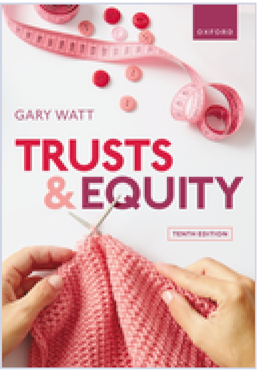

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Gary Watt

p. 440 13. Breach of trust: the personal liability of trustees

Gary Watt, Professor of Law, University of Warwick

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Abstract

The powers enjoyed by trustees are incidents of their legal ownership of the trust property, whereas their duties are incidents of their personal office. The beneficiary of any trust, even if it is a discretionary trust, has *locus standi* (which means 'a place to stand', used to describe a claimant's right to be heard in a court of law) to bring an action against trustees for breach of trust. Common law concepts such as causation are increasingly being introduced to limit trustees' liability for breaches of bare trusts in commercial contexts. This chapter examines the nature and potential extent of trustees' liability for breach of their duties, along with the remedies that are available against trustees when they breach their trust. It also looks at defences that may be available to trustees in breach and, in the absence of defences, whether trustees may be relieved of personal liability.

Keywords: breach of trust, personal liability, trustees, locus standi, remedies, compensation, account, defences, beneficiary

Context

Suppose a solicitor paid out money from the firm's client account before the due date, and therefore in breach of trust, and suppose the money was used to purchase land that proved to be a bad investment. Would the solicitor-trustee be liable for the full loss in value including the effects of a crash in the property market, or only for loss that was solely caused by their mistake? What if the breach took place many years ago—is there a time limit for bringing a claim for breach of trust? Should the trustee be relieved of liability if they acted honestly? The aim of this chapter is to consider 1) the nature and extent of the remedies that are available against trustees when they breach their trust; 2) defences that may be available to trustees in breach, and, in the absence of adequate defences, 3) whether trustees may be relieved of liability.

13.1 Introduction

Trustees' powers are incidents of their legal ownership of the trust property, but their duties are personal obligations arising from their office as trustee. It follows from this that the beneficiaries' principal remedies in an action for breach of trust will be against the trustees personally. This is not to say that individual trustees owe a direct personal obligation to individual beneficiaries: generally speaking, trust obligations are owed by the trustees to the trust, which means to the beneficiaries collectively. A beneficiary, unless she is the sole beneficiary of a bare trust, does not claim that the trustees owe her an individual duty of loyalty or care, she merely claims '*to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law*'.[1] The beneficiary's rights against the trustee survive even where the trustee passes the trust asset to a third party in breach of trust: 'Where an asset is held on trust, the legal title remains capable of transfer to a third party, although this undoubted disposition p. 441 ↵ may be in breach of trust. But the trust rights, including the right to have the legal title held and applied in accordance with the terms of the trust, remain'.[2]

Typically, then, the trust fund or 'estate' mediates the relationship between the trustees and the beneficiaries. This is most clearly seen in the trustees' duty to invest the trust fund fairly in the interests of all classes of beneficiary, as we noted in Chapter 12. However, many trusts do not involve a fund in need of investment. Trusts created in commercial contexts are very often 'bare trusts', in which the trustees' only duty is to hold the trust property to the beneficiary's order and to apply it in accordance with the beneficiary's instructions. A typical example of such a trust is the trust under which a solicitor holds clients' monies. The direct, bi-party nature of such trusts is analogous to the sort of relationships that give rise to contractual and tortious obligations; indeed, it is normal for such trusts actually to arise in accordance with the terms of a contract between the parties. It is interesting to note, therefore, how common law concepts, such as causation, remoteness of damage, and contributory negligence, are increasingly being introduced to limit trustees' liability for breaches of bare trusts in commercial contexts.[3] It is not that commercial contexts automatically call for different rules governing remedies for breach of trust,[4] but that commercial contexts more often give rise to the sort of bare trusts that call for remedies different to the remedies that apply to traditional settlement trusts of the sort typically used in family contexts.

13.1.1 The beneficiaries' right to bring a claim

The beneficiary of any trust, even if it is a discretionary trust, has *locus standi* ('standing') to bring an action against her trustees for breach of trust. This is so whether her interest is vested or contingent upon a condition such as the happening of an event or reaching a certain age. However, a person with nothing more than a speculative hope (a mere '*spes*') of becoming entitled to an interest in an estate has no *locus standi* in relation to that estate; one example is anyone who hopes to be entitled as 'next of kin' to the estate of someone who has not yet died.

p. 442 ↵ Where there is more than one beneficiary interested in the action, the court may, in the interests of efficient justice, make a representation order allowing one or more claimants to represent the interests of the others with whom they have an identity of interest.[5] Such orders were granted to protect the interests of the 800 or so mail-order customers in *Re Kayford Ltd (in liquidation)*,[6] the thousands of investors in *Barlow Clowes International Ltd (in liquidation) v. Vaughan*,[7] and the persons in *Foskett v. McKeown*[8] who had paid deposits on the purchase of land in the Algarve. When an order is made allowing certain members of an occupational pension trust to represent the interests of all the members, the representative action is said to be analogous to a derivative action brought by a minority shareholder on behalf of a company.[9] The court also has power to make a representation order on behalf of an unborn beneficiary.[10] If no representation order is made on behalf of an unborn beneficiary, the judgment of the court may not be binding on the child when it is subsequently born.[11]

It is not only the beneficiaries who have *locus standi* to bring action against trustees who have breached their trust. Trustees also have *locus standi* to bring claims against their co-trustees.[12]

13.1.2 Breach of trust without liability

The title of this chapter indicates that a trustee will be personally liable for breach of trust, but breach of trust does not always lead to liability. Breach will only lead to liability if the breach produced an unauthorized gain for the trustee or caused a loss to the trust. This was starkly illustrated by the *Nestle* case in Chapter 12, where we noted that a trustee was not liable to compensate, because it had not been proved that its breach had caused a loss. As Leggatt LJ stated: '*Loss cannot be presumed, if none would necessarily have resulted.*'[13] It is clear, then, that a trustee can escape liability for imprudently making an investment which by pure chance happens to do well,[14] but even when a trustee *deliberately* breaches his trust, by making an investment that he knows he has no authority to make, he will escape liability unless loss is proved:

> Say, as often occurs, a trustee commits a judicious breach of trust by investing in an unauthorised investment which proves to be very profitable to the trust. A carping beneficiary could insist that the unauthorised investment be sold and the proceeds invested in authorised investments: but the trustee would be under no liability to pay compensation either to the trust fund or to the beneficiary because the breach has caused no loss to the trust fund.[15]

It has even been suggested, somewhat tongue in cheek, that 'the main duty' of a trustee is to commit 'judicious' breaches of trust.[16]

Even where there is no difficulty in establishing that a breach of trust has produced a loss to the trust or an
p. 443 unauthorized gain for the trustee, the trustee might still escape ↵ liability if he can successfully raise a defence to the beneficiary's claim. The defendant may plead statutory limitation or 'laches', both of which are concerned with preventing claims from being brought too long after the occurrence of the alleged breach. Appropriately worded exculpatory clauses in trust instruments may also be relied upon to remove or reduce trustees' liability to make amends for their breach. Most defences operate merely to excuse a breach of trust, but defences which might be said actually to justify the breach include the advance

authority of a court and the advance unanimous consent of the beneficiaries. The various defences are considered later in the chapter. We will also consider the possibility of a trustee being relieved of some or all of his liability in cases where he does not have a defence as such.

13.2 Liability for breach of trust

There are basically two distinct measures of trustee liability for breach of trust. One measure is determined by the loss caused to the trust and is typically remedied by monetary compensation,[17] the trustee's obligation being to restore the trust to the position it was in before the breach;[18] the other measure is determined by the trustee's unauthorized gains and is typically remedied by requiring the trustee to account for those gains.[19] Liability on either measure is personal, which means that the trustee is liable to satisfy the beneficiary's claim out of his personal funds, and the success of the beneficiary's claim is not dependent (as a proprietary claim would be) upon proof that the trustee is still in possession of trust property (including any unauthorized gains). Of course, if the trustee *is* still in possession of the trust property or its traceable proceeds or substitutes, the beneficiaries will also have their usual proprietary rights in the trust property in addition to their rights against the trustee personally in respect of the breach of trust.

The fact that a trustee's liability to compensate losses and account for gains is personal means that in an extreme case liability may bring about the financial ruination of the trustee, even if the trustee's breach was honest.[20] This is exacerbated by the fact that trustees are jointly and severally liable for their joint breaches of trust: each one of the trustees is potentially liable for the entire sum claimed.[21] A trustee is not, however, *vicariously* liable for the defaults of his co-trustees if he was not a party to the breach. A trustee is only liable for his own defaults, whether committed alone or jointly with the other trustees. By the same token, for the purposes of a defence under the Limitation Act 1980 s.21(1)(a) (see 13.4.1.1), a co-trustee is not to be treated as 'party or privy to' another trustee's fraudulent breach of trust unless the co-trustee is proven to have been implicated in the fraud.[22]

p. 444 ↵ It is not unusual for a single breach of trust to give rise to potential liability both to compensate losses and to account for gains. If, for example, a trustee has wrongfully appropriated trust property to his own use, the trust will have suffered a loss and the trustee will have made a gain. Or, to take another example, a trustee might wrongfully have sold a specific item of trust property and made a secret commission on the sale, in which event the beneficiaries may seek its return or compensation for its lost value, as well as requiring the trustee to account for the secret commission. However, in such cases, the remedies of compensation and account will be alternative and 'inconsistent' bases of recovery,[23] which means that the beneficiaries must elect between them before judgment is entered in their favour.[24] So a trustee who misappropriates an item of trust property will not be liable to account both for his gain of that item and for the trust's loss of that item.

Before we continue, it will be useful to clarify the meaning of the term 'account' in the context of trustee liability. The term has two quite distinct meanings: first, there is liability to account for unauthorized gains, mentioned earlier,[25] second, there is account as a method of compensation. Beneficiaries can bring an action for 'an account' at any time. This, as its name suggest, requires the trustees to account for trust assets that ought to be in their hands. If the account falls short, the trustees can then be ordered to account to the trust for the shortfall by reinstating specific assets, or reconstituting the fund, or, in an appropriate case, compensating individual beneficiaries directly. Each of these circumstances is considered in the following sections.

13.2.1 Specific 'restitution'

If trustees distribute or sell a particular trust asset, say 1,000 ordinary shares in Trade Ltd, which they were obliged to retain, their basic obligation is to restore the trust fund to the position it was in before the breach. This may be achieved by specific 'restitution',[26] which is the process of restoring to the trust the asset that has been misapplied. However, if it is not possible to purchase another 1,000 ordinary shares in Trade Ltd, the trustees will be liable to compensate the trust for the value of 1,000 ordinary shares in Trade Ltd,[27] calculated at the date of the court's judgment in the matter.[28]

The same rule applies where the trustees are directed to invest in specific investments—for example, 1,000 ordinary shares in Commerce Co—but instead invest (or leave) the trust money elsewhere. In such a case, they may be charged '*with the amount of the stock which they might have purchased with the money*'.[29] This
p. 445 remedy will be ↵ most attractive to the beneficiaries where the value of the desired stock has risen since the date on which the trustee ought to have purchased it, for the trustee may now be required, at the option of the beneficiaries, to purchase the same stock using only the same amount of trust money as would have been required to make the purchase in the first place.[30] In other words, the trustee will be required to make up the difference between the original and the present purchase price out of his own pocket.

Despite its traditional name, the remedy of specific 'restitution' should not be confused with the more usual meaning of 'restitution', which, as we saw in Chapter 2, is the label attached to the remedial processes by which unjust enrichment is stripped from a recipient. Specific 'restitution' is really specific 'compensation'.

13.2.2 Compensation for loss: general

A loss suffered by a trust will not found liability unless it is shown to have been caused by a breach of trust.[31] Accidents happen; trustees are not insurers of the fund and are under no obligation to account personally for trust property damaged or destroyed by flood or fire or otherwise through no fault of his own. However, although a trustee is not liable for losses that were not the result of any breach of trust, a trustee who has breached his trust may be liable for the consequences if his breach exposes the trust to accidental or incidental damage. The same principal applies to a company director. If, for example, a director uses the company to pay himself unauthorized remuneration, the director will be liable not only for the company's loss of the money paid but also for National Insurance contributions and income tax which, as a result of the breach, the company is required to pay to HM Customs & Exercise and the Inland Revenue.[32]

It is important to recall that a trustee's honesty is no defence to a claim based on a breach of his duty of care. So when a trust suffers a loss, as might be caused by a dishonest agent employed by the trust, the court is sometimes presented with an invidious choice: whether the loss should be borne by the honest trustee or the innocent beneficiaries.[33] The outcome depends upon whether the trustee has breached his trust, however honestly. If the trustee is in breach, perhaps because he failed adequately to supervise an agent who was thereby able to steal trust property, the trustee will bear the loss. If the trustee is not in breach, the loss will fall upon the trust fund.

