

Insights

NAVIGATING LIABILITY FOR DISHONEST ASSISTANCE: AN ACCOUNT OF PROFIT, LOSS AND CONSTRUCTIVE TRUSTS

SUPREME COURT JUDGMENT: *STEVENS V HOTEL PORTFOLIO II UK LTD* ("HP II")
(*IN LIQUIDATION*) [2025]

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The UK Supreme Court has recently addressed novel issues concerning liability for dishonest assistance in respect of a breach of fiduciary duty, involving the acquisition and dissipation of unauthorised profits.

It is an interesting and important judgment that will be useful to those making or facing breach of fiduciary duty and dishonest assistance claims. Certain questions remain, however, unanswered and the dissenting judgment of Lord Burrows, which supported the Court of Appeal's findings, is a persuasive read. The judgment is certainly a good example of the development of English common law in action.

EXECUTIVE SUMMARY

In a self-proclaimed "over-long" judgment, the Supreme Court in *Stevens v Hotel Portfolio II UK Ltd* ("HP II") (*in Liquidation*) [2025]^[1] has decided that a principal (HP II) can claim equitable compensation from the dishonest assistant (Mr Stevens) for the loss caused by the dissipation of the unauthorised profits made by its fiduciary (Mr Ruhan) through the fiduciary's dishonest scheme of secretly purchasing assets from the principal and selling on for a profit.

The entitlement to compensation from the dishonest assistant was in addition to the principal's entitlement to an account of the separate profit made by the assistant (of £1.5m). Moreover, it was awarded by the Supreme Court even though the principal had suffered no loss if the acquisition and onward sale of the assets is considered to be part of one dishonest scheme.

The Supreme Court was, however, divided:

- The 4-1 majority determined the acquisition and dissipation of the profits to be two separate transactions, which the dishonest assistant could not set off against each other to escape "scot-free". Instead, the practical effect of this decision is that the assistant's liability was

subject to a very significant increase, from a £1.5m account of personal profits to a much higher liability of c.£105m.

- The dissenting judgment was delivered by Lord Burrows. Lord Burrows set out a number of persuasive objections, preferring the Court of Appeal's determination, and concluded that he would dismiss the appeal. While Lord Burrows agreed that the conduct of the dishonest assistant was abhorrent, he made clear that the Court's interpretation and application of equitable principles should not be affected by the fact that the principal had been unsuccessful in making a recovery from the fiduciary: "*the temptation to distort equitable principles so as to award a substantial compensatory remedy against him [dishonest assistant]...must be resisted*".

BACKGROUND – FACTS OF THE CASE

Mr Ruhan was a director of HPIL and, in that capacity, owed fiduciary duties to HPIL. HPIL owned various hotels in central London, which it then sold at market value to a company called Cambulo Comercio e Serviços Sociedade Unipessoal LDA ("**Cambulo Madeira**" or "**CM**").

CM was ostensibly owned by Mr Stevens but he was actually acting as nominee for Mr Ruhan. Mr Ruhan did not inform HPIL that he was the true purchaser. When Mr Ruhan resold the hotels to third parties, he made very large profits of c. £100m. These were unauthorised profits, made in breach of Mr Ruhan's fiduciary duty to HPIL.

The liquidators of HPIL then discovered what Mr Ruhan had done and brought claims against both Mr Ruhan and Mr Stevens to recover the unauthorised profits. The trial judge found that Mr Ruhan held the unauthorised profits on constructive trust for HPIL's benefit. The trial judge also found that Mr Stevens had dishonestly assisted Mr Ruhan. The judge therefore ordered Mr Ruhan to account for his unauthorised profits and Mr Stevens to pay HPIL compensation (in the amount of both his own personal profits and Mr Ruhan's dissipated profits).

Mr Stevens appealed on the primary basis that HPIL had suffered no loss by reason of the dissipation of the unauthorised profits, so there was no loss for which to pay compensation. The Court of Appeal accepted Mr Stevens' submissions and allowed the appeal. HPIL then appealed to the Supreme Court.

ISSUE ON APPEAL

The issue on appeal to the Supreme Court was whether a person (Mr Stevens) who dishonestly assists a constructive trustee (Mr Ruhan) in dissipating a trust fund is liable to compensate the beneficiary (HPIL) for the consequential loss of its proprietary interest in the fund in circumstances where:

1. The funds held on constructive trust comprised unauthorised profits previously made by the trustee (Mr Ruhan) in breach of fiduciary duty to the same beneficiary (HPIL), the making of which caused the beneficiary no loss;
2. The dishonest assistant (Mr Stevens) also dishonestly assisted the trustee in making the profits in the first place; and
3. *None* of the following key facts were in dispute:
 - HILP sold the hotels to CM at a fair market value.
 - HILP would never have made the profits that Mr Ruhan himself made.
 - HILP had suffered no loss.
 - Mr Ruhan had dissipated the profits.
 - Mr Stevens dishonestly assisted Mr Ruhan with both the making and dissipation of the profits.
 - Mr Stevens was liable to account for the profits that he had personally made through his dishonest assistance in the amount of c.£1.5m.

