

Directors' duties, remedies when property taken in breach of duty (CRAFT v Pope)

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Pensions analysis: This is a useful decision on how remedies should be determined in a situation in which company directors have wrongfully converted company property to themselves—should the property simply be returned in full, or is it open to the directors to argue that they should have credit for sums that they would have received had they acted in accordance with their duties? In this case, the converted property was placed in a Self-Invested Personal Pension (SIPP) and the SIPP provider had been joined to the claim as innocent recipient of the property. The decision therefore also addresses the complications which arose from the property having been placed into SIPPs (a form of trust) and the appropriate order in those circumstances. Written by Lydia Seymour, barrister, Outer Temple Chambers.

Ceredigion Recycling and Furniture Team v Pope and others [\[2022\] EWHC 1969 \(Ch\)](#)

What are the practical implications of this case?

The court accepted that where a company director wrongfully converts assets which belonged to the company, the company is entitled to seek restoration of those assets in full, even though the former director might have been entitled to award themselves lower sums without having been in breach of duty. So directors cannot (at least in these circumstances) seek credit for sums that they might have been entitled to without being in breach against sums that they took in breach of duty.

It made no difference to the company's entitlement that the converted assets had been placed into a SIPP for the benefit of the directors, so that the legal owner was the SIPP provider. The SIPP provider was represented at the remedy hearing and made submissions, and this case is a good demonstration of the need to join that legal owner to the proceedings (in this case as an innocent recipient). While there are inevitably some costs consequences of joining an essentially neutral party, those should be limited, and at the point of remedy it is important for the court to have the benefit of submissions from the legal owner of the property in circumstances in which the claimant is seeking a transfer back of converted assets.

What was the background?

Following a Liability Decision in June 2021 (*Ceredigion Recycling and Furniture Team (CRAFT) v Pope* [\[2021\] EWHC 1783 \(Ch\)](#)), the court found that the former directors of CRAFT, which is a not for profit company limited by guarantee, had acted in breach of fiduciary (and other) duties by awarding themselves a commercial property owned by the company and entering it into a leaseback arrangement under which the company was liable to pay them rent. The property and the lease monies were placed into SIPPs for the benefit of the directors.

At remedy stage, the former directors argued that while the court had found that the award of the property and leaseback was a breach of duty, they should nonetheless have credit for sums that could properly have been paid to them. That is, that while the court's findings were that the award of the property and leaseback was excessive, they would have been entitled to award themselves something in respect of their pension entitlement, and that the sum they would have received in this counterfactual scenario should be set off against any award to the company.

The company's argument was that the counterfactual analysis did not arise because the property and lease monies had been taken in breach of trust. It followed that the company was entitled to the return of the assets either on the basis of an account of profits, or because the former directors were under an obligation to restore those assets in full.

What did the court decide?

The court accepted the company's arguments on how remedy should be assessed. Following the Court of Appeal decision in *Auden McKenzie v Patel* [2019] EWCA Civ 2291, it found that where property is converted away from a company in breach of trust by directors, the position is analogous to a breach of fiduciary duty by a trustee. The consequence is that the remedy should be substitutive—ie the defendant is under an obligation to restore the property in full. They cannot argue that the property (or a portion of it) might have been lost anyway, so that less than the full amount is due.

So here, although it might have been the case that the former directors could hypothetically have awarded themselves smaller amounts from the company, potentially to the point that there was no breach of duty, they could not use that counterfactual scenario to argue that the company was not entitled to the return of the full sum of the converted property.

The position would have been different if the case had not concerned conversion of company property, but some other sort of breach, such as making an unauthorised profit at the company's expense. In those circumstances it is relevant to consider what the company would actually have received in the absence of the breach of duty, and potentially to give credit for that counterfactual. This was the principle applied in the well-known case of *Boardman v Phipps* [1966] 3 All ER 721, in which a fiduciary was found to be entitled to part-payment for work done despite his having acted in breach of duty, and explains why the outcome of cases involving that form of breach may be different to conversion of company property.

Case details

- Court: Chancery Division, Cardiff District Registry
- Judge: Judge Jarman QC (sitting as High Court Judge)
- Date of judgment: 26 July 2022

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