13.2.2.1 Compensation for breach of trust compared to common law damages

According to Brightman LJ in *Bartlett v. Barclays Bank Trust Co Ltd (Nos 1 and 2)*,[34] compensation for breach of trust is 'not readily distinguishable from [common law] damages except with the aid of a powerful legal microscope'.[35] This is true, in as much as both are p. 446 ↵ monetary awards made by way of remedy for loss. However, it is equally true, as Brightman LJ observed in the same case, that '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'. Whereas a contractual or tortious wrongdoer must compensate the losses suffered by the particular claimant, the trustee's obligation 'is to restore to the trust estate the assets of which he has deprived it',[36] irrespective of the level of harm that particular beneficiaries, or classes of beneficiary, may have actually suffered as a result of the breach.

13.2.2.2 Traditional settlement trusts: the duty to reconstitute the fund

It is worth reciting the following extract from the speech of Lord Browne-Wilkinson in the House of Lords in *Target Holdings v. Redferns*.[37] His Lordship expressly had in mind a case of a breach of trust '*involving the wrongful paying away of trust assets*',[38] but the principle has also been applied to cases of loss arising from negligent investment:[39]

> [I]n relation to a traditional trust where the fund is held in trust for a number of beneficiaries having different, usually successive, equitable interests, (e.g. A for life with remainder to B), the right of each beneficiary is to have the whole fund vested in the trustees so as to be available to satisfy his equitable interest when, and if, it falls into possession … Courts of Equity did not award damages but, acting *in personam*, ordered the defaulting trustee to restore the trust estate.[40]

In *Bartlett v. Barclays Bank Trust Co Ltd (Nos 1 and 2)*,[41] a case of loss caused by poor investment, Brightman LJ acknowledged that in the context of reconstituting the trust fund what is involved is '*in reality compensation for loss suffered*'.[42] Distinguished counsel in that case summarized perfectly the precise nature of the trustee's liability:

> 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 the monetary value of what should have been there had there been no breach of trust.[43]

The significance of the 'estate reconstitution' measure of compensation is that it requires the defendant to restore the trust to the state it was in prior to his breach, even if the consequence may be to overcompensate individual beneficiaries at the defendant's expense. So if, for example, the trustee's breach reduces the level of trust income and thereby has the incidental effect of reducing the tax burden on individual beneficiaries, the trustee's liability is not reduced to take account of individual beneficiaries' tax savings.[44] The trustee will have a valid defence if 'but for' the breach of trust precisely p. 447 the same loss would *certainly* have occurred, but the onus will be upon the trustee to prove that fact. So if a trustee breaches his trust by, for example, storing trust-owned antiques on display in his own home, he will suffer the full consequences of any accident, such as his house being burned to the ground, that befalls the antiques by reason of their being in his house.[45]

13.2.2.3 Bare trusts: direct equitable compensation

According to Lord Browne-Wilkinson in *Target Holdings v. Redferns*,[46] the duty to compensate by restoring the trust fund (what we have called the duty of 'estate reconstitution') which applies to subsisting settlement trusts will normally have no application to a settlement that has come to an end leaving a remainder beneficiary solely entitled to the fund.[47] Provided that the remainder beneficiary is a competent adult, the trustee is no longer under a duty to reconstitute the trust fund in the event of a breach of trust causing loss; instead, he is under a duty to compensate the beneficiary directly for the loss. His Lordship illustrated the point by reference to the case of *Bartlett v. Barclays Bank Trust Co Ltd (Nos 1 and 2)*[48] where, by the date of judgment, some of the interests settled by the trust deed had become absolutely vested in possession, with the result that compensation was payable directly to the beneficiaries, rather than indirectly via the fund. This duty to compensate directly also applies to any other sort of bare trust, such as those that frequently arise in commercial contexts. The trust in the leading case *Target Holdings*[49] was of this kind.

The claimant in *Target* was a finance company that had entered into an arrangement to advance a loan secured by way of mortgage on a commercial property. The defendant was a firm of solicitors instructed by the claimant to act on its behalf in connection with the transaction. The defendant firm had also been instructed by the borrower, who had informed the claimant that the commercial property (the intended security for the loan) had been valued by a firm of surveyors at £2m. The borrower failed to reveal that it had, in fact, paid only £775,000 for the commercial property. Relying on the false valuation, the claimants gave the solicitors £1.5m to be held on bare trust until completion of the mortgage in its favour, at which point, the defendant firm was authorized to pay the loan monies to the borrower. In the event, the defendant firm advanced the monies to the borrower before completion of the mortgage and untruthfully informed the claimant that the mortgage had already been completed. The mortgage was not, in fact, completed until almost one month later. When the claimant decided subsequently to enforce its security and sell the commercial property, it found that the property was worth (at that time) only £500,000. The claimant therefore brought an action against the solicitors alleging, *inter alia*, breach of trust and claiming an account for the entire advance of £1.5m. The Court of Appeal held that, in the circumstances, the defendant p. 448 firm was liable to replace all of the monies paid away in breach of trust, subject only to the claimant giving credit for any monies recoverable on the sale of the commercial property. The solicitors appealed.

The House of Lords held that the rule applicable to traditional settlement trusts, which requires trustees fully to reconstitute the trust fund to its original state, has no application to bare trusts arising in commercial contexts. On the contrary, the quantum of compensation should be assessed at the date of judgment as the figure necessary to put the beneficiary in the position he would have been in if there had been no breach. On the facts the claimant had not shown that it was entitled to any compensation since it had obtained precisely that which it would have acquired 'but for' the breach of trust, namely, a valid security for the sum advanced.

The decision in *Target* establishes that a common-sense approach to causation should be applied to bare trusts in a commercial context. If, at the date of the court hearing, the facts demonstrate, with '*the full benefit of hindsight*',[50] that the claimant's loss would have been incurred even if there had been no breach, the trustee will not be liable. Correspondingly, if the facts demonstrate that part of the loss would have occurred but for the trustee's breach, the trustee will be liable to compensate *only* to the extent of the part he caused even though transfer of the entire sum had been in breach of trust.[51] The previous rule, which had required a trustee in breach to compensate for all losses incurred through the tainted transaction, even if they would have occurred regardless of his breach,[52] was overruled.

Target has been followed by the Supreme Court in *AIB Group (UK) plc v. Mark Redler and Co Solicitors* (hereafter '*AIB*').[53] In this case the claimant bank sought to recover compensation from a firm of solicitors that had acted negligently in a remortgage transaction. AIB had loaned £3.3m to Mr and Mrs Sondhi to enable them to remortgage a house then worth £4.25m. The house was subject to a first charge in favour of Barclays Bank plc. The charge secured a total debt of £1.5m owed by the Sondhis and recorded in two different accounts at the bank. AIB made a loan on condition that Barclays' prior mortgage would first be paid off and that AIB would take a first charge over the house. Mark Redler solicitors agreed to carry out the instructions, but they mistakenly paid off only one of the Barclays' debt accounts. Realizing their mistake, they used AIB's money to pay off the second account, in the sum of £309,000, but because of the mistake AIB's charge did not have priority to secure that part of the debt. The Sondhis subsequently defaulted on their repayments and Barclays repossessed the house and sold it for £1.2m. AIB received the first slice of proceeds (£867,697), but they claimed that the solicitors had caused their entire loss (which now stood at about £2.5m). The solicitors admitted the breach of trust but argued, relying on *Target*, that they should be liable to compensate only for such losses as were caused by their failure to register a first charge to secure
p. 449 ↵ the debt of £309,000 (which in retrospect could now be seen to have caused a loss of about £275,000). The solicitors argued that they should not be responsible for losses they did not cause, including losses caused by the general decline in the market value of land. A key difference between this case and *Target* was that in *Target* the solicitors did what they were meant to do, only late, whereas in *AIB* the solicitors never did register a first charge to secure the £309,000. In fact they tried to keep their error secret. Despite these differences, the Supreme Court held that the solicitors should not be turned into insurers against market risk, but should only compensate for losses which would not have occurred but for their breach. Their Lordships confirmed that the 'the basic *right* of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law' and clarified that where there has been a breach of that duty 'the basic *purpose* of any remedy will be either to put the beneficiary in the same position as if the breach had not occurred or to vest in the beneficiary any profit which the trustee may have made by reason of the breach' (emphasis added). In the same paragraph their Lordships made the following broader conceptual observation which is very interesting in terms of the nature of the strict rules that apply to trustees:[54]

> Placing the beneficiary in the same position as he would have been in but for the breach may involve restoring the value of something lost by the breach or making good financial damage caused by the breach. But a monetary award which reflected neither loss caused nor profit gained by the wrongdoer would be penal.

Hence their Lordships decided that AIB's recovery should be limited to the loss that the solicitors' breach had actually caused, which at the date of judgment was around £275,000, plus interest from 2011, which was the date of sale of the house and the commencement of the proceedings. The interest in such a case will be simple, not compound.[55]

There were dicta in *Target* to suggest that cases such as these are considered to be analogous to cases in which the common law tort of negligence is alleged, which is why an analogous common-sense test should be applied to determine whether the defendant's wrongdoing had caused harm. However, their Lordships in *AIB* made the point of stressing that, however apparent and appealing the analogy might be, equitable reasoning is quite different to common law reasoning: 'It follows that the liability of a trustee for breach of trust, even where the trust arises in the context of a commercial transaction which is otherwise regulated by contract, is not generally the same as a liability in damages for tort or breach of contract.'[56] In any case, if one were going to use tort as an analogy, the analogy had better be as accurate as possible. If, for example, a fiduciary defendant had acted dishonestly the appropriate analogy would be to the common law tort of deceit and not the tort of negligence.[57] In such a case, the fiduciary defendant will be liable for any losses to which his dishonest acts or omissions were a contributory cause, even if the losses might have been incurred despite his default.[58]

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13.2.2.4 Criticism of *Target Holdings* and *Redler*

Lord Millett, writing extra-judicially, has been strongly critical of the reasoning in *Target Holdings* and critical of the Supreme Court in *Redler* for following *Target*, especially where the Supreme Court in *Redler*:

> confirmed the distinction between cases where the trust is still continuing and cases where it has come to an end on the distribution of the trust fund; the notion that equitable compensation is compensation for loss; and the consequent introduction of a causation requirement. These are all heretical. But the underlying error lies in categorising the remedy as compensatory when it is not. Although the case was decided as a question of causation, it is really a case about remedies.[59]

Lord Millett went on to list the 'principal remedies which equity makes available for breach of an equitable obligation' as being (i) rescission; (ii) specific performance; (iii) account and orders to make good any deficit; and (iv) equitable compensation. His lordship points out that the 'first three are primary remedies' whereas the fourth 'is a secondary remedy, granted when it would be impractical or unjust, particularly to third parties, to grant the primary remedy'.[60] It follows that, in his lordship's opinion, the Supreme Court was wrong in *Target* and *Redler* to resort to equitable compensation as a primary remedy. Lord Millett writes, further, that the 'primary remedy for breach of trust is not equitable compensation but account, and the orders which follow the taking of the account are not compensatory but restorative'.[61] It will be interesting to see if the Supreme Court takes the next opportunity to respond to these fundamental criticisms of the current approach. In the meantime, the Supreme Court has consolidated a tort-focused approach to professional negligence generally.[62]

13.2.2.5 Remoteness and contributory fault: the relevance of the claimant's own behaviour

We have seen that, in the case of a bare trust, the date for determining causation is the date of judgment and that the extent of the losses caused by the defendant is determined by taking a common-sense retrospective view of all of the facts, but does this mean that the claimant's own behaviour should be relevant when determining the extent of the ↵ losses caused by the defendant's breach? On any p. 451 common-sense view the claimant's behaviour ought to be relevant, but the orthodox approach to trustee liability was, as we have seen, to focus exclusively upon the behaviour of the defendant trustee. It has been said, for example, that equitable compensation '*is not limited to common law principles governing remoteness of damage*'.[63]

