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LAWS2205 Equity and Trusts 1st Semester 2009

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Question 3

20.5/25

- A. Hamlet's (H) rights and remedies against Claudius (C) for breach of duty of care as a trustee

As part of trustee's duty to administer the trust personally, C, as trustee has a duty to H to invest the trust property. The standard of care in exercising that duty is that which a prudent person would exercise in managing the affairs of other persons (s 14A(2)(b) Trustee Act). [✓] If C has professional expertise he will be held to a higher standard but that is not evident on the facts. This standard is objective (Re Speight) [✓] and so C may be liable despite the fact that he personally did not believe in a looming GFC. More information is needed about the level of risk of the portfolio in which C has invested (e.g. how much riskier it is) but given the standard is that of a 'prudent person' C is probably in breach. [✓] H can get equitable compensation for loss to the trust fund, which will be \$400,000; 20% of \$2 million. [Youyang?] Equitable compensation is a personal remedy (Nocturn v Lord Ashburton) so C must be solvent for this remedy to be effective; [✓] seems he is on facts. Equitable comp. is restorative in function → C will have to put the trust in as good a position as it would have been 'but for' his breach (Re Dawson). However, this remedy will be affected by the exclusion of liability clause; excluding C from all personal liability for any breach of trust not amounting to actual fraud. This is a valid exclusion of liability clause (Armitage v Nurse) [✓ status in Oz?] and will operate as a complete defence. As C genuinely didn't believe rumours of a looming GFC, this is not a fraudulent breach (→ H gets no remedy re shares). [Good]

- B. C's breach of trust by paying H's interest under the will (from properties) into Elsinore's (E) bank account

More information is required as to what the trust instrument (the will) says with respect to income from the properties. However, from the facts given it appears that H is the only beneficiary under the discretionary trust. [Clear breach of fiduciary duty] Thus, C is in breach of trust when he misappropriates the trust's rental income by putting it into E's bank account. Appears (as discretionary) that C can choose not to make a distribution to H, but can't make a distribution to someone who's not within the class of beneficiaries, which on the facts I assume E is not. Thus, the trust fund can get equitable compensation from C for breach of trust. [✓] Personal remedy, but appears C is solvent. C's obligation will be to restore the trust fund the losses that have occurred (Re Dawson) i.e. put the trust in the same position it would have been in 'but for' the breach (Re Dawson). This will be quantified at \$30,000 (10 * \$3000 payments). [✓]

Alternatively, H could seek a constructive trust over any property that E has purchased with the money from the trust. Here, however, it appears that the money has been used to pay ‘the company’s expenses’ which implies covering things like rent and other overheads (this is reinforced by the fact that E needs ‘short-term cash flow’). In this case, there will be no property left to trace, [✓] and so H will not be able to trace and get a constructive trust as there is no property left. (NB a CT would be a proprietary remedy against E)

C. G’s liability as a 3rd party

H will have equitable rights and remedies against G if he can show she is liable as a 3rd party. If liable as a 3rd party she will be liable as though she were the trustee (Barnes v Addy). Here G may be liable as an accessory under the 2nd limb of Barnes v Addy. Here there is the existence of a trust of fiduciary duty (Farah) – have both trust for H’s benefit and C has fiduciary obligations to H as a trustee. [✓] There has been a ‘dishonest and fraudulent’ breach of duty by C in misappropriating the rental income under the trust and putting it in E’s bank account. [✓] Note the English courts have shifted the focus to the wrongdoing of the accessory rather than the fiduciary [✓✓] (Royal Brunei) but not a live issue here. Thirdly, there may have been assistance by G in the design of the breach as she continues to sign off on the company accounts. However, Farah considered that the 3rd party needs to have some active involvement in the breach which is probably not made out here. [✓] As C is sole trustee, he did not need G’s assistance to redirect the trust income to E’s bank account and while more information would be useful, signing off on the company accounts would probably be at a point in time later than the breach, not assisting C in the breach itself. [Debateable] However, if assistance were made out (which seems unlikely), G will be liable if she had type (iv) or above level of knowledge on the Baden scale (Koorootang Nominees) [only re recipient liability]. NB that the position in Aust on knowledge requirements is unsettled but it appears to be enough if the 3rd party knows \$ is not at the free disposal of the trustee/fiduciary (Twinsectra) [✓]. Here G likely has constructive knowledge as she heard C’s conversation with H and (having checked and signed E’s accounts) knows that about the same time E started getting ‘donations from C’ which would indicate the facts to a reasonable person (Baden scale). [✓] here G is unlikely to be liable as an accessory as ‘assistance’ in design of breach will be difficult to make out → no remedy for H with respect to G.

D. H could bring an action against E for 3rd party liability

E is likely liable as though E were trustee (Barnes v Addy) under the first limb of B v A, receipt liability. E has received property already subject to a trust (Barnes v Addy, Farah) [✓] in the form of \$30,000 in rental income payments. E will be liable if E has knowledge of circumstances which would indicate the facts to a reasonable person (Baden scale – (iv), Koorootang Nominees) [✓]. It is difficult to know how knowledge will be determined with respect to E as it

is a company [see tutorial!] but it can probably be imputed to the directors. [✓✓] In Citadel, the two streams of authority re level of knowledge were discussed; Re Montagu, (iv) + (v) insufficient as conscience of recipient must be affected and Agip (Africa), receipt based → (iv) + (v) suffice. In Aust, appears (iv) will suffice (Koorootang) → as C had actual knowledge and G had constructive knowledge (as discussed in part C), will suffice → E liable as though trustee, can get equitable compensation for loss → can get \$30,000 back. Restorative (Re Dawson). [✓]

E. Removal of C as trustee/End the trust

As H is 18 and is the sole beneficiary (seems to be the case on facts) he can end the trust and have it transferred to him (Saunders v Vautier). [✓] Discretionary trust, OK – H is fully entitled Sir Moses Montefiore. Alternatively, could apply to have C removed as trustee but as past breaches not indicative of future (e.g. won't be enough for removal) (Titterton v Oates) this probably won't succeed and he should simply end the trust and take he shares and rental income outright.

[Excellent answer. See comments on text.

Trust – 12/15

Third parties – 8 ½]