

CHAPTER 42

PERSONAL REMEDIES AGAINST RECIPIENTS**1. SCOPE OF CHAPTER****Remedies against wrongful recipients of trust property**

- 42-01** AT THE END ADD: And the courts in England^{2a} and Australia^{2b} have declined to remould the traditional personal causes of actions into a general restitutionary remedy.

**2. COMMON LAW ACTION FOR RECOVERY OF MONEY PAID BY
MISTAKE**

Recovery by trustee*Claim in equity*

- 42-07** NOTE 20. ADD: And see § 42-29A (online supplement).

5. KNOWING RECEIPT**Receipt based liability of third parties as constructive trustees**

- 42-21** NOTE 69. ADD: For an Australian judicial account of the development of the remedy see *Bell Group Ltd v Westpac Banking Corp.* [2009] WASC 107; (2008-09) 39 W.A.R. 1 at [4627]-[4838].

General requirements of liability for knowing receipt

- 42-22** NOTE 71. AT THE END ADD: The six requirements were adopted in *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2010] EWHC 1653 (Ch); [2010] All E.R. (D) 54 (Jul) at [48].

^{2a} *Bank of Credit and Commerce International (Overseas) Limited v Akindele* [2001] Ch. 437; *Charter plc v City Index Ltd* [2007] EWCA Civ 1382; [2008] Ch. 313.

^{2b} *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007-08) 10 I.T.E.L.R. 136.

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Knowing receipt as a proprietary and personal remedy

- 42–24** NOTE 74. ADD: In *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); [2007] W.T.L.R. 835 at [1486], [1577] knowing receipt was treated as a personal remedy only which applies where the defendant no longer retains trust property or its identifiable proceeds subject to the proprietary remedy. The question whether knowing receipt might have any impact on the remedy available where trust property or its identifiable proceeds were still retained by the recipient was not considered.

Basis of liability*Restitution basis*

- 42–28** NOTE 78. FOR THE REFERENCE TO Underhill and Hayton, *Law of Trusts and Trustees*, SEE NOW (18th edn), §§ 98.37 and 98.38.
- 42–29** NOTE 83. FOR THE REFERENCE TO Scott, *The Law of Trusts*, SEE NOW Scott and Ascher, *The Law of Trusts* (5th edn), Vol.5, § 29.1.9.

AFTER § 42–29 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

Locus standi

- 42–29A** Generally the same rules apply as in connection with breach of trust claims.^{91a} Though a claim will normally be brought by a successor trustee or a beneficiary, the trustee who has made a transfer in breach of trust has *locus standi* to bring a knowing receipt claim against a third party recipient, even though as between himself and his beneficiary he has committed a breach of trust and the commission of that breach of trust is a necessary ingredient in his cause of action against the recipient.^{91b} A recipient who no longer has the transferred property or its traceable proceeds may, however, seek a contribution from the trustee.^{91c}

^{91a} See §§ 39–67 *et seq.*

^{91b} See *Montrose Investments Ltd v Orion Nominees Ltd* [2004] EWCA (Civ) 1032; [2004] W.T.L.R. 1133; *Pulvers v Chan* [2007] EWHC 2406 (Ch); [2008] P.N.L.R. 9 at [380]; and compare § 41–46 on the proprietary remedy and §§ 40–02 to 40–05, 40–13A (online supplement) and 42–04 to 42–12 on other remedies by trustees who have made wrongful or mistaken payments or transfers.

^{91c} See § 42–73A (online supplement).

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Requirement (1)—property subject to a trust*Companies and other fiduciary agents—quasi-trustees*

- 42–32** NOTE 94. ADD: *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); [2007] W.T.L.R. 835 at [1487]–[1488].

Property subject to a constructive (or resulting) trust—constructive trustees

- 42–33** NOTE 1. DELETE AND REPLACE BY: See § 20–53 (including online supplement) and note that the circumstances in which a profit is subject to a constructive trust is now narrower than was formerly thought to be the case, see §§ 20–28 to 20–28C (including online supplement).

Requirement (2)—transfer by the trustee

- 42–35** NOTE 13. For the reference to Gower and Davies, *Principles of Modern Company Law*, see now (8th edn), § 13–35. Companies Act 2006, ss.677–683 came into force on October 1, 2009: Companies Act 2006 (Commencement No.8, Transitional Provisions and Savings) Order 2008 (SI 2008/2860).

NOTE 16. ADD: See Smith (2009) 125 L.Q.R. 338.