Subsequent decisions have demonstrated, however, that there is growing judicial acceptance of common law concepts (or language) in the determination of the extent to which a trustee is liable for losses of which his breach was a contributory cause. In *Nationwide BS v. Various Solicitors*,[64] for example, Blackburne J held that the conduct of the person to whom a fiduciary duty is owed could be relevant and that there may come a point, following the breach of fiduciary duty, at which the loss would be 'too remote' to be said to flow from the breach. His Lordship seems to have had a more loose idea of 'remoteness' in mind than the technical idea of 'remoteness of damage' that applies in the common law of negligence.[65] He added that he could see no reason why the inquiry should be concerned only with the behaviour of the defendant: '*I do not see why equity should close its eyes to what the beneficiary would have done if there had been no misrepresentation or the appropriate disclosure had been made.*'[66]

The litigation in *Nationwide BS v. Various Solicitors* concerned a number of mortgages made by the claimant in which the defendant firms had acted on behalf of the claimant and, as is quite usual, on behalf of the borrower at the same time. All of the mortgages had unusual features, such as an agreement by the borrower immediately to sell the land onwards after acquiring the mortgage monies, or a misrepresentation by the borrower as to the true value of the land. The claimant had made losses on all of the mortgages and claimed that it would not have made these losses if the solicitors had discharged their duty to disclose the unusual features of the various mortgages. In some cases, in which the defendant firms were held liable in the common law tort of negligence, their liability was reduced because of the contributory negligence of the claimants (elements of contributory negligence included the claimants' failure to exercise industry-recommended levels of prudence in lending, including failure to emphasize the adequacy of underlying security and the borrower's financial well-being). However, Blackburne J refused to accept that liability for breach of trust or fiduciary duty might be similarly reduced to take account of the beneficiaries' contributory fault. In a subsequent case, Patten J agreed that the plea of contributory negligence '*has no application to liability for breach of trust or for breach of fiduciary duty*'.[67] This accords with the position in Australia, where the focus in this context is still exclusively upon the wrongdoer,[68] but it contrasts with the approach in New Zealand[69] and Canada,[70] where ↵ liability for p. 452

breach of trust or fiduciary duty may be reduced to take account of the beneficiaries' contributory fault.[71] Matthew Conaglen contends that '[i]*t would be anathema to the nature and function of fiduciary liability for* [contributory fault] *pleas to be accepted*' to reduce a fiduciary's liability,[72] but this extreme position is somewhat at odds with Conaglen's own theory that fiduciary duties are merely subsidiary to non-fiduciary duties (see Chapter 10). If fiduciary duties were utterly free-standing duties established in the public interest to prevent abuse of trust, to reduce a fiduciary's liability on account of the principal's fault ought then to be prohibited or wholly exceptional, but if the most important duties owed by a fiduciary to their principal are non-fiduciary duties, as Conaglen argues, it is then not difficult to imagine cases in which the fiduciary's personal liability ought in fairness to be reduced to take account of the principal's contribution to their own loss. To reduce a trustee's liability on account of a trust beneficiary's fault will not be appropriate to all trusts, but a compromise may be to admit the plea in simple cases of bare trust, since bare trusts involve a tort-like direct duty of care owed by one party (the trustee) to another (the sole adult beneficiary).[73]

13.2.3 Liability to account

Account is a procedure and a remedy. As a procedure, it involves the production of the trust's financial accounts and requires the trustee to give an account of his dealings with the trust property. As a remedy, it requires the trustee to account personally to the trust for any trust property or money which, according to the procedure for an account (or otherwise), is, or ought to be, in the trustee's possession or under his control. The beneficiary can 'falsify' any unauthorized transactions and 'surcharge' the account for any shortfall.[74]

A trustee account can be calculated in one of two ways: calculation on the normal 'common' basis, or calculation 'on the basis of wilful default'.

13.2.3.1 Summary order for an account

When proceedings against a trustee involve the taking of an account, any party can apply to the Chancery Division of the High Court for an order directing the requisite accounts and inquiries to be undertaken on a summary basis—that is, without a full hearing of the merits of the case.[75] Provided that the trustees have acknowledged service, or the court otherwise sees fit, the court can enter summary judgment against any trustee for the amount certified on the account whenever the court adjudges that there is no reason for the case to proceed to a full trial. Summary judgment is unlikely in any case where the trustee has a real prospect of making out a successful defence.

p. 453 ### 13.2.3.2 The common basis of account

This basis of account requires a trustee to account personally for trust property that is, or ought still to be, in his possession. The fact that the duty to account is 'personal' means that it extends to trust property that has passed through the trustee's hands, whether or not it remains in his hands at the date of the account. The fact that an account on the common basis extends to trust property that 'ought' still to be in the trustee's possession means that it can be used to establish a trustee's liability to compensate the trust for any losses caused. The common basis of account does not itself allege wrongdoing, but where a shortfall is established, the beneficiaries can then claim an account on the basis of wilful default.[76] Indeed, it has been suggested that the popularity of equitable compensation in relation to actions against fiduciaries '*tends to obscure the fact that the account remains the main method of compelling trustees to pay compensation for breach of trust*'.[77]

13.2.3.3 Accounting on the basis of wilful default

Account on the basis of wilful default must be specifically pleaded or further inquiry requested.[78] The burden is on the claimant to prove the alleged default, but, if proved, the corresponding benefit to the claimant is that the defendant will be subjected to a more intensive inquiry. The defendant will be liable to account not only for property and monetary gains that he has, or has had, in his possession or under his control, but also for that which he could, and should with reasonable diligence, have had in his possession or under his control.[79] Suppose, for example, that a trust owns a house that the trustee has neglected to rent out, so that it stands empty. The beneficiaries have the option of seeking compensation on the basis of wilful default for rents that ought to have been received by the trustee acting properly.

Although an account on the basis of wilful default must be specifically pleaded and proved,[80] the courts can order similar accounts on their own initiative. Thus, in *Re Howlett*,[81] a trustee, who for several years had been using trust-owned land without paying rent, was held to be in possession of, and liable to account for, 'notional' trust property in the form of unpaid rent and in *Re Brogden*,[82] the trustee was personally liable to account for funds which he ought to have 'got in' for the trust, but did not. In neither case was an account on the basis of wilful default specifically pleaded.

13.2.4 Interest awarded on sums awarded

Courts have discretion to award interest on any sum adjudged payable to a successful claimant. When judgment is awarded against a trustee in an action for breach of trust, the type of interest will be simple interest unless it is alleged that the defendant has committed a fraud or made an unauthorized gain, in
p. 454 which case the court may ↵ award compound interest.[83] (At present, the courts have no power to award compound interest on common law debts or damages.)[84] Simple interest is awarded at a fixed rate for every year that the judgment debt remains outstanding, the rate of interest lying in the discretion of the court.[85] Compound interest is interest on interest. In practice, this means that simple interest will be awarded on the judgment in the first year, with the first year's interest being added to the judgment debt. In the second year, the same fixed rate of interest will be charged on the combined sum of judgment debt plus the interest from the first year; and so on in future years.

Compound interest is not awarded as a punishment.[86] The object of the award is to ensure that the trustee does not retain any unauthorized profit at the expense of the trust.[87] This is why it is routine for the court to consider an award of compound interest on the judgment debt when a trustee or fiduciary is required to account for unauthorized gains.[88] In fact, it has even been suggested obiter that compound interest should be limited to cases in which the trustee or fiduciary has used unauthorized gains in the course of his own trade or business,[89] but that is probably a restriction too far. However that may be, it is certainly the case that, whenever a defendant trustee improperly uses trust assets for the purposes of his own trade or business, the claimant must elect either to take the portion of trade profits made with trust assets or compound interest on the account for trust assets so used.[90] To recover both would be to give the claimant a double satisfaction.[91] Having said that, '*the court will think hard before enforcing an election against the plaintiff where the trustee has deliberately loaned trust money (in breach) to himself and to others*'.[92]

If the claimant fails to establish that the defendant was a trustee or fiduciary, an award of compound interest will not be possible. The appropriate award will be simple interest, as if for a judgment debt at common law.[93] Thus in *Westdeutsche Landesbank Girozentrale v. Islington LBC*,[94] where it was held that the recipient of monies paid under a void contract did not hold those monies on a resulting trust, the House of Lords held that, in the absence of fraud or a fiduciary relationship, the proper award was of simple interest
p. 455 only.[95] This rule has since been relaxed. In *Sempra Metals Ltd (formerly ↵ Metallgesellschaft Ltd) v. IRC*,[96] it was held by a bare majority of the House of Lords that the court has power to make an award of compound interest in a claim for restitution where such an award is necessary to achieve full justice for the claimant. *Sempra* arose when numerous taxpayers sought restitution of tax paid after a decision of the Court of Justice of the European Communities held certain UK tax provisions to be in contravention of Art. 52 (now Art. 43) of the EC Treaty. It was held that the detriment suffered by a taxpayer by the premature payment of tax was loss of use of the money for the period of prematurity and such loss included interest paid on borrowing substitute money during that period. Alternatively, if the taxpayer's reparation claim was framed in restitution, the Revenue had been unjustly enriched by the tax and by interest earned on it. Accordingly, an award of compound interest 'was necessary to achieve full restitution and, hence, a just result'.[97]

It was held in another case that there is no jurisdiction to award compound interest against a fiduciary on damages for deceit unless the deceit relates to the use of a fund held by the fiduciary, since the purpose of the award of compound interest is to ensure that the defendant does not profit from his breach.[98] When the same case went to appeal, it was indicated that the essentially contractual nature of the council's rights (in *Westdeutsche*) might have barred the award of compound interest even if the claimant had been able to establish fiduciary liability alongside liability in contract.[99]

13.2.5 Costs

The general rule of trusts law is that a trustee is entitled to be indemnified out of the trust fund whenever he embarks upon litigation in connection with trust business, but where the trustee is held liable for breach of trust, the general rule of costs in hostile litigation applies—namely, that the unsuccessful party must pay the costs of the successful party.[100] In such a case, the court has discretion to reduce the award of costs against the trustee if, for example, he has remedied, or attempted to remedy, his breach before judgment[101] or can point to gains that he has made for the trust.[102] Trustees who are solicitors may be ordered to indemnify trustees who are not,[103] and an entirely innocent trustee who is joined as a defendant to an action against the trustee who committed the breach may be indemnified out of the trust fund in respect of any costs that he was unable to recover from the trustee in breach.[104]

13.2.6 Tax

When the value of a trust fund is reduced because of a trustee's breach of trust, it will very often follow that the tax liability of the beneficiaries will also be reduced. If, for example, a life tenant receives less income due to the trustee's breach, she will pay less ↵ income tax. This raises the question of whether a trustee will be permitted to reduce his liability to compensate by the amount of tax that his breach has 'saved' the beneficiaries. The courts have tended to answer that question in the negative.[105] In *Bartlett v. Barclays Trust (No. 2)*,[106] Brightman LJ stated that:

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> the tax liability of individual beneficiaries … do[es] 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.[107]

The rule prohibiting deduction of tax seems fair enough in any case in which a trustee has deliberately misappropriated trust assets for his own benefit or for the benefit of a third party, as was the case in *Re Bell's Indenture* in which Vinelott J applied it,[108] but it does seem somewhat harsh in any case in which the breach of trust was merely negligent, as it was in *Bartlett* itself.

Of course, not every fiduciary is a trustee of the traditional sort, having a duty to manage and invest a trust estate (rather than merely a direct duty to their principal). Consider, for example, a commercial fiduciary agent who is called to account for unauthorized gains. *O'Sullivan v. MAM Ltd*[109] was such a case. There, the fiduciary (a manager who had profited from an unfair contract obtained by his undue influence over a naive young pop star) was given credit for tax that it had already paid on its improper profits and which (having been paid more than six years ago) it would be unable to reclaim from the Inland Revenue. However, it was not permitted to deduct tax that it still had time to recover from the Inland Revenue.[110]

13.3 Election between alternative inconsistent remedies

An election is the choice that any claimant must make when presented with two 'mutually exclusive' courses of action. Two types of election are of special relevance to cases of breach of trust, both of them having a 'procedural' rather than a 'substantive' quality. The first is the choice whether or not to pursue a remedy at all. Thus beneficiaries must decide whether to avoid a voidable transaction (such as self-dealing by their trustee),[111] whether to claim unauthorized profits made by their trustee from his position of trust,[112] and whether to complain when their trustee has used trust funds to make an unauthorized purchase of an asset.[113] The second type of election is the choice between alternative inconsistent remedies, the classic instance being the choice between the remedy of ↵ account and the remedy of compensation where the trustee has misappropriated trust property to his own use.[114]

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The second type of election is our main focus here. The primary reason why the claimant is required to elect between inconsistent alternatives is simple fairness between the parties,[115] for an election will prevent the 'double satisfaction' of the claimant. Suppose that a trustee were to steal an antique vase from his trust. It would clearly be unfair to require him to return the vase in an action for specific 'restitution' (or to return its value in an action for an account) and *in addition* to require him to compensate the trust for the loss of the vase. The claimant must choose between an award based on the trustee's gain and an award based on the trust's loss. However, the doctrine of election is not concerned solely with fairness between the parties to the litigation; it is also concerned with the wider public interest in the conduct of judicial proceedings.[116] The doctrine of election prevents two logically inconsistent awards appearing in the same judgment and therefore prevents the judicial process from being brought into disrepute.

