When ‘fraud’ does not unravel all: the limits of the doctrine of dishonest assistance in a breach of trust and the decision in *Mosley v Popley*

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**Abstract**

*Prest v Petrodel* has focussed attention on the principle that, ordinarily, a claim against a shareholder does not allow that claim to be satisfied or enforced against a company’s assets. This article examines the recent decision in *Mosley v Popley*, where an application of the same principle led to a beneficiary’s claim based on dishonest assistance in a breach of trust being struck out: the victim of the alleged fraud was a company owned by the trust and the remedy sought was in relation to the company’s former assets and not the assets of the trust.

**Trust-company-asset structures**

Trust structures are very commonly created where the trustees hold the shares of one or more companies, which in turn hold or are intended to hold the valuable assets of the settlement. The valuable assets may often be real property, securities, or a trading business. The reasons for interposing a limited company between the trustees and the underlying assets are usually some combination of fiscal considerations, the protection of the trustees from unlimited liability, a desire to enhance the confidentiality of the structure, and to enable the directors of the company (who will not necessarily be the trustees) to manage the underlying assets. The purposes of interposing a company will rarely be well served if the company holds the underlying assets on resulting trust for or as nominee for the trustees.

Although it is often convenient to consider the underlying assets in a trust-company-asset structure as being ‘the trust assets’ or to regard them as being held in trust ‘through the company’, in law they are not. It is the shares in the company that are assets of the trust. The underlying assets belong to the company, without reference to the trusts on which its shares may be held. Mentally ‘fudging’ this vital distinction can have serious legal consequences, as the decision under review illustrates.

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1. [2013] UKSC 34.
2. [2013] WTLR 521. The respondent’s family name is Popely, rather than, as the judgment has it, Popley, and the correct spelling is used below.
3. Although this may in some cases still be the result, see the controversial analysis in *Prest v Petrodel* at [54].
4. Although the purpose of the inquiry may lead to a different analysis or at least a different result, see *Re Poyiadjis* [2004] WTLR 1169 (Isle of Man).

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**Dishonest assistance in a breach of trust**

Readers will be familiar with the ugly sisters of trust litigation: dishonest assistance and knowing receipt. The critical distinction for current purposes is that liability for knowing receipt, as its name suggests, depends upon the receipt of trust property, whereas dishonest assistance renders a party liable personally for the loss caused to the trust by the breach of trust which he has assisted with the required degree of knowledge. There is probably no meaningful distinction between the dishonesty that gives rise to accessory liability of this kind and the term ‘fraud’ as used in related contexts. The usual remedy for dishonest assistance is equitable compensation, which is the imposition of personal liability on the defendant to make good the loss suffered by the trust.

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**The Popely saga**

In 1998 a trust governed by the law of St Vincent and The Grenadines (SVG) was declared for the benefit of members of the family of John Popely, including his son Andrew. In 2000 the beneficiaries wanted to buy a barn conversion in Kent to live in but decided that the purchase should be carried out by Ayton Limited, an SVG company, and that Ayton should become an asset of the trust. The Popelys therefore came to live in a house that was owned by a company that was in turn owned by a trust.

In 2001 the Popelys fell out with the professional trustee of their trust (or rather the individuals who controlled that company) and a decade of litigation ensued both in England and in St Vincent, as well as related litigation between different branches of the family. A search of the law reports will turn up a good number of relevant reported decisions.

**Mosley v Popely**

In May 2011 Ayton entered voluntary liquidation. The liquidator promptly sold its main asset, the Popelys’ home in Kent, to Mr Mosley. Andrew Popely then issued the English proceedings now under discussion, seeking, as against Mr Mosley, Ayton and the trustee, an order that the sale by Ayton to Mr Mosley be set aside. The claim was brought by Mr Popely in his capacity as a beneficiary of the trust. The basis of the claim was that Mr Mosley was alleged to have dishonestly assisted in a scheme hatched by the trustee (which was also said to control Ayton’s director) to frustrate the Popelys’ attempts to terminate the trustee’s control of Ayton and hence of the property. Relevant to these allegations were St Vincent proceedings, in which the Popelys claimed, among other things, that the SVG court should replace the trustee (as it subsequently did).

