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Remedies against Third Parties

Identify the breach of trust and trustee responsible. Consider the claim and whether the claim against trustee of fiduciary will be worthwhile given:

• They are bankrupt or have fled
• Own no assets
• 3rd party has professional insurance cover
• 3rd party in possession of property

In any case, remedies can be claimed from third parties involved in the breach.

Receipt of Property in Breach of Trust

Personal Claims

1. **Recipient Liability**: Claimant can bring a claim *in personam* (personal claim) against stranger, provided:

   • Transferred trust property to stranger in breach of trust or duty
   • Stranger received trust property for own benefit
   • Stranger received property with requisite degree of knowledge that it was in breach, or later acquired the knowledge – affected their conscience (*BCCI v Akindele*)

   → **BCCI v Akindele** – Defendant’s knowledge made it unconscionable for him to retain the property

   → **Re Montagu** – Constructive notice of the origins of the property will not suffice for knowledge

   → **Williams v CBN** – Strangers found to be accessories or recipients are not subject to S21(1) Limitation Act 1980
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Claim will be compensation for loss to the trust fund plus interest.

2. **Intermeddling**: Where someone who is not a trustee acts as though he is one or beyond the scope of his authority as an agent, he will be liable for loss just as if he’d been appointed an express trustee (*Mara v Browne*) – strict liability

   → **Lyell v Kennedy** – Agent of trustee continuing to collect rent from tenants after death of trustee – was liable as trustee *de don sort*

   → **Williams v CBN** – Only intermeddlers are considered constructive trustees.

   Accessories and recipients will be liable as though they were trustees as the only duty they owe is to account for and return trust property

Claim will be compensation for loss to the trust fund plus interest.

**Common Law Claim**

1. **Restitution**: Can bring a claim in common law provided
   
   a) Claimant is legal owner
   
   b) Defendant must be unjustly enriched (received claimant’s property)
   
   c) No mixing prior to receipt by defendant (*Lipkin v Gorman*)

   It’s a strict liability claim.

**Defences:**

- Defendant bona fide purchaser who has provided full consideration
- Change of position by innocent defendant
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→ *Lipkin v Gorman* – Cannot claim if money spent in an irretrievable manner or exceptional expenses that wouldn’t have been made otherwise, and defendant has nothing left to meet the claim

→ *Abou-Rahmah* – Transferring money to customer is a change of position and a bank can defend itself even though it was in bad faith. This because bad faith falls short of dishonesty for these purposes

**Proprietary Claim**

A claimant can bring a claim *in rem* against a wrongdoer or an innocent volunteer for the property they received in breach of trust.

1. **Wrongdoer:** Once recipient liability or intermeddling established apply the rules of equitable following and tracing:
   - **Following:** Where the trustee holds the original trust property, a proprietary claim can be made against it
   - **No Mixing/Clean Substitution** – Under *Re Hallett* can claim the ownership of the new asset or can enforce an equitable *lien*
   - **Mixed Asset Purchase** – Under *Foskett*, the beneficiary is able to claim a proportionate share in the asset or enforce a *lien* upon the asset
   - **Mixed Bank Account** – Presumed against stranger for his wrongdoing
     - → *Re Hallett* – Stranger deemed to have spent his own money first (usually when money dissipated)
     - → *Re Oatway* – Stranger can be deemed to have spent trust money first, if it was used to buy an asset and remaining was dissipated, as beneficiaries claim can be satisfied from an identifiable part of the mixed fund
2. **Innocent Volunteer:** A stranger who lacked the requisite degree of knowledge that the money was stolen.
   - **Following:** Where the trustee holds the original trust property, a proprietary claim can be made against it
   - **No Mixing/Clean Substitution** – Under *Re Hallett* can claim the ownership of the new asset
   - **Mixed Asset Purchase** – Under *Foskett*, the beneficiary is able to claim a proportionate share in the asset but no *lien*
   - **Mixed Bank Account** – Where volunteer mixes his funds with trust the rule of first in first out is applied (*Clayton’s Case*) – outline the bank entries and withdrawals with diagram
     - → *Barlow Clowes; Russell-Cooke* – FIFO may not be applied if it would result in injustice
     - → *Re Diplock* – In certain situations, a claim may be unsuccessful if:
       - Money dissipated or untraceable; or
       - Used for improvement that adds no value to own property; or
       - Inequitable to allow tracing i.e. leads to unequal treatment of innocent volunteer (e.g. against a charity)

3. **Bona fide Purchaser** – There is no claim against a bona fide purchaser for value without notice
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No Receipt of Property in Breach of Trust

Personal Claim

1. Accessory Liability: Claimant can bring a claim in personam against the defendant for assisting in the breach, provided there is:
   a) A breach of trust or fiduciary duty; and
   b) Assisted by the 3rd party; and
   c) 3rd party dishonest

→ Royal Brunei – Dishonesty is not acting as an honest person would in the circumstances i.e. ‘conscious impropriety’ – not careless. It’s an objective test but take into account the circumstances and the defendant’s experience and intelligence

→ Barlow Clowes – Not necessary for the defendant to know he was being dishonest or the exact details of the breach, but must know that he was part of an illegal scheme