Requirement (3)—transfer in breach of trust*Breach of trust by company directors*

- 42–38** NOTE 30. Companies Act 2006, ss.197–214 came into force on October 1, 2007 in relation to transactions or arrangements entered into on or after that date (subject to transitional provisions and amendments of Companies Act 2006, s.205): Companies Act 2006 (Commencement No.3, Transitional Provisions and Savings) Order 2007 (SI 2007/2194); Companies Act 2006 (Commencement No.6, Savings and Commencement Nos. 3 and 5 (Amendment)) Order 2008 (SI 2008/674).

Receipt of property under contract entered into by company

- 42–39** NOTE 33. ADD: applied *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); [2007] W.T.L.R. 835 at [1492]–[1494]. For an inconclusive discussion of the availability of a knowing receipt remedy where property is taken under an unauthorised and hence void

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contract purportedly entered into by a company, see *Thanakharn Kasikhorn Thai Chamkat (Mahachon) v Akai Holdings Ltd* [2010] HKCFA 64; [2011] HKEC 1692 at [138]–[144].

NOTE 34. FOR THE REFERENCE TO Gower and Davies, *Principles of Modern Company Law*, SEE NOW (8th edn), § 7–2.

NOTE 36. Companies Act 2006, s.39 came into force on October 1, 2009 in relation to acts of a company done on or after that date (subject to transitional provisions): Companies Act 2006 (Commencement No.8, Transitional Provisions and Savings) Order 2008 (SI 2008/2860). Companies Act 2009, s.40 came into force on October 1, 2009: *ibid.*

NOTE 38. Companies Act 2006, s.42 came into force on October 1, 2009: Companies Act 2006 (Commencement No.8, Transitional Provisions and Savings) Order 2008 (SI 2008/2860).

NOTE 39. Companies Act 2006, s.41 came into force on October 1, 2009: Companies Act 2006 (Commencement No.8, Transitional Provisions and Savings) Order 2008 (SI 2008/2860).

“Breach” of remedial constructive trust

42–41 NOTE 42. DELETE THE FIRST SENTENCE AND REPLACE BY: Similar considerations apply to the kind of resulting trust considered in § 42–33, n.7.

Requirement (4)—the receipt by the defendant

Receipt by agent or nominee of defendant

42–43 NOTE 49. AT THE BEGINNING INSERT: *Pulvers v Chan* [2007] EWHC 2406 (Ch); [2008] P.N.L.R. 9 at [379].

Note 50. Add: *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); [2007] W.T.L.R. 835 at [1562]–[1563]; *Law Society of England and Wales v Habitable Concepts Ltd* [2010] 1449 (Ch); [2010] All E.R. (D) 156 (Jun) at [20]–[22]; *Dyson Technology Ltd v Curtis* [2010] EWHC 3289 (Ch) at [132] and [133].

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Receipt by subsidiary company

- 42–44 NOTE 52. FOR THE REFERENCE TO Gower and Davies, *Principles of Modern Company Law*, SEE NOW (8th edn), §§ 8–5 to 8–14.

Requirement (5)—receipt for the defendant’s own benefit

- 42–45 NOTE 53. AT THE END OF THE LAST SENTENCE ADD: compare *Thanakharn Kasikhorn Thai Chamkat (Mahachon) v Akai Holdings Ltd* [2010] HKCFA 64; [2011] HKEC 1692 at [143] leaving open whether receipt as pledgee was enough.

Receipt by trustees of special trust

- 42–47 AFTER THE TEXT TO N.64 ADD: and so too in Australia.^{64a}

Requirement (6)—knowledge generally*Company’s knowledge*

- 42–52 AT THE END OF THE TEXT ADD: Knowledge of a director or other agent of a company will not generally be imputed to a company where that knowledge arises from a breach, whether or not fraudulent, of the director’s or agent’s duties to the company, except where the director or agent exercises exclusive control over the company and is its human embodiment.^{88a}

Application of knowledge requirement to knowing receipt*The general rule*

- 42–55 NOTE 98. ADD: applied *Charter plc v City Index Ltd* [2007] EWCA Civ 1382; [2008] Ch. 313 at [7]–[8]; *Thanakharn Kasikhorn Thai Chamkat (Mahachon) v Akai Holdings Ltd* [2010] HKCFA 64; [2011] HKEC 1692 at [127], [128] and [134]–[137]; *Dyson Technology Ltd v Curtis* [2010] EWHC 3289 (Ch) at [79]–[84].

- 42–56 NOTE 2. For the reference to *Halsbury’s Laws of England*, see now (4th edn), Vol.48 (2007 Reissue), § 702.

^{64a} *Quince v Varga* [2008] QCA 376; (2008–09) 11 I.T.E.L.R. 939 at [2]–[4]; [54].

^{88a} See *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39; [2009] 1 A.C. 1391 (not a knowing receipt case) which contains a comprehensive review of the authorities but differing views as to the circumstances in which knowledge should be attributed to a company in such a case.

