

REVIEW

Professionals & Fiduciaries: Perils and Pitfalls, Simon Baughen [Saffron Walden, Essex, England: Gostick Hall Publications, 2002, x + 145 pp, paperback, £45]

Human beings are susceptible to fall into temptation when times are hard. Commercial and other fraud becomes widespread as people become desperate for money. Professionals such as solicitors and accountants who provide advisory services and facilitate the implementation of transactions may incur liability by unwittingly involving themselves in their clients' breach of fiduciary duties or otherwise in the commission of some "unlawful" act by their clients. The timely publication of *Professionals & Fiduciaries: Perils and Pitfalls* by Simon Baughen highlights and discusses the various potential problems faced by professionals when they render services to their clients.

The book is divided into seven chapters. In Chapter 1, the author introduces readers to the various perils and pitfalls facing professionals today. In addition to the duty of care and skill which professionals owe to their clients, the law may in certain circumstances impose fiduciary obligations on professionals. In this chapter, the author guides the reader through cases dealing with the question "who is a fiduciary?" and examines the various remedies available against professionals who are adjudged to be in breach of their fiduciary duties. In particular, the author highlights the fact that some of the decisions concerning fiduciaries are draconian in their approach. For example, in *Boardman v Phipps*,¹ Tom Boardman, the solicitor for a trust, was held liable to account to the trust for the profit he had made out of the reorganisation of a company in which the trust held shares, on the ground that he obtained the relevant information through representing the trust at the company's annual general meeting. He was thus in a fiduciary position *vis-à-vis* the trust, and was held liable notwithstanding that he had acted in good faith, that there was merely a potential (rather than an actual) conflict of interest, that the trust itself had also benefited from the reorganisation, and that he had kept the active trustee and the beneficiaries generally informed of what he was doing (although this fell short of full disclosure). In pointing out that a professional's practice can be a perilous one, this chapter sets the tone for the rest of the book.

Chapter 2 contains an in-depth analysis of the equitable doctrine of knowing assistance. A professional may incur liability under this doctrine if he or she dishonestly assists in the fraudulent design of the client, even though the professional may not be in receipt of any misappropriated funds and his or her participation may be relatively minor. One of the most difficult issues in this connection is identifying the kind of "knowledge" which is required before a

¹ [1967] 2 AC 47.

professional will be found liable as a constructive trustee. This is no easy task, but one which the author accomplishes with admirable insight and conciseness. The different elements are examined in relation to what constitutes “actual knowledge”, “Nelsonian knowledge” (that is, where an examination of the surrounding circumstances would lead one to conclude that the defendant must have known of the breach of trust) and wilful and reckless failure to make such inquiry as an honest and reasonable person would. The facts and judgments of certain important cases on this issue are carefully analysed and commented on – including recent cases such as *Royal Brunei Airlines v Tan*,² *Jyske Bank (Gibraltar) Ltd v Heintz*,³ *Balfour Trustees Ltd v Peterson*,⁴ *Dubai Aluminium Co. Ltd v Salaam*,⁵ *Grupo Torras SA v AL-Sabah*,⁶ *Mortgage Express v Newman*⁷ and the important House of Lords’ decision of *Twinsectra v John Francis Yardley*.⁸

Whilst a professional rendering assistance to a client who is committing a breach of fiduciary duty may be liable in equity for knowing assistance, in the absence of any fiduciary relationship the professional may still be liable at common law if he or she has committed an economic tort. This topic is covered well in Chapter 3. The author discusses in detail the requisite “knowledge” for establishing a claim in economic tort, as well as the causation element. These elements are compared with the requirements for establishing a claim for knowing assistance. The author predicts a gradual shift away from knowing assistance to the economic torts in view of the House of Lords’ approach to “dishonesty” in the *Twinsectra* case.