The Popelys could not assert a claim of the kind that found favour in the Supreme Court in Prest v Petrodel, that Ayton had held the property on resulting trust for them and hence that Mr Mosley had received trust property. They had already fought and lost that claim against Ayton at trial in earlier English proceedings. It had been found on the evidence that the Popelys had not had any intention reserving any beneficial interest in the property when it was decided that the purchaser of the property would be Ayton. Nor, despite the allegations as to the dishonest intent of the trustee and others in relation to the liquidation of Ayton and the sale of the property, could it be

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6. Which has ended up in the report of the judgment in *Mosley v Popely* as ‘Atem Limited’.
7. See n 1.
8. *Ayton Ltd v Popely (No.1)* [2004] EWHC 2403 (Ch).
argued that, even on the basis of the law as it stood before Prest, this was a case where the corporate veil should be pierced.9

Before filing a defence, Mr Mosley applied to strike out the claim against him as disclosing no reasonable cause of action. No other defendant played any part. The Master found that it was arguable that still fecund equity could grant Mr Popely the remedy he sought. Mr Mosley appealed with the permission of the Master and the appeal came before Michael Brindle QC, sitting as a deputy judge of the Chancery Division.

The decision on appeal

Mr Popely did not argue that the property transferred by Ayton to Mr Mosley was trust property, although he contended that, nevertheless, the ‘purpose’ of the trust was to provide a home for the Popelys and that Ayton should have given effect to that purpose (which may be to attempt a distinction without establishing any legal difference). He sought to argue that the remedy he was seeking, an order that the sale to Mr Mosley be set-aside and the register rectified, was not a proprietary remedy, but an order against Mr Mosley personally and that as such it was available to him, if he could establish the dishonest assistance in the trustee’s breach of trust on which he relied. So, it was argued, the ‘interposition’ of Ayton should not make any difference.

The court disagreed and held that the error in the decision at first instance in the case had been to view the ‘trust assets’ as being held ‘through’ Ayton

But precisely because the property was not ‘actually owned by the trust’ but instead by Ayton, there was no possibility of the court making an order on Andrew Popely’s application that the sale by Ayton to Mr Mosley should be set aside. A trust does not own assets ‘through’ a company whose shares the trustee holds. If any party had a claim for the relief sought in relation to the transfer of the property, then that party must be Ayton.11

A trust does not own assets ‘through’ a company whose shares the trustee holds

The wrong and the remedy

English law clearly does not recognize remedial constructive trusts, and that the use of the term ‘constructive trust’ when describing liability under both forms of accessory claim (dishonest assistance and knowing receipt) is apt to mislead. The sense in which those who are liable for dishonestly assisting in a breach of trustee are ‘constructive trustees’ is that they come under a personal liability to account, as if they were trustees.

The use of the term ‘constructive trust’ when describing liability under both forms of accessory claim (dishonest assistance and knowing receipt) is apt to mislead

However, describing a trustee’s liability as being to account can itself be misleading, as that term is often used to describe both a duty to account for trust property in the trustee’s hands (and hence giving rise to proprietary claims to that property itself) and

9. Mosley v Popley at [24].
10. ibid.
11. ibid [30].
to a personal liability to pay compensation, when due to the trustee’s default the trust has suffered loss.

The defaulting trustee’s liability to pay equitable compensation is personal and the nature of that liability is a debt, even though the amount of that debt is to be calculated under the equitable rules applying as between beneficiaries and defaulting trustees.12 This may prove important if the trustee is insolvent, as establishing a liability of this kind does not give the claimant any priority over the trustee’s other creditors.

What such ‘constructive trusteeship’ does not do, in English law, is to convert what was not previously trust property into trust property in the hands of the dishonest assister.13 As Brightman LJ said in Bartlett v Barclays Bank (No.2) with regard the remedy available for a company-owning trustee’s breach of trust:

Restitution to the company is never and never could have been an appropriate remedy. The defendant trustee could never properly have been ordered to make good to the company the losses suffered by the company. Indeed, the defendant who was a shareholder in and not a director of the company did not owe any duty to the company.14

Conclusion
Fraud is often said to unravel all.15 As between the parties to a transfer of an asset that may well often be an accurate summary of the law, at least when the transferor is an innocent party and the transferee a guilty one. However a claim to recover an asset is necessarily a proprietary claim and it depends upon establishing that the claimant retains a beneficial interest in the asset despite the tainted transfer. A trust-company-asset structure will prevent beneficiaries launching claims of this kind because, critically, the asset will have been the property of the company, not the trust. Proprietary remedies will be available, if at all, to the company. Even in the face of dishonest assistance in a breach of trust, it is essential that trustees and beneficiaries identify the correct claim or the correct claimant if the claim is to succeed.

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13. The position may be different in jurisdictions where remedial constructive trusts are part of domestic law.
15. For example, HIH Casualty and General Insurance v Chase Manhattan Bank [2003] UKHL 6, [15].