Trusts
Fall Term 2017

Lecture Notes – No. 16

LIABILITY OF THE TRUSTEE FOR BREACH OF TRUST

(a) The Retired Trustee

A trustee is liable for acts or omissions that fail to fulfill the duty of care owed during his or her tenure as trustee. Early retirement, however, will not render the trustee safe from liability where his or her acts or omissions during administration of the trust would facilitate a breach and where the trustee retires in order to save himself or herself from liability but does nothing to prevent the breach.

Head v Gould
[1898] 2 Ch 250

A retired trustee may be an accessory to his or her successor's breach, but narrowly.

Per Kekewich J:

> What their successors did was to convert the whole remaining trust property and improperly to spend it. They knew that G. D. Gould was reflecting on some possible mode of assisting Mrs. Head, and he had told them, by his letter to Mr. Clapp of November 2, 1894, that he was turning his attention to some means of doing this; but apparently he was as conscious as Messrs. Houlditch & Clapp themselves of the difficulty of doing this, and he certainly never hinted at doing it in the manner ultimately adopted. On reflective study of the evidence and correspondence, and notwithstanding suspicious criticism of some unhappy expressions in Mr. Clapp's letters, I do not believe that Messrs. Houlditch and Clapp contemplated any breach of trust at all, and I am convinced that they never contemplated that actually committed. With the judgment of the Court of Appeal in *Clark v. Hoskins* before us it is easy to understand the Master of the Rolls as meaning what he probably intended to express - that **in order to make a retiring trustee liable for a breach of trust committed by his successor you must shew, and shew clearly, that the very breach of trust which was in fact committed was not merely the outcome of the retirement and new appointment, but was contemplated by the former trustee when such retirement and appointment took place.** That is clearly the doctrine of *Clark v. Hoskins.* It will not suffice to prove that the former trustees rendered easy or even intended, a breach of trust, if it was not in fact committed. They must be proved to have been guilty as accessories before the fact of the impropriety actually perpetrated.

(b) Consent, Participation, Acquiescence or Release by the Beneficiary

The beneficiary cannot claim for breach of trust if he or she assented to or concurred in the breach or, after the fact, confirmed the act or released the trustee from liability if the beneficiary is of age, has had full disclosure and knows the consequences of hir or her decision, and there is no undue influence brought to bear in him or her to decide one way or another.

Re Pauling
[1963] Ch 576
[1964] Ch 303

There was a family trust. A father and his children were amongst the beneficiaries. The father tricked the trustee into making advancements to his children for their own needs, but used the money for other purposes. The children were adults but did not object. The children brought an action against the trustee. At trial, Wilberforce J. held that when considering whether it was fair and equitable for a beneficiary who had concurred in such transactions to sue the trustee for breach of trust **the court must consider all the circumstances in which the concurrence was given, and that subject to that, it was not necessary that the beneficiary should know that what he was concurring in was a breach of trust provided that he fully understood what he was concurring in, and that it was not necessary that the beneficiary himself should have benefited by the breach of trust**. In the Court of Appeal, the position was clarified such **that the beneficiary who doesn't consent but who benefits cannot have double recovery – the benefits obtained must be deducted from the compensation due.**

(c) Limitations

In Ontario there is no special treatment of breach of trust claims under the Limitations Act, 2002, SO 2002:

> Basic limitation period
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> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
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> Discovery
> 5. (1) A claim is discovered on the earlier of,
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
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> (iii) that the act or omission was that of the person against whom the claim is made, and

> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
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> Presumption
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.
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> Demand obligations
> (3) For the purposes of subclause (1) (a) (i), the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made.

(d) Laches

Before the development of modern statutes governing civil procedure, equitable doctrines developed alongside substantive common law and equity law to regulate procedure. The equitable maxim *Vigilantibus Et Non Dormientibus Jura Subveniunt* (the laws aid those who are vigilant, not those who sleep) gave rise to the doctrine of laches. The doctrine is not a defence and does not rely on merely the passage of time, but rather looks to acquiesce on the part of the claimant and detrimental reliance on the part of the defendant so as to recognize in essence a waiver or set up an estoppel.