In the course of their practice, it is likely that many professionals will receive funds from their clients. At the very least, they charge their clients for professional services rendered and expect their fees to be paid. Hence, there is a greater risk that claims for knowing receipt may be brought against them than for knowing assistance. It is not necessary to establish “dishonesty” for liability to arise under knowing receipt; it is sufficient to show that a reasonable person in the professional’s position would have known that the money belongs to someone to whom the professional’s client owes a fiduciary duty. The important equitable doctrine of knowing receipt is discussed in Chapter 4. In addition to reviewing the case law on this doctrine, the author takes the reader through the academic debate as to whether liability under this head should be strict, or notice- or knowledge-based, and discusses both

² [1995] 2 AC 378.

³ [1999] Lloyd’s Rep Bank 511.

⁴ (2001) 151 NLJ 1180.

⁵ [2001] QB 113.

⁶ [2001] Lloyd’s Rep Bank 38.

⁷ [2000] PNLR 298.

⁸ [1999] Lloyd’s Rep Bank 438.

the jurisprudential justifications and policy considerations behind these arguments.

Chapter 5 deals with the action for money had and received, the common law counterpart to the equitable claims for knowing assistance and knowing receipt. After pointing out that the common law action has the advantage over its counterparts in equity in that liability for money had and received is strict, the author gives a perceptive analysis of the three possible defences: bona fide purchaser for value without notice, change of position and ministerial receipt. The last defence is of particular relevance to professionals who are only in receipt of the funds in their capacity as agents (rather than for their own benefit) and who may have disposed of the funds pursuant to client's instructions with no actual knowledge that the funds have been misappropriated.

Whilst the first five chapters deal with claims *in personam*, a professional may equally be faced with a claim *in rem*. The proprietary claim of tracing, both at common law and in equity, is discussed in Chapter 6. Cases in tracing can be difficult, and some cases are not easy to reconcile with others. The author's approach to these cases is a most pragmatic one, which helps to make this chapter easy to understand.

When and to what extent is a professional vicariously liable for the wrongs committed by his or her partner or employee? This is a question which must be close to the heart of many accountants, solicitors and other professionals today. This important issue is discussed in Chapter 7. Since many professionals practise in partnership, the author devotes most of the chapter to discussing an innocent partner's liability for his or her fellow partner's knowing receipt or knowing assistance, in the light of relevant provisions of the Partnership Act 1890.

In the conclusion to the book, the author highlights again a professional's potential exposure, and concludes that professionals must not be complacent when executing client's instructions. Instead, professional curiosity would require that professionals ask "why", although at times this may seem awkward; otherwise, a professional may find him or herself liable for his or her involvement in the client's affairs.

To further facilitate understanding of this difficult area of law, three Appendices are included. Appendix 1 contains illustrations of the working of the rules of tracing into mixed funds and the names of cases which lay down these rules. In Appendix 2, the author compares the knowledge requirements in the various claims which may be faced by the professional, both at common law and in equity. Relevant rules and annexes from the English Law Society's *Guide to Professional Conduct of Solicitors* (1999) are extracted and set out in Appendix 3 for the reader's ease of reference.

The law relating to fiduciaries has seen tremendous development in the past decade. It would therefore be unrealistic for professionals to naively believe they can carry on in happy oblivion to the many perils and pitfalls they face when they execute clients' instructions. Today, professionals must be aware of the impact of the law relating to fiduciaries on their practice and the difficult questions which the law sometimes requires them to ask. In this respect, Simon Baughen's book is most timely and valuable. It is remarkable that the author has dealt with such a complex area of law in less than 200 pages. Analysis of the cases and judgments is in-depth and perceptive. In this connection, the author must be excused for having limited his discussion to English cases, with only minimal reference to case law in other common law jurisdictions. The book also introduces the reader to the various academic debates in this area of law, for example on the issue of whether liability for knowing receipt should be strict. The footnotes provide useful starting points for those readers interested in furthering their research on this topic. Whilst academically sound and intellectually challenging, this book is pragmatic in its approach to the problems faced by professionals in their daily work. The author clearly shows sensitivity to the dilemmas in which professionals often find themselves. The book therefore represents a laudable effort by the author to present to professionals a guide on a very complex area of law. It is a useful "first port of call" for any professional concerned about his or her potential liability or otherwise interested in this area of law.

*Jessica Y. K. Young**

* Assistant Professor, Department of Professional Legal Education, University of Hong Kong.