MAJORITY DECISION

The Supreme Court majority decided that Mr Stevens was liable to account to HPIL (in addition to the profits that he himself had made of c.£1.5m) for the c.£100m profits which had been dissipated by Mr Ruhan with Mr Stevens' dishonest assistance.

In reaching this decision, the Supreme Court analysed Mr Steven's submissions which called for the examination of fundamental questions about the nature of constructive trusts and that of liability for dishonest assistance.

WAS COMPENSATION PAYABLE IN PRINCIPLE?

By analogy to a remedy in damages for loss, where the failure to pay damages does not lead to a cause of action for compensation, Mr Stevens argued that since the constructive trust was an equitable remedy for an earlier breach of trust, breach of constructive trust should not sound in damages either.

The Court firmly disagreed. The Court found it "*extraordinary and contrary to basic equitable principle*" for the dissipation of a fund held on constructive trust to give rise to no remedy by way of equitable compensation for any consequential loss.

The nature of a constructive trust is institutional rather than purely remedial. Dissipation causes a loss to the beneficiary which will generally be at least equivalent in value to the property dissipated,

since the beneficiary was its beneficial owner, and has thereby been deprived of any proprietary claim to the property.

As to (what Lord Briggs referred to as) the “*Novoship* principle” (i.e. that the dishonest assistant is not generally required to account for profits that they did not personally make), the Court considered that the answer lies in the distinction that is to be drawn between: (a) the making of the profits and (b) the dissipation of the profits.

The breach consisting of the making of the profit is separate and distinct from the breach consisting of the dissipation of the property subject to the constructive trust. The latter breach is not about making unauthorised profits. It is about dissipating trust property. There is no rule or principle that a person who dishonestly assists the constructive trustee in the dissipation is only liable for that which he has received, merely because the property in question came to be held upon constructive trust on the basis that it represented an unauthorised profit.

The Court concluded that where an individual dishonestly assists in both the making of the profit and its dissipation, “*it makes no sense, nor is it equitable*” to allow the dishonest assistant a defence to a claim for compensation where he has dishonestly assisted with the dissipation of the trust property.

HAD HP11 SUFFERED ANY LOSS AS A RESULT OF THE DISSIPATION?

Equitable compensation requires the Court to compare: (a) the position of the beneficiary/principal as a result of the breach with (b) the position in which it would have been in if the trustee/ fiduciary had performed his duty (i.e. the counterfactual), in order to quantify the compensable loss.

Mr Stevens submitted that the comparison should be between: (a) HP11’s position following *both* breaches and (b) the position in which HP11 would have been if neither breach had occurred. The Court of Appeal had agreed.

The Supreme Court rejected this. The Court held that the constructive trust provided a vital means of recourse for compensation for loss caused by the dissipation, against both the trustee and the dishonest assistant, but only if the breach consisting of the making of the profit “[wa]s *not airbrushed out of the counterfactual*” by being aggregated with the breach consisting of its dissipation.

The majority’s view was that “*the dishonest assistant would get away scot-free from his dishonest assistance in the dissipation if that were to be the outcome of any case where the subject matter of the constructive trust was an unauthorised profit*” and that there was “*no reason why that should be a just or equitable outcome*”.

The Court found that HP11 had, in fact, suffered loss because the counterfactual was to be assessed on the basis that the dissipation was a separate and distinct breach and was not to be

amalgamated with the earlier breach (which called for the imposition of the constructive trust in the first place).

WAS THE MAKING AND SUBSEQUENT DISSIPATION OF PROFITS SUBJECT TO EQUITABLE SET-OFF?

Mr Stevens relied on the “*well-settled principle*” that trustees and fiduciaries may set off breaches which made gains for the beneficiaries against breaches which caused losses to them provided that the two (or more) breaches were connected, as was the case here. He argued that the profits from the onward sale should be subject to equitable set off against the subsequent dissipation loss to reduce his liability.

The Court firmly rejected Mr Steven’s set-off claim. The Court explained that: “*The general principle applied by equity where gains and losses are made and incurred for the trust estate by a series of breaches of trust is that one breach may not be set off against the other ...the beneficiary is entitled to the gains, but the trustee must bear the losses...the court may recognise an exception where the application of the no set-off rule would, usually because of a particular type of connection between the breaches concerned, produce a clearly inequitable result*”.