In *Re Hipel Estate*, 2011 ONSC 5259 (Ont. S.C.J.); appeal dismissed, **Jacques v. Hipel Estate, 2012 ONCA 371; application for leave to appeal refused, 2012 CanLII 76984 (S.C.C.),** Justice Parayeski dealt with an unusual case. The deceased died and 52 years later one of his children brought an action against the successor corporate trustee for breach of trust in that no distribution was ever made to her. On that point (i.e. breach), the Court found that the distribution had not in fact been made. Questions arose, *inter alia*, based on laches. Parayeski J. nicely summarized the doctrine:

> [29] The doctrine itself has been defined by the Supreme Court of Canada in its 1992 decision in *M(K) v. M(H)* [[1992] 3 S.C.R. 6]… as follows:
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> > Thus there are two distinct branches of the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of the two branches. Rather the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches much be resolved as a matter of justice between the parties, as is the as with any equitable doctrine.
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> [30] Whether a defendant is entitled to the equitable relief of laches is:

a) discretionary; and

b) not available by merely demonstrating that there has been delay on the part of the plaintiff.

[31] In order for this court to exercise its discretion in its favour, the defendant must demonstrate that Norma, by delaying the commencement of her action, either:

a) acquiesced in the defendant's conduct, or

b) (i) caused the defendant to alter its position in reasonable reliance on her acceptance of the status quo; or (ii) otherwise permitted a situation to arise which it would be unjust to disturb.

[32] Under the first branch of the doctrine of laches, as defined in the *M(K) v. M(H)* decision, (supra), knowledge by the plaintiff of her rights is critical to determining whether she has acquiesced in them. The standard is objective, i.e. : "the question is whether it is reasonable for the plaintiff to be ignorant of her legal rights given her knowledge of the underlying facts relevant to a possible legal claim"…

…

[34] The second branch of the doctrine of laches does not depend upon acquiescence, with its component of knowledge, on the part of the plaintiff. Rather, it focuses on prejudice to the defendant.

Thus, laches operates on the unconscionable conduct of the claimant in the form of seeking justice before the Court after having acquiesced in delay to the prejudice of the defendant. In concept and application, then, laches is distinct from a statutory limitation period but can be pleaded together with a conventional limitations defence.

(e) Exculpation Clauses

The settlor of the trust may specifically forgive the trustee for breaches of trust based on simple negligence in certain conditions (for example, that the trustee acted honestly, and, that the trustee was insured for liability for negligence). However, what of gross negligence? Here the Courts are generally hostile to enforcing such clauses.

Poche v Pihera
(1983), 16 ETD 68 (Alta Surr Ct)

Executrix of a trust will was found to be grossly negligent in the administration of the estate causing loss to the beneficiary of the trust, who was to receive income from the estate during her life. A second beneficiary, who was to receive the residue outright upon the death of the first beneficiary, was found to have suffered no loss.

Per Hetherington J.

63 Mr. Poche's will contains a number of provisions which relieves Mrs. Pihera from liability for a loss resulting from an exercise of discretion by her. Since I am not satisfied on a balance of probabilities that Mrs. Pihera exercised any discretion with respect to the matters complained of in this case, I need not consider these provisions.

64 Mr. Poche's will also contains the following provision:

> 8. I DECLARE that the Trustee of this my Will shall not be liable for any loss not attributable:
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> (a) To her own dishonesty, or
>
> (b) To a wilful commission by her of any act known by her to be a breach of trust ...

It was not suggested that the loss in question is attributable to Mrs. Pihera's dishonesty. Nor was it suggested that the loss is attributable to the wilful commission by her of any act. The loss is attributable to omissions by Mrs. Pihera, not to any commission. It would appear, therefore, that Mrs. Pihera is relieved from liability for this loss by para. 8 of Mr. Poche's will.

65 However, I am of the view that the conduct of Mrs. Pihera which resulted in the loss to Mrs. Poche was grossly negligent. And I am further of the view that para. 8 of Mr. Poche's will cannot relieve Mrs. Pihera from liability for a loss resulting from her gross negligence.