If judgment is mistakenly entered before an election is made, the claimant will still be required to make an election in order to prevent a double satisfaction. This is what occurred in the leading case, *Tang Man Sit (decd) (personal representative) v. Capacious Investments Ltd*[117] Tang was the owner of land and a party to a joint venture for the building of houses on it. As part of the joint venture, he agreed to assign some of the houses to the claimant after completion of the building works. No assignment was made. Instead, Tang let out the houses as homes for the elderly without the claimant's knowledge or approval. The presence of the tenants in the flats produced rents, but it reduced the letting value of the flats; their presence therefore produced a gain and caused a loss. Accordingly, the claimant sought to recover the unauthorized rents and to be compensated for lost use and occupation (and diminution in the value) of the property due to wrongful use and occupation. The judge entered judgment in the claimant's favour in respect of both elements—the gain and the loss—before the claimant had had the opportunity to consider fully its preferred remedy. The claimant was still required to make an election between the two remedies, not only to prevent a 'double satisfaction', but also to prevent an internally inconsistent judgment from remaining on the public record. Clearly, an award could not be permitted to stand which, at one and the same time, assumed the flats were *vacant* for the purpose of assessing the claimant's loss and *occupied* for the purpose of assessing the defendant's gain.

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13.4 Defences

When a trustee is called upon to account for unauthorized gains, it is no defence for him to show that the trust has suffered no loss;[118] and that, when a trustee is called upon to compensate a loss caused to the trust, it is no defence for the trustee to show that he has made no gain.[119] There are, however, a number of defences that trustees may raise to actions for breach of trust.

13.4.1 Limitation of actions

The Limitation Act 1980 lays down time limits within which certain legal actions must be commenced if the cause of action is not to be lost. The Act is the latest in a long line of statutes of limitation which give effect to the public interest in an end to civil litigation (*interest reipublicae ut sit finis litium*) and the related public interest in certainty of proprietary title, which requires that, after a sufficient time, the possessor of property should be presumed to be entitled to it, so as to be 'quieted' in possession.[120]

On 9 July 2001, the Law Commission for England and Wales published a report recommending reform of the law relating to the limitation of actions.[121] The report was accompanied by a draft Civil Law Limitation Bill, but in 2009 the Government announced to the House of Commons that it would not be taking the reforms forward.

13.4.1.1 The limitation period for breach of trust

Ever since the Limitation Act 1623, the general limitation period for a breach of trust has been six years. As the 1980 Act now recites: '*an action by a beneficiary to recover trust property or in respect of any breach of trust shall not be brought after the expiration of* six years *from the date on which the right of action accrued.*'[122] Certain cases are not subject to this six-year period. Cases excepted by the statute itself include cases of '*fraud or fraudulent breach of trust to which the trustee was a party or privy*',[123] cases where the claimant is under a disability, and cases where the defendant concealed the cause of action. Cases where the trust property, the proceeds of trust property, or notional trust property[124] are still in the possession of the
p. 459 trustee or have been ↵ converted to the trustee's use are also excepted.[125] A further exception, recognized by the courts, is breach of the self-dealing and fair dealing rules.[126]

Where an action is brought by the Attorney General against the trustees of a charity, the Limitation Act has no application, because the 'beneficiary' of a charitable trust is 'the public at large'[127] and it cannot sensibly be said that a cause of action has 'accrued' to the public at large as that term is employed in the Limitation Act.

13.4.1.2 Accrual of the right of action

The right of action may accrue to different beneficiaries at different times. Under a traditional settlement trust 'for A for life and B in remainder', B's interest will not vest in possession until A's death. Accordingly, if the trustees commit a breach of trust during A's lifetime, A will have six years within which to bring an action for breach of trust, but time does not begin to run against B until B's interest falls into possession at the date of A's death.[128]

13.4.1.3 The disability exception

Infants and persons of unsound mind are treated as being under a disability for the purposes of the Act.[129] If the claimant was under a disability at the date on which the right accrued to him, he may bring his action within six years from the date on which he ceased to be under the disability.[130] This rule applies even if he ceases to be under the disability by reason of death, because in that case, his personal representatives may bring the action on behalf of his estate.

13.4.1.4 The concealment exception

If a trustee deliberately conceals any fact relevant to a right of action against him, the period of limitation will not begin to run until the claimant becomes aware of the concealment.[131] To be 'deliberate', concealment need not be dishonest—it suffices that the concealment was intentional.[132] Concealment is only relevant where it is the intentional act of the defendant; concealment by another party is not sufficient to disapply the limitation period. This is demonstrated by *Thorne v. Heard*.[133] Heard was the first mortgagee of certain land and Thorne was second mortgagee of the same land. The land had been sold and the solicitor employed by Heard paid off the first mortgage from the proceeds of sale. The solicitor should then have accounted to Thorne for part of the balance. Instead, he kept that part of the proceeds to himself and continued secretly to pay off the second mortgage by the usual instalments. Thorne had a right of action against Heard, because Heard's agent (the solicitor) had failed to hand over the proceeds of sale. p. 460 However, Thorne's right of action was held to be time-barred, ↵ because it had been concealed, not by Heard, but by Heard's solicitor. Heard could not be imputed with the consequences of his agent having acted fraudulently and beyond his authority.

13.4.1.5 The 'trustee still in possession of trust property' exception

According to s. 21(1)(b) of the Limitation Act 1980, no period of limitation under the Act shall apply to actions 'to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use'. However, the statute does place a limit on trustees' liability for actions brought under this section: a claim brought after the limitation period has expired against a trustee who is also a beneficiary under the trust is limited to property in excess of that trustee's proper share under the trust.[134]

The rationale behind s. 21(1)(b) may be that a trustee in possession of trust property is under an ongoing obligation to account for that property to the beneficiaries of the trust. When Romer J applied the old Statute of Limitations[135] against a husband who held his wife's property as a trustee, his Lordship observed that he '*was her trustee at first, and never ceased to be her trustee*'.[136] In a sense, therefore, a fresh duty to account arises each day and the corresponding cause of action accrues to the beneficiary on a daily basis. A limitation period can have no sensible application to this sort of situation, hence its express exclusion by s. 21(1)(b).

In *Re Howlett*,[137] the beneficiary of a trust waited for more than six years before bringing an action for an account against the trustee's estate. The complaint was that the trustee had been using trust-owned land without paying rent and was therefore liable for several years' unpaid back rent. The beneficiary had waited for so long, because the trustee in question was his own father and he had been reluctant to litigate the matter while his father was alive. It was held that the claimant was not subject to the usual limitation period, because the trustee's estate was still in possession of 'notional' trust property in the form of unpaid rent.

In *Nelson v. Rye*,[138] the defendant was an agent who, in the words of Millett LJ in the later case of *Paragon Finance plc v. D. B. Thakerar & Co (a firm)*,[139] was:

> entitled to pay receipts into his own account, mix them with his own money, use them for his own cash flow, deduct his own commission, and account for the balance to the plaintiff at the end of the year.[140]

Millett LJ observed (in *Paragon*) that an agent of this sort is not a constructive trustee, even if he is in a fiduciary relationship with the person to whom he must account, since a trustee is, by definition, required p. 461 to keep trust money separate from his own.[141] ↵ Accordingly, such an agent does not have trust property within his possession and is able to rely upon the usual six-year limitation period applicable to the personal duty to account. His Lordship also observed that certain types of constructive trustee never actually commit a ‘breach of trust’ properly so-called and are therefore not subject to the onerous ‘trustee still in possession of trust property’ exception,[142] since that exception applies to the six-year limitation period for breach of trust.[143] Far from being liable for breach of trust, ‘constructive trustees’ of this sort become ‘constructive trustees’ because they have breached some other duty, such as the fiduciary duty not to misappropriate their employer’s property.[144] This was the situation in *First Subsea Ltd v. Balltec Ltd*,[145] where the defendant company director resigned and set up a rival company which competed for tenders against the director’s former company. The Court of Appeal upheld the judge’s finding that the defendant director had not breached an existing trust of any assets held by him for the claimant and that he only became a nominal or formulaic ‘constructive trustee’ of gains acquired after his breach of fiduciary duty. Their lordships therefore concluded that the judge had properly held that s. 21(1)(b) did not operate to exclude the limitation period. However, the judge did hold, applying s. 21(1)(a), that by reason of his fraud the defendant should be barred from claiming that the limitation period had passed. The Court of Appeal also approved this reasoning. Their lordships noted that, following the decision of the Supreme Court in *FHR European Ventures LLP v. Cedar Capital Partners LLC*,[146] a person who makes an unauthorized gain in breach of fiduciary duty is deemed to hold the gain on constructive trust for his principal and therefore cannot claim that the limitation period has expired. Such a constructive trustee should be contrasted with defendants who are sometimes said to be a ‘constructive trustee’ but never actually hold trust property and therefore never commit a breach of trust, for example the defendant who dishonestly assists in a breach of trust.[147]

It is not always straightforward to identify who is, and who is not, a constructive trustee for purposes of the Limitation Act.[148] In *Martin v. Myers*,[149] the issue was whether a surviving cohabitee who remained in the home after the death of her partner had become a constructive trustee of the property for their children (who were entitled on her partner’s intestacy) so as to be barred under s. 21(1)(b) from relying on the Limitation Act 1980 to claim title to the house by long possession. It was held that the surviving cohabitee never became a constructive trustee for her children, because her conscience was never affected by knowledge of any entitlement that her children might have in the house.

13.4.2 Time bars ‘by analogy’ to the Limitation Act 1980

Where equity exercises a concurrent jurisdiction (giving the same or corresponding relief) as the common law, a claim under that equitable jurisdiction will be time-barred by analogy to the time-bar under the Act
p. 462 in relation to the comparable common law ↵ jurisdiction.[150] Thus, in *Coulthard v. Disco Mix Club Ltd*,[151] an equitable claim based on breaches of fiduciary duty by way of deliberate and dishonest under-accounting, arising from facts analogous to those which would give rise to an action in fraud at common law fraud, was held to be subject to the limitation period for common law fraud.

In *P & O Nedlloyd B V v. Arab Metals Co*,[152] the Court of Appeal concluded that, in claims for the equitable remedy of specific performance, it is never appropriate to apply a limitation period by analogy to the common law, because specific performance has no common law counterpart.[153] In reaching this conclusion, Moore-Bick LJ observed that the facts giving rise to specific performance are not always the same as those giving rise to contractual damages for breach of contract,[154] noting in particular that a contract is specifically enforceable from the moment it is made, with the result that the cause of action would accrue then and the six-year period might run its course before there is even any suggestion of breach. In other situations, the courts have been more willing to find an analogy between common law damages and equitable compensation for the purposes of limitation. For example, where trust monies have been improperly paid away by a trustee the situation may be sufficiently analogous to a claim at common law for a 'liquidated pecuniary claim'.[155] This was the opinion of the majority of the Court of Appeal in *Barnett v. Creggy*,[156] although on the facts of that case their lordships held that the claim for equitable compensation for breach of trust and breach of fiduciary duty was more akin to a claim in contract for breach of a duty of skill and care than a right of action to recover a liquidated pecuniary claim.