The Court also explained that even if the transactions were connected, a person seeking to demonstrate an inequitable result must still demonstrate that the underlying purpose of the principle is outweighed by other weightier considerations of an equitable nature.

The Court took a dim view of Mr Steven’s argument that the transactions were connected and remarked that “*dishonesty and greed*” were the only connecting factors linking the three transactions (i.e. (a) the purchase of the hotels, (b) the on-sales of the hotels to third parties and (c) the subsequent dissipation of profits). The Court also found that this was not a case where it would be manifestly unfair or inequitable not to allow for set off.

DISSENTING OPINION

While it appears that the majority decision was aimed at complying with notions of “*justice, equity or common sense*”, it would be interesting to know whether the decision would have been the same, had recovery from the principal wrongdoer been possible and available in the circumstances.

The decision raises a number of questions which will, no doubt, be subject to further judicial consideration in the future, when the factual matrix allows it. There is a danger that the finding of liability in this case could have unintended consequences, as highlighted by Lord Burrows in his dissent.

Lord Burrows raised a number of powerful objections in his well-reasoned dissenting opinion. He first doubted that the imposition of a constructive trust of the profits does include the possibility of

an equitable compensatory remedy against the constructive trustee for dissipation of those profits. However, even if one were to accept this proposition, there are still, in Lord Burrows' view, significant objections to accepting HPII's submissions on dishonest assistance, including the below:

- **Artificial Division of Dishonest Scheme.** It is "wholly artificial" to divide the dishonest scheme into the acquisition of the profits and their dissipation. The correct question regarding Mr Stevens, based on a compensatory analysis, is: what position would HPII have been in if the scheme had not been carried out (i.e. if Mr Ruhan never breached his fiduciary duty). The answer is that HPII would have been in the same position as at present (i.e. having suffered no overall loss).
- **Account for Profits Made Personally.** It is well-established under English law that the wrong of dishonest assistance does not lead to the dishonest assister being liable to account for the profits made by the principal wrongdoer. Instead, the dishonest assister is severally liable to account only for the profits that it has personally made. Lord Burrows considered that finding Mr Stevens liable to account for the dissipated profits in this case would be *"inconsistently, and by a backdoor 'compensation' route, making the assister liable to account for the profits made by the principal wrongdoer."*
- **Unintended Consequences.** A finding of liability in this case could produce "odd" consequences. In particular, when this principle is applied, a dishonest assister who assists in the actual making of the profits would not be held liable through an equitable compensation claim where (as here) there is no loss to the principal. Yet a dishonest assister who merely assists in the dissipation of these profits could be held liable, through an equitable compensation claim, for the profits dissipated, which is a *"distinction that appears to have no sound basis in principle or policy."*
- **Election Principle.** HPII can be said to have elected for an account of profits against Mr Ruhan, rather than equitable compensation (which are two inconsistent remedies). If HPII were to give up its claim to an account of profits, it could not at the same time argue that Mr Ruhan's failure to account for profits constitutes a loss. That is because that loss is dependent on the existence of the constructive trust and the election for an account of profits. Therefore, there is no possible claim for compensation against Mr Ruhan and, by extension, against Mr Stevens.
- **Double Recovery.** Related to the above election point, Lord Burrows highlighted that finding Mr Stevens liable in this case could generate potential for double recovery on different facts. For example, if HPII had suffered a loss here of for example £75m (say because it would have exploited a more profitable opportunity had it not been for Mr Ruhan's breach), then HPII could have potentially recovered both the £75m loss, as well as the value of the unauthorised

profits. Lord Burrows deployed this example to illustrate that the majority findings could have this unintended result and therefore cautioned against the potential for double recovery.

In light of these objections and as Lord Burrows put it: *“The law abhors the dishonest wrongful conduct of Mr Stevens. But the temptation to distort equitable principles so as to award a substantial compensatory remedy against him, where remedies against the principal wrongdoer are thwarted (e.g. by insolvency) must be resisted.”*

CONCLUSION

In conclusion, it is certainly arguable that the Supreme Court decision expands the remedies against dishonest assistants. Dishonest assistants may now be required to account not only for unauthorised profits that they have made personally, but also for unauthorised profits (subject to a constructive trust imposed pursuant to an earlier breach) which have been dissipated with their dishonest assistance.

The question remains as to how significant this Supreme Court’s decision will be and how it will impact future claims of dishonest assistance of a breach of fiduciary duties. Certainly, where a judge is faced with the same type of claim but a different fact pattern, there likely will be scope for distinguishing this decision to arrive at a different finding of liability, based on Lord Burrows’ objections.

[1] UKSC 28.

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