66 In the case of Seton v. Dawson, (1841), 4 Ct. Sess. Cas. (2d) 310, the Court was required to consider the effect of a clause quoted at p. 311 which provided as follows:

> ... and I declare that the trustees, whether originally added or assumed, shall not be liable for omissions, neglect of diligence, of any kind, nor singuli in solidum, but each only for his own actual intromissions; ...

The Court held that this clause did not relieve the trustees from liability in the circumstances of the case. Lord Cockburn, with whom Lords Justice-General (Boyle,) Mackenzie, Fullerton and Cunninghame concurred, stated at p. 317:

> We hold this total disregard of the trust, after their attention had been called, by their being required to sign the deeds, to the fact that these sums had been received, to amount to culpa lata. Though aware of the indulgence due, under such a clause, to trustees, we think that no trust property would be safe, if such gross negligence were not to make those who are guilty of it liable to the party injured.

Lord Ivory, with whom Lords Gillies and Murray concurred, stated at p. 318:

> But in no view can I hold them excusable, after putting the money into the hands of such third party, for having allowed it, or the greater part of it to remain there for a space of nine years wholly uncared for, and without so much as an account having during all that time been rendered. It is here that the gravamen of the case, as regards the trustees, in my opinion lies. For, could I get over the plea of culpa lata, as applied to this species facti, I should have been disposed, in other respects, to allow them the protection of the clause which the trust-deed contains in their favour; that protection being only to be withheld, when there is a clear case of culpa lata, which, however, I think, there unquestionably is here.

In Knox v. Mackinnon (1888), 13 App. Cas. 753 (H.L.), Lord Watson stated at p. 765:

> By the second of those clauses, it is declared that the trustees 'shall not be liable for omissions, errors, or neglect of management, nor singuli in solidum, but each shall be liable for his own actual intromissions only.' I see no reason to doubt that a clause conceived in these or similar terms, will afford a considerable measure of protection to trustees who have bona fide abstained from closely superintending the administration of the trust, or who have committed mere errors of judgment whilst acting with a single eye to the benefit of the trust, and of the persons whom it concerns. But it is settled in the law of Scotland that such a clause is 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.

…

70 I am persuaded by the reasoning in these cases. In my opinion a trustee must be held responsible for any loss resulting from his gross negligence, regardless of any provision in the trust instrument relieving him from such liability.

71 Since the conduct of Mrs. Pihera which caused Mrs. Poche's loss was grossly negligent, she is not relieved from liability for this loss by para. 8 of Mr. Poche's will.

(f) The Statutory Defences

The Trustee Act

> Protection from liability
> 28. A trustee is not liable for a loss to the trust arising from the investment of trust property if the conduct of the trustee that led to the loss conformed to a plan or strategy for the investment of the trust property, comprising reasonable assessments of risk and return, that a prudent investor could adopt under comparable circumstances.
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> Assessment of damages

> 29. If a trustee is liable for a loss to the trust arising from the investment of trust property, a court assessing the damages payable by the trustee may take into account the overall performance of the investments. s. 16 (1).
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> Technical Breaches of Trust
> **35. (1) If in any proceeding affecting a trustee or trust property it appears to the court that a trustee, or that any person who may be held to be fiduciarily responsible as a trustee, is or may be personally liable for any breach of trust whenever the transaction alleged or found to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the court in the matter in which the trustee committed the breach, the court may relieve the trustee either wholly or partly from personal liability for the same.**
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> (2) Subsection (1) does not apply to liability for a loss to the trust arising from the investment of trust property.

A trustee may be personally liable for breach of trust, unless it appears to the court that she acted (i) honestly; (ii) reasonably; and (iii) ought fairly to be excused for the breach and for not seeking direction of the court before the breach under the Trustee Act.

In ***National Trustee Co of Australia v General Finance Co of Australasia*** **[1905] AC 373, 381** it was held:

> Unless both [honesty and reasonableness] are proved the Court cannot help the trustees; but if both are made out, there is then a case for the Court to consider whether the trustee ought fairly to be excused for the breach, looking at all the circumstances.