13.4.3 Laches

The doctrine of laches[157] bars an action by reason of the 'staleness' of a claim in situations in which the statutory limitation period does not apply either expressly or by analogy. The doctrine '*renders it necessary to consider the time which has elapsed and the balance of justice or injustice in affording or refusing relief*.'[158] The doctrine also applies where the Act expressly disapplies the usual statutory limitation period, as it does, for example, where the trustee is still in possession of trust property.[159] A beneficiary's p. 463 claim to recover property from the trustee of an express trust will not be barred by laches unless there has been a breach of trust giving rise to a cause of action, but a claim to assert proprietary rights under a constructive trust might be barred by laches, regardless of the merits of the claim.[160]

The modern formulation of the doctrine holds that what is required is 'a broad approach, directed to ascertaining whether it would in all the circumstances be unconscionable for a party to be permitted to assert his beneficial right'.[161] According to this formulation, the public interest has nothing to do with the doctrine. It is true, of course, that, after long delay, '[i]t is immaterial to the public at large whether the estate belongs to A or B', as Lord Redesdale put it, but he immediately went on to say that 'it is material, that the person in possession, should be quieted in that possession'.[162] This interest in 'quiescence of title' is a public interest as much as it is a private one and, if one goes a little further back in the authorities, it is clear that laches was deeply concerned with the public interest in bringing civil dispute to an end:

> A Court of Equity, which is never active in relief against conscience, or public convenience, has always refused its aid to stale demands, where the party has slept upon his right, and acquiesced for a great length of time … '*Expedit reipublicae ut sit finis litium*,' is a maxim that has prevailed in this court in all time.[163]

The irony is that these earlier formulations of the doctrine, which take into account the public interest as well as the private interests of the parties, are, at first blush, better suited to the modern system of civil litigation, with its emphasis on efficiency, than is the modern formulation of the doctrine of laches with its emphasis on private justice between the parties.[164]

13.4.3.1 Reform of laches

At present, the doctrine of laches only applies to breaches that are not subject to a statutory limitation period, of which the most significant are those committed fraudulently, those involving an infringement of the rules on 'self-' or 'fair' dealing, and cases in which the trustee is still holding trust property. However, under the new Limitation Act,[165] these three situations will be subject to the standard statutory limitation periods of three and 10 years, respectively, so the new Limitation Act will reduce significantly
p. 464 ↵ the circumstances in which the doctrine of laches, as currently understood, will apply to breaches of trust. This is despite the assertion in the draft Limitation Bill that nothing in the proposed new Limitation Act will affect '*any equitable jurisdiction to refuse relief on the ground of delay, acquiescence or otherwise*'.[166]

13.4.4 Release, acquiescence, concurrence, and instigation

A beneficiary may, by his own acts and omissions, lose his right to take action against a defaulting trustee.

The most straightforward method of precluding a right of action is to execute a formal release or confirmation: the former releases the trustee from liability; the latter confirms the righteousness of the trustee's acts or omissions. A trustee should ensure, before potential claimants execute such forms, that the potential claimants are in possession of all relevant facts, have independent legal advice, and are free from undue influence. When a trustee makes the final distribution of the fund so that he no longer has any trust assets in his possession, he is well advised to seek a release from the beneficiaries and, preferably, in the form of a deed. A trustee is not entitled to *demand* a release except where the beneficiaries have requested the trustee to breach the express terms of his trust.[167]

More problematic than formal release or confirmation is the possibility of informal 'acquiescence' in a breach of trust, which can take effect by words, or conduct, or omissions. Acquiescence cannot be pleaded against a claimant unless he is *sui juris* and has full knowledge of the facts upon which his right of action is based,[168] but a claimant who fails to complain of a breach of trust when in possession of all of the relevant and necessary facts may be held to have acquiesced in the breach even though he was not aware that, as a matter of law, those facts constituted a breach of trust.[169]

Acquiescence is frequently confused with laches, but the two doctrines are in theory quite different. Acquiescence is purely concerned with justice between the parties, whereas laches is also concerned with the public interest in an end to litigation and the public interest in certainty of ownership of property.[170] The defence of laches may be based on long periods of mere delay, but, for acquiescence, there must be delay combined with knowledge of the facts on which the breach of trust is based, such that it would be inequitable as between the parties for the claimant to bring an action for breach after such a long time. Current judicial formulations of laches tend to overlook the public policy dimension of that doctrine, thereby blurring the distinction between acquiescence and laches.

p. 465 ↵ Wilberforce J confirmed in *Re Pauling's ST* that acquiescence concerns the balance of justice between the parties:

> The court has to consider all the circumstances in which the concurrence of the *cestui que trust* was given with a view to seeing whether it is fair and equitable that, having given his concurrence, he should afterwards turn around and sue the trustees.[171]

However, the defendant trustee cannot rely upon the claimant's release or concurrence as a defence to an action brought by another claimant, so a trustee who proposes to commit a technical breach of trust (a so-called 'judicious' breach of trust)[172] for the benefit of the beneficiaries must be careful to get the consent of all present and future beneficiaries of the trust, preferably in writing and ideally by deed. Of course, the concurrence of unborn beneficiaries will be unobtainable and the concurrence of infant beneficiaries will not be effective to preclude the minor from bringing a claim on attaining majority, unless the minor beneficiary had fraudulently induced the trustee to rely on her consent by, for example, representing that she was an adult.[173] Any beneficiary who concurs in a breach of trust may be required to indemnify the trustees out of his or her share against liability arising from an action brought by non-concurring beneficiaries.[174]

13.5 Exemption clauses

An exemption clause is a clause in a trust instrument that excludes or limits a trustee's liability for breaches of trust. The leading case is the decision of the Court of Appeal in *Armitage v. Nurse*,[175] in which a clause of a traditional settlement trust provided that the trustee would not be 'liable for any loss or damage which may happen from any cause whatsoever unless such damage shall be caused by his own actual fraud'. Such clauses are construed fairly without preference for either party,[176] but any ambiguity in the wording of an exemption clause is construed strictly *contra proferentem* ('*against the one who seeks to benefit from it*').[177] There was no ambiguity in the wording of the clause in *Armitage v. Nurse*, so the court simply had to determine whether it was proper, as a matter of law, principle, and policy, that such a wide exemption clause should be permitted to operate according to its natural construction. The Court of Appeal held that it should. Their Lordships declined to strike out the clause as being repugnant to the public interest, on the ground that a clause excluding liability for ordinary negligence or want of care had never been deemed contrary to public policy in the law of contract.[178] However, if similar policies apply to trust deeds as apply to contracts, it may be wondered why the Court of Appeal in *Re Duke of Norfolk's Settlement*
p. 466 *Trusts*[179] held that the Unfair ↵ Contract Terms Act 1977 does not apply to exemption clauses in trusts[180] and cautioned against taking the contractual analysis of the deal between settlor and trustee too far.[181]

13.5.1 Dishonesty, recklessness, gross negligence, and negligence

'Gross negligence may be evidence of *mala fides* but is not the same thing:'

Goodman v. Harvey (1836) 4 A & E 870, 876, *per* Lord Denman CJ.[182]

The Court of Appeal in *Armitage v. Nurse* held that a clause purporting to exclude all liability apart from liability for actual fraud is effective to exclude liability for deliberate breaches of trust which the trustee honestly believed to be in the best interests of the beneficiaries.[183] The definition of actual fraud is an act or omission, involving some element of dishonesty or deceit, which is intended to harm the beneficiaries' interests. In a later case, the Court of Appeal held that a trustee might be found to have been dishonest in this context if no reasonable solicitor-trustee would have considered the trustee's actions to be in the best interests of the beneficiaries, even if the trustee genuinely believed that they were.[184] The decision of the Court of Appeal in *Bonham v. David Fishwick*[185] suggests that trustees who follow legal advice will be able to rely on a clause exempting them from liability for wilful default. The honesty of a trustee's conduct is judged according to what an objective trustee, looking on, would make of it—it is not judged subjectively according to the trustee's own beliefs.[186] The test for establishing a dishonest breach of trust by a professional trustee requires the claimant to show that there had been a deliberate breach of trust by a professional trustee who knew that, or was indifferent to whether, the breach was contrary to the interests of the beneficiaries, or whose belief that the breach was not contrary to the interests of the beneficiaries was so unreasonable that no reasonable professional trustee could have held it.[187]

Their Lordships in *Armitage v. Nurse* held that an exemption clause is unable to remove liability for fraudulent and dishonest breaches of trust, but that an appropriately worded clause is able to remove liability for mere negligence and gross negligence.[188] The question to which no definite answer was given is whether liability for recklessness ↵ can be removed by an appropriately worded exemption clause. The judgment of Millett LJ in *Armitage v. Nurse* is inconclusive on this issue, although his Lordship does indicate that there is a distinction between gross negligence, which is inactive, and recklessness, which is active. Reading between the lines of the judgment, it would appear that recklessness—what is sometimes referred to as the attitude of someone who '*couldn't care less*'[189]—is inconsistent with the bona fide or 'honest' state of mind that is essential to trusteeship. Patten LJ confirmed in the Court of Appeal in *First Subsea Ltd v. Balltec Ltd* that '[f]or a breach of trust to be fraudulent it is not enough to show that it was deliberate. There must also be an absence of honesty or good faith. This can include being reckless as to the consequences of the action complained of.'[190] It follows that an exemption clause will probably be ineffective, no matter how it is worded, to exclude or reduce liability for reckless breaches of trust.

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13.5.2 The irreducible core of trust obligations

An exemption clause does not define the nature and extent of a trustee's obligations; it is merely concerned to define the nature and extent of liability for the breach of those obligations. One consequence of this is that a trustee cannot rely upon an exemption clause to justify a proposed course of action. Such a course would be regarded as a reckless breach of trust.[191] Another consequence is that conclusions as to the scope of exemption clauses should not, and logically cannot, form the basis for conclusions about the essential nature of trusteeship. It is this writer's respectful submission that Millett LJ was therefore mistaken to conclude, as he did in *Armitage v. Nurse*, that the '*irreducible core of obligations*' owed by trustees to the trust beneficiaries does not include '*the duties of skill and care, prudence and diligence*'. His Lordship put it this way:

> The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts, but in my opinion it is sufficient.[192]

Such a radical observation on the nature of the trust was unnecessary to dispose of the issues in *Armitage v. Nurse* and is, as such, obiter dicta. In any event, it is this writer's belief that the statement is wrong in principle. It is submitted that the duty of care is a fundamental feature of trusts, such as traditional settlement trusts of the *Armitage v. Nurse* variety, under which the trustees manage a fund for beneficiaries who have competing interests in it. In such trusts, the trustees' duty prudently to maintain a fairly invested fund in accordance with the terms of the trust becomes a surrogate for, or summary of, the fiduciary duty and duty of care that, in a bare trust, would be owed to individual beneficiaries or individual classes of beneficiary. If a clause in the trust p. 468 ↵ instrument of a traditional 'fund' trust were competent to exclude trustees' liability for negligence, even gross negligence, it would surely come close to being a trust with no meaningful trust obligations. Of course, the beneficiaries would still have rights enforceable against rogue trustees in relation to fraudulent breaches, dishonest breaches, bias, perverse exercise of discretion, and so on, but they would be left with little recourse against the typical trustee in relation to that most practically significant of duties—caring for the fund. As Lord Kerr opined in *Spread Trustee Company Ltd v. Hutcheson*:[193]

> If … placing of reliance on a responsible person to manage property so as to promote the interests of the beneficiaries of a trust is central to the concept of trusteeship, denying trustees the opportunity to avoid liability for their gross negligence seems to be entirely in keeping with that essential aim.[194]

If contract has the power to strip the trust of the core duty of care (or avoiding gross negligence), then the power of contract must be restrained in this context in the interest of maintaining public confidence in the trust institution. However, the restraint of contract is, as Millett LJ observed, a task for Parliament.[195]

13.6 Relief

If trustees are unable to raise a defence to a breach of trust, or if the defence can only be raised against some of the beneficiaries, trustees may nevertheless be relieved of all, or some, of their liability.