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42–57 NOTE 8. AT THE END OF THE FIRST SENTENCE INSERT: *Papamichael v National Westminster Bank plc* [2003] EWHC 164 (Comm); 1 [2007] 1 Lloyd’s Rep 341 at [246]–[248] (“the type of knowledge that is required is actual rather than constructive knowledge”).

NOTE 9. ADD: *Imobilari Pty Ltd v Opes Prime Stockbroking Ltd* [2008] FCA 1920; (2009) 252 A.L.R. 41 at [27] (“knowledge of facts that would put an honest and reasonable person on notice (but not merely inquiry) of a real and not remote risk that the transfer was in breach of trust or fiduciary duty or involved the misapplication of trust property”).

Transactions entered into by companies involving breach of trust

42–61 NOTE 36. The repeal of Companies Act, 1985, s.711A by Companies Act 2006, Sch.16, came into force on October 1, 2009: Companies Act 2006 (Commencement No.8, Transitional Provisions and Savings) Order 2008 (SI 2008/2860).

NOTE 37. Companies Act 2006, s.40 came into force on October 1, 2009: Companies Act 2006 (Commencement No.8, Transitional Provisions and Savings) Order 2008 (SI 2008/2860).

NOTE 38. Companies Act 2006, s.40(2)(b)(iii) came into force on October 1, 2009: Companies Act 2006 (Commencement No.8, Transitional Provisions and Savings) Order 2008 (SI 2008/2860).

NOTE 39. Companies Act 2006, s.40(2)(b)(i) came into force on October 1, 2009: Companies Act 2006 (Commencement No.8, Transitional Provisions and Savings) Order 2008 (SI 2008/2860).

Relevant time for determining knowledge

42–64 NOTE 53. ADD: See too *Heperu Pty Ltd v Belle* [2009] NSWCA 252; (2009) 258 A.L.R. 727 at [87]–[174].

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Receipt of property claimed to be trust property

42–65 NOTE 54. AT THE END ADD: See too *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2010] EWHC 1614 (Ch); [2011] 1 B.C.L.C. 202 at [92]–[98]; [2011] EWCA Civ 347; [2011] W.T.L.R. 1043 at [102]–[108] (proprietary remedy).

NOTE 55. ADD: Compare *Horler v Rubin*, February 11, 2011, unreported, Ch D at [140]–[153].

Measure of personal accountability of knowing recipient

42–71 DELETE THE SECOND SENTENCE AND N.77 AND REPLACE BY: In general a trustee who distributes trust property in breach of trust will be personally liable to restore the property, and may be held liable to pay the value of the property at the date of misapplication or, if greater, the value of the property at the date of judgment or when it would sooner have been sold in the proper administration of the trust.⁷⁷ It has been held in the Hong Kong Court of Final Appeal, however, that where trust property is distributed in breach of trust and is then sold for less than its value at the date of receipt, though more than its value at the date of judgment, the knowing recipient can be made liable for the amount of the proceeds of sale, but not for the higher value at the date of receipt.^{77a} It is thought, however, that in a case where the property received by the knowing recipient is an appreciating rather than depreciating asset, the measure of accountability is not necessarily limited to the amount of the proceeds of sale received by the knowing recipient and that he may be made liable for the value of the property at the date of judgment or the value when the property would sooner have been sold by the trustee in the proper administration of the trust had there been no breach of trust, if greater than the proceeds of sale.^{77b}

⁷⁷ See § 39–54.

^{77a} *Thanakharn Kasikhorn Thai Chamkat (Mahachon) v Akai Holdings Ltd* [2010] HKCFA 64; [2011] HKEC 1692 at [148]–[155] (Lord Neuberger).

^{77b} This is the principle applied in England in the context of dishonest assistance, see *Re Bell's Indenture* [1980] 1 W.L.R. 1217 at 1231–1233, itself applying with modifications the principle of *Re Massingberd's Settlement* (1890) 63 L.T. 296 which applies to express trustees. This principle was not referred to by Lord Neuberger in the *Thanakharn* case, above, though in reaching his decision he was influenced by the consideration that the claimant was better off as a result of the sale since the property in that case would have become worthless had the property been retained rather than sold, as would probably have happened if there had been no breach of trust, see at [153]–[154]. Different considerations apply in the context of an appreciating rather than

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DELETE THE TEXT AFTER N.80 AND N.81.