These requirement are questions of fact and the onus of proof rests on the trustee; *Re Stuart* [1897] 2 Ch 583. Both honesty and reasonableness must be proven; *Re Rosenthal* [1972] 3 All ER 552 (T was honest but did not reasonably). The statute should be given a broad construction and the standard should be that of an ordinary honest business person. In *Re Grindey* [1898] 2 Ch 593, 601, Chitty LJ said:

> The section is not easy to construe; but in my opinion, a narrow construction ought not to be put upon it, having regard to the language used and the general object in view, which is plain, namely, the relief of honest trustees who have acted reasonably. "Reasonably" must mean reasonably as trustees.

Taking advice is not a "passport to relief":

In *Marsden v Regan* [1954] 1 WLR 423, 435 Evershed MR said:

> In this court it is our unhappy lot sometimes to come across cases in which nothing is more deplorable than the fact that a person inexperienced in matters in which he is involved fails to take advice from solicitors, who could clearly have given advice, and have protected that person from the consequences of his rash conduct. I think that one must pay some regard to

> the kind of station in life of the people here concerned, the character of the business, and the difficulties with which they were confronted, including the unfortunate fratricidal strife.
>
> If this court were to say that the defendant ought to have taken some further advice by way of going to counsel or applying to the judge, I think that it would shock the common sense of many people, and certainly be a most disturbing factor when other persons in like situation found themselves in the position of being personal representatives of their deceased relatives.
>
> I therefore acquit the judge entirely from the view that merely taking advice, without more, is necessarily a passport to relief, but I think with him that, in all the circumstances of the case, and bearing in mind the grave difficulties with which the defendant was confronted, it was reasonable for her, having taken the advice, and paying regard to the advice which was in fact given, to act upon it as she did.

(g) Indemnification

Generally, a trustee is liable for his or her own acts or omissions for breach of trust. If there are two or more trustees held to be liable, contribution proceedings can be instituted by the trustees to apportion liability as between themselves through indemnification (they remain jointly and severally liable to the trust, but one trustee or another may be liable to indemnify the others for his or her greater responsibility for the breach).

PERSONAL REMEDIES

The basic position:

1. Where the trustee is in breach of trust, he or she must pay compensation for any loss occasioned to the beneficiary. The object of the remedial response is just that - compensation and not punishment; see *Fales v Canada Permanent Trust* [1977] 2 SCR 302.

2. Where the trustee is in breach of fiduciary duty and causes a loss to the beneficiary, he or she must pay compensation; this is a monetary award which sounds in equity ('equitable compensation'). The measure of compensation is in respect of those losses which actually flow from the breach (and are not caused by third parties independently) and equity operates to favour the innocent beneficiary rather than the wrong-doing fiduciary in calculating quantum.

3. Where the trustee has made a profit arising from breach of her fiduciary duty, the beneficiary may seek to have the trustee disgorge those profits through the imposition of a proprietary remedy (for example, in the form of a constructive trust).

Campbell v Hogg
[1930] 3 DLR 673 (PC)

The trustee failed to keep accounts. Certain transactions were disputed by the beneficiary and there was no documentation to show what had in fact transpired; the trustee maintained that he gave funds to the beneficiary and the beneficiary denied that to be the case. Quite simply, the trustee had to compensate the beneficiary for the value of property which he could not account for properly.

Compensation
Canson Enterprises Ltd v Boughton & Co
[1991] SCR 534

Here a solicitor acted for the purchasers in a land transaction and in the preparation of a joint venture agreement to develop it. Unknown to the purchasers, an intermediate company had bought the land from the vendors and resold it to the purchasers at a substantially higher price (they 'flipped' the land). The solicitor also acted for the intermediate company in its purchase and resale of the land, but did not disclose to the purchasers that the land was not being purchased directly from the vendors. The purchasers then proceeded with development of the property but suffered substantial losses when piles supporting a constructed warehouse began to sink. They obtained judgment against the soils engineers and pile-driving company they had retained, but were left with a large shortfall when these defendants could not pay. The purchasers then sued the solicitor on an agreed statement of fact. The parties agreed that the purchasers would not have purchased the property or entered into the joint venture had they known of the involvement of the intermediate company. The solicitor was held liable for breach of fiduciary duty for failing to disclose the intermediary's purchase. The issue

then was damages – *was the solicitor liable for more than the secret profit or the whole of the defendant's loss*?