13.6.1 Set-off

The general rule is that, if a trustee makes a gain in one breach of trust, he cannot set off that gain against a loss arising out of another breach of trust,[196] but, if transactions are connected as part of a larger transaction—as is the case when individual investments form part of a portfolio of investments—a loss in one transaction may be set off against a gain in another transaction.[197]

p. 469 13.6.2 Contribution

Trustees are liable only for their own defaults; they are not vicariously liable for breaches committed by their co-trustees[198] (or their agents).[199] Trustees are, however, jointly and severally liable for breaches to which they have together been parties, and, if one trustee commits a breach of trust, the other trustees will be jointly and severally liable if, with adequate supervision of their co-trustees, they could have prevented the breach.[200] There is, however, a significant palliative to the pain of joint and several liability—namely, that a trustee may recover a contribution under the Civil Liability (Contribution) Act 1978 from any other person (typically another trustee) who is liable in respect of the same damage. The Act applies if the breach occurred after 1978 and if all relevant trustees were appointed after 1978.[201] Under the Act, the court may apportion liability between trustees who are '*jointly and severally liable*' for the same breach of trust, according to whatever is '*just and equitable*'. Apportionment is effected by requiring one trustee to make a financial contribution to another trustee in reduction of the latter's liability to the trust. The Act confirms that a person is liable to contribute whether his liability is based in '*tort, breach of contract, breach of trust or otherwise*'.[202] A person who is liable for knowing receipt of property misapplied in breach of trust is also liable to contribute under the Act.[203]

13.6.3 Indemnity from a co-trustee

A trustee who is liable to the beneficiaries for a breach of trust may claim an indemnity from a co-trustee, if that co-trustee committed the breach fraudulently, or if the co-trustee exclusively benefited from the breach,[204] or if the co-trustee is a solicitor-trustee whose controlling influence over the other trustees caused the breach.[205] (Note, however, that it will not be *presumed* that a solicitor has a controlling influence.)[206]

Where the benefits of a breach of trust fall exclusively on a particular trustee and that trustee is a beneficiary under the trust, he will be liable to indemnify his co-trustees up to the extent of his beneficial interest under the trust. This has been described as the co-trustee's 'lien'.[207] This rule does not apply, however, where the defendant is beneficially interested under trusts distinct from those under which the claimant is entitled. So, in *Re Towndrow*,[208] the rule had no application due to the fact that the defendant trustee was entitled to a specific legacy under a will, whereas his breach had caused a loss to the residue of the testator's estate, and the legacy and residue were held upon distinct trusts.

p. 470 13.6.4 Impounding a beneficiary's interest

The court has the power to impound a beneficiary's interest under the trust in certain circumstances. That impounded interest can then be used, in whole or in part, to relieve a trustee of his liability to the other trustees. The court can impound under its inherent jurisdiction if the beneficiary instigated or requested the breach with the intention of obtaining a personal benefit, or if the beneficiary consented to the breach and *actually benefited* from it. The court can also impound under s. 62 of the Trustee Act 1925 if the beneficiary instigated or requested the breach, or consented in writing to the breach, although the courts seem to have treated this largely as a consolidating section, rather than one extending their powers.[209]

The trustee has to show that the beneficiary acted in full knowledge of the facts, but it is not necessary to show that she knew that the acts she was instigating or consenting to amounted to a breach. Furthermore, in order to bring a case within s. 62:

> The cestui que trust must instigate, or request, or consent in writing to some act or omission which in itself is a breach of trust, and not to some act or omission which only becomes a breach of trust by reason of want of care on the part of the trustees.[210]

The power to impound will not be lost upon an assignment of the beneficial interest. Nor is it lost when the court replaces the trustees in consequence of the breach. In *Re Pauling's ST*[211] the trustees resisted removal because they were in the course of claiming an indemnity. Wilberforce J held that they were entitled to such indemnity and that this would be unaffected by their replacement. They were therefore unable to use this as a ground for continuing in office.

13.6.5 Section 61 of the Trustee Act 1925

Under s. 61 of the Trustee Act 1925, the courts may relieve a trustee of some, or all, of his liability for breach of trust if he acted honestly and reasonably, and ought fairly to be excused. If these three requirements are met, the award of relief is in the discretion of the court. The section was first introduced in 1896,[212] in response to a perceived shortfall in the number of persons willing to act as trustees,[213] and consolidated in the 1925 Act. The section is little used because it is hard for a trustee to demonstrate that conduct amounting to a breach was 'reasonable', but it has, for example, assisted trustees of land used by a
p. 471 tennis club who omitted to charge rent because they (erroneously) believed ↵ that the land was held on charitable trusts for the benefit of the club members.[214] It is also applicable to relieve trustees of liablity for investment losses when they did their reasonable best by following expert investment advice.[215] It has been suggested that the section '*offers a viable but as yet unexplored base for a change of position defence where a defendant has become a constructive trustee due to his receipt of trust property belonging to another*'.[216] Section 61 also offers a possible (although not the only, or best) basis for reducing trustee liability to take account of a beneficiary's contributory fault.[217] However, the courts are reluctant to infer such a possibility into the section when Parliament was free (but declined) to extend the section by express words.[218]

13.6.5.1 Section 61—the meaning of 'reasonably'

Objective reasonableness is not a defence to breach of trust in the way that it is a defence to certain heads of common law tortious liability, such as negligence and nuisance. Acting 'reasonably' is merely one of the factors that a trustee must establish before a court will consider the grant of statutory relief from liability for breach of trust under s. 61. The trustee's basic liability for breach of trust is based on a finding that the trustee acted imprudently in the light of the usual paradigm of trustee behaviour, so it might be thought almost impossible for the trustee to demonstrate that he nevertheless acted reasonably according to some other objective standard. Professional trustees will find it especially hard to escape liability, for a single error can undermine the regime to protect beneficiaries from risk.[219]

In practice, the section appears to be most useful in the case of a non-professional trustee who makes a reasonable error of judgement that is technically in breach of trust. An example is the case of *Re Evans*.[220] The defendant was the daughter of a man who had died intestate. His estate had passed to her on the usual statutory trusts to distribute it between herself and her brother in equal shares. However, she had not heard from her brother for 30 years, so, having taken out missing beneficiary insurance,[221] she distributed the entire estate in favour of herself on the assumption that her brother was dead. When her brother reappeared four years later, he sued his sister on the ground that the insurance cover had been inadequate. She was held to have breached her trust, but, applying s. 61, the judge limited her liability to whatever sums might be forthcoming from the sale of a trust-owned house that had not yet been sold. Judges have expressly stated that s. 61 is more likely to be applied to relieve unpaid amateur trustees than trustees who
p. 472 are remunerated[222] or professional.[223] However, the courts will relieve a ↵ professional trustee under s. 61 where the trustee inadvertently hands trust money to a fraudster, assuming that the trustee's behaviour wasn't otherwise a cause of the beneficiaries' loss.[224] It has been said that the law 'leans towards confining the responsibility of professional people to a duty to take reasonable care, and … does not readily impose on them responsibility for loss resulting from the fraud of others'.[225]

13.6.5.2 Section 61—the meaning of 'ought fairly to be excused'

The question of whether a trustee ought fairly to be excused arose for consideration in *Marsden v. Regan*.[226] The claimant was a personal creditor of a deceased debtor. He brought this action against an executrix who had paid off all of the deceased's business creditors out of the deceased's estate, but had not paid the claimant. The claimant had been the landlord of the premises from which the deceased had conducted his business, so, when the defendant sought relief under s. 61, the claimant argued that it would not be fair to relieve the defendant of her liability to account to him. The judge at first instance held that the defendant had acted honestly and reasonably, and ought fairly to be excused. In the Court of Appeal, Denning LJ doubted that the defendant ought fairly to be excused, but he felt that it would not be proper to interfere in the fully informed exercise of the judge's discretion at first instance. In the same case, Evershed MR made it clear that it will not be sufficient, by itself, for a trustee seeking relief from liability to say, '*I acted throughout on solicitor's advice*'.[227]

Test your understanding of this chapter with essay questions and problem scenarios *<https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-chapter-13-essay-questions-and-problem-scenarios?options=showName>* and accompanying answer guidance *<https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-chapter-13-guide-answers-to-the-essay-questions-and-problem-scenarios?options=showName>*. Further improve your approach by reading general guidance on answering essay questions and problem scenarios *<https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-general-guidance-on-answering-essay-questions-problem-scenarios?options=showName>*.

Use the flashcard glossary *<https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-flashcard-glossary?options=showName>* to help consolidate your knowledge of key terms.

13.7 Further reading

In addition to the following print sources, expand your learning with web links *<https://iws.oupsupport.com/ebook/access/content/watt-trustsequity10e-student-resources/watt-trustsequity10e-chapter-13-web-links?options=showName>* to further reading on this topic.

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p. 474 *Commerce* (P. S. Davies and J. Penner, eds) (Oxford: Hart Publishing, 2017) 331–60. ↵

Notes

[1] In *Target Holdings Ltd v. Redferns (a firm)* [1996] AC 421, *per* Lord Browne-Wilkinson at 434A.

[2] *Akers v. Samba Financial Group* [2017] UKSC 6, [2017] AC 424, per Lord Mance at para. [51]. Noted Nolan (2017) 133 LQR 353–8.

[3] See, generally, P. Birks, 'The content of fiduciary obligation' (2002) 16(1) TLI at 34–52.

[4] Note that in *AIB Group (UK) plc v. Mark Redler and Co Solicitors* [2014] UKSC 58; [2014] 3 WLR 1367, the Supreme Court sought to dampen enthusiasm for the suggestion that legal doctrinal analysis should be different according to whether the trust context is 'commercial' or 'traditional'. If different rules apply to different contexts it is because the facts of those contexts are different, but such factual differences are not adequately expressed within the umbrella terms 'commercial' and 'traditional'.

[5] Civil Procedure Rules 1998 (SI 1998, No. 3132) (CPR), rr. 19.6–19.7 incorporated by the Civil Procedure (Amendment) Rules 2000 (SI 2000, No. 22 and replacing Ord. 15, r. 13(1) and (2) of the old Rules of the Supreme Court).

[6] [1975] 1 WLR 279, see Chapter 3.

[7] [1992] 4 All ER 22, CA, see Chapter 14.

[8] See the decision of the Court of Appeal at [1998] 2 WLR 298. For the decision in the House of Lords, see Chapter 14.

[9] *McDonald v. Horn* [1994] 1 All ER 961, CA.

[10] CPR, r. 19.7(2)(a), r. 19.7(1)(b). For an Australian example, see *Yunghanns v. Candoora No. 19 Pty Ltd* [2000] 2 ITELR 589, in which a father was appointed to represent the interests of his unborn child.

[11] *Blathwayt v. Baron Cawley* [1976] AC 397, HL, at 403C.

[12] RSC, Ord. 15, r. 14. See, also, CPR, r. 50.

[13] In *Nestle v. National Westminster Bank plc* [1993] 1 WLR 1260, *per* Leggatt LJ at 1283B.

[14] *Jeffrey v. Gretton* [2011] WTLR 809 (Ch).

[15] *Target Holdings Ltd v. Redferns (a firm)* [1996] AC 421, *per* Lord Brown-Wilkinson at 433G. See, also, *Re Brogden* (1888) 38 Ch D 546, CA, at 557.

[16] Attributed to Selwyn LJ by Sir Nathaniel Lindley MR in *Perrins v. Bellamy* [1899] 1 Ch 797, CA, at 798.

[17] See, generally, J. D. Heydon QC, 'The negligent fiduciary' (1995) 111 LQR 1; C. E. F. Rickett, 'Where are we going with equitable compensation?' in *Trends in Contemporary Trust Law* (A. J. Oakley, ed.) (Oxford: Clarendon Press, 1996) at 177.

[18] *Nocton v. Lord Ashburton* [1914] AC 932, HL, *per* Lord Haldane LC at 952.

[19] See Chapter 10.

[20] Witness the unfortunate plight of Mr Budgett in *Re Brogden* (1888) 38 Ch D 546, which is discussed in Chapter 11.

[21] Subject to 'contribution', see later.

[22] *Dixon Coles & Gill (A Firm) v. Baines* [2022] 2 WLR 16, Court of Appeal (Civil Division).

[23] The argument that a defendant's unauthorized gain is a gain that the claimant might have made, and is therefore a loss, does not withstand close scrutiny, but see S. Stoljar, 'Restitutionary relief for breach of contract' (1989) 2 JCL 1.

[24] See 'Election', later.

[25] This is considered at length in Chapters 8 and 10.

[26] For consideration of the distinction between 'restitution' to a trust fund and restitution as a remedy for the reversal of unjust enrichment, see the end of this section.

[27] *Caffrey v. Darby* (1801) 6 Ves Jr 488; *Target Holdings v. Redferns* [1996] AC 421, HL, at 434.

[28] *Re Bell's Indenture* [1980] 1 WLR 1217.

[29] *Shepherd v. Mouls* (1845) 4 Hare 500 at 504. How much the trustee might have purchased will be difficult to establish by evidence.

[30] *Re Massingberd's Settlement* (1890) 63 LT 296, CA.

[31] Only if some relevant right has been infringed so as to give rise to a loss is it necessary to consider the extent of the trustee's liability to compensate for such loss (*Target Holdings Ltd v. Redferns (a firm)* [1996] AC 42).

