

Brian is the manager of a Premier League association football club, Bristol United. In 2004, Melchester United buy Bristol United's best player, Junior, for £5,000,000. As a condition of agreeing to the transfer, Brian insists that Melchester United secretly pay him £500,000. Bristol United knows nothing about this payment.

The money is paid by Melchester to Brian's solicitor, Heep. Heep has received similar payments in the past on behalf of Brian. He does not consider it to be part of his job to ask Brian where Brian's money comes from.

Brian uses £250,000 to buy a house for his wife, Mary. The house is registered in her name and Brian tells her that the money is his bonus for winning promotion for Bristol United last year. She believes him.

Brian opens a bank account at Floyds Bank and deposits the other £250,000 there. The Bank knows that Brian is a well-paid football manager and do not question where the money comes from. Brian spends the money on two expensive motor cars, a Mercedes and a BMW, gambling, visits to night clubs, and other amusements typically enjoyed by football managers.

A Football Association investigation uncovers the secret payment to Brian. Bristol United wants to claim the £500,000.

In 2006, Mary's house is worth £300,000, Brian's bank account is £50,000 overdrawn, but he still owns the Mercedes and the BMW. Heep still owns a firm of solicitors which is earning large profits.

Advise Bristol United whether equitable remedies such as constructive trusts and tracing could be used to recover the £500,000.

Suggested Answer

This is a problem which covers material from chapters 17, Tracing and chapter 16 on Constructive Trusts. If it is possible to trace the assets that have been removed then the court has to decide which remedy to award to the claimant. The imposition of a constructive trust would be one of the most important remedies used in tracing.

The first issue is whether there is any form of trust or fiduciary relationship, because that is essential for an "equitable remedy", such as equitable tracing or a constructive trust: *Westdeutsche Landesbank v Islington BC*. Managing directors are clearly in a fiduciary position to their company: *IDC v Cooley*. Employees entrusted with their employer's money could also be fiduciaries: *Reading v AG*. So Brian is probably a fiduciary. He holds the bribe money on a constructive trust. In *AG for Hong Kong v Reid*, the Privy Council took a dim view of bribery, and held that bribe money should be held by the fiduciary on a constructive trust. The Supreme Court endorsed this view in *FHR European Ventures v Cedar Capital Partners*. Any unauthorised profit taken by a fiduciary, whether it is a bribe or a secret commission is held on constructive trust. This gives prospective claimants proprietary rights and the ability to trace and recover the unauthorised profit.

If Brian is a fiduciary, he has a strict duty not to profit from his fiduciary position and must not have conflicting loyalties: *Bristol & West BS v Mothew*. He should have promoted the interests of Bristol United and not taken money for himself, outside of his normal salary: *Boardman v Phipps*. *Imagewiew v Jack* is a recent case that made the same point and it concerned a football agent, showing that fiduciary duties are not confined to traditional categories.

According to *Reid* and *Phipps*, above, Brian has a duty to account and holds the £500,000 on constructive trust for Bristol United. A close reading of *Reid* and *FHR European Ventures*, would suggest that there are some advantages to this being a constructive trust. The things that he has bought with trust money, such as the cars and the house for Mary belong to the trust i.e. Bristol United. So Bristol United could probably successfully sue Brian, but as he no longer has all the money, they might wish to sue some of the other parties involved.

Heep has clearly assisted Brian, but which category in *Barnes v Addy* does this place Heep in? Heep makes no claim to the money for himself and no longer has the money, so this puts him into the third category of constructive trust in *Barnes v Addy* according to *Westpac Banking v Savin* and *AGIP (Africa) v Jackson*. Neither Heep nor his firm still have the £500,000, but that does not matter for this category of constructive trust. That is why cases such as *Selangor v. Cradock* and *Central Bank of Nigeria v Williams* suggest that these are not true trusts.

Liability for dishonest assistance used to depend upon proving that defendants such as Heep had knowledge of the breach of trust, but there was confusion as to whether the knowledge had to be actual or constructive, as in *Selangor v Cradock*. Because of that difficulty the courts changed the test of liability and, nowadays, the case law centres on the meaning of “dishonesty”. The new test has also caused problems! *Royal Brunei v Tan*, a Privy Council case, set an objective standard of dishonesty, as did the recent case from the same court, *Barlow Clowes v Eurotrust*. By this standard Heep would probably be liable. The House of Lords required more in *Twinsectra v Yardley*. Heep would also have to be aware that what he did was wrong, a kind of mens rea requirement borrowed from criminal law. Under this test he would escape liability. So it depends which line of authority the courts follow. The recent Court of Appeal case, *Abou-Rahmah v Abacha* and High Court case, *Statek v Alford*, suggest that the courts of England and Wales will follow *Royal Brunei v Tan* making Heep liable. Tracing does not seem very likely against Heep as the money that he received from Brian, has been mixed and dissipated. The right to trace ceases when the means of ascertainment fails, to nearly quote Lord Ellenborough in *Taylor v Plumer*.

Heep’s firm may be vicariously liable for his actions as banking money for a client would be in his normal course of dealings: *Dubai Aluminium v Salaam*, overruling *Mara v Browne*, which held that breach of trust could never be in the normal course of employment for solicitors.

Brian’s wife, Mary, has received money, but according to the second category in *Barnes v Addy*, she must have knowledge that the money was obtained through a breach of trust to

be liable. Older cases, such as *Re Polly Peck No.2*, were willing to assume, from the circumstances, that defendants must have known what was going on.

More modern cases, such as *Re Montague* and *BCCI v Akindele*, require Bristol United to prove that Mary actually knew where the money came from. This does not seem likely from the facts, so in the words of *Akindele*, it is not “unconscionable” for her to keep the money. Common law tracing might be an alternative approach to recovering this money. The bribe money has been turned into real property, but it is still ascertainable and has not been mixed with other property, so it may fall under the test propounded in *Taylor v Plumer*. If that is so, “the beneficiary”, Bristol United, can take the benefit of the increase in value, as they have title to this property, not Mary: *Jones (FC) & Sons v Jones* [1996] 3 WLR 703. Even if equitable tracing is used, the same property right can be asserted to claim the increase in value: *Foskett v Mc Keown*.

Floyds Bank might also be considered under dishonest assistance. It is less likely that they would be liable, under whichever dishonesty test is correct. The courts used to make banks liable if they should have known what Brian was doing and should have asked him questions: *Selangor v Cradock* and *Rowlandson v NatWest*. *Royal Brunei* changed this and now we just ask the question: Were they dishonest? The answer seems to be no. It would be necessary to use equitable tracing to go after the money in the bank, because it has been mixed with Brian’s own money: *In re Hallett’s Estate*. At first this would seem pointless, because it is not possible to trace into an overdrawn bank account, according to *Bishopsgate Investment Management Ltd. v Homan & Others* [1995] Ch 211. However, the trace could continue to pursue the money as it leaves the bank account and is used to purchase the two cars, as seen in *Re Oatway*. A charge could be imposed on the cars, as seen in that case.

In conclusion then, Brian is probably liable to return the bribe money, but that is not very useful to the claimant, as all he has left is the two cars, which might be claimed. Floyds Bank is probably not liable because they were not dishonest, but Heep is, because he was. Heep’s wrongdoing could also make his employers vicariously liable. Mary does not seem to have known of her husband’s wrongdoing, so that would rule out a constructive trust, but maybe the house could be traced against and a charge imposed upon it.