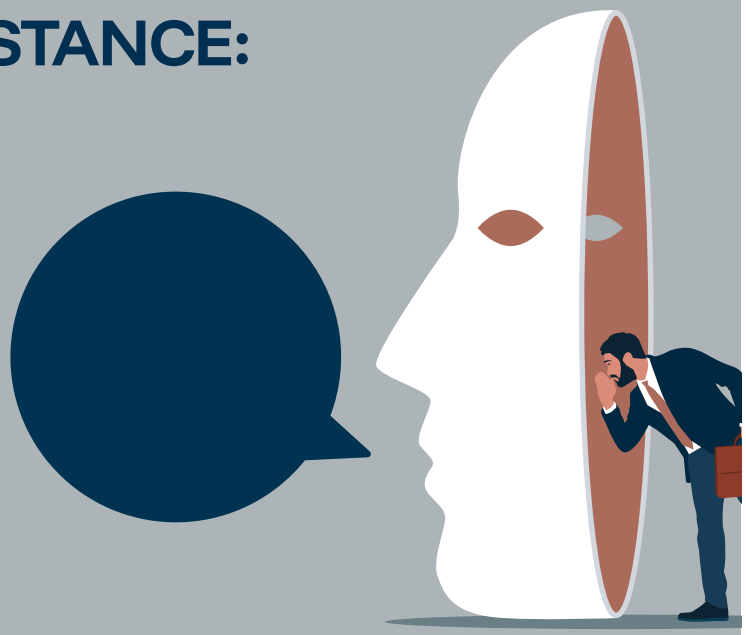
RETHINKING REMEDIES FOR DISHONEST ASSISTANCE:

STEVENS V HOTEL PORTFOLIO II UK LTD (IN LIQUIDATION) [2025] UKSC 28; [2025] 3 W.L.R. 293

CORPORATE PARTNER

serle court



Authored by: Ramyaa Veerabathran (Barrister) – Serle Court

Introduction

When a company director makes an unauthorised profit in breach of fiduciary duty and a dishonest assistant helps the director to make the secret profit and then to dissipate it, is the dishonest assistant liable to compensate the company for the loss of its proprietary interest in the unauthorised profit?

This was the question before the Supreme Court in Stevens v Hotel Portfolio II UK Ltd (In Liquidation) & Anor [2025] UKSC 28. The majority of the Court answered "yes" for the reasons explained in the powerful judgment of Lord Briggs (with whom Lord Reed, Lord Hamblen and Lord Richards agreed) and Lord Burrows answered "no" in a fascinating dissenting judgment.

Background

Hotel Portfolio II UK Ltd ("HP") sold three hotels to a buyer at fair market value in 2005. Mr Ruhan was a director of HP at the time and owed it various fiduciary duties. Unbeknownst to HP, the buyer was controlled by one Mr Stevens acting as nominee for Mr Ruhan. Mr Ruhan thus hid his interest in the sale from HP and breached the rule that prohibits self-dealing by a fiduciary.

A few years later, the buyer sold the hotels at a tremendous profit, of which approximately £102 million found its way to Mr Ruhan in the form of a dividend, in breach of the 'no profit' rule that binds fiduciaries. Mr Ruhan's involvement in the onward sale was still being dishonestly concealed from HP

(and did not come to light until it went into liquidation and its liquidators unearthed Mr Ruhan's scheme, leading to these proceedings).

Mr Stevens then dishonestly assisted Mr Ruhan to dissipate around £95 million of the dividend on unconnected ventures overseas which ultimately turned out to be loss-making. That dissipation was a (distinct) breach of Mr Ruhan's fiduciary duties as trustee of the secret profit. In return for his assistance with Mr Ruhan's dishonest scheme, Mr Stevens made a relatively modest profit of £1.5 million for himself, for which he accepted he was liable to account to HP.