[32] *Interactive Technology Corp Ltd v. Ferster* [2018] EWCA Civ 1594, CA.

[33] *Re Rosenthal, decd* [1972] 1 WLR 1273, *per* Plowman J at 1276 G–H: '*The question is where is the loss to fall?*'

[34] [1980] Ch 515.

[35] Ibid. at 545B.

[36] Ibid. at 545C.

[37] *Target Holdings Ltd v. Redferns (a firm)* [1996] 1 AC 421, HL.

[38] Ibid. at 434.

[39] See *Bartlett v. Barclays Bank Trust Co Ltd (Nos 1 and 2)* [1980] Ch 515, later in the chapter.

[40] His Lordship cites *Nocton v. Lord Ashburton* [1914] AC 932, *per* Viscount Haldane LC at 952, 958.

[41] [1980] Ch 515.

[42] Ibid. at 545A; R. P. Austin refers in 'Moulding the content of fiduciary duties' in *Trends in Contemporary Trust Law* (A. J. Oakley, ed.) (Oxford: Clarendon Press, 1996) 153 at 170 to '*the restitutionary nature of equitable compensation for breach of trust*'; see *Caffrey v. Darby* (1801) 6 Ves 488.

[43] E. G. Nugee QC and J. Sher (now QC) for the claimants.

[44] See *O'Sullivan and Another v. Management Agency and Music Ltd* [1985] QB 428, CA.

[45] *Caffrey v. Darby* (1801) 6 Ves Jr 488 at 496 establishes that a trustee in breach will be liable for the consequences of '*fire, lightning or any other accidents*'.

[46] [1996] 1 AC 421, HL. See, generally, D. Capper, 'compensation for breach of trusts' (1997) 61 Conv 14.

[47] Followed in *Hulbert v. Avens* [2003] EWHC 76 (Ch).

[48] [1980] Ch 515.

[49] *Target Holdings Ltd v. Redferns (a firm)* [1996] AC 421.

[50] [1996] 1 AC 421, HL, at 438H.

[51] *AIB Group (UK) plc v. Mark Redler & Co Solicitors* [2013] EWCA Civ 45; [2013] PNLR 19; upheld [2014] UKSC 58 at paras [52]–[54], [90].

[52] See, for example, *Jaffray v. Marshall* [1993] 1 WLR 1285.

[53] [2014] UKSC 58; [2014] 3 WLR 1367. *Target* had previously been followed by the Court of Appeal in *Swindle v. Harrison* [1997] 4 All ER 705, CA.

[54] Para. [64].

[55] The distinction is discussed later in this chapter.

[56] Para. [136].

[57] As to which, see Lord Steyn in *Smith New Court Securities Ltd v. Scrimegeour Vickers (Asset Management) Ltd* [1997] AC 254.

[58] *Nationwide BS v. Various Solicitors* [1999] PNLR 606; *The Times*, 5 February 1998.

[59] (2018) Tru LI 32(1), 44–9 at 46.

[60] Ibid.

[61] Ibid. at 48.

[62] The common law approach to professional negligence is guided by the so-called ‘SAAMCO’ principle (on the basis of *South Australia Asset Management Corporation v. York Montague Ltd* [1997] AC 191, HL), which the five person majority of a seven strong panel of the Supreme Court restated in *Manchester Building Society (MBS) v. Grant Thornton UK LLP* [2021] UKSC 20 as requiring the following six questions to be asked in professional negligence cases to assess liability: Is the harm which is the subject matter of the claim actionable in negligence? (The actionability question); What are the risks of harm to the claimant against which the law imposes a duty on the defendant to take care? (The scope of duty question); Did the defendant breach the duty by an act or omission? (The breach question); Is the loss for which the claimant seeks damages the consequence of the defendant’s act or omission? (The factual causation question); Is there sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant’s duty of care? (The duty nexus question); Is a particular element of the harm for which damages are sought irrecoverable because it is too remote or because there is a different effective cause or because the claimant has mitigated his or her loss or failed to avoid loss they could have been expected to avoid? (The legal responsibility question) (para. [6] of the judgment).

[63] *Re Dawson* [1966] 2 NSWR 211.

[64] [1999] PNLR 606.

[65] *Overseas Tankship (UK) Ltd v. Morts Dock and Engineering Co Ltd, ‘The Wagon Mound*’ [1961] AC 388, PC.

[66] *Nationwide BS v. Various Solicitors* [1999] PNLR 606, at heading 9.

[67] *De Beer v. Kanaar & Co. (a firm)* [2002] EWHC 688, *per* Patten J at para. [92].

[68] *Pilmer v. Duke Group Ltd (in liquidation)* (2001) 207 CLR 165, 201 (High Court of Australia).

[69] *Day v. Mead* [1987] 2 NZLR 443, CA, *per* Sir Robin Cooke, P at 451.

[70] *Canson Enterprises Ltd v. Boughton & Co* (1991) 85 DLR 4th 129 (Supreme Court of Canada).

[71] See, generally, R Mulheron, ‘Contributory negligence in equity: Should fiduciaries accept all the blame?’ (2003) 19(3) Professional Negligence 422.

[72] ‘Remedial ramifications of conflicts between a fiduciary’s duties’ (2010) 126 LQR 72–101.

[73] G. Watt, ‘Contributory fault and breach of trust’ (2005) 5(2) OUCLJ 205.

[74] *Ultraframe (UK) Ltd v. Fielding* [2005] EWHC 1638 (Ch) at para. [1513]; *Pullan v. Wilson* [2014] EWHC 126 (Ch) at para. [27]; *AIB Group (UK) plc v. Mark Redler & Co Solicitors* [2014] UKSC 58 at paras [52]–[54], [90].

[75] CPR, Pt 24.

[76] *Partington v. Reynolds* (1858) 4 Drew 253, 255–6. R. Chambers, ‘Liability’ in *Breach of Trust* (P. Birks and A. Pretto, eds) (Oxford: Hart Publishing, 2002) 1 at 18.

[77] Chambers, ‘Liability’ at 21.

[78] Practice Direction, Pt 16, 11.2(7).

[79] *Armitage v. Nurse* [1998] Ch 241, *per* Millett LJ at 252C, CA.

[80] See earlier.

[81] [1949] 2 All ER 490.

[82] (1888) LR 38 Ch D 546, CA.

[83] *President of India v. La Pintada Compania Navigacion SA* [1985] AC 104, 116; *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] AC 669.

[84] The Law Commission proposed reform of this rule for judgments over £15,000 (*Pre-Judgment Interest on Debts and Damages*, Report No. 287, 24 February 2004, para. 5.69). The recommendation was included in the draft Civil Law Reform Bill in 2010, but the Bill was subsequently dropped, and the recommendation was rejected.

[85] In *Wallersteiner v. Moir (No. 2)* [1975] 1 QB 373, the interest was fixed at 1 per cent above the minimum bank lending rate. In *Bartlett v. Barclays Bank (No. 1)* [1980] Ch 515, it was fixed at the rate from time to time allowed on the court’s short-term investment account. Judges can now look to other indices, such as those suggested by the Society for Trust and Estate Practitioners (‘STEP’), in order more accurately to deprive the wrongdoer of his potential to profit from their breach of trust (*Watson v. Kea Investments Ltd* [2019] EWCA Civ 1759, CA (Civ Div)).

[86] *Wallersteiner v. Moir (No. 2)* [1975] 1 QB 373.

[87] See Chapter 10.

[88] *Wallersteiner v. Moir (No. 2)* [1975] 1 QB 373.

[89] *O’Sullivan and Another v. Management Agency and Music Ltd* [1985] QB 428, CA, *per* Dunn LJ at 461.

[90] *Vyse v. Foster* (1872–3) LR 8 Ch App 309, *per* Sir W. M. James LJ at 329, 334.

[91] See ‘Election’.

[92] *Vyse v. Foster* (1872–3) LR 8 Ch App 309 at 334.

[93] Law Reform (Miscellaneous Provisions) Act 1934, s. 3(1).

[94] [1996] 2 WLR 802.

[95] Lord Goff of Chieveley and Lord Woolf dissenting.

[96] [2007] UKHL 34; [2008] 1 AC 561.

[97] [2008] 1 AC 561, 605.

[98] *Black v. Davies* [2004] EWHC 1464, QBD.

[99] *Black v. Davies* [2005] EWCA Civ 531, CA (Civ Div).

[100] *McDonald v. Horn* [1995] 1 All ER 961 at 972j. CPR, r. 44.3.

[101] *Peacock v. Colling* (1885) 54 LJ Ch 743 at 746, CA.

[102] *Knott v. Cottee* (1852) 16 Beav 77.

[103] *Lockhart v. Reilly* (1856) 25 LJ Ch 697.

[104] *Cook v. Addison* (1869) LR 7 Eq 466 at 471.

[105] Nicholls LJ in *John v. James* [1986] STC 352, 361h.

[106] [1980] Ch 515.

[107] Ibid. at 545C.

[108] [1980] 1 WLR 1217 at 1235H–1236A, 1237B–C.

[109] [1985] QB 428.

[110] Ibid. at 460G–H.

[111] The beneficiary might elect instead to adopt, confirm, or ratify the transaction, or might by his conduct or acquiescence be said to have elected to waive his remedy.

[112] For example, on facts such as those in *Keech v. Sandford* (1726) Sel Cas Ch 61.

[113] '*The fact that he does not … complain of the acquisition of the asset but seeks to take advantage of it does not mean that he adopts or ratifies it—he will almost certainly plead that it was a breach of trust—it means only that he does not seek a remedy in respect of it*' (*per* Millett LJ in *Boscawen v. Bajwa* [1996] 1 WLR 328 at 342B).

[114] See *Tang Man Sit (decd) (personal representative) v. Capacious Investments Ltd* [1996] 1 AC 514.

[115] In *Johnson v. Agnew* [1980] AC 367, HL, Lord Wilberforce stated (at 398) that '[e]*lection, though the subject of much learning and refinement, is in the end a doctrine based on simple considerations of common sense and equity*'. In *Tang Man Sit v. Capacious Investments Ltd* [1996] 1 AC 514, Lord Nicholls approved this dictum (at 522B–C).

[116] See *Tang Man Sit v. Capacious Investments* at 521H–522B. G. Watt, 'Laches, estoppel and election', in *Breach of Trust* (P. Birks and A. Pretto, eds) (Oxford: Hart Publishing, 2002) at 354.

[117] *Tang Man Sit v. Capacious Investments*.

[118] This was considered when we discussed unauthorized fiduciary profit in Chapter 10.

[119] *Lord Mountford v. Lord Cadogan* (1810) 17 Ves Jr 485 at 489.

[120] *Chalmondeley v. Clinton* (1821) 4 Bligh 1, *per* Lord Redesdale at 124.

[121] Law Commission Report No. 270, *Item 2 of the Seventh Programme of Law Reform: Limitation of Actions* (2001).

[122] Limitation Act 1980, s. 21(3). The Law Commission has proposed a number of fundamental changes to the law relating to limitation of actions. These are considered later.

[123] Ibid. ss. 21(1)(a) and 32(1)(a). In *Armitage v. Nurse* [1997] 2 All ER 705, the Court of Appeal held that proof of actual dishonesty is required to establish 'fraud' under s. 21(1)(a), but see Goff and Jones, *The Law of Restitution*, 5th edn (London: Sweet & Maxwell, 1998) at 858. In *Gwembe Valley Development Company Ltd v. Koshy* [2003] EWCA Civ 1478, a trustee who had dishonestly concealed the fact that he had a personal interest in a trust transaction was held to have acted fraudulently for the purposes of s. 21(1)(a) Limitation Act 1980. (Note that certain other aspects of the decision in *Gwembe* have since been disapproved by the Court of Appeal, in *Green v. Gaul* [2007] 1 WLR 591.)

[124] The facts of *Re Howlett* [1949] 2 All ER 490 illustrate how notional trust property can be said to remain in the possession of the trustee.

[125] Limitation Act 1980, s. 21(1)(b). See *Nelson v. Rye* [1996] 1 WLR 1378.

[126] See *Tito v. Waddell (No. 2)* [1977] Ch 106, *per* Megarry VC at 248–9.

[127] *AG v. Cocke* [1988] Ch 414, *per* Harman J at 419E.

[128] *Re Allsop* [1914] 1 Ch 1, CA.

[129] Limitation Act 1980, s. 38(2).