AT THE END OF THE TEXT ADD: Formerly, the court did not generally award compound interest in the absence of evidence that the defendant had used the money or property received for his own commercial advantage in earning profits in his business.⁸¹ Now, following developments in the law on the award of compound interest in restitutionary claims,^{81a} compound interest may be awarded generally.^{81b} In a case where there are a number of knowing recipients in respect of the property transferred in breach of trust, the liability of each recipient will be limited by reference to what he received, not what other recipients received, and the remedy will be framed so as to avoid double recovery.^{81c} In a case where the knowing recipient sold depreciating property which he had previously received, and the measure of accountability was limited to the amount of the proceeds of sale, compound interest ran from the date of sale and not the date of receipt, and no interest at all was payable in respect of the period between the date of receipt and the date of sale.^{81d}

Relief under section 61 of the Trustee Act 1925 and defence of change of position

42–73 NOTE 86. ADD: And see *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch. 437 at 456F, CA; *Dyson Technology Ltd v Curtis* [2010] EWHC 3289 (Ch) at [129].

depreciating asset where a sale by the knowing recipient has the effect of increasing rather than reducing the loss. Though Lord Neuberger was sympathetic to the view that the measure of accountability for knowing receipt should be the same as for common law damages for conversion (see at [155]), he did not have in mind issues of equitable accountability in the context of appreciating property.

⁸¹ *Belmont Finance Corporation Ltd v Williams Furniture Ltd (No.2)* [1980] 1 All E.R. 393 at 419, CA. Compound interest with yearly rests was awarded in *El Ajou v Dollar Land Holdings plc (No.2)* [1995] 2 All E.R. 213. As to compound interest, see § 39–61.

^{81a} *Sempra Metals Ltd v I.R.C.* [2007] UKHL 14; [2008] UKHL 1 A.C. 561.

^{81b} *Dyson Technology Ltd v Curtis* [2010] EWHC 3289 (Ch) at [148]–[154].

^{81c} *Trustor AB v Smallbone* [2000] All E.R. (D) 624, CA at [63]–[66]; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); [2007] W.T.L.R. 835 at [1577]–[1578]. As to contribution between knowing recipients and others liable in respect of the same damage, see § 42–72A (online supplement).

^{81d} *Thanakharn Kasikhorn Thai Chamkat (Mahachon) v Akai Holdings Ltd*, above, at [156]–[160].

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AFTER § 42–73 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

Contribution

42–73A A defendant who is held liable for knowing receipt, or who enters into a *bona fide* settlement or compromise of such a claim, may seek contribution under the Civil Liability (Contribution) Act 1978^{87a} from any other person liable in respect of the same damage, including not only the trustee who made the transfer in breach of trust, but also directors and professional persons liable in respect of the transfer.^{87b} Though a recipient must expect to pay back any part of the transferred fund which he has retained, it does not necessarily follow that, because he received the fund, he cannot receive any contribution in respect of the part of the fund which he has transferred away from those liable for the same damage who have received nothing.^{87c}

6. TRUSTEE *DE SON TORT***Generally**

42–74 NOTE 89. ADD: *Dubai Aluminium Co. Ltd v Salaam* [2002] UKHL 48; [2003] 2 A.C. 366 at [135]–[141]; *Cunningham v Cunningham* [2009] JRC 124; 2009 J.L.R. 227 at [21]–[33].

Liability limited to property received

42–76 NOTE 99. AFTER THE REFERENCE TO *Pearce v Pearce* INSERT: *Cunningham v Cunningham* [2009] JRC 124; 2009 J.L.R. 227 at [21]–[33].

^{87a} On which see generally §§ 39–78 to 39–83.

^{87b} *Charter plc v City Index Ltd* [2007] EWCA Civ 1382; [2008] Ch. 313 at [12]–[33] and [79] (note the somewhat different approach of Arden L.J. at [62]–[72]).

^{87c} *Charter plc v City Index Ltd*, above, at [34]–[59], [73]–[77] and [79].

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**7. INCONSISTENT DEALING BY LAWFUL RECIPIENTS OF TRUST
PROPERTY****Lawful agents of trustees in receipt of trust property**

42–86 NOTE 16. ADD: *Dubai Aluminium Co. Ltd v Salaam* [2002] UKHL 48; [2003] 2 A.C. 366 at [135]–[141]; *Cunningham v Cunningham* [2009] JRC 124; 2009 J.L.R. 227 at [21]–[33].

Inconsistent dealing by lawful agent of trustees acting on instructions

42–89 NOTE 29. ADD: For a wider statement of a solicitor’s liability not requiring dishonesty, see *Eden Refuge Trust v Hohepa* (2010–11) 13 I.T.E.L.R. 187 at [191]–[205], NZ HC (authorities on inconsistent dealing not cited or considered).

Other cases of inconsistent dealing by agents who hold trust property

Agent of trustee de son tort

42–96 NOTE 46. AFTER THE REFERENCE TO *Mara v Browne* INSERT: *Cunningham v Cunningham* [2009] JRC 124; 2009 J.L.R. 227 at [34].

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