At trial, Mr Ruhan was also ordered to account to HP for the unauthorised profit that he made but it was common ground that nothing had been recovered from him nor would be recovered via proprietary claims in relation to those profits.

The Supreme Court was therefore concerned solely with the extent and basis for Mr Steven's liability as dishonest assistant to Mr Ruhan's wrongs. Against this backdrop three issues arose for the Supreme Court's consideration.

Constructive Trust: Merely Remedial Or "Real"?

It was common ground that Mr Ruhan held the secret profit as constructive trustee for HP as beneficiary. Lord Briggs teased apart the legal consequences that flowed from this premise, beginning by applying the equitable principle derived in FHR European Ventures LLP v Mankarious [2014] UKSC 45; [2015] AC 250, that a

profit made by a fiduciary

"as a result of his fiduciary position"

is to be treated as having been acquired on behalf of the principal, so that it is beneficially owned by the principal. This meant the secret profit generated was beneficially owned by HP from the moment it was received by Mr Ruhan.

Mr Stevens contended that the constructive trust was merely a remedy for Mr Ruhan's initial breach of fiduciary duty owed as director with the result that his subsequent breach of the constructive trust (through the dissipation of the secret profit) could not sound in a remedy for compensation, just as a failure to comply with an order to pay damages does not generate a new cause of action.

The majority rejected this argument, emphasising that the constructive trust of the secret profit was an institutional trust under English law and not merely remedial as in some other jurisdictions. In other words it was a free-standing "real" trust which automatically comes into being as equity's response to particular facts: not a remedial device created by the court's order.

Therefore, like any other trust, the constructive trust gave HP a proprietary interest in the trust fund comprised of the secret profit. Its dissipation by the trustee (Mr Ruhan) was a breach of trust which caused the beneficiary (HP) to lose the value of its proprietary interest. Anyone who dishonestly assisted the dissipation was jointly liable with the errant trustee for the loss caused, which is assessed by reference to the value of the proprietary interest which would still belong to the beneficiary but-for the dissipation.

In contrast, the dishonest assistant has a much more limited liability to account for unauthorised profits made in breach of fiduciary duty as they are not required to account for any profit that they themselves did not make: Novoship (UK) Ltd v Mikhaylyuk [2014] EWCA Civ 908; [2015] QB 499 at §77. However, Lord Briggs reasoned, the breach that constituted the making of the unauthorised profit (which gave rise to the constructive trust) is distinct from the subsequent breach of the constructive trust by its dissipation. The boundsof liability for the former do not dictate the bounds of liability for the latter. On that basis Lord Briggs concluded that the Novoship principle does not insulate a dishonest assistant from joint liability with the trustee for loss caused by the breach of the constructive trust just because the assets which were dissipated were secret profits generated at an earlier stage of the dishonest scheme with their dishonest assistance. Such an outcome would accord with neither equitable nor common sense.

In summary, once a constructive trust has come into existence, neither the circumstances of its genesis nor the fact that it was a windfall to the beneficiary are relevant to the issue of whether there is a compensable loss caused by the dissipation of the trust fund.

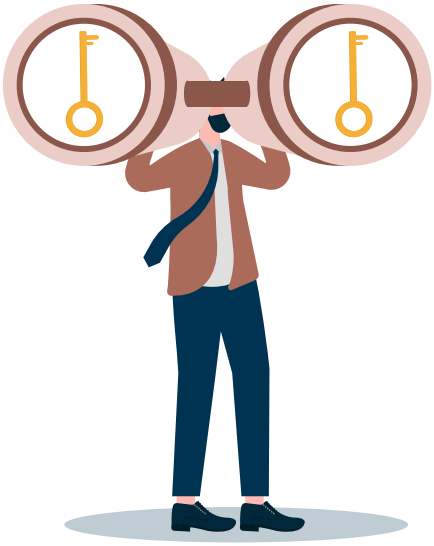
The 'No Loss' Argument

The trial judge had found that HP received full market value for the hotels in 2005 and that it could not itself have made the profits that Mr Ruhan's nominee buyer went on to make.

