from the transcript of the judgment:

> "On November 18, 1963, BTL granted to Mr. Roberts and his wife a lease of a two-room flat in Chelsea for a term expiring in 1984 at an annual rent of £425 rising to a maximum of £500, inclusive of rates at the then current level and including also, without any service charge, the supply of hot water and other facilities usual in a block of flats. Mr. Roberts agreed in cross-examination that these terms were more favourable than would have been offered to an outside tenant. The bank was not consulted about, and had no knowledge of, this lease. It amounted to an increase in Mr. Roberts' emoluments without reference to the bank. It is fair to add that the lease was surrendered at the end of 1973."

The plaintiffs seek a declaration that the defendant is liable to make good the loss suffered in consequence of the enjoyment by the directors, or A their families, of residential accommodation at less than the full market value. The defendant says that the plaintiffs are not entitled to this relief because there is no allegation in the statement of claim relating thereto. The plaintiffs reply that they are entitled to an account on the footing of wilful default, and are merely seeking such an account in a restricted form: compare *In re Tebbs, decd.* [1976] 1 W.L.R. 924. B

Wilful default by a trustee in this context means a passive breach of trust, an omission by a trustee to do something which, as a prudent trustee, he ought to have done—as distinct from an active breach of trust, that is to say, doing something which the trustee ought not to have done. If an instance of such wilful default is pleaded and proved, as are a number of such instances in the present case, the court is entitled to order an account on the footing of wilful default. It is otherwise if C the plaintiff has merely alleged and proved one or more active breaches of trust. That does not necessarily entitle a plaintiff to a roving commission, which would be afforded by an account on the footing of wilful default. The distinction between wilful default, in the sense of a wrongful omission entitling the plaintiffs in appropriate circumstances to an account on the footing of wilful default, and an active breach of D trust not so entitling the plaintiffs, can be seen by comparing the judgments in *In re Stevens* [1898] 1 Ch. 162 and *In re Wrightson* [1908] 1 Ch. 789.

I would add a word on the argument which proceeded before me on the question of wilful default. It was suggested by Mr. Sebestyen, for the defendant, that such an account can only be directed where there has been wilful default in the sense of conscious wrongdoing. Indeed, E that invaluable work, *Snell's Principles of Equity,* 27th ed. (1973), seems so to state in the case of personal representatives: see p. 341 and in particular note 51, referring to p. 274. But during the course of the argument at the trial the defendant's counsel disclaimed the proposition that wilful default involved conscious wrongdoing in the context of a claim against a trustee for an account on the footing of wilful default. F For reasons which I have indicated I think that that concession was rightly made. Instances of wilful default having been pleaded and proved, in my judgment the plaintiffs are entitled to the relief claimed in respect of the residential accommodation.

I turn now to the question of interest. It is common ground that interest can be claimed on the compensation which is found due. Dispute only arises on the rate of interest to be charged. In former days a trustee G was as a rule charged only with interest of 4 per cent. unless there were special circumstances. That rate seems to have prevailed as the general rule until recent years. The defendant has helpfully supplied the court with a table of bank and minimum lending rates, and bank deposit rates. Between 1963, the year in which the Old Bailey scheme began, and the present day there have been nearly 80 changes of bank H rate of minimum lending rate and nearly 70 changes in Barclays Bank deposit rate. The bank or minimum lending rate during this period has varied between 4 per cent. and 17 per cent. and deposit rate has varied between two per cent. and 15 per cent. In these days of huge and constantly changing interest rates (the movement being usually upwards so far) I think it would be unrealistic for a court of equity to abide by the modest rate of interest which was current in the stable times of our forefathers.

In my judgment, a proper rate of interest to be awarded, in the absence of special circumstances, to compensate beneficiaries and trust funds for non-receipt from a trustee of money that ought to have been received is that allowed from time to time on the courts' short-term investment account, established under section 6 (1) of the Administration of Justice Act 1965. To some extent the high interest rates payable on money lent reflect and compensate for the continual erosion in the value of money by reason of galloping inflation. It seems to me arguable, therefore, that if a high rate of interest is payable in such circumstances, a proportion of that interest should be added to capital in order to help maintain the value of the corpus of the trust estate. It may be, therefore, that there will have to be some adjustment as between life tenant and remaindermen. I do not decide this point and I express no view upon it. I merely mention it as something which may have to be considered by the trustees and their legal advisers.

I turn to interest on costs. The costs incurred by the plaintiffs in establishing their claims have obviously been very large, and no doubt substantial disbursements have been made from time to time. The plaintiffs ask for an order which will give them interest on a disbursement as from the date of the disbursement, or the date of judgment in the action, whichever is later. I see the force of the arguments which have been advanced to support this claim, but I am not able to make such an order. A defendant cannot be charged with interest on costs before they have been taxed, because until taxation the defendant does not know what he is liable to pay: see *K.* v. *K.* (*Divorce Costs: Interest*) [1977] Fam. 39.

Lastly, the plaintiffs seek taxation on the common fund basis instead of the party and party basis. It is not in dispute that I have jurisdiction to make such an order under R.S.C., Ord. 62, r. 26. Such an order can properly be made against a trustee in exceptional circumstances: see for example *In re Chapman* (1895) 72 L.T. 66. But the usual rule, subject to well-recognised exceptions, in the case of fiduciary, contractual or tortious wrongdoing, is that the defendant pays to the plaintiff only party and party costs. It is not, I think, the policy of the courts in hostile litigation to give the successful party an indemnity against the expense to which he has been put and, therefore, to compensate him for the loss which he has inevitably suffered, save in very special cases. Why this should be, I do not know, but the practice is well established and I do not think that there is any sufficient reason to depart from that practice in the case before me.

Order accordingly.

Solicitors: *Frere, Cholmeley; Simmons & Simmons.*

T. C. C. B.