

# Account of Profits

*When can an account of profits be ordered against a third party if there has been no misapplication of trust property?*

Steven Thompson QC



# Trustees and Fiduciaries

Millett, LJ in *Bristol & West BS v Mothew* [1998] Ch 1

- Core liability has several facets. A fiduciary must:
  - Act in good faith
  - Not make a profit out of his trust
  - Not place himself in position where duty and interest conflict
  - Not act for his own benefit (or a third party) without informed consent
- Not every breach by a fiduciary is a breach of a fiduciary duty

# Breaches of fiduciary duty

- Breach of fiduciary duty connotes disloyalty or infidelity
- But not all breaches involve misapplication of property
  - Agents who take bribes
    - *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324
  - Agents who take secret commissions
    - *Fyffes Group v Templeman* [2000] 2 Lloyd's Rep 643
    - *FHR European Ventures v Mankarious* [2015] AC 250
  - Directors who divert business opportunities
    - *IDC v Cooley* [1972] 1 WLR 443

# Liability for breach of trust

- Principal liability of fiduciary is to compensate beneficiaries for loss caused to trust by breach
  - *Target v Redferns* [1996] 1 AC 421
  - *AIB Group v Redler* [2015] AC 1503
- Obligation is to restore trust fund or compensate it
  - Not a prerequisite that fiduciary has taken any benefit
  - Must be a **loss**
  - And the loss must have been **caused** by breach

# Liability of strangers

- *Barnes v Addy* (1874) 9 Ch App 244
  - Knowing receipt
  - Dishonest assistance
  - Trustee *de son tort*

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  - **Dishonest assistance**
  - Trustee *de son tort*

# Dishonest assistance

- *Royal Brunei Airways v Tan* [1995] 2 AC 378
  - Liability on person who assists a breach of trust
  - Breach of trust itself need not be dishonest
  - Assistant liable if acted in a way honest man would not have behaved
- **Nature of liability**
  - Purely personal liability
  - Liability to account?
  - If no misapplication of property?
  - Causation required?
  - Automatic?

# ***Fyffes v Templeman***

Toulson J, [2000] 2 Lloyd's Rep 643

- Fyffes Group
- Mr Templeman
- Seatrade
- Kickback of 1.5% paid offshore
- Templeman settles
- Seatrade sued
- Claim failed on causation

# ***Novoship v Mikhaylyuk***

CA, [2015] QB 499

- Novoship
- Mr Mikhaylyuk
- Mr Ruperti and the bribes
- Mr Nikitin and the Henriot charters
  - Nikitin knew Mikhaylyuk was disloyal
  - *“a relationship which was corrupt at inception and had not been cleansed”*

# ***Novoship v Mikhaylyuk***

CA, [2015] QB 499

- Christopher Clarke J at first instance
  - Mr Mikhaylyuk breached his fiduciary duties
  - Mr Nikitin and Henriot Finance liable to account as dishonest assistants
  - *“no defence to say that the charters were at commercial rates”*

# ***Novoship v Mikhaylyuk***

CA, [2015] QB 499

## Issues on appeal

- Can account of profits be ordered against third party:
  - Who had not voluntarily assumed fiduciary obligations to C ?
  - Who was a mere dishonest assistant?
  - If no misapplication of trust property?

# ***Novoship v Mikhaylyuk***

CA, [2015] QB 499

- Account of profits against non-fiduciary
  - *Cook v Deeks* [1916] 1 AC 554
  - *Attorney General v Blake* [2001] 1 AC 268

***If equitable wrong linked to breach of fiduciary duty, court can order wrongdoer to disgorge profits derived from the wrong***

# ***Novoship v Mikhaylyuk***

CA, [2015] QB 499

- Account of profits against dishonest assistant
  - *Dubai Aluminium v Salaam* [2003] 2 AC 366
  - Liability to account does not depend on receipt

**Availability in principle of remedies should be the same for knowing recipients and dishonest assistants**

# *Novoship v Mikhaylyuk*

CA, [2015] QB 499

- Account of profits if no misapplication of trust property
  - In knowing receipt cases, receipt of property is the gist of the action
  - *JD Wetherspoon v Van de Berg* [2009] EWHC 639 (Ch)
  - Accessory liability does not involve a trust
  - Makes no difference whether dishonesty is paying or receiving a bribe

**If claim is against dishonest assistant, no need for claimant to prove a misapplication of property**

# ***Novoship v Mikhaylyuk***

CA, [2015] QB 499

- **Causation**

- Different considerations apply from those which apply to fiduciary
- Not just ‘but for’ test
- Must be more than just occasion to make a profit
- Here: rates were market rates

- **Discretion**

- Ordering an account is not automatic

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