In other words, the covert purchase and subsequent profitable sale of the hotels did not cause HP any loss overall, in a commercial sense.

Mr Stevens argued that HP suffered no loss by the dissipation of the secret profit because HP only became the beneficial owner of the secret profit as a result of Mr Ruhan's prior breach of fiduciary duty. Viewed through that prism, HP's gain of the secret profit and its subsequent loss through dissipation were merely different stages of one composite fraudulent scheme, none of which would have occurred but for Mr Ruhan's breaches of his fiduciary duties (first) as director of HP and (second) as constructive trustee.

The majority rejected the idea that HP had not suffered loss in no uncertain terms. Nothing in the authorities that govern the assessment of loss qualifying for equitable compensation answered the question at hand, which was whether the fact that the dividend represented the fruit of an earlier breach of trust meant that its dissipation did not constitute loss to HP. The correct answer to that question was that there is no reason to aggregate the two successive breaches in order to assess the loss. To the contrary, that approach would undermine the intended effect of the constructive trust for reasons that had nothing to do with fairness, equity or justice. The correct counterfactual to consider when applying the but-for test laid down in Target Holdings Ltd v Redferns [1996] AC 421 for the assessment of loss for equitable compensation was that Mr Ruhan had not breached the constructive trust and had instead preserved HP's beneficial interest in it, not that there was no secret profit and therefore no constructive trust and nothing for HP to lose: such an approach was akin to throwing out the baby with the bathwater.



Could The "Gain" Of The Secret Profit Be Set Off Against The Loss Caused By Dissipation?

Mr Stevens (standing in Mr Ruhan's shoes by reason of their joint liability) ambitiously argued that, even if the dissipation caused a loss to HP it should be set off against the prior gain represented by its beneficial interest in the secret profit which arose as a result of Mr Ruhan's related breach of fiduciary duty.

The answer to this issue lay in a proper understanding of the nature and scope of an exception first recognised in Bartlett v Barclays Bank Trust Co Ltd (Nos 1 and 2) [1980] Ch 515. Lord Briggs reasoned that, properly

understood, Bartlett turned on its particular facts which made it unjust to apply the usual 'no set-off' principle in equity. He then restated the true principle: where gains are made and losses incurred for a trust estate by a series of breaches of trust, the general principle in equity is that one breach may not be set-off against another (i.e. the beneficiary is entitled to any gains but the trustee must bear any losses). However, the court may recognise an exception where the application of this principle would produce a clearly inequitable result, typically because of a particular connection between the breaches. The test for the exception is whether the application or disapplication of the no set-off principle would better serve the objectives of equity on the facts before the court.

Applying that test to the facts, the majority concluded that the only connecting factors between the relevant transactions were dishonesty and greed such that there was nothing equitable about disallowing a set-off in these circumstances. To the contrary, allowing the set-off would frustrate the purpose of the constructive trust by enabling the dishonest assistant to avoid liability for the beneficiary's loss.

Conclusion

The decision authoritatively confirms that a dishonest assistant may be liable to compensate a claimant who has suffered loss as a result of a fiduciary's dissipation of unauthorised profits whilst clarifying the nature of constructive trusts arising out of the breach of fiduciary duties, equitable compensation and the principle of equitable set-off. While Lord Burrows' dissenting judgment raises interesting questions, the approach of the majority hews close to what might be termed the orthodox analysis in equity and holds an instinctive appeal: as Lord Briggs quipped, if Mr Stevens' arguments were found to be right such that he would walk scot-free without liability to compensate HP for its loss,

"[a] non-lawyer might well think that something had gone seriously wrong with the law"[1]!

1 Stevens v Hotel Portfolio II UK Ltd (In Liquidation) & Anor [2025] UKSC 28 at §8 per Lord Briggs JSC.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