[130] Ibid. s. 28.

[131] Ibid. s. 32(1).

[132] *Liverpool Roman Catholic Archdiocese Trustees Inc v. Goldberg, The Times*, 18 July 2000, Ch D.

[133] [1895] AC 495.

[134] Section 21(2).

[135] 1623 (21 Jac. 1, c. 16). The Real Property Limitation Acts of 1833 (3 & 4 Wm 4, c. 27) and 1874 (37 & 38 Vict., c. 57) have also gone under the name 'statute of limitations'. For a comprehensive analysis of the statutory history, see W. Swadling, 'Limitation' in *Breach of Trust* (P. Birks and A. Pretto, eds) (Oxford: Hart Publishing Ltd, 2002) at 319.

[136] *Wassell v. Leggatt* [1896] 1 Ch 554 at 558.

[137] [1949] 2 All ER 490.

[138] [1996] 1 WLR 1378.

[139] [1999] 1 All ER 400, CA.

[140] Ibid. at 416b.

[141] Ibid. at 416c.

[142] Limitation Act 1980, s. 21.

[143] Ibid. s. 21(1)(b).

[144] See Chapter 8.

[145] [2017] EWCA Civ 186.

[146] [2014] UKSC 45. See Chapter 8.

[147] See Chapter 15.

[148] See, generally, Chapter 8.

[149] [2004] EWHC 1947 (Ch).

[150] Limitation Act 1980, s. 36(1); *Knox v. Gye* (1872) LR 5 App Cas 656, 674.

[151] [1999] 2 All ER 457.

[152] [2006] EWCA Civ 1717.

[153] On the application of statutory time-bars to specific performance, see J. Beatson, ‘Limitation periods and specific performance’ in *Contemporary Issues in Commercial Law, Essays in Honour of Professor A. G. Guest* (Lomnicka and Morse, eds) (London: Sweet & Maxwell, 1997) at 9–23.

[154] Cases such as *Hasham v. Zenab* [1960] AC 316 illustrate the point.

[155] Limitation Act 1980, s. 29(5)(a).

[156] [2016] EWCA Civ 1004; [2017] 2 WLR 1054, CA. Examined in Derek Whayman, ‘More clues as to the nature of the remedy for breach of trust’ [2017] 2 Conv 139–46.

[157] The word laches (pronounced ‘lay-cheese’) has its root in the Latin *laxus*, meaning ‘loose’. Even in everyday speech, we might describe as ‘lax’ a person who acts in a tardy manner.

[158] *Re Sharpe* [1892] 1 Ch 154, *per* Lindley LJ at 168.

[159] Under Limitation Act 1980, s. 21(1)(b), see *Green v. Gaul* [2007] 1 WLR 591, CA (dismissing an appeal from the decision of Lawrence Collins J in *Re Loftus (decd)* [2005] EWHC 406 (Ch)).

[160] *Burdick v. Garrick* (1870) LR 5 Ch App 233 at 243; *Mills v. Drewitt* (1855) 20 Beav 632, *per* Sir John Romilly MR at 638; *Re Ashwell’s Will* (1859) Johns 112, *per* Sir W. Page Wood at 117; *Wedderburn v. Wedderburn* (1838) 4 My & Cr 41, *per* Cottenham LC at 53.

[161] *Frawley v. Neill* [2000] CP Rep 20, CA, *per* Aldous LJ (at the conclusion of his judgment); followed in *Patel v. Shah* [2005] EWCA Civ 157, CA, and *Green v. Gaul* [2007] 1 WLR 591, CA.

[162] *Chalmondeley v. Clinton* (1821) 4 Bligh 1, *per* Lord Redesdale at 124.

[163] *Smith v. Clay* (1767) 3 Bro CC 639n, *per* Lord Camden. See, also, *Hercy v. Dinwoody* (1793) 2 Ves Jun 87 at 93 and *Pickering v. Stamford* (1794) 2 Ves Jun 581 at 582–3, both *per* Sir R. P. Arden, MR.

[164] G. Watt, ‘Laches, estoppel and election’ in *Breach of Trust* (P. Birks and A. Pretto, eds) (Oxford: Hart Publishing, 2002) 353.

[165] Proposed by the Law Commission in Law Commission Report No. 270, *Item 2 of the Seventh Programme of Law Reform: Limitation of Actions* (2001).

[166] Paragraph 34(2) of the report.

[167] *King v. Mullins* (1852) 1 Drew 308.

[168] *Holder v. Holder* [1968] Ch 353.

[169] Wilberforce J in *Re Pauling's ST* [1962] 1 WLR 86.

[170] Lusina Ho argues to the contrary that laches can be rationalised exclusively with reference to private justice between the parties ('The Importance of Being Earnest: The Doctrines of Laches and Acquiescence' in Davies, P. S., Douglas, S. & Goudkamp, J. (eds), *Defences in Equity* (Oxford: Hart Publishing, 2018) ch 15).

[171] [1962] 1 WLR 86 at 108.

[172] See the beginning of this chapter.

[173] *Overton v. Banister* (1844) 3 Hare 303.

[174] See 'Impounding a beneficiary's interest', later.

[175] *Armitage v. Nurse* [1998] Ch 241.

[176] *Bogg v. Raper, The Times*, 22 April 1998, CA.

[177] *Wight v. Olswang, The Times*, 18 May 1999.

[178] In the USA, exculpation (exemption) clauses are set aside as being contrary to public policy in some such cases (see D. Waters, 'The protector: new wine in old bottles' in *Trends in Contemporary Trust Law* (A. J. Oakley, ed.) (Oxford: Clarendon Press, 1996) 63 at 100).

[179] [1982] Ch 61.

[180] A distinguished commentator once argued that it should (Sir William Goodhart QC (1980) 44 Conv 333), but withdrew his argument at a later date: Sir William Goodhart QC, 'Trust law for the twenty-first century' in *Trends in Contemporary Trust Law* (A. J. Oakley, ed.) (Oxford: Clarendon Press, 1996) 257 at 270. He defended the principle, however, that '*paid trustees should not be permitted to be exempt from collective or personal liability for negligence, except in special circumstances*'.

[181] For a comparison between contract and trust, see Chapter 2.

[182] Approved as common law doctrine in *Spread Trustee Company Ltd v. Hutcheson* [2011] UKPC 13, PC, at para. [46], where it was contrasted with the doctrine in civil law jurisdictions.

[183] [1998] Ch 241 at 251B–D, 252G.

[184] *Walker v. Stones, The Independent*, 27 July 2000.

[185] [2008] EWCA Civ 373.

[186] *Barnes v. Tomlinson* [2006] EWHC 3115; [2007] WTLR 377.

[187] *Fattal v. Walbrook Trustees (Jersey) Ltd* [2010] EWHC 2767 (Ch), applied in *Sofer v. Swiss Independent*

⤴ *Trustees SA* [2020] EWCA Civ 699 Court of Appeal (Civil Division).

[188] Contrast the approach of Scots law, under which gross negligence is considered to be inconsistent with bona fides and therefore inconsistent with trust: *Knox v. MacKinnon* (1883) LR 13 App Cas 753, 765. In *Rae v. Meek* (1889) LR 14 App Cas 558 HL (SC) an exculpatory clause '*was held to be ineffectual to protect a trustee against the consequences of* culpa lata, *or gross negligence on his part, or of any conduct which is inconsistent with bona fides*' (*per* Lord Herschell at 573).

[189] D. Hayton, 'The irreducible core content of trusteeship' in *Trends in Contemporary Trust Law* (A. J. Oakley, ed.) (Oxford: Clarendon Press, 1996) 47 at 59.

[190] [2017] EWCA Civ 186 at para. [64].

[191] Millett LJ in *Armitage v. Nurse* [1998] Ch 241: '*a trustee who relied on the presence of a trustee exemption clause to justify what he proposed to do would thereby lose its protection: he would be acting recklessly in the proper sense of the term*' (at 254A).

[192] Ibid. at 253–4.

[193] [2011] UKPC 13, PC.

[194] Ibid. at para. [180].

[195] [1998] Ch 241 at 256B–D, 264B. On 19 July 2006, the Law Commission for England and Wales published a report on *Trustee Exemption Clauses* (Law Commission Report No. 301) containing its recommendations for reform. It is recommended that '[a]*ny paid trustee who causes a settlor to include a clause in a trust instrument which has the effect of excluding or limiting liability for negligence must before the creation of the trust take such steps as are reasonable to ensure that the settlor is aware of the meaning and effect of the clause*'. The Law Commission expects that this will ensure that exemption clauses will in future '*represent a proper and fully informed expression of the terms on which settlors are willing to dispose of their property on trust*' (para. 1.19). The report follows a consultation paper on the same subject (*Trustee Exemption Clauses* (2003) Law Commission Consultation Paper No. 171).

[196] *Dimes v. Scott* (1828) 4 Russ 195.

[197] *Bartlett v. Barclays Bank Trust Co (Nos 1 and 2)* [1980] Ch 515. In truth, the discussion in *Bartlett v. Barclays Bank Trust Co Ltd* on the issue of set-off was not relevant to the facts of that case. The facts did not concern a distinct gain and loss, but merely a loss in the form of a drop in value of trust-owned shares.

[198] See, generally, G. E. Dal Pont, 'Wilful default revisited: liability for a co-trustee's defaults' [2001] Conv 376–86.

[199] Trustees' liability for the acts of their agents is considered in Chapter 11.

[200] *Bahin v. Hughes* (1886) LR 31 Ch D 390.

[201] Section 7(2); *Lampitt v. Poole Borough Council* [1991] 2 QB 545.

[202] Section 6(1).

[203] *Charter plc v. City Index Ltd (Gawler, Part 20 defendants)* [2008] EWCA Civ 1382; [2008] 2 WLR 950 (noted G. Virgo, 'Contribution Revisited' (2008) 67 CLJ 254). For 'knowing receipt', see Chapter 15.

[204] *Chillingworth v. Chambers* [1896] 1 Ch 685, CA.

[205] *Re Partington* (1887) 57 LT 654.

[206] *Head v. Gould* (1898) 2 Ch 250.

[207] *Chillingworth v. Chambers* [1896] 1 Ch 685.

[208] [1911] 1 Ch 662.

[209] *Re Pauling's ST (No. 2)* [1963] Ch 576. The words 'in writing' have been held to apply only to consent, and not to instigation or request (*Griffith v. Hughes* [1892] 3 Ch 105). A request or instigation may be oral.

210 *Re Somerset* [1894] 1 Ch 231 per Lindley MR at 265.

211 *Re Pauling's ST (No. 2)* [1963] Ch 576.

212 Judicial Trustees Act 1896, s. 3.

213 J. Lowry and R. Edmunds, 'Excuses' in *Breach of Trust* (P. Birks and A. Pretto, eds) (Oxford: Hart Publishing, 2002) 269 at 272–6. The concern was such that extracts from the proceedings of the Select Committee on Trusts Administration, chaired by Sir R. T. Reid, Attorney General, made the newspapers (see, for example, *The Times*, 9 March 1895); D. R. Paling, 'The Trustee's duty of skill and care' (1973) 37 Conv 48.

214 *Re St Andrew's (Cheam) Lawn Tennis Club Trust (sub nom. Philippe v. Cameron)* [2012] EWHC 1040 (Ch); [2012] 3 All ER 746.

215 *Daniel v. Tee* [2016] EWHC 1538 (Ch).

216 G. Elias, *Explaining Constructive Trusts* (Oxford: Clarendon Press, 1990) at 20.

217 G. Watt, 'Contributory fault and breach of trust' (2005) 5(2) OUCLJ 205–24. For the situation in tort see the Law Reform (Contributory Negligence) Act 1945.

218 *Lloyds TSB Bank plc v. Markandan & Uddin (a firm)* [2010] EWHC 2840 (Ch).

219 *Santander UK v. RA Legal Solicitors* [2014] EWCA Civ 183, CA.

220 [1999] 2 All ER 777.

221 See Chapter 3.

222 *Bartlett v. Barclays Bank (No. 1)* [1980] Ch 515.

223 *Re Rosenthal, decd* [1972] 1 WLR 1273, Ch D.

224 *Santander UK plc v. RA Legal Solicitors* [2013] EWHC 1380 (QB); [2013] PNLR 24.

225 Ibid. at para. [72], citing *Platform Funding Ltd v. Bank of Scotland plc* [2008] EWCA Civ 930, para. [48].

226 [1954] 1 WLR 423.

227 Ibid. at 434–5.

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