Trial:

> Secret profit, as well as consequential damages of the expenses incurred on the warehouse project prior to the wrongful acts of the engineers and pile-drivers.

Court of Appeal:

> A fiduciary who mishandles trust property and causes a loss is liable in damages to be calculated by analogy to trust law. The shortfall was not recoverable because such damages did not flow from the breach of fiduciary obligation but were the unrelated fault of the soils engineers and pile-driving contractor.

SCC:

> The majority held that while equitable compensation is compensatory and are on par with common law damages to some extent, the principles of forseeability and remoteness play no role in respect of breach of trust (although they may in respect of breach of fiduciary duty outside breach of trust). Thus the solicitor was liable merely for returning the secret profit.
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> The minority held rejected the distinction between two types of fiduciary obligation and factoring in remoteness in calculating the damages – the beneficiary was entitled to be made whole again. However, causation is relevant as a matter of common sense – hence, the negligence of the engineers was not caused by the solicitor's breach of fiduciary duty.

LaForest J (for the majority) held:

> 82 **What is important for our purposes is the manner in which the Court of Appeal dealt with compensation, and in particular the question whether the compensation could be reduced in respect of the second investment in 1977 because of Day's contributory negligence. Like the trial judge, it concluded that it was proper to apportion the loss. In its view, not only was this justifiable on the basis of equitable principles, but law and equity had become so merged in this area that the principles of contribution should apply.** As well, judge-made law was quite properly affected by legislative action, there the Contributory Negligence Act, and by other current trends. Having reviewed a number of cases where there was an intermingling of common law and equitable principles, Cooke P. continued, at p. 451:
>
> 'These developments accord with what is probably the most authoritative modern exposition of the effect that should be accorded to the Judicature Acts in England, namely the speech of Lord Diplock in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, 924-927. As Lord Diplock put it, law and equity have mingled now;

the Acts did not bring to a sudden halt the whole process of development of the common law of England that had been so notable a feature of the preceding decades; the legislation placed no ban upon further development of substantive rules by judicial decision. I respectfully subscribe to such views, as will be apparent from *Hayward v Giordani* [1983] NZLR 140, 148:

> '**Compensation or damages in equity were traditionally said to aim at restoration or restitution, whereas common law tort damages are intended to compensate for harm done; but in many cases, the present being one, that is a difference without a distinction.** There is, however, the more significant historical difference that Courts of equity were regarded as having wider discretions than common law Courts. Equitable relief was said to be always discretionary. Its grant or refusal was influenced by ideas expressed in sundry maxims. He who seeks equity must do equity. He who seeks equity must come with clean hands. Delay defeats equity. These are merely examples. Further, relief could be granted on terms or conditions.
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> 'Whether or not there are reported cases in which compensation for breach of a fiduciary obligation has been assessed on the footing that the plaintiff should accept some share of the responsibility, there appears to be no solid reason for denying jurisdiction to follow that obviously just course, especially now that law and equity have mingled or are interacting. It is an opportunity for equity to show that it has not petrified and to live up to the spirit of its maxims. Moreover, assuming that the Contributory Negligence Act does not itself apply, it is nevertheless helpful as an analogy, on the principle to which we in New Zealand are increasingly giving weight that the evolution of Judge-made law may be influenced by the ideas of the legislature as reflected in contemporary statutes and by other current trends: compare *Dominion Rent A Car Ltd v Budget Rent a Car Systems* (1970) Ltd [1978] 2 NZLR 395, citing *Erven Warnink v J Townend & Sons (Hull) Ltd* [1979] AC 731, 743 per Lord Diplock.'

83 I agree with this approach. As I have attempted to demonstrate, it would be possible to reach this result following a purely equitable path. I agree with Cooke P. that the maxims of equity can be flexibly adapted to serve the ends of justice as perceived in our days. They are not rules that must be rigorously applied but malleable principles intended to serve the ends of fairness and justice. Viscount Haldane reminded us in *Nocton v. Lord Ashburton* of the elasticity of equitable remedies. **But in this area, it seems to me, even the path of equity leads to law. The maxim that "equity follows the law" (though I realize that it has traditionally been used only where the Courts of Chancery were called in the course of their work to apply common law concepts) is not out of place in this area where law and equity have long overlapped in pursuit of their common goal of affording adequate remedies against those placed in a position of trust or confidence when they breach a duty that reasonably flows from that position. And, as I have indicated, willy-**

> **nilly the courts have tended to merge the principles of law and equity to meet the ends of justice as it is perceived in our time.** That, in effect, is what was done in *Jacks v. Davis*, supra, and by the courts below in the instant case. As I see it, this is both reasonable and proper. It is worth observing that while the breakthrough in *Hedley Byrne & Co. v. Heller & Partners Ltd*., supra, took place in a common law context, it finds its roots in equitable principles; see Gummow in Equity, Fiduciaries and Trusts, supra, at pp. 60-61; Davidson, supra, at pp. 370-71.

McLachlin J (minority) held at para 84:

> **… compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach, i.e., the plaintiff's lost opportunity. The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach. The plaintiff will not be required to mitigate, as the term is used in law, but losses resulting from clearly unreasonable behaviour on the part of the plaintiff will be adjudged to flow from that behaviour, and not from the breach. Where the trustee's breach permits the wrongful or negligent acts of third parties, thus establishing a direct link between the breach and the loss, the resulting loss will be recoverable. Where there is no such link, the loss must be recovered from the third parties.**

[subsequently quoted with approval by Binnie J. for the Court in *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, para. 93].

Accounting of Profits:

MacMillan Bloedel Ltd. v. Binstead
(1983), 14 ETR 269 (BSSC)

Where a company director held a share in a company purchasing chattels (logs) from his employer, and where the director does not disclose the conflict of interest and obtain consent, he will be liable for breach of fiduciary duty. The appropriate remedy is an accounting of all profits made in respect of the property purchased in breach of fiduciary duty notwithstanding that the employer has suffered no loss.

Per Dohm J:

> 60. … Where there has been a breach of fiduciary duty, as in the present circumstances, the law calls upon the Defendants to account to the plaintiff for any profit made or benefit received as a result of the breach of duty. This is not the same as paying damages, which are compensatory in

nature. The purpose of damages is to put the plaintiff in the same position it would have been in if not for the wrongdoing. Here the plaintiff suffered little damage and will be in a better position than it would have been in if not for the wrongful act of the defendants.

61 A trustee who has breached his duty and profited as a result is obligated to disgorge those profits regardless of whether there is a corresponding loss to the cestu que trust. Nowhere is this principle more clearly stated than in *Boardman v. Phipps* by Upjohn, L.J.:

"Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case. The relevant rule for the decision of this case is the fundamental rule of equity that a person in a fiduciary capacity must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict. I believe the rule is best stated in *Bray v. Ford* by Lord Herschell, who plainly recognised its limitations:

> 'It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondents, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule."

62. Basic to the application of this principle is a determination of what is meant by the term "profit". The Oxford Dictionary describes "profit" as being "the surplus product of industry after deducting wages, cost of raw material, rent and charges". In the present circumstances then, what must be returned by the Defendants to MB is the difference between the gross earnings of MB transactions and expenses. In *Waters on Trusts*, the learned author states it in these terms:

> "In principle, if the beneficiary is enriched, he should be liable to meet the expenses of the person who has thus enriched him, and this approach is applied in those cases where the court deems a person a constructive trustee of property for another. **The constructive trustee, although he installed the improvements, for instance, thinking or intending to claim that the property in question is his own, will be held entitled to recover what he put into the property.**"

The expenses though must be proper, that is, all reasonable and necessary expenses incurred by the trustee in earning the profit.

[The principle of deducting reasonable expenses can also extend to tax liability; see *Hanson v. Clifford* (1994), 59 C.P.R. (3d) 465